THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 24

Case No. 14,078 — Case No. 14,691

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TOLER—U. S. v. BURNS

Case No. 14,078—Case No. 14,691

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

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

Case No. 14,078.

TOLER v. ARMSTRONG

[4 Wash. C. C. 297.] [1]

Circuit Court, D Pennsylvania. Oct. Term, 1822.[2]

CONTRACTS—VALIDITY—PUBLIC POLICY—ILLEGAL TRANSACTIONS—WHEN ENFORCEABLE—RULE.

1. It is a salutary rule, founded on morality and good policy, and which recommends itself to the good sense of every one, that no man ought to be heard in a court of justice, who seeks to enforce a contract founded in or arising out of moral or political turpitude.

2. The rule itself has sometimes been carried to inconvenient lengths; the difficulty being not in any unsoundness of the rule itself, but in its fitness to the particular case to which it has been applied. Does the taint in the original transaction infect and vitiate every contract growing out of it, however remotely connected with it? This would be to extend the rule beyond the policy which produced it, and would lead to the most inconvenient consequences.

3. The rule, as now clearly settled, is, that where the contract grows immediately out of, or is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it.

[Cited in Tufts v. Tufts, Case No. 14,233. Quoted in Bailey v. Milner, Id. 740.]

[Cited in brief in Bancroft v. Dumas, 21 Vt. 459. Cited in Galligan v. Fannan, 89 Mass. [7 Allen] 256; Thomas v. Brady, 10 Pa. St. 170. Cited in brief in Atkins v. Johnson, 43 Vt. 79; Rheem v. Naugatuck Wheel Co., 33 Pa. St. 363; Melchoir v. McCarty, 31 Wis. 254.]

4. But if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act; although it was known to the party to whom the promise was made; and although he was the contriver and conducter of the illegal act.

[Cited in Tufts v. Tufts, Case No. 14,233.]

[Cited in Morris' Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 189.]

This was an action to recover upwards of $2,000, being so much paid by the plaintiff for freight, shipping charges, duty, charges of importation, appraisement, land carriage to Boston, law and other expenses, on certain goods shipped at St. John's in New Brunswick, in December, 1813, for account of the defendant, in the schooner George, and consigned to the plaintiff to forward to the defendant, residing in Philadelphia. The schooner George was captured by the Fly, and brought into Ellsworth, in the district of Maine, on the 13th of January, 1814, and there seized and libelled by the collector of that port, upon the ground of a collusive capture. The cargo was delivered to Dekoven, the owner and commander of the Fly, who brought in the George, upon admiralty stipulations given by Dekoven, and Smead, as his surety. The plaintiff informed the defendant of the arrival of the goods, and gave his bond to Smead to indemnify him for becoming the surety. The defendant applied to the plaintiff for an order on Dekoven for the goods belonging to him, which was given, upon the faith of the defendant's assurances that he would indemnify the plaintiff, and reimburse him all expenses, and other sums which he might be obliged to pay on account of these goods. The defendant received the goods from Dekoven, and paid him upwards of $5,000, as upon a sale of the goods to him by Dekoven. The goods were finally condemned to the United States, upon the ground of a collusive capture by the Fly. See the case of The George, 2 Wheat. [15 U. S.] 278; 1 Wheat. [14 U. S.] 408. It appeared by the testimony in the cause, that the plaintiff had also goods

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

[2] [Affirmed in 11 Wheat. (24 U. S.) 258.]

shipped on his own account in the George, and that he was the consignee of the goods of the defendant and others; that he paid all the expenses and other charges incurred on account of this shipment, and in defending the admiralty proceedings against the cargo; and charged the defendant with his proportion of the sums so expended.

It was contended by Mr. Peters, for the defendant, that this was an illegal importation from the country of the enemy during war, in which the plaintiff was concerned. That in the scheme for importing these goods into the United States, by means of a collusive capture, the plaintiff was concerned; as appeared by his conducting and managing the whole of the business, paying all the expenses, many of them incurred before the capture; and defending the admiralty proceedings after the seizure and libel; and by many other circumstances, to be collected from the evidence. This being the case, the plaintiff could not recover in an action so clearly growing out of an illegal transaction. But at all events, as the defendant had paid Dekoven for the goods, the plaintiff could have no just charge against him for the sums paid on account of the same goods.

C. J. Ingersoll, for the plaintiff, insisted that though the plaintiff should be considered as owner of part of the cargo of the George, that circumstance cannot impeach the validity of the defendant's engagement to indemnify him against whatever sums he, the plaintiff, might have to pay on account of the defendant's goods, it being fully proved that the plaintiff had no interest of any sort in the goods imported by the defendant. That the charge against the plaintiff that he was concerned in the scheme of introducing these goods into the United States, by means of a collusive capture, has no colour for it in the evidence. The true rule is, that unless the promise be the immediate offspring of the illegal act, the person entitled under it is not prevented from maintaining his action. Bird v. Appleton, 8 Term R. 562; Farmer v. Russel, 1 Bos. & P. 295; Ex parte Bulmer, 13 Ves. 313; Hodgson v. Temple, 5 Taunt. 181.

C. J. Ingersoll, for plaintiff.

Mr. Peters, for defendant.

WASHINGTON, Circuit Justice (charging jury). The rule of law, under which the defendant seeks to shelter himself against a compliance with his contract to indemnify the plaintiff for all sums which he might have to pay on account of the goods shipped from New Brunswick for the defendant, and consigned to the plaintiff, is a salutary one, founded in morality and good policy; and which recommends itself to the good sense of every man as soon as it is stated. The principle of the rule is, that no man ought to be heard in a court of justice, who seeks to enforce a contract founded in, or arising out of moral or political turpitude. The rule itself has sometimes been carried to inconvenient lengths; the difficulty being, not in any unsoundness in the rule itself, but in its fitness to the particular cases to which it has been applied. Does the taint in the original transaction infect and vitiate every contract growing out of it, however remotely connected with it? This would be to extend the rule beyond the policy which produced it, and would lead to the most inconvenient consequences. Carried out to such an extent, it would deserve to be entitled a rule to encourage and protect fraud. So far as the rule operates to discourage the perpetration of an immoral or illegal act, it is founded in the strongest reason; but it cannot safely be pushed farther. If, for example, the man who imports goods for another, by means of a violation of the laws of his country, is disqualified from founding any action upon such illegal transaction for the value or freight of the goods, or for other advances made on them, he is justly punished for the immorality of the act, and a powerful discouragement from the perpetration of it is provided by the rule. But after the act is accomplished, no new contract ought to be affected by it. It ought not to vitiate the contract of the retail merchant, who buys these goods from the importer; that of the tailor, who purchases from the merchant; or of the customers of the former, amongst whom the goods are distributed in clothing, although the illegality of the original act was known to each of those persons at the time he contracted.

I understand the rule, as now clearly settled, to be, that where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it. The case before supposed, of an action for the value of goods illegally imported for another, or for freight and expenses attending it, founded upon a promise, express or implied, exemplifies a part of the above rule. The latter part of it may be explained by the following case: as if the importation was the result of a scheme to consign the goods to the friend of the owner, with the privity of the former, that he might protect and defend them for the owner, in case they should be brought into jeopardy, in consequence of some intended violation of law: I should consider a bond or promise, afterwards given by the owner to his friend to indemnify him for his advances on account of any proceedings against the property, or otherwise, as constituting a part of the res gestæ, or of the original transaction, though it purports to be a new contract. For it would clearly be a promise growing immediately out of, and connected with the illegal act. It would be in fact all one transaction; and the party to whom the promise was made would, by such a contrivance, contribute, in effect, to the

success of the illegal measure. But if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act; although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. Thus if A. should, during war, contrive a plan for importing goods from the country of the enemy on his own account, by means of smuggling or of a collusive capture, and in the same vessel should be sent goods for B.; and A. should, upon the request of B., become security for payment of the duties; or should undertake to become answerable for expenses on account of a prosecution for the illegal importation, or should advance money to B. to enable him to pay those expenses; these acts, constituting no part of the original scheme, here would be a new contract, upon a valid and legal consideration, unconnected with the original act, although remotely caused by it; and such contract would not be so contaminated by the turpitude of the offensive act, as to turn A. out of court when seeking to enforce it; although the illegal introduction of the goods into the country was a consequence of the scheme projected by A. in relation to his own goods. Whether the plaintiff had any interest in the goods imported by the defendant from New Brunswick; or was the contriver of, or concerned in a scheme to introduce those goods, or even his own, if he had any, into the United States, by means of a collusive capture, or otherwise; or consented to become the consignee of the defendant's goods, with a view to their introduction; are questions which must depend upon the evidence, of which you must judge. It ought however to be remembered, that it would seem from the letters of introduction of the defendant to the plaintiff, some time after this importation had taken place, that these gentlemen were, at that time, strangers to each other.

It is necessary, before I conclude my observations upon this part of the case, to observe, that what was said by the supreme court in the case of The George [supra], with respect to the evidence, is not to be regarded by the jury, so as to prejudice either of the parties in this cause. As to the account and receipt of Dekoven for the value of the goods delivered by him to the defendant, it has nothing to do with the action now before you; which is brought to recover certain sums of money expended by the plaintiff for the defendant, in relation to those goods, upon the faith of the defendant's promise to indemnify the plaintiff for making the advances. If, notwithstanding the plaintiff's order upon Dekoven to deliver the goods to the defendant, he chose to purchase them from Dekoven, it furnishes no reason why the promise to the plaintiff should not be complied with.

The jury having been out some time, returned into their box, and requested the instruction of the court upon the following questions, viz. whether Toler must have an interest in Armstrong's goods to constitute him a participator in the voyage? or, if simply having goods on board will constitute him such?

WASHINGTON, Circuit Justice. The mere circumstance of the plaintiff having goods on board would not constitute him a participator in the illegal importation, so as to affect his right of recovery in this action; but being interested in the goods imported by the defendant, would have that effect.

Verdict for plaintiff for the whole of his demand.

An exception was taken to this charge, and the judgment was affirmed on writ of error. 11 Wheat. [24 U. S.] 258.

Case No. 14,079.

TOLER v. WHITE.

[1 Ware (277), 280;[1] 19 Am. Jur. 206.]

District Court, D. Maine. Dec. 22, 1834.

SHIPPING—PUBLIC REGULATIONS—DEPOSIT OF PAPERS WITH CONSUL.

The act of February 28, 1803, § 2 [2 Stat. 203], concerning consuls and vice-consuls requiring masters of vessels to deposit their ship's papers with the consul on their arrival in a foreign port, does not apply to a case when the vessel merely touches at a port, without coming to an entry or transacting any business.

[Cited in Parsons v. Hunter, Case No. 10,778; Passenger Cases, 7 How. (48 U. S.) 537; Harrison v. Vose, 9 How. (50 U. S.) 384; The Javirena, 14 C. C. A. 350, 67 Fed. 155.]

This action was brought by the United States, in the name of [Hopeful Toler] their consul at Ponce, in Porto Rico, to recover a penalty of $500, of the defendant [John White], master of the brig Cadmus, of Kennebunk-port, for not depositing his register with the said consul, on his arrival at Ponce, agreeably to the requirement of the statute of February 28, 1803, § 2. It appeared by the evidence that Capt. White arrived at Ponce, in Porto Rico, in the brig Cadmus, the first of March, 1834, between the hours of six and seven o'clock in the morning, and came to anchor; that he went on shore in the course of the day, and passed by the consul's office, and that the vessel remained in port until about five o'clock in the afternoon of the same day, when she got under weigh and left, without having deposited her papers with the consul.

Mr. Anderson, Dist. Atty., for plaintiff.
G. W. Pierce, for defendant.

WARE, District Judge. [2] [The admission of the consul's certificate as evidence is objected to in the first place because he is a

[1] [Reported by Hon. Ashur Ware, District Judge.]

[2] [From 19 Am. Jur. 206.]

party in the case. The general rule is that a person whose name appears as a party on the record cannot be heard as a witness to support his own cause. The reason is that he is directly interested in the event of the suit, either from having an immediate interest in the matter in controversy, and therefore obtaining a certain benefit or loss, as the decision may be either in his favor or against him, or from his liability to cost in the event of an adverse decision. This is the sole reason for his exclusion, and the rule by which he is excluded, extends no farther than the reason on which it is founded. When, therefore, he has no interest in the subject in controversy, and is not liable for costs, whatever may be the decision, he is like any other disinterested person a competent witness. On this distinction the members of charitable corporations have been held to be competent witnesses for the corporation, they not being personally interested in the suit nor liable for costs (Weller v. Governors of Foundling Hospital, Peake, 153); and for the same reason it was ruled by Judge Washington, in Willings v. Consequa [Case No. 17,767], that a party who had assigned to his co-plaintiff's all his interest in the matter in controversy, and had been indemnified by them against costs by a deposit with the clerk, of a sum sufficient to cover the costs already arisen and those which probably would arise, was a competent witness for his co-plaintiffs, though his name stood on the record as a party to the cause. The interest which a party has, says Mr. Justice Washington, in the event of the suit, both as to costs and the subject in dispute, is the reason why he cannot be a witness; and when that interest is removed the objection ceases. In this case the suit is directed by the statute to be prosecuted in the name of the consul. But it is commenced by the order of the United States, it is prosecuted for their benefit and by their attorney, and the penalty when recovered is recovered for their use. The consul's name is used instead of that of the United States, the real plaintiff, as the postmaster-general stands on the record as the nominal plaintiff, in all suits commenced for debts due to the post office. The consul has no interest in the subject in controversy, and no control over the action. He is a mere nominal plaintiff and is not, as I understand the law, liable for costs, in the event that the decision is against him. The objection to the admissibility of the certificate on the ground that the consul is a party on the record cannot be sustained. It is further objected that the evidence is taken ex parte. The answer to this objection is that it is taken by neither party in the proper sense of the word, unless the consul should be considered in this act as the representative of the United States. The evidence comes from a public officer in the regular discharge of the proper functions of his office, and as a part of his regular and ordinary official duty. It cannot therefore with propriety be termed ex parte evidence.

[Another objection is that it is not under oath. It is true that the certificate is not confirmed by the oath of the consul. But it cannot be considered as wholly unprovided with the sanction of an oath. In giving the certificate he acts as a public officer within the proper sphere of his official duty, and though the attestation of his oath is not given directly to the certificate, it is made under the obligation of his oath of office. There are many cases in which the certificate of a public officer, acting within the range of his official duty, is received as evidence without being verified by the oath of the officer. Indeed they are not thus usually verified. But this is not admitting evidence unsupported by oath. The official oath of the officer applies to the certificate, and is binding on the officer in giving it, as far as an oath can bind. The violation of truth is not in such cases, indeed, usually visited with the penalties of perjury, but is punished as an official misdemeanor. But it is not on that account the less perjury in the forum of conscience. The return of an officer on a precept of court is received as evidence, but it is not sworn to. A copy of a record, certified under the official seal of the recording officer, is not verified by any other oath than his oath of office. Yet this is admitted in evidence and is of higher authority than an examined copy which is sworn to by any other person. Bull. N. P. 226.

[But though these objections are not conclusive against the admissibility of the certificate, the question still recurs, is it competent evidence? As it does not present itself in a form, which entitles it to be received according to the ordinary rules of courts of law, it belongs to him who offers it to shew, that it is within some principle, that takes it out of the ordinary rule, by which papers of this kind are excluded from the character of evidence. No decision directly in point has been referred to in the argument. I have met with none in my own researches. Yet it can hardly be doubted that this precise question must have occurred in the practice of the courts. In deciding the question, then, we must recur to general principles.

[A consul holds a high and responsible office. The original object of the institution of the office was purely commercial, it being the consul's duty to watch over and protect the commercial rights of his country, within the limits of his consulate. This is a general duty, which it is believed results from the nature of his office. But there are some particular duties, which are specifically required of him by the laws of this country, and one of them is that mentioned in the section of the law on which this action is founded, viz., that of receiving the papers of all American vessels arriving at the port where he resides.

The receiving of the register of a vessel is an official act done in discharging the ordinary functions of his office. He is therefore the proper person to be called upon to prove, whether it was deposited with him or not; and if it was not, he is the only person by whom this fact can be proved. It would seem, therefore, that he must be a competent witness, from the necessity of the case, and the only question which can be raised, is, whether his testimony must be under oath. I think it is not necessary; but that the authentication of the certificate, by the seal of the consulate, is equivalent to a verification of it by the oath of the party. It is not contended that the annexation of the seal of the consulate to every certificate will make it evidence. It is only when he certifies a fact, which falls within his official cognisance, in the regular discharge of the duties of his office. Why should not his certificate, authenticated under the seal of the consulate, have the same credit as the certificate of the clerk under the seal of the court? In the case of Church v. Hubbart, 2 Cranch [6 U. S.] 187, the certificate of the American consul at Lisbon was offered to prove a law of Portugal. It was annexed to a copy of a translation of the law certifying that the copy was a true one and that the translation was correct. It was adjudged to be inadmissible as evidence. The chief justice, in delivering the opinion of the court, observed, that to give this certificate the force of testimony, it would be necessary to show, that it was one of the consular functions, to which the laws of this country attach credit. The certificate in that case was an extra-official act. The American consuls have not the custody of foreign laws, and can give no copies of them. But in the present case, it is made the duty of the master to deposit his register with the consul, and the consul receives it in his official character. It is a matter which falls within his official cognizance, and, in making a certificate of the fact, he is performing one of the regular and ordinary functions of his office. My opinion on the whole is, that the certificate is evidence of the fact which it certifies.

[A question still remains, is it evidence of any thing more than the naked fact of the non-delivery of the register? It appears to me that it must be allowed the effect of prima facie evidence of the arrival of the vessel. This is indeed a fact which may be proved by other witnesses; but it is the consul's duty to see that our laws are observed by masters of vessels visiting the port where he resides. The fact of the arrival, connected with the non-delivery of the register, seems properly proved by the consular certificate.

[The certificate of the consul having been admitted to be read as evidence, it appeared therefrom, that Captain White arrived at Ponce, in Porto Rico, in the brig Cadmus, the first of March, 1834, between the hours of six and seven o'clock in the morning, and came to anchor; that he went on shore in the course of the day and passed by the consul's office, and that the vessel remained in port until about five o'clock in the afternoon of the same day, when she got under weigh and left, without having deposited her papers with the consul.] [3]

A number of ship masters were examined to show what had been the practice of masters, as to depositing their papers with the consul. The evidence related principally, but not exclusively, to the usage in the ports of the West Indies. It appeared that, for many years after the passage of the act, it was not the custom of masters to deposit their papers with the consul, except at the ports where they came to an entry and transacted business, and not always in those cases; but that the usage was general, not to deposit their papers with the consul at a port where they merely touched to try the market, or for information, although they might be required to pay some small port charges, as anchorage, &c.; but that within a few years, the consuls in some of the West India ports had required the deposits of the ship's papers, in all cases where the vessel came into port, whether she came to an entry and transacted any business, or not; that the demand of the consuls had in some instances been complied with, but had more generally been resisted. It was also proved that it was a common practice in this trade, for vessels to touch at one or more ports, for the purpose of ascertaining the state of the market, or to learn at what place they could dispose of their cargo most advantageously.

The case was then argued by the gentlemen above-mentioned, and was submitted to the decision of the court, on the law and evidence, the right being reserved to each party to sue out a writ of error, as on a judgment rendered on a verdict.

[The following opinion was subsequently delivered by WARE, District Judge:] [4]

This is a suit for a penalty, brought on the act of February 28, 1803, supplementary to the act of April 14, 1792 [1 Stat. 254], concerning consuls and vice-consuls. The 2d section of the act provides, that it shall be the duty of every master or commander of a ship or vessel belonging to citizens of the United States, who shall sail from any port of the United States after May next, on his arrival at a foreign port, to deposit his register, sea letter, and Mediterranean passport, with the consul, vice-consul, commercial agent, or vice-commercial agent, if any there be at such port, and that in case of refusal or neglect of the said master or commander to deposit the said papers as aforesaid, he shall forfeit and pay five hundred dollars, to be recovered by the said consul, vice-consul, commercial agent, or vice-commercial agent, in his own name, for the benefit of the

[3] [From 19 Am. Jur. 206.]

United States, in any court of competent jurisdiction.

It is contended by the counsel for the plaintiff, that by the true construction of the act, the master is bound in all cases to deliver the papers of his ship to the consul whenever he goes into port and comes to anchor, whether he makes an entry at the custom-house and transacts any business in the port, or not, and whether he remains there a longer or shorter time; that the words of the statute being general, and without qualification, that the master shall, on his arrival, deposit his papers, the court cannot interpose an exception which is not found in the law. On the part of the defendant, it is contended that the master is never bound to deposit his papers, except at a port where he comes to an entry at the custom-house, and that such has been the general understanding with respect to the law among masters of vessels and mercantile men.

The evidence which has been offered to show what has been the usage under the law, may be disposed of by one or two general observations. It cannot be pretended that usage alone can abrogate a positive act of the legislature. Customary law, or that which rests on no other foundation than usage may be abrogated by a contrary usage. As it derives its whole authority from the silent assent of those who are affected by it, its obligatory force may be annulled in the same way, by the silent adoption of a contrary usage. But an act of the legislature can be annulled only by the same authority by which it was made. If it was then shown by satisfactory evidence that the law had not been observed, this would not prove that it is not in force, and obligatory in those cases to which it applies. U. S. v. Lyman [Case No. 15,647].

But the practice under the law has been urged in another view, as showing the sense in which it was understood at the time, and immediately after it was made, by those to whom it applies, and who had an agency in carrying it into execution, and as having something like the force of a contemporaneous construction of the act. It may be admitted that usage may, in some cases, throw light on the meaning of a statute, when its language is ambiguous, and may fairly admit of two constructions. But usage, to be urged with effect for this purpose, must be consistent with the words of the act, although they may be susceptible of a different meaning. To admit that it can authorize a construction against the plain and evident meaning of the words, is to admit that usage can repeal a statute. The custom must also be general and uniform. Now the evidence in this case relates almost entirely to a particular trade, the trade in the ports of the West Indies; and a part of the evidence proves too much, for it shows that a practice has prevailed to some extent directly in conflict with the words of the law, not to deposit the ship's papers with the consul at all, even in the port where she has discharged her cargo and taken in a new one. The evidence does not prove such a general and uniform usage as can safely be relied upon as an index even to the opinions of mercantile men, as to the meaning of the law; much less such an usage as a court can receive as having the authority of a contemporaneous exposition of the statute.

We must then return to the statute itself, and expound it by its own words, and by other acts of the legislature relating to the same general subject. The difficulty lies in determining the precise import of the word "arrival," as it is used in this section. The common and obvious meaning of the word, is, coming to some port or place. But in the fiscal and navigation laws of the United States, it is not always, perhaps not most generally, used in its original and etymological meaning, nor is it invariably used in one and the same sense, so that what is deemed by law to be an arrival for one purpose, is not deemed to be so for another. In the 25th, and some of the following sections of the collection law,—act 1799, c. 128 [1 Story's Laws, 595; 1 Stat. 646, c. 22],—the word is used in its common and most comprehensive signification. Every master of a vessel coming from a foreign port is directed, on his arrival within four leagues of the coast—or within the limits of any collection district, to exhibit the manifest of his cargo to the first officer of the customs who comes on board his vessel. The sense in which the word is used here, is that of coming within four leagues of the coast, or within the limits of a district. The third section of the coasting act, February 18, 1793 [1 Stat. 306], authorizes vessels in certain cases, when in a district to which they do not belong, to change their papers and take out a temporary register or license, which they are required, within ten days after their arrival within the district to which they belong, to surrender and take out new papers. In the case of U. S. v. Shackford [Cases Nos. 16,262 and 16,263], which arose in this district, it was decided that the penalty under this section was not incurred by a vessel touching at a port in her home district, coming to anchor, and landing passengers in the course of a voyage to another port; but that to constitute an arrival, within the meaning of this section, it must be an arrival in the regular course of her employment, at a port of destination within her home district. The casual touching at such port, for purposes not connected with the objects of the voyage, was not such an arrival as was contemplated by this section of the act. The word is evidently used in the same restricted sense in the 14th section of the registry act. Act Dec. 31, 1792 [1 Stat. 294]. In both

these sections nearly the same form of expression is used, as in the 25th section of the collection act, in which it is quite clear that merely coming within four leagues of the coast, or within the limits of a district, is an arrival within the meaning of the legislature; and in the other acts referred to, it is clear that a mere coming within the district is not such an arrival as is contemplated, and as makes it necessary for a vessel to change her papers. By the 15th and 17th sections of the coasting act, the master of a vessel arriving at a district, from another district, is required in certain cases to deliver a manifest of his cargo to the collector. The context clearly shows, that arrival, in these sections, means an arrival at a port of destination, where the cargo, or a part of it, is intended to be delivered. The 22d section of this act relates to vessels "putting into a port other than that to which they are bound," which, in the subsequent part of the section, is called an arrival. Here the word is used for the touching at a port for purposes disconnected with the principal objects of the voyage.

It being then clear that the word is used in the revenue and navigation laws of the country in different senses; for merely coming to a place or port—for putting into or touching at a port, not for the purposes of trade, but from necessity or any other cause, as well as for an arrival at a port of destination; whether in a given case the legislature intended one or another of these meanings, must be determined from the connection in which it is used, and the objects intended to be effected by the law. One of the objects of this requirement, as stated by the district attorney, is to prevent the use of simulated American papers, by vessels which are not entitled to them; and he referred to a communication of the executive to congress, in 1797, urging the subject upon the attention of congress, in this view. In time of war, the temptation to the merchants of the belligerents is very strong to screen their vessels from capture, by giving them a neutral character; and it is known as an historical fact, that during the late European wars, the practice of fabricating American papers for vessels belonging to the belligerents was carried to a very great extent. The consequences were extremely embarrassing and vexatious to our commerce. The American flag became everywhere suspected of covering enemies' property: and our own vessels, in consequence of this suspicion, were subjected to great embarrassments, and our merchants to heavy losses. The interests of our commerce were at that time deeply concerned in suppressing this abuse. And in peace, as well as in war, both the honor and interest of the country require that the rights of our flag should not be usurped by those who are not entitled to them. When nations have granted to our commerce particular privileges by treaty, good faith as well as the public interest demands of our government to prevent others from fraudulently obtaining the same privileges, by the use of simulated American papers. These frauds may be checked to a very great extent, or made very hazardous to those who perpetrate them, by requiring masters of vessels, in all cases, on arriving in a foreign port, to deposit their papers with a public officer, who may be provided with the means of distinguishing the genuine from spurious and forged papers or documents. But besides motives of this kind, the government have an interest in knowing whether our vessels habitually carry with them, when abroad, the proper documentary proof of their American character.

The mercantile classes of the community have a deeper interest than any other in having this law so enforced as to attain rather than frustrate the objects intended to be effected by it;—and, on the other hand, it cannot be supposed that the legislature intended such a construction as should produce unnecessary embarrassments to trade. The provisions of the law were doubtless intended as a benefit and security, and not as a burden to the commerce of the country. Now the evidence in this case shows that it is common for vessels to clear out for a particular port or island and a market, and if the evidence which was objected to by the counsel for the plaintiff, is not properly admissible, I know not but the court may judicially take notice of a fact of so frequent occurrence and so well known. In those cases they often touch at one or more ports for information, before they find a market that suits them, and usually they only stop long enough for the master to go on shore and call on a merchant;—sometimes the vessel goes into port and comes to anchor, and sometimes she lies off and on without coming into port; in some cases there are small port charges to be paid, and in some cases there are none. The object of the master is to obtain information with the least delay practicable, and if the market does not suit him, to proceed to another port. To require him, in these cases, to part with his vessel's papers, might be attended with serious inconvenience. Besides the increased delay it would occasion, and every delay in maritime commerce is to be regarded as a source of increased danger, his vessel, while lying off a port, might, by a sudden change of wind, be driven to sea without papers. A construction of the law which would produce such inconvenience, ought not to be adopted, unless such appears evidently to have been the intention of the legislature. The district attorney makes here a distinction, and holds that a master is not required to part with his papers unless his vessel come to anchor. But the words of the law make no such distinction, and if we adopt the strict meaning of

the word in this section, the coming to anchor is no part of the arrival. This is complete before her anchor is cast.

It does not appear to me that the policy of the law requires this construction, and it seems that all the objects intended to be attained by it, may be had by an interpretation less onerous to commerce. And I think the words of the law, also, point to a different construction. The term "deposit," carries with it the idea of something more than the mere delivery of the papers to the consul, for inspection, to be redelivered in a few hours. This word is not usually employed, except when the thing is intended to remain with the depositary for some time, and when the deposit is made for some specific object, beyond that of mere inspection or examination. The subsequent words of the statute go to confirm the idea, that this term is here used in its common and most usual sense. After directing the master to deposit his ship's papers with the consul, the law proceeds to direct the consul in whose custody they are deposited, on "the master's producing a clearance from the proper officer of the port, where his ship or vessel may be, to deliver to said master all his said papers." The natural inference from this language is, that the legislature intended that the ship's papers should remain in the custody of the consul, while the ship remained in port. And it may be inferred with a yet higher degree of probability, that the cases which were in the contemplation of the legislature, as falling within the provisions of the law, were those of vessels coming to an entry at the custom-house, and engaging in trade, where they would necessarily be detained a considerable time. For when a vessel merely touches at a port for a few hours, and engages in no trade, she does not ordinarily make an entry at the custom-house, and of course does not take a clearance. If the cases of vessels merely touching at a port for information, without engaging in trade, had been within the contemplation of the legislature, as comprehended within the requirements of this section, they would not have directed the consul to redeliver the ship's papers to the master, on his producing a clearance, but to deliver them whenever the vessel was ready to depart; at least, that or some other equivalent expression would have been much more natural, and more consistent with such an intention than that actually used. The inference is therefore strong, from the language of the law, that such a case as the present does not come within its meaning, and of course that the master has not incurred the penalty. On the whole, whether we look to the policy and objects of the law, or to its words, we are, I think, brought to the same conclusion, that when a vessel merely touches at a port without making an entry at the custom-house, or transacting any business, and stops but a few hours, the master is not bound to deposit his ship's papers with the consul. The natural inference from the language of the act is, that the deposit is only required when an entry is made, and the word "arrival," in this section of the law, means an arrival at a port of destination; but there may, perhaps, be other cases to which this act will apply. It will, however, be in season to decide those cases when they are presented.

According to the agreement of the parties, judgment must be rendered for the defendant.

NOTE [from original report in 19 Am. Jur. 206]. A writ of error was afterwards brought to the circuit court, on the foregoing decision, and was dismissed. The several questions discussed in this case are also examined in the cases of Levy v. Burley [Case No. 8,300], and Parsons v. Hunter [Id. 10,778], in which Mr. Justice Story dissents, in some points, from the opinion above expressed by Judge Ware.

Case No. 14,080.

TOLMIE v. THOMPSON.

[3 Cranch, C. C. 123.] [1]

Circuit Court, District of Columbia. May Term, 1827.[2]

COURTS—GENERAL JURISDICTION—STATUTORY JURISDICTION—SALE OF INTESTATE'S ESTATE—HOW MADE—MINOR HEIRS.

1. Where proceedings are under the general and ordinary jurisdiction of the court, as a court of law or a court of equity, many things may be presumed which do not appear upon the record, and evidence will not be permitted, to contradict the presumptions arising from the acts of the court. But if the proceedings be under a special authority, delegated to the court in a particular case and not under its general jurisdiction, as a court of common law or of equity, nothing material can be presumed; and the person claiming title under such proceedings must show them to be regular, and to be in a case in which the court had jurisdiction, and was authorized to do what it has done.

2. The proceedings for the partition or sale of the real estate of an intestate, under the Maryland act of descents, 1786 (chapter 45, § 8), are under a special jurisdiction given to a county court in a particular case, and every thing necessary to their validity must be proved.

3. A sale under that statute is the act of the commissioners, not of the court, and, to be valid, must be ratified by the court; and such ratification must be absolute, not dependent upon an act to be done in pais.

4. If all the heirs are minors at the time of the sale, it is void.

Ejectment by the lessees of the heirs of Robert Tolmie, against the defendant, James Thompson, tenant in possession, claiming in right of his wife, who purchased the property (lot 14, in square 290, in Washington), at a sale made in 1814, by commissioners under the Maryland act of descents, 1786 (chapter 45, § 8), and the case turned upon the validity of that sale. By that act it is

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

[2] [Reversed in 2 Pet. (27 U. S.) 157.]

enacted, "That in case the parties entitled to the intestate's estate cannot agree upon the division thereof, or in case any person entitled to any part be a minor, an application may be made to the court of the county where the estate lies, and the court shall appoint and issue a commission to five discreet and sensible men, who, before they act, shall take an oath, to be annexed to the commission, well and truly, and without favor, partiality, or prejudice, to adjudge and determine whether the estate will admit of being divided, without injury and loss to all the parties entitled, and to ascertain the value of such estate in current money; and if the estate can, in the opinion and judgment of the commissioners, or a majority of them, be divided, without loss and injury to all the parties entitled, that they will then divide and make partition of the same, fairly and equally in value between all the parties interested, according to their several just proportions; and if the said commissioners, or a majority of them, shall determine that the estate cannot be divided, without loss to all the parties, then they shall make return to the county court of their judgment, and the reasons upon which the same is formed, and the real value of the estate in current money; and if the judgment of the commissioners shall be confirmed by the county court, then the eldest son, child, or person entitled, if of age, shall have election to take the whole estate, and pay to the others their just proportions of the value in money; and if the eldest child, or person entitled, refuses to take the estate, and pay to the others money for their proportions, then the next eldest child, or person entitled, being of age, shall have the next election, and so on to the youngest child, or person entitled; and if all refuse, then the estate shall be sold under the direction of the said commissioners, or a majority of them, for money, or upon credit, as they, with a majority of the persons interested who are of age, and the guardians of such as may be minors, shall determine to be most advantageous to all concerned; and the purchase-money shall be justly divided among the several persons interested, according to their respective titles to the estate. But if all the parties entitled shall be minors at the death of the intestate, the estate shall not be sold until the eldest arrives to age, and the profits of the estate shall be equally divided in the mean time." The act then provides for the case where the lands may, in the opinion of the commissioners, be divided without loss, &c., and directs them to divide and allot the same to the respective parties, and return their proceedings to the next county court, "which shall be ratified or rejected as justice shall dictate; and either party may appeal to the chancellor from the judgment of the county court. If the lands lie in different counties, then application may be made to the chancellor, who shall appoint commissioners," who "shall proceed in the same manner," &c.; "and in the execution of this act reasonable notice shall always be given by the commissioners to all parties concerned, before any proceeding is had; and if any minor is interested who hath not a guardian, then the court from which the commission issues shall appoint a guardian for the purpose; and no proceedings of the commissioners shall be set aside for matter of form." The act of Maryland, 1797 (chapter 114, § 6), provides "that all sales, by the act to direct descents, directed to be made of lands which will not admit of division amongst the heirs, shall be made agreeably to the order of the court from which the commissions issued, and shall not be valid until ratified by the said court." In the preamble to the act of Maryland, 1799 (chapter 49), it is said to be "expedient and proper that deeds of conveyance should be executed and acknowledged to purchasers, in those cases wherein it becomes necessary for commissioners to make sale of the intestate's estates, as manifesting the best evidence of their title, in future times." And by the third section, it is enacted, "that in all cases of sale made by the said commissioners, after the same shall be ratified by the respective county courts, or chancellor, and the terms of sale shall have been complied with, by the purchaser or purchasers having paid the purchase-money, agreeably to the said terms of sale, it shall then be the duty of the commissioners, or the majority of them, or the survivors or survivor of them, to make over unto the purchaser or purchasers, by deed duly executed and acknowledged according to law, all the right, title, interest, claim, and estate of the deceased intestate to the land and premises sold by them in virtue of their commission; and the commission and proceedings thereon shall be recited in the preamble of the respective deeds; and every such deed shall be recorded within the time now limited by law." And by the fourth section it is enacted, "that when the estate of an intestate shall be sold on a credit, bonds shall be taken for the purchase-money, from the purchaser or purchasers, by the commissioners, with security, if required, and made payable to each representative respectively, according to his or her proportionable part of the net amount of sales."

Upon the trial of this cause, it was agreed by the parties that the jury should find their verdict for the plaintiff, subject to the opinion of the court upon the following case agreed:— That Robert Tolmie died intestate, seized in fee of the lot in question, in the year 1805, leaving Margaret, Alice, and James Tolmie, his children and only heirs at law, who were then infants under the age of twenty-one years, and who entered and continued in possession until some time in the year 1814. That Margaret was the eldest of

the said infants, and that she intermarried with one Francis Beveridge, and has since died, leaving three children, to wit, Margaret Beveridge, Hannah Beveridge, and James Beveridge, who are named among the lessors of the plaintiff. That James Tolmie aforesaid also died after the death of the said Margaret, his sister, intestate, under age, and unmarried, prior to the commencement of this suit, leaving the said Alice, his sister, and the said three children of Margaret, his heirs at law. That the said Margaret Tolmie was seventeen years of age at the time of her said marriage, which was in 1812, and was an infant under the age of twenty-one years at the time of the sale made by the commissioners hereinafter mentioned. That her husband, the said Francis Beveridge, some time in the year 1814 or 1815, went away, leaving his family residents in the city of Washington, and has never been heard of for several years, and is generally believed by his family and friends to be dead. That the defendant has possession of the property, and has held possession thereof since the year 1814, when Julia Kean, now the wife of the defendant, became the purchaser of the same, at a public sale made by certain commissioners under the proceedings following:— "To the Honorable the Judges of the Circuit Court of the District of Columbia, Sitting for the County of Washington. The petition of Francis Beveridge and Margaret his wife, and of Alice Tolmie and James Tolmie, infants, by Margaret Tolmie their guardian, mother, and next friend, all of said county, respectfully showeth:— That Robert Tolmie, late of said county, deceased, died intestate, leaving the said Margaret his widow; also the following children and heirs at law, to wit, Margaret, since intermarried with said Francis Beveridge, said Alice Tolmie, and James Tolmie, which said Alice and James are infants under the age of twenty-one years. That said Robert Tolmie died seized in fee of lot number fourteen in square number two hundred and ninety, in the city of Washington, with its appurtenances. That the said lot has descended in coparcenery to the said parties, who are desirous of having the same divided among them; they therefore pray that a commission may issue to commissioners as directed by law, for the purpose of ascertaining whether the said property be susceptible of division, or of selling the same and dividing the proceeds. That for that purpose, guardians may be assigned by this court to said infants, and such other order made in the premises as to this honorable court may appear right, and agreeable to the act in such cases made and provided. They beg leave to refer to the deed for said lot now filed and exhibited; and will ever pray, &c. John Hewitt, Solicitor for Petitioners. June term, 1814." This petition was filed on the 15th of June, 1814; and on the same day Margaret Tolmie, the mother, was appointed guardian of the infant petitioners, and a commission was issued to David Appler, David Shoemaker, David Ott, Samuel Hoyt, and Clotworthy Stephenson, in the usual form, "to adjudge and determine whether the lot of ground aforesaid will admit of being divided without injury and loss to all the parties entitled; and to ascertain the value of said lot in current money; and that if the said lot can be divided, then to divide and make partition of the same between all the parties interested according to their several just proportions; and if the said lot cannot be divided without loss to all the said parties, to return the same to the said court, with the reasons thereof, and the real value of the said lot in current money, according to the act of assembly of Maryland in such cases made and provided." On the back of this commission was a certificate of a justice of the peace, that on the 17th of June, 1814, the commissioners were duly sworn and affirmed, "that they will well and truly and without favor, partiality, or prejudice, adjudge and determine whether the estate within mentioned will admit of being divided without any injury or loss to all the parties entitled; and that they will ascertain the value of such estate in current money; and if the estate can, in their opinion and judgment, or in the opinion and judgment of a majority of them, be divided without loss and injury to all the parties entitled, that then they will divide and make partition of the same fairly and equally in value between all the parties interested according to their several just proportions." On the 20th of June, 1814, the commissioners reported that they had taken the oath, &c., and after having given reasonable notice to all the parties concerned, they met, and having made an accurate survey and view of the said estate, they "adjudged and determined that the estate would not admit of a division without injury to all the parties concerned;" and stated the reason of their opinion to be that the property consisted of a single lot, on which was built a small frame building; they therefore recommended a sale of the premises, and valued the same at $1,400 in current money. On the 6th of July, 1814, the heirs respectively and successively refused to take the estate at the valuation, and thereupon the following order was made by the court:— "The commissioners appointed in this case having returned to the court, that the property mentioned in the petition will not admit of a division without loss to all the parties concerned; and all the said parties having refused to take the same at the valuation and pay the others their respective proportions; it is therefore adjudged and ordered by the court, that the said commissioners, or a majority of them, proceed to sell the said property at public auction; that they give ten days previous notice of the time, place, and terms of sale by advertisement inserted four times in the National Intelligencer, and three times in a Georgetown

newspaper; that the terms be one fourth of the purchase-money cash; one fourth on a credit of three months; one fourth on a credit of six months; and the remaining fourth on a credit of nine months, from the day of sale, taking bonds with good security to the heirs according to their several interests, bearing interest from the day of sale."

Among the papers in the cause is the following, not marked by the clerk as filed, nor noted upon the clerk's docket:— "To the Honorable the Judges of the Circuit Court for the County of Washington. The undersigned, a majority of the commissioners appointed by this honorable court, at June term last, to sell a certain house and lot in Washington City, being lot number fourteen, in square number two hundred and ninety, as the estate of the heirs at law and representatives of Robert Tolmie, deceased, beg leave to report, that having, according to order, advertised the same for ten days in the National Intelligencer, and three times in a Georgetown newspaper, they did proceed to sell the same on the thirtieth day of July last on the premises; at which said sale Julia Kean being the highest bidder, for the sum of eleven hundred and five dollars, on a credit of three, six, and nine months; one fourth being paid in hand; that she gave due security for the payment of the purchase-money; all which has been duly paid with interest; they therefore request that the said sale be ratified; and that they may be directed to distribute the proceeds, and to make a conveyance to the purchaser aforesaid. They herewith submit an account of the expenditures. Given under the hands of us, a majority of the commissioners, this third day of July, in the year one thousand eight hundred and fifteen. David Appler. [Seal.] David Shoemaker. [Seal.] David Ott. [Seal.]" On the 3d of July, 1815, the following order was made by the court:— "Ordered by the court, that the report of the commissioners returned and filed in this case be, and the same is hereby ratified and confirmed, so soon as proper receipts of the parties are produced before one of the judges of this court, and that the commissioners or a majority of them make a sufficient deed in fee to the purchaser." On the 13th of June, 1816, the same majority of the commissioners made a deed of bargain and sale of the lot to the purchaser, "Julia Kean," with the following preamble:— "Whereas by a decree of the circuit court of the county of Washington, in the District of Columbia, sitting as a court of chancery, rendered in June term, one thousand eight hundred and fourteen, David Appler, David Ott, David Shoemaker, Samuel Hoyt, and Clotworthy Stephenson, were appointed commissioners, and they, or a majority of them were authorized and empowered to sell and dispose of a piece of ground, known and distinguished on the plan of the said city of Washington as lot numbered fourteen, in square numbered two hundred and ninety, being the real estate of Robert Tolmie, late of the said city of Washington, deceased. That in pursuance of the said decree the said David Appler, David Ott, and David Shoemaker, being a majority of the said commissioners did, on the thirtieth day of July, in the year of our Lord one thousand eight hundred and fourteen, sell and dispose of, to the above-named Julia, the above described lot or parcel of ground, for the sum of one thousand and seventy dollars; and whereas the purchase-money for the said lot of ground hath been fully paid and satisfied; and the said David Appler, David Ott, and David Shoemaker, being a majority of said commissioners are authorized and empowered by the said decree to execute a conveyance for the same, and to comply with the terms of the said decree, the said David Appler, David Ott, and David Shoemaker, being a majority, have agreed to execute these presents. Now this indenture witnesseth," &c. This deed was duly acknowledged and recorded.

Upon the facts above stated, and the sale and proceedings, and deed therein mentioned, it is submitted to the court to decide, whether the plaintiffs are entitled to recover the said premises.

Redin & Key, for plaintiffs.

C. C. Lee and Mr. Jones, for defendant.

CRANCH, Chief Judge. The title set up under these proceedings is said to be void. 1st. Because none of the heirs was of full age at the time of the sale. 2d. Because the sale was never ratified by the court. 3d. Because bonds for the purchase-money were not taken payable to each representative respectively according to his proportionable part of the net amount of sales; and 4th. Because the deed does not recite the commission and all the proceedings thereon necessary to show a good title.

1. Upon the first point, the fact is admitted by the state of the case, or necessarily inferred from the facts therein stated. Margaret, the eldest of the heirs, was only 17 years old when she was married in 1812; consequently could be only 19 at the time of the sale. But it is said that this was a judicial sale, made by order of this court; and the court would not have ordered the sale unless satisfied that one at least of the heirs was of full age. That it is a proceeding in chancery, and that a purchaser under a sale by a master, under a decree in chancery, has a good title unless implicated in fraud in the sale. 2 Schoales & L. 572. That a sale of land under execution on an erroneous judgment is good, although the judgment be afterwards reversed. That a judicial proceeding cannot be questioned collaterally. And it has been said to be immaterial whether the wife were of full age or not, as the husband was the "person entitled" to elect, and he is presumed to be of full age, unless the contrary appear. That he is "the person entitled" within the meaning of

the statute. That a purchaser (of full age) of an infant's share, would be entitled to elect, although the heir from whom he purchased, be an infant; and that upon such election the purchaser would take the estate in his own right. Stevens v. Richardson, 6 Har. & J. 156. On the contrary it has been argued for the plaintiff, that this is not a proceeding in chancery, nor in equity, but at law. That it is a particular proceeding authorized only in a particular case, and that all the circumstances which constitute that particular case must appear upon the face of the proceedings, or the court would have no authority to order the sale. That quoad hoc this is a court of limited jurisdiction. That it is a proceeding in derogation of the common law, and therefore must be construed strictly; and the following case have been cited: Williams v. Peyton, 4 Wheat. [17 U. S.] 77, which was upon a collector's sale for taxes; Jarrett's Lessee v. Cooley, 6 Har. & J. 258, which was a case of election under the eighth section of the "Act Directing Descents," 1786 (chapter 45); Wickes' Lessee v. Caulk, 5 Har. & J. 36, which was a case under the statute of Maryland, 1718 (chapter 18), "For Ascertaining the Bounds of Lands;" and Shivers v. Wilson, 5 Har. & J. 130, which was a case under the act of Maryland, 1795 (chapter 56), regulating the manner of issuing attachments. See, also, McClung v. Ross, 5 Wheat. [18 U. S.] 119, and Walker v. Turner, 9 Wheat. [22 U. S.] 549. It was also said, that it does not appear that the husband, Francis Beveridge, was of full age, and if he were he could only elect in right of his wife; and if she had no right to elect, he had none. That none but an heir could elect. That the husband is not "the person entitled" within the meaning of the statute. That he was not entitled to the intestate's estate, but to his wife's estate. There is much weight in those arguments.

It is an important question in this cause, whether the proceedings of this court upon a petition to divide the real estate of an intestate, under the act of descents, 1786 (chapter 45, § 3), be proceedings under a special authority delegated to this court in a particular case, or whether they be proceedings under its general and ordinary jurisdiction, as a court of law, or a court of equity. If the latter be the case, many things may be presumed which do not appear on the record, nor in the evidence produced; nor will evidence be permitted to contradict the presumption arising from the acts of the court as they appear upon the record. Thus, after the court has ordered a sale, in the exercise of its general and ordinary jurisdiction, it would be presumed that the court had satisfactory evidence of every prerequisite to justify the court in making the order, and such presumption would continue so long as the order of the court should remain unreversed. On the contrary, if the proceedings be under a special authority delegated to this court in a particular case, and not under its general jurisdiction as a court of common law or of equity, nothing material can be presumed. The person claiming title under such proceedings must show them to be regular, and in a case in which the court had jurisdiction, and was authorized to do what it has done.

By the Maryland act of descents, 1786 (chapter 45, § 8), the chancellor has original jurisdiction only in the case where the lands to be divided lie in different counties. If the land lie entirely in one county, the county court alone has jurisdiction of the case. This court therefore can exercise jurisdiction in the present case, only as being substituted for the county court. It is a special jurisdiction given to a court of law in a particular case.

The powers of the county court, under that act, are 1. To appoint the commissioners; and this upon application, they are obliged to do; they have no right to refuse. 2. To confirm or reject the report of the commissioners, in case they should report that the estate cannot be divided without loss to all parties. 3. To ratify or reject the proceedings of the commissioners in case they should proceed to make partition and allotment between the parties. Either party may appeal to the chancellor from the judgment of the county court.

The power to make the partition, and all the incidental powers, are by the act given directly to the commissioners. They derive no power from the court. They have a naked authority without an interest. Their powers must be as strictly executed as those of a collector of taxes, or any other public agent. The court cannot authorize any other person to make the division or the sale, and no sale can be made unless some one of the persons entitled to the estate be of full age. The commissioners, with a majority of the persons interested, are to determine whether the sale shall be for money or on credit; and if for money, the commissioners are to divide it among the heirs. The act of 1797 (chapter 114, § 6) provides that all sales directed by the eighth section of the act of 1786 (chapter 45), to be made, shall be made agreeably to the order of the court. This act does not necessarily repeal that part of the eighth section of the act of 1786 (chapter 45) which gives power to the commissioners, with a majority of the persons interested, to decide whether the sale shall be for money or on credit. There is enough left for the order of the court to operate upon, in deciding whether the sale shall be made at public or private sale, and in fixing the time and place of sale, and the notice which shall be given. The act of 1797 also provides that the sale shall not be valid until ratified by the court. Still, however, the power to sell is derived directly from the act of 1786 to the commissioners. It does not pass through the court, nor is the sale the act of the court. It is the act of the commissioners' alone, under the authority of the law, not of the court. The act of 1786 is imperative. The words are, "then the es-

tate shall be sold, under the direction of the said commissioners or a majority of them, for money, or upon credit, as they with a majority of the persons interested who are of age, and the guardians of such as may be minors, shall determine." It leaves no discretion to the court—it requires no order of the court for the sale. The duty is imposed on the commissioners. It is true that the act of 1797 requires that all sales directed by the act of 1786 to be made, should be made "agreeably to the order of the court," that is, in such time, place, and manner, but not upon such terms as to cash or credit, as the court should order. The act of 1786 provides for the terms of sale, that is, whether for ready money or on credit; but did not provide for the time, or place, or manner of sale; it might be at public or private sale, or at long or short notice, or at any place the commissioners might appoint. In these respects, then, the act of 1797 requires that the sales directed by the act of 1786, to be made, should be made agreeably to the order of the court, in those particulars. The act of 1797 evidently recognizes the construction, that the sales were to be made by the commissioners under the act of 1786, and not under an order of the court. The act of 1786, as before observed, is peremptory, that the land shall be sold by the commissioners, if their judgment (that it cannot be divided without loss to all the parties,) shall be confirmed by the court. The judgment thus to be revised and confirmed or rejected by the court is not a judgment that the land should be sold; but that it cannot be divided without loss. The act of 1797, therefore, does not give the court any authority to decree, or to refuse, a sale. That clause of the act of 1786 (chapter 45, § 8) which says, "but if all the parties entitled shall be minors at the death of the intestate, the estate shall not be sold, until the eldest arrives to age," is a prohibition to the commissioners, who alone had the power to sell, and not the court, who had no power to decree a sale. All the acts of Maryland upon the subject, evidently consider the power of sale as vested immediately in the commissioners by the act of 1786, and as a power to be executed in pais. Thus the act of 1797 (chapter 114, § 6) says, "that all sales by the act to direct descents directed to be made," &c. So the act of 1799 (chapter 49), in section 1, says, "in those cases wherein it becomes necessary for the commissioners to make sale of the intestate's estates"; and in section 2, "in case the lands or estate shall be sold by the commissioners agreeably to the provisions of the said act"; and in section 3, "in all cases of sale made by the said commissioners," &c., "it shall be the duty of the commissioners," &c. The fourth section requires that bonds shall be taken "by the commissioners." The fifth section authorizes them to lay off the widow's dower; and the sixth section empowers them, with the assent of the widow, to sell the estate disincumbered of her dower. These powers are all vested by the statute directly in the commissioners, without the intervention of the court; and no power is given to the court, but to ratify or reject the acts of the commissioners.

The act of 1799 (chapter 49) provides for the payment of the expenses of executing the commission, and their allowance by the court. It makes it the duty of the commissioners, without any order of the court therefor, after ratification of the sale and payment of the purchase-money, to make a deed to the purchaser, conveying all the right of the intestate; and requires that the commission and proceedings thereon should be recited in the preamble of the deed. It also provides, that when the sale shall be on credit the commissioners shall take bonds for the purchase-money payable to each representative respectively, according to his proportion of the amount of sales. Before this statute, the commissioners had no power to make a deed, nor any interest which they could convey. Their deed would have been a mere nullity. The purchaser's title rested upon the matter in pais, connected with the record of such acts of the court and of the commissioners as were required to be entered of record. The matters required to be recorded were only, 1st. The judgment of the commissioners that the estate could not be divided without loss to all the parties interested, the reasons of such judgment, and the confirmation of that judgment by the court; and 2d. The partition actually made by the commissioners, in case they proceeded to divide the estate, and the ratification or rejection by the court of such partition. The sale, if made, was a matter entirely in pais, of which no report, nor record, nor ratification, was required to be made. The purchaser was left to make out his title, by proof of all the facts necessary to give jurisdiction to the commissioners, and to the court, as far as it had power to act in the case, and to show that the authority given by the statute had been strictly pursued and executed. If the commissioners made a deed it was of no value, unless as a memorandum of dates and facts, which might be susceptible of proof by evidence aliunde In case of a sale under the act of 1786, the purchaser, to make out his title, was bound to prove that the ancestor died seized of an estate of inheritance, and intestate; that the parties entitled to the estate could not agree upon a division thereof, or that some person entitled to a part was a minor; that application was made to the court; that a commission was issued; that the commissioners took the oath required by the statute; that they determined that the estate could not be divided without loss to all the parties; that they made return to the court of their judgment, and the reasons upon which the same was formed, and the real value of the estate in current money; that their judgment was confirmed by the court; that all the persons entitled to elect

to take the whole estate and pay to the others their just proportions of the value in money, refused so to do; that the sale was made under the direction of the commissioners, or a majority of them, for money, or upon credit, as they, with a majority of the persons interested who were of full age, and the guardians of such as were minors, determined to be most advantageous to all concerned; that some one, at least, of the parties entitled, was of full age at the time of the sale; and, perhaps, that the purchase-money was justly divided among the several persons interested, according to their respective titles to the estate. The statutes of 1797 and 1799 have not altered the nature of the source of the power of sale, vested in the commissioners. They still derive it immediately from the statute of 1786. It does not flow through the court; and cannot be hindered or obstructed by the court, unless incidentally, by its refusal to appoint the time, place, and manner in which the sale shall be made, or by its refusal to ratify the same after it has been made. The power of sale is still an authority vested by law in the commissioners, to be executed by them in pais. "It is a naked power, not coupled with an interest; and in all such cases," (says Mr. Chief Justice Marshall, in delivering the opinion of the supreme court of the United States in the case of Williams v. Peyton, 4 Wheat. [17 U. S.] 79), "the law requires that every prerequisite to the exercise of that power must precede its exercise, or his act will not be sustained by it." And again he says, "It is a general principle, that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depend upon an act in pais, the party claiming under that deed is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser; and the evidence of them should be preserved, as a necessary muniment of his title." In Thatcher v. Powell, 6 Wheat. [19 U. S.] 127, Mr. Chief Justice Marshall again, in delivering the opinion of the court, says:—"We think otherwise," (that is, that the sale was void, and not merely voidable.) "In summary proceedings, where the court exercises an extraordinary power, under a special statute prescribing its course, we think that course ought to be exactly observed; and those facts, especially, which give jurisdiction ought to appear, in order to show that its proceedings are coram judice." See, also, Hartley v. Hooker, Cowp. 523.

What is there to prevent these general principles from being applicable to the present case?

1. It is said that this is a judicial sale, and that, in such cases, every thing necessary to the jurisdiction of the court, and validity of the sale, is to be presumed; and to this point was cited the Irish case of Bennett v. Hamill, 2 Schoales & L. 572. That was a case where the heir, after coming of age, sought, by petition, to set aside a sale made twenty years before, under a decree in equity at the suit of a creditor of his ancestor, suggesting a deficiency of personal assets, and praying for a sale of the real estate for the payment of debts. The petition suggested fraud between the creditor and the mother of the complainant and her advisers. The purchaser, however, was entirely ignorant of the fraud, and purchased bona fide for a fair price, and had obtained the legal estate from the person in whom it was outstanding at the time of the sale. Lord Redesdale, after much argument and consideration, finally decided that as the defendant, Hamill, was a bona fide purchaser, for a fair price, without notice or knowledge of the fraud, and had obtained the legal title, and had laid out $1,200 on the land, he ought not to be disturbed in his title; but that the complainant might pursue his remedy against the creditor, and the other parties concerned in the fraud. That case confirms the distinction before noticed, between the judicial act of a court in the exercise of its general jurisdiction, and the execution of a naked power under an authority given in a special case. In the case of Bennett v. Hamill, the sale which was sought to be set aside was made under a decree of a court of equity, in the exercise of its ordinary and general jurisdiction under the Irish law. All the presumptions were, therefore, in favor of the decree. But, in the present case, the sale was not made under the authority of the court in the exercise of its general jurisdiction, but under a special authority vested by law in certain commissioners; and, therefore, is not entitled to any presumptions in its favor. Every thing necessary to its validity must be proved. It is also said that a sale under a fi. fa. is valid, although the judgment be afterwards reversed for error. 8 Coke, 96b. But the reason given is, "for the sheriff who made the sale had lawful authority to sell; and, by the sale, the vendee had an absolute property in the term during the life of Alice, the wife; and although the judgment, which was the warrant of the fi. fa. be afterwards reversed, yet the sale, which was a collateral act done by the sheriff by force of the fi. fa., shall not be avoided; for the judgment was that the plaintiff should recover his debt, and the fi. fa. is to levy it of the defendant's goods and chattels; by force of which the sheriff sold the term, and the vendee paid money to the value of it. And if the sale of the term should be avoided, the vendee would lose his term and his money too, and thereupon great inconvenience would follow; that none would buy of the sheriff

goods or chattels in such cases, and so execution of judgment, (which is the life of the law,) in such case, would not be done." And in Id. 143a, the reason given is, "because the sheriff was commanded and compelled by the king's writ to sell it." In that case, the authority to sell was complete and perfect at the time of the sale; for an erroneous judgment remains in full force until reversed. But in the present case the question is, whether, at the time of the sale, the commissioners had authority to sell; and whether, in making the sale, they pursued their authority strictly. There is no analogy between the cases. In Drury's Case, 8 Coke, 142a, a "difference was taken and agreed between a thing collateral executory and executed; for when an erroneous judgment is given, and afterwards the judgment is reversed by a writ of error, collateral acts executory are barred thereby;" for, after reversal, the party may plead nul tiel record. But until the erroneous judgment be reversed, the party cannot take advantage of the error; for he cannot plead nul tiel record, although there be apparent error. And collateral things, executed before the reversal, remain in force, notwithstanding the subsequent reversal of the original judgment; and the reason is, because in the latter case the authority was complete at the time of the act done; and in the other case there was no authority.

There is also a difference between judgments which are erroneous and judgments which are void. The judgment of a court, in a case in which it has not jurisdiction, is void; and no act done under it can be valid. Borden v. Fitch, 15 Johns. 121. Thus in the case of Wise v. Withers, 3 Cranch [7 U. S.] 331, which was trespass by a justice of the peace against a collector of militia fines, the supreme court of the United States decided that, as the plaintiff was not liable to be enrolled in the militia, the court-martial had no jurisdiction in the case, and its judgment was void, and gave the collector no authority to distrain the plaintiff's goods. See, also, Bissell v. Briggs, 9 Mass. 462. All the cases rest upon the authority to do the act at the time it was done. The difference among them consists in the evidence required of that authority. In Kempe's Lessee v. Kennedy, 5 Cranch [9 U. S.] 173, 179, 184, the supreme court held, that when a court of general jurisdiction acted within the sphere of its authority, its proceedings were not examinable when coming before them collaterally; but that where the jurisdiction is limited, it must be shown upon the record itself that the court acted within the sphere of its authority. The case of Barney v. Patterson's Lessee, 6 Har. & J. 182, was an action of ejectment by a purchaser at the marshal's sale, by virtue of a fi. fa. issued upon a judgment of the circuit court of the United States, in an attachment upon two non ests, under the act of Maryland, 1750 (chapter 40). Many objections were made to the jurisdiction of the court, and to the regularity of the proceedings in the attachment. Mr. Chief Justice Buchanan, in delivering the opinion of the court of appeals of Maryland, said: "But, though the intervening of a term before the issuing of the attachment, and the negligence of the marshal, were irregularities in the proceedings, the judgment of condemnation is not therefore void, (whatever disposition might be made of it by an appellate court,) the circuit court being a court of record of competent jurisdiction, from whose decisions an appeal or writ of error lies to the supreme court of the United States, and is not an inferior court according to the technical sense of the term as used in England. It is not like the case of special and extraordinary powers given by statute to a court in relation to a subject-matter of which such court has no jurisdiction independent of the statute, but derives its authority to act upon facts arising in pais entirely from the statute giving the power, and prescribing the mode of proceeding. The act upon which the proceedings of the circuit court were founded, professes to give no new jurisdiction, but only to regulate and limit the powers of courts already possessed of full and complete jurisdiction of the whole subject-matter." There is no presumption in favor of a court of limited jurisdiction. Perkin v. Proctor, 2 Wils. 382. And "where, by statute, a special authority is delegated to particular persons, affecting the property of individuals, it must be strictly pursued; and appear to be so upon the face of their proceedings. Rex v. Croke, Cowp. 26, 29." The case of Perkin v. Proctor, 2 Wils. 382, was trespass against the assignees of Goodall, a supposed bankrupt, for acts done by the assignees under a void commission of bankruptcy; Goodall having been a victualler, and not a trader, liable to the bankrupt laws. The court of common pleas decided that the commission was not merely voidable, but void; and that all acts done under it, even before it was superseded by the lord chancellor's order, were absolutely void. The court said, "We are all of opinion that the commission of bankruptcy is void, and of no avail. The jurisdiction concerning bankrupts is confined to particular persons and cases; as that the person subject to a commission, must be a trader; must be indebted in such a sum; must do some particular act, &c. The court of chancery acts herein solely upon the application of the party petitioning, at whose peril the commission issues, and if he sues it out on any false suggestion the law gives a remedy against him to the party whose liberty or property is thereby invaded. There are a variety of commissioners whose power and jurisdiction are limited and confined, which, if they exceed, the law will give remedy against them. And where courts of justice assume a jurisdiction which

they have not, an action of trespass lies against the officer who executes process, because the whole proceeding was coram non judice. Where there is no jurisdiction at all there is no judge; the proceeding is as nothing; this is the very case of The Marshalsea, 10 Coke, 76a. The party in this case is no trader; there is no foundation to build a commission upon; the commissioners had no power at all. Where a rate is unduly taxed, the warrant of the justices of the peace for levying thereof will not excuse the church-warden, or overseer of the poor, who distrains for it. Nichols v. Walker, Cro. Car. 395. And it is like where an officer makes an arrest by warrant out of the king's court, which, if it be error, the officer must not contradict, because the court hath general jurisdiction; but here" (says Justice Croke,) "the justices of the peace have but a particular jurisdiction. The case of Terry v. Huntington, Hardr. 480, is a very strong case. In trover for goods levied by warrant of the commissioners of excise, the question was, if they adjudge low wines to be strong waters perfectly made upon the statute 12 Car. II. (chapter 23), whether an action lies against the officer; per Hale, Lord Chief Baron. The commissioners have only a stinted, limited jurisdiction, and if they exceed it, that does not take away the jurisdiction of this court. Special jurisdictions are circumscribed, 1. With respect to place, as a leet, or a corporation. 2. With respect to persons, as 10 Coke, 76a (the case of The Marshalsea). 3. With respect to the subject-matter of their jurisdiction; and the statute limits their jurisdiction in all these three respects; and therefore if they give judgment in a cause arising in another place; or betwixt private persons; or in other matters, all is void and coram non judice; as if they should adjudge rose-water to be strong water." The court also cited the case of Smith v. Bouchier [2 Strange, 993], in which an action for false imprisonment was maintained against the vice-chancellor of Oxford, who had issued his warrant upon oath of suspicion when, by law, he was not authorized to issue it but upon oath of belief; the whole proceeding was adjudged to be "coram non judice, and a mere nullity."

In the case of Wickes' Lessee v. Caulk, 5 Har. & J. 42, the court of appeals in Maryland, say, "It is a well-established principle of law, that the proceedings of any tribunal not having jurisdiction over the subject-matter which it professes to decide, are void; and it is equally well established that the proceedings of tribunals of limited jurisdiction, must, on the face of them, state the facts which are necessary to give them jurisdiction." "That the proceedings of tribunals, having no jurisdiction to decide the case, are not voidable, but void, is a proposition equally clear; and, among other cases, was established in this court in the case of Partridge v. Dorsey's Lessee [3 Har. & J. 302], at December term, 1813, where the court decided that a plaintiff, in an ejectment, might show that a decree of the chancellor, ordering lands to be conveyed in a case where he had no jurisdiction to make such a decree, was void, and therefore could give no title, though such decree had not been appealed from, or reversed. If the proceedings exhibit a case in which the commissioners who did act, had power to act, their award is final, until reversed in the manner prescribed by the act; but if, on the contrary, they themselves show that they had no jurisdiction, the whole must be considered as coram non judice, and therefore a nullity." The court of appeals, upon that ground, reversed the judgment of the court below, although a hundred years had elapsed since the proceedings were heard, before the commissioners, which now, for the first time, were adjudged to be void. The case of Shivers v. Wilson, 5 Har. & J. 130, was under the Maryland act of 1795 (chapter 56), relating to attachments. The garnishee had pleaded non assumpsit for his principal, and on the trial of the issue upon that plea, although the plaintiff was described in the proceedings as a citizen of the United States, the court below instructed the jury that the plaintiff could not recover, unless he satisfied them, by evidence, that he was a citizen of the state of Maryland, or of some other of the United States; to whom alone the statute gives the remedy by attachment; and, a man may be a citizen of the United States, and yet not be a citizen of any particular state of the United States. Mr. Justice Johnson, in delivering the opinion of the court of appeals, says, "On the part of the appellant it is contended, that as the court before whom the cause was depending, had a general, and not a limited jurisdiction over the matter in contest, no advantage could be taken of the plaintiff's incapacity to sue, except by a plea in abatement. No position of law is more clearly established than that a defendant in a cause, before a court of general jurisdiction, must, if he wishes to avail himself of the disability of the plaintiff to sue, do so by a plea in abatement; and no principle of law is more evident than that where the tribunal is of a limited jurisdiction, or the proceedings are particularly prescribed by a statute made on the subject, the course of procedure, so prescribed, must, on the face of the record, appear to have been, if not literally, at least substantially complied with; or the case must, by the proceedings, disclose itself to be within the limited jurisdiction." "On these principles rest the numerous decisions on the acts for marking and bounding lands, made by the late general court, and all the courts of the state, of original jurisdiction, and which have been universally acquiesced in. These decisions rest on the principle that where the course of procedure is prescribed by the statute, the proceedings

themselves must show their conformity with the act by which they are authorized, and that otherwise advantage of non-conformity, can, at any time, be taken." "The act of 1795 (chapter 56), under which the proceedings in this case are supposed to be protected, gives, it is true, full and entire jurisdiction in all cases of attachments coming within the purview of the act, yet that entire jurisdiction is confined to such cases as the act embraces. If the act comprehends the case at bar, then no exception to the disability of the plaintiff was available, except by plea in abatement; if, on the contrary, that act extends not to the case, the plaintiff had no right to recover, and the decision against him was correct. The act of assembly needs only to be read, to discover its limited operation. It gives not the right to every person to issue, or cause attachments to issue. Its provisions confine the remedy to citizens of this state, or of some other of the United States; and the manner in which they are to proceed, is, in detail, pointed out. The plaintiff, to succeed under that law, must come within its provisions. The plaintiff, to recover under that act, must follow its directions. The record before the court in this case, in no part of it, brings the plaintiff within that description of persons who had a right to issue, or cause the attachment to be issued. The right to condemn the property in favor of such a plaintiff is, by no law, vested in the court before whom the cause was tried, or in any other court." The judgment of the court below was affirmed.

These principles and authorities seem to be decisive of this case. The sale was the act of the commissioners, not of the court. All the parties entitled to the estate being minors at the time of the sale, the commissioners had no authority, but were expressly forbidden, by law, to sell. This objection alone is fatal. But if the commissioners had a power to sell, at the time of the sale, it is an equally fatal objection, that it does not appear in the proceedings that the sale was ever ratified by the court, as required by the act of 1797 (chapter 114). It is true, that there was an order that the report of the sale should be ratified and confirmed, "so soon as proper receipts of the parties should be produced before one of the judges of this court; and that the commissioners, or a majority of them, make a sufficient deed in fee to the purchaser. But it does not appear in the proceedings that such receipts were ever produced to the judge. And although a deed was afterwards made by the commissioners to the purchaser, yet as nothing material can be presumed in the execution of a special authority, the deed does not, in law, justify a presumption that the receipts were produced, especially as the deed, although required by law to contain a recital of the commission and the proceedings thereon, contains no recital of the fact that the receipts had been produced to the judge, or that the sale had been confirmed by the court. It does not even recite the commission, or the proceedings thereon. It states falsely, that by a decree of this court sitting as a court of chancery, David Appler and four others were appointed commissioners, who were authorized to sell lot 14 in square 290, being the estate of Robert Tolmie, deceased, and to execute a conveyance for the same. Whereas the proceeding was not before this court, sitting as a court of chancery, but as a court of common law, being substituted for the county court of Maryland; and the decree did not authorize the commissioners to sell the lot, nor to execute a conveyance. There is nothing in the deed to show that it was a proceeding under the act of assembly, directing descents, and for the partition of an intestate estate. It does not state that Robert Tolmie died intestate and seized of an estate of inheritance in the property; nor that the parties entitled could not agree on a division thereof; nor that any of the heirs were minors; nor that application was made to the court for a commission; nor that the commissioners took the oath prescribed by the statute; nor that they determined that the estate could not be divided without loss to all the parties; nor that they made return of their judgment to the court with their reasons for such judgment; nor of their valuation of the estate; nor that their judgment was confirmed by the court; nor that all the persons entitled to elect to take the estate at the valuation had refused to do so; nor that the sale was made agreeably to the order of the court; nor whether the sale was for money or on credit; nor whether the money had been duly divided among the persons entitled to it; nor whether the bonds were taken payable to the respective heirs agreeably to the statute; nor that any of the heirs was of full age; in short, it does not correctly recite any one of the facts necessary to constitute a title in the purchaser, except the payment of the purchase-money. The deed, therefore, raises no presumption of the existence of any of those facts.

The court is of opinion, 1. That the commissioners had no authority to sell the property, because all the heirs were minors at the time of the sale; and that therefore the sale was void. 2. That the sale was not valid, because it does not appear to have been ratified and confirmed by the court. See, also, Shivers v. Wilson, 5 Har. & J. 132.

Verdict and judgment for the plaintiff.

Reversed by the supreme court (2 Pet. [27 U. S.] 157).

TOLSON (UNITED STATES v.). See Case No. 16,530

TOM (UNITED STATES v.). See Case No. 16,531.

Case No. 14,081.

TOMBECKBEE BANK v. DUMELL et al.

[5 Mason, 56.] [1]

Circuit Court, D. Rhode Island. June Term. 1828.

PARTNERSHIP—DISSOLUTION—SUBSEQUENT ACCEPTANCE OF BILL.

A bill drawn upon a partnership, but not accepted until after a dissolution of the partnership publicly announced, binds only the partner, who accepts it, and not the other partners, who have not consented thereto.

[Cited in Smith v. Milton, 133 Mass. 371. Cited in brief in Southwick v. Allen, 11 Vt. 77.]

Assumpsit on a bill of exchange drawn on 17th of March, 1827, in Alabama, by Stone, Ellis & Co., at sixty days' sight, on the defendants, for $3,000, payable to Moses Sewall or order, and by him indorsed to the plaintiffs. The declaration averred a presentment for acceptance, and an acceptance and subsequent non-payment. There were other counts on other similar bills. Plea, the general issue. At the trial, the sole defence relied on was, that the acceptance was made by Jacob Dumell after the dissolution of the partnership between him and his co-defendant, John Lyman. It appeared in evidence, that the firm was dissolved on the 1st of January, 1827; but it was not advertised in the newspapers until the 5th of April, 1827, when it was published at Providence, where the firm carried on business. The acceptances of all the bills were after the dissolution was so advertised.

William A. Burgess, for plaintiff.
Richard N. Greene, for defendant Lyman.
Thomas Burgess, for defendant Dumell.

STORY, Circuit Justice. Upon this statement of facts, which is not controverted, I am of opinion, that the plaintiffs are not entitled to recover. No partner has any authority after a dissolution of the partnership, to bind his copartners by any new contract. The acceptance of these bills is altogether a new contract. It is true, that if the partnership is still ostensibly carried on in the name of the firm, and no public notice is given of the dissolution of the partnership, though it is secretly dissolved, third persons, dealing with the firm upon the faith of the partnership and joint responsibility, are entitled to hold all the partners. But it is otherwise, where the dissolution is made public. Here, before the acceptance, the dissolution was publickly announced. The partners had not held out to the payee, or the present holders, that they would accept the bill. Every non-accepted bill is necessarily taken upon the faith and credit of the drawer; and no person can bind the drawee by his acceptance, except a person having an express or implied authority for that purpose. After the dissolution of the partnership, and a public notice of it, there was a withdrawal of all such authority; and consequently the acceptance, as to John Lyman, is void. Upon principle then, the action, being joint upon a joint acceptance, fails as to both.

Mem. By consent of the parties, the plaintiff discontinued as to Lyman, amended his declaration, and took a judgment against Dumell alone.

[1] [Reported by William P. Mason, Esq.]

Case No. 14,082.

TOMBECKBEE BANK OF MOBILE v. ——.

[1 U. S. Law Int. 244.]

Circuit Court, D. New York. Aug., 1829.

DAMAGES ON BILLS OF EXCHANGE.

At law.

Daniel Lord, Jr., for plaintiffs.
G. Sullivan and G. Winter, for defendants.

Before EDWARDS, District Judge.

The Tombeckbee Bank of Mobile held the drafts on a house in that city, duly accepted, but protested for non-payment, and settled with an endorser, receiving the principal and interest only, and reserving one of the bills as the ground of an action on which to recover the damages on all the bills,—amount of damages at ten per cent., $2,500. This action was brought to recover these damages. The declaration was in usual form on a bill of exchange against drawers. In defence, the counsel for the defendants insisted that by receiving payment of the principal and interest of the bills, the holders had lost all right to the damages, and relied on the case of Johnson v. Brannan, 5 Johns. 268, where an indorsee was denied the right of recovering the interest on a note, of which the principal had been paid, and the court held interest could not be recovered separately after payment of principal.

EDWARDS, District Judge, in charging the jury, instructed them that the plaintiffs, by receiving the principal and interest of the bills of exchange, had, in effect, released all rights to damages; and damages could not be recovered on a bill after the principal and interest had been received by the holder. The jury returned a verdict into court, but, the plaintiffs' counsel claiming to be called, and not answering to the call, the verdict, which was for the defendants, was not recorded, and the plaintiffs became nonsuited.

Case No. 14,083.

TOME et al. v. FOUR CRIBS OF LUMBER.

[Taney, 533.] [1]

Circuit Court. D. Maryland. Nov. Term, 1853.

SALVAGE—LUMBER RAFTS—DERELICTS—PRACTICE IN ADMIRALTY—WRIT OF RESTITUTION.

1. Where rafts of lumber, anchored in the Susquehanna river at Port Deposit, within the

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

flux and reflux of the tide, are driven from their anchorage by a high wind and tide, but are not broken up, and whilst floating down the stream, are rescued and brought to the shore: *Held*, that this is not a salvage service.

[Cited in Raft of Cypress Logs, Case No. 11,527. Disapproved in Maltby v. Steam Derrick Boat, Id. 9,000. Cited in Cope v. Vallette Dry-Dock, 10 Fed. 145; Id., 119 U. S. 630, 7 Sup. Ct. 338.]

2. The person so rescuing it acquires no lien on the lumber, and has no right to retain it from the owner; his remedy is an action at law to recover the value of the service rendered.

[Criticised in Fifty Thousand Feet of Timber, Case No. 4,783.]

3. This is one of the usual accidents of the lumber trade; if the owners choose to expose their property to the risk, they have a right to do so, and no one can acquire a lien upon the lumber by interfering with it without their authority.

[Approved in Bywater v. A Raft of Piles, 42 Fed. 918.]

4. Although no one was on the raft, yet, it was no derelict on that account, or abandoned by those who had the care of it; for it is not the usage of the trade to keep any one on board, while the raft is at anchor.

5. Such service has none of the qualities or character of the services for which the maritime law of all commercial nations allows salvage, when the property is in danger of perishing from the perils of the sea.

6. When a raft is broken up and scattered, any one may lawfully take measures to save it from further loss, and secure the property for the owner; but it is rather a case of finding, than of salvage service; and whatever just claim the party may have to a reasonable compensation for his service and time, he has no right to retain the property when the owner demands it; and if he does, it may be recovered in an action of replevin, in a court of common law.

[Cited in Chase v. Corcoran, 106 Mass. 288.]

7. Rafts anchored in the stream, although it be a public navigable river, are not the subject-matter of admiralty jurisdiction, in cases where the right of property or possession is alone concerned; they are not vehicles intended for the navigation of the sea or arms of the sea; they are not recognized as instruments of commerce or navigation, by any act of congress; they are piles of lumber, and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive and transport it to its destined port; and any assistance rendered to these rafts, even when in danger of being broken up, and swept down the river, is not a salvage service, in the sense in which that word is used in courts of admiralty.

[Cited in The W. H. Clark, Case No. 17,482. Applied in Salvor Wrecking Co. v. Sectional Dock Co., Id. 12,273. Followed in Gastrel v. Cypress Raft, Id. 5,266. Distinguished in Muntz v. A Raft of Timber, 15 Fed. 557. Cited in Snyder v. A Floating Dry Dock, 22 Fed. 686; Cartier v. The F. & P. M. No. 2, 33 Fed. 511; Ruddiman v. A Scow Platform, 38 Fed. 159; Seabrook v. Raft of Railroad Cross-Ties, 40 Fed. 596.]

8. The remedy of the owners of the lumber in this case, to regain the possession, from the party claiming salvage, was an action of replevin, and not a libel in the district court.

9. The lumber having been taken from the respondent's possession by process which the district court had no jurisdiction to issue, a writ of restitution would be awarded, if there was any question between the parties as to the right of property or of possession, which this court considered an open one; but as the respondent claims no property in the lumber, but merely the right to retain the possession until paid for services which were not of a nature to give him that right, it would be unreasonable and unjust to deprive the owner of the possession he has obtained, merely to subject him to the necessity of recovering it again, in a new suit in a court of common law.

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

This case was instituted in the district court on the 18th of June 1852. The libellants (now appellants), were Jacob Tome and Edward Rhinehart, lumber-merchants of Port Deposit, trading under the name of Tome & Rhinehart, agents and consignees of William Hartley, of the state of Pennsylvania, and the said William Hartley. The libel was against four cribs of lumber, and the contents thereof, in Harford county, in the state of Maryland, and against Albert Davis of the same county, in a cause of spoliation, and damage, civil and maritime.

The libellants alleged that on the 17th of April 1852, they, the said Tome & Rhinehart, as agents and consignees as aforesaid, were possessed of two rafts of lumber containing twenty cribs or platforms, and in all 100,000 feet of lumber, which was at that time anchored in the Susquehanna river, near Heckertown, in Cecil county, within the district aforesaid, and within the flux and reflux of tide, and the admiralty and maritime jurisdiction of this court. That on that day, the said lumber, so safely anchored, was carried down the river, about five miles, by the wind and current, in a freshet, to the opposite side of said river, near the shore of one Stephen I. Thompson, of Harford county; and on the 20th of May, the libellants Tome & Rhinehart, sent vessels and hands down the river to the said lumber, with a view to have the same put on board the vessels, to carry them to Baltimore and the District of Columbia, to Smith, Barnett & Co., and others, to whom the libellants had sold the same. That by their said hands and agents, they had succeeded in putting all of the lumber alongside of the vessels, preparatory to putting it aboard, when the said Albert Davis, with his servants and agents, came from his shore in a boat, armed with a gun, and threatened to shoot and otherwise violently to disturb and injure the libellants' agents and servants, if they resisted, and finally against their will, cut away violently from the said lumber, four cribs or platforms thereof, by severing the ropes which bound them to the other lumber and the said vessels, and carried them to the shore of the said Albert Davis, and he has since had the said lumber drawn and piled on his farm lying in the said county, and fronting on the said river, next above the farm of the said Thompson. That after the said Albert Davis had taken away the lumber (worth about $200), he pretended that he was entitled to salvage for saving the two rafts, and demanded therefor

$150, and also endeavored, by the like violence, to prevent the rest of the said lumber from being put on board the said vessels, under the said pretence. That the said claim for salvage, was a mere pretence to cover and excuse the said spoliation and trespass; for the said two rafts having been anchored as aforesaid, were cast loose by the rise of the river, and carried down, by the current and wind, to the shallow water opposite to the shore of the said Thompson, where the anchor again performed its office; and all the said lumber was perfectly safe and free from all kind of danger, except that incident to lumber afloat as it was at Heckertown; and if the libellants had been present, they would have prevented any person from interfering therewith. That all of it was staunch and tight (no rope or fastening having been broken or disturbed), and would have so continued, but that the said Albert Davis (not with a view to save it, but with a view to draw it to his own shore, and there possess himself of it, in order to extort money for delivering it up) boarded the rafts and cut the fastenings, whereby about fourteen cribs went ashore, and three of them were carried down the river as far as Swan creek, so as to expose the libellants to risk and expense; which said cribs the said Davis made no effort to recover or secure. And the other cribs so cut away from their fastenings, went ashore on the said Thompson's land, and so remained, in a situation more exposed than they were while attached to the anchor as aforesaid. That it is the usual manner of preserving rafts of lumber in the Susquehanna river, within the flux and reflux of tide, and within the admiralty and maritime jurisdiction of this court, to anchor the same until they are drawn or piled up on land; and the said Thompson's shore is only about five miles below Heckertown; and the said lumber thus secured by the anchor, was just as safe and required no further interference with than at Heckertown; and was actually put at greater risk, and was in no manner saved or secured by anything done by the said Davis. That the libellants, Tome & Rhinehart, having been for many years engaged in the lumber trade, and having frequently before had lumber carried by wind and freshet to some point below Port Deposit in the said river, had always been in the habit of making liberal allowances to such persons, as gave themselves any trouble about their lumber; although they always preferred that they should not interfere with it, as lumber was always put at more risk by unskilful handling; and with that view the libellant Tome, about the 30th of April (on his return from New York, where he was at the time of the freshet), on hearing that Davis had been upon the lumber, called upon him, but not finding him at home, left word with his sister, informing her that the libellants were the owners of the lumber, as agents as aforesaid, and offering to pay any reasonable sum for such trouble, as the said Davis or his hands might have been put to in doing what they might have conceived necessary for the benefit of the said lumber. That they never received any demand from the said Davis, but before the 20th day of May aforesaid, they sent a letter to said Thompson, making a similar offer for any person concerned, which letter they believed and charged the said Thompson showed to Davis; and on the said 20th day of May, the libellants sent the vessels and hands for the lumber, in the manner above mentioned, never suspecting for a moment that there would be the least difficulty, as the said Davis well knew that they were the owners of the lumber, and were willing and able to pay whatever was reasonable for his services.

And they averred, that by reason of the said spoliation by the said Davis, and the threats and violence he used in endeavoring to prevent the rest of the lumber from being put on board the vessels, the said vessels and hands, as well as the other servants and agents of the libellants, were delayed at a heavy expense. The libellants were not able to fulfil their contract with the said Smith, Barnett & Co., in Baltimore, and with others in the District of Columbia, and so in both ways had been subjected to a loss, in the shape of damages, of at least $150. That the libellant Tome, notwithstanding the bad conduct of the said Davis and his bad faith respecting the said lumber, and notwithstanding the libellants had been injured instead of being benefited by his interference therewith, yet, for the purpose of obtaining the said lumber without the expense of litigation, offered and tendered to him $25 for his trouble, if he would give up the said four cribs, which he declined to do. That the said Davis never had taken any steps to obtain salvage, and never made any demand therefor, until after he had taken away the four cribs, when he demanded $150. That the said four cribs of lumber had been drawn and piled on the farm of the said Albert Davis, in Harford county within the district aforesaid, and were now there, though the libellants had been informed and believed, and so charged, that the said Davis had been using and consuming the same as if it were his own; so that the whole thereof might not be there, but they were advised that for any deficiency he would be responsible to them. That all of the said lumber was worth between nine hundred and one thousand dollars; and if the said Davis had fixed upon any reasonable demand for salvage, the said libellants would either have paid the same, however improperly demanded, or left sufficient of the said lumber to meet the said demand; but that the whole of the proceedings on the part of the said Albert Davis were designed, by taking the law into his own hands, and subjecting the libellants to heavy and unusual and unnecessary ex-

penses, to extort money from them. Whereby and by the said act of spoliation, the libellants said they had been injured, besides the value of the said four cribs of lumber, in the sum of $150, as aforesaid.

Prayer for restoration of the lumber, and compensation in damages.

Albert Davis, in his answer, stated that he had no knowledge of what lumber the libellants had anchored in the Susquehanna river near Heckertown, on the 17th of April, 1852, and left them to their proof thereof. That he did not know, of his own knowledge, whose lumber had broken away in the Susquehanna river, and came down the bay on the 18th of April, but it was true, as alleged by the libellants, that they sent vessels down, about the 20th of May, to carry the same away. That early in the morning of the 18th of April last, when a very heavy easterly storm was raging, he discovered one raft of lumber drifting down the bay, and along and near the shore, which his servants secured and tied to the adjoining shore of Stephen I. Thompson; that said lumber had no anchor attached to it, and when secured by his servants, was in great danger of being scattered by the violence of the storm, and broken up on the shores of Swan creek, into which the storm was sweeping with great force. That about eleven o'clock of the same day, he saw another raft drifting down the bay; that he boarded the same, and found that it was dragging its anchor; that it was fast breaking up, but he secured the fastenings, so that it only parted in two parts; one part, consisting of five cribs. he secured on his own shore, and the other part, he secured with the anchor, a short distance from shore. That having thus secured this lumber, he went in two or three days afterwards, to Havre de Grace, and put up public notices in several places in that town, giving notice that he had secured and saved this lumber, and requesting the owners to apply to him for the same. That some two weeks after this notice was set up, he learned that libellants claimed the lumber, and about the 20th of May, a vessel came down to carry it away, but without the knowledge of respondent, and without having tendered him any compensation for his services in saving it. That on being told that the agents of the libellants, had taken the lumber from the shore, and were about to put it on board of their vessel, he immediately went out to them and forbade their doing so, without first proving it to be the lumber of the libellants, and paying respondent his salvage for securing the same. That they refused to pay anything, and persisted in their efforts to carry away said lumber, when the respondent cut loose four cribs, and carried them back to the shore, and told the libellants' agents, that he would return the same upon the payment of a reasonable salvage, which he thought would amount to $150. That respondent had his gun in the boat with him, but he never threatened to shoot or injure any one; but the master of the vessel had a gun, and threatened frequently to shoot respondent. That he placed those four cribs of lumber on his shore, where they remained safely, untouched by any one, until taken by the marshal under the process issued in this case; and the balance of said lumber was taken away by the libellants. That the whole lumber secured by him was worth about $1000, and he deemed himself clearly entitled to $150 for salvage, and demanded that sum. That the salvage was not claimed as a mere pretence and excuse, but he was justly entitled to the same, as the lumber, when secured by him, was in great danger of being scattered and broken up, and if the wind had shifted to the north or northwest, it would have been carried down the bay and probably lost; and his sole object in boarding the said raft, was to secure the same, and save the lumber for the owners. That the last-mentioned raft had come loose in several of its fastenings, which he secured, and he denied that he cut loose any fastenings, or in any other manner did anything to separate the same. That it was true, that one of the libellants called in April last, at the respondent's house, and not finding him at home, informed his sister that the libellants were the owners of the lumber, but he had no knowledge of any offer made to his sister by said libellants to pay any reasonable sum to respondent for his services. That he was never shown any letter by said Thompson, containing any offer of the said libellants, and when they came to take away said lumber, no offer was made to pay respondent for his trouble in securing the same; that said Tome subsequently offered him $25, which he refused, deeming it entirely inadequate to compensate him for his services; that as soon as the agents of the libellants came to claim the lumber, respondent made his claim for salvage to the amount above mentioned. That he caused the said four cribs of lumber to be piled up in a place of safety on the shore; that no part of the same was used by him or his servants or any other person to his knowledge; and that the loss, if any, which might have accrued to the libellants by reason of respondent's refusal to deliver them the four cribs of lumber, might have been avoided by their paying him his reasonable demand for salvage.

The notice referred to in the above answer, was as follows:

"Notice.—On the 18th of April, was taken adrift, a number of platforms of lumber. Apply to Albert Davis."

On the 10th of December, 1852, the district court (Glenn, J.) passed a decree for the sale of the lumber, directing that the defendant, Davis, should be paid out of the proceeds the sum of $150 for salvage; each party to pay his own costs. From this decree, the libellants took an appeal.

In addition to the evidence offered in the

court below, the depositions of several witnesses were read at the hearing of the appeal, the substance of which, is fully detailed in the opinion of the court.

Cornelius McLean and Geo. W. Williams, for libellants.

Wm. F. Giles, for respondent.

TANEY, Circuit Justice. This dispute has arisen from a claim of salvage made by the appellee, for saving, as he alleges, two rafts of timber belonging to the appellant, Hartley, and consigned to Tome & Rhinehart, his agents, at Port Deposit.

These rafts had been floated down the Susquehanna river, and anchored in the stream below Port Deposit; while they remained thus at anchor, a sudden rise in the river took place, accompanied by a high wind and heavy sea, which floated the rafts from the place where they were anchored, and carried them with the current down the river. The respondent, Davis, owns a farm bordering on the river, about five miles below the place from which the rafts had floated off. As they descended the river, they passed near his shore; and the first that came down was taken possession of by his servants, by his direction, and fastened by a chain to a tree; it was, however, fastened to the shore of Stephen I. Thompson, who owns the farm immediately below that of Davis; the current having swept the raft a little below Davis's line, before its motion was arrested. When the second raft came down, which was a few hours afterwards, Davis boarded it, at some personal risk; and while he was on it, five cribs broke off, which he drew to his own shore and fastened there; the residue of the raft was held by the anchor attached to it, after being drawn by Davis into shallow water. There is some difference in the testimony as to the cause of the separation of these five cribs from the residue of the raft, while Davis was on board. But it is not necessary to examine this question; for in the view which the court take of this controversy, it is immaterial whether, as he alleges, the raft was about to break up when he reached it; or, as the appellants insist, the cribs were separated by him.

Three of the five cribs anchored off his shore, broke loose from the other two, and floated down to Swan creek, where they were afterwards found safe, and recovered by the owners, when they came with their vessels to take away the lumber; the residue remained at the place above mentioned, until the owners came for it. Davis put up an advertisement at Havre de Grace, immediately after he had taken up the lumber, stating that he had done so, and requesting application for it to be made to him; and he was shortly afterwards informed by an agent of the libellants that it belonged to them. It remained for some weeks. It was plank, or what is usually called boards; and was destined, part for Baltimore, and part for the District of Columbia. It was suffered to remain so long, because it is more convenient to load it on vessels in high water, when it can be floated off from the shore without breaking up the cribs.

As soon as the state of the water became favorable, the libellants sent their agents with two vessels to take the lumber, and carry it to the places where they had engaged to deliver it. They took the raft from Thompson's shore without any opposition from him, or any demand for compensation; they also took the five cribs which had been fastened by Davis to his own shore, and attached them to the rest of the lumber, and were engaged in lading the vessels, when Davis came on the raft, and insisted that the plank should not be taken away until he was paid salvage for his services; he was offered twenty-five dollars, which he refused, and demanded one hundred and fifty. And upon this disagreement, a scene of violence, by no means creditable to either party, ensued, in the midst of which, Davis succeeded in detaching four cribs from the raft, by cutting the fastenings; he took them to his shore, and drew the plank from the water, and piled it on his land; claiming the right to retain it until he was paid the sum he demanded for salvage.

The owner, and the agents to whom he had consigned it, thereupon filed this libel in the district court, praying that this lumber might be delivered to them, and Davis compelled to pay damages for its detention. Process was accordingly issued, and the plank delivered to them by the marshal; and a monition in the usual form served upon Davis, who appeared and put in his answer; he insists on his claim of one hundred and fifty dollars for salvage, and his right to retain the property until it is paid.

The district court was of opinion that he had rendered service to the libellants, in saving these rafts, of the value claimed by him; that they were salvage services which gave him a lien on the property; and directed these four cribs to be sold, and the sum above-mentioned to be paid to the respondent out of the proceeds. From this decree the libellants have appealed to this court.

The sum in dispute is a small one; but this question is important, from the great quantity and value of the lumber annually brought down the Susquehanna river, and anchored in the stream at or near the place from which these rafts floated. One of the witnesses states that in the month of May, 1852, he saw from one hundred to one thousand anchored there; all of them being more or less liable to be swept down the river by a sudden rise in the waters.

The course of the trade is this: In order to send it down the river, it is in the first place put up in cribs, varying, in some degree, in size, but most commonly about sixteen feet square; they are strongly secured

so as to keep the lumber together; a number of these cribs (generally about ten) are then strongly fastened to each other, and form what is called a raft. In this state it is floated down to Port Deposit, and remains there until it is sold, or the owner prepared to transport it to another market; when it is to be transported to any of the great lumber markets, either by the purchaser or original owners, it is either laden in vessels from the rafts, which are brought alongside for that purpose, or formed into what is called a float, and floated to its place of destination.

A float, in the language of the trade, means two or more rafts attached together, and prepared, by proper fastenings and suitable arrangements, to withstand the winds and waves of wider waters; but the lumber is not often transported in this condition, except to Baltimore. The rafts which first come down in a rafting season are usually fastened near the shore, at Port Deposit; when that space is filled up, those that follow are anchored in the stream, and often remain anchored there for some weeks, before the lumber is transported to another market.

As I have already said, while they remain in this condition, they are always liable to be swept from their anchorage by a sudden rise in the river; but the owners are, of course, well aware of this danger, and willing to encounter it; because the winds and currents almost invariably drive them into shallow water, where the current is not so strong, and where the anchor attached to the raft will again take hold and keep it anchored until the owner desires to remove it. All of the witnesses engaged in this trade say that they regard the risk of losing their lumber by this means as a small one; for the raft very rarely breaks up, or floats into the Chesapeake Bay; and that they are very unwilling that any one, without their authority, should interfere with it, as it drifts down the river, or haul it to the shore. They prefer to take the chances that the anchor will again take hold because the raft is apt to be broken by thumping on the shore, when fastened in water too shallow, and in a place exposed to the waves; and that the lumber is in some degree injured, if improperly handled when piling it on to land, and more expensive and troublesome to put on board of vessels, than it would be if anchored out in the river. When the raft is missed from the anchorage at which they placed it, their own agents are sent to look after it and see that it is secured in a place of safety; but where they find that any one has rendered them a service in this respect, before their agents arrive, they are accustomed to pay them a reasonable compensation for their trouble.

Now, the first question before the court in this case, is, not whether Davis rendered a service or not, or what is the value of his service, but whether that service was a salvage service or not. For, if it was not a salvage service, then he has no lien on the lumber, and had no right to detain it from the owner; his remedy would be an action at law to recover the value of the service he rendered.

And I think this is not a case for salvage. The water in the river had risen, and a heavy wind was blowing, and these rafts were driven from their anchorage; but they had not broken up, when he boarded them, and were floating down the stream. It was one of the usual accidents of the trade; and if the owners choose to expose their property to this risk, they have a right to do so, and no one can acquire a lien upon it by interfering with it without their authority. It is true, no one was on the raft; but it was no derelict on that account, or abandoned by those who had the care of it, for it is not the usage of the trade to keep any one on board while the raft is at anchor.

The case of The Upnor, 2 Hagg. Adm. 3, was a stronger case than this in favor of salvage. The Upnor was a flat-bottomed barge, loaded with manure, which was found on a sand-bank, with the water over the upper dead-eyes of the shrouds, the sails (except the mizen) washing about, no person on board, and no anchor out; she was boarded in that condition, with much difficulty, by some men who took her to Sheerness, and claimed salvage for their services. It was proved, that it was a common case for vessels to be left on that sand, until the owners could procure assistance, and that the master and a lad who navigated her had made all safe, and then went to the owner to have assistance sent to her. Lord Stowell refused salvage, saying that individuals who thus choose to expose their property to the chances of wind and weather, have a perfect right to exercise their own discretion upon the matter, and that other persons are not entitled to interfere.

The case of Nicholson v. Chapman, 2 H. Bl. 254, is still more analogous to the case before the court. In that case, a quantity of timber was placed in a dock, on the banks of the Thames, but the ropes by which it was fastened got loose and it floated off, and was carried by the tide to some considerable distance, and left at low water upon a towing-path; it was removed to a place of safety, at some distance, and the party who took care of it claimed salvage for his services, and a lien for them on the timber. But the court held, that taking care of timber in that situation, although on a navigable river, and within the flux and reflux of the tide, did not entitle the party to salvage, nor give him a lien upon the property for his services; that the service had none of the qualities or character of the services for which the maritime law of all commercial nations allowed salvage, when the property was in danger of perishing from the perils of the

sea. The case under consideration comes within the distinction taken in the case referred to. The rafts are prepared to float the timber down the current of the narrow part of the river; but they are not prepared or intended to encounter sea perils; the lumber is placed in vessels, or in floats, before it is exposed to the winds and waves of the Chesapeake Bay; and in that condition it is usually transported to the places for which it is destined. If the raft is carried off from its anchorage by the rising of the river and high winds, the owner knows what direction it will most probably take, and where to look for it; and even if the rafts and cribs are all broken up and cast, in separate pieces, on the shore, the quality of the lumber is not much injured, and if never found by the owner, his loss is occasioned rather by floods from the land than the perils of the sea.

If salvage were allowed, in such cases, to every one who chose to interfere, and take possession of the rafts which he saw floating down the river, property of great value might, and probably would, often be withheld from the owner, upon claims for salvage services; and this, too, under circumstances where the owner would have desired that the party should not interfere; and where the service, if any was really rendered, cost him very little time or trouble. And we might, moreover, have a libel in admiralty for salvage, upon every piece of timber cast on the shore from a broken raft.

Undoubtedly, when a raft is broken up and scattered, any one may lawfully take measures to save it from further loss, and secure the property for the owner; but, as was said by the court in the case of Nicholson v. Chapman, it is rather a case of mere finding than of salvage service; and whatever just claim the party may have to a reasonable compensation for his trouble and time, he has no right to detain the property when the owner demands it; and if he does, it may be recovered in an action of replevin, in a court of common law.

The result of this opinion is, that these rafts, anchored in the stream, although it be a public navigable river, are not the subject-matter of admiralty jurisdiction, in cases where the right of property or possession is alone concerned. They are not vehicles intended for the navigation of the sea, or the arms of the sea; they are not recognised as instruments of commerce or navigation by any act of congress; they are piles of lumber, and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive and transport it to its destined port. And any assistance rendered to these rafts, even when in danger of being broken up, or swept down the river, is not a salvage service, in the sense in which that word is used in the courts of admiralty. And this seems always to have been the view taken of this subject; for, notwithstanding the great extent of this trade, and the number of years it has been carried on, this is the first instance in which a claim for salvage has been made in the court of admiralty, for arresting a raft which was driven from its anchorage. The district court, therefore, had not jurisdiction to issue the process by which the marshal was directed to take the property from the possession of the respondent; the controversy was proper for the decision of a court of common law, and the remedy of the owners to regain the possession, was an action of replevin, and not a libel in the district court; consequently, its decree must be reversed, and the libel also dismissed.

The lumber having been taken from the respondent's possession, by process which the district court had not jurisdiction to issue, a writ of restitution would be awarded, if there was any question between them, as to the right of property, or the right of possession, which this court considered as an open one. But the respondent claims no property in the lumber; he claims the possession only, upon the ground that the services he rendered were salvage services, under the maritime law. And as the court is of the opinion that the services were not of that character; and that he had no right to withhold the property from the owners; it would be unreasonable and unjust to deprive the owner of the possession he has obtained, merely to subject him to the necessity of recovering it again in a new suit, in a court of common law. The court will not, therefore, disturb the possession of the libellants; but as they brought the controversy into the court of admiralty, and have failed to support their libel, they must be charged with costs, as well in this, as in the district court.

Case No. 14,084.

In re TOMES et al.

[19 N. B. R. 36.] [1]

District Court, S. D. New York. Dec. 18, 1878.

BANKRUPTCY—PARTNERSHIP—ASSIGNMENTS—FIRM ASSETS.

On the first of October, 1877, T. and W., copartners under the firm name of T. & Co., being then insolvent, made an assignment for the benefit of their creditors, but the signature and assent of the assignee were never obtained. On October 10, 1877, a paper was executed by T. and W., dissolving the firm and providing that all the assets were to be transferred to T., who agreed to assume all the debts. No notice of the dissolution was given, and the business was continued as theretofore under the old firm name. On October 22, 1877, T. made an assignment for the benefit of creditors to the same assignee. T. and W. having been adjudged bankrupt on a petition filed January 3, 1878, the assignment was set aside as in fraud of the bankrupt law [of 1867 (14 Stat. 517)]. The assets which came in the hands of the trustee in bankruptcy were wholly from property formerly of the firm. T.'s individual debts exceeded one hundred thousand dollars. On application by the trustee for instructions as to the distribution of the

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assets, *held*, that the transaction between T. and W. was invalid as to the firm creditors, and that the assets in the hands of the trustee must be held to be firm assets, to be distributed accordingly.

[Cited in Re May, Case No. 9,328.]

[In the matter of Francis Tomes and another, bankrupts.]

P. H. Vernon, for trustee.

Wm. S. Opdyke, for firm creditors.

F. P. Forster, for Tomes' creditors.

CHOATE, District Judge. This is a petition by the trustees of the bankrupts, asking the instructions of the court as to the distribution of the assets. The bankrupts, Tomes and Watson, copartners under the firm name of Francis Tomes & Co., were adjudicated bankrupts upon the petition of their creditors, which was filed January 3, 1878. Prior to October 10, 1877, they had done business as a firm for several years, as importers and traders in guns and other military goods. During the year 1876 they met with heavy losses, and from the end of that year certainly the firm was embarrassed. During the year 1877 its condition grew constantly worse. and on the first of October, 1877, it was clearly insolvent, and known so to be by both partners. They were carrying about forty thousand dollars of paper, which had mostly been renewed from time to time, and which they had no available means of meeting, except by fresh discounts. They had about thirty-five thousand dollars of debts on open accounts, nearly all of which was overdue, and payment of which had been demanded, a considerable part of it having been due for six months. Watson had no individual assets or individual debts of any account, but Tomes was carrying a very large amount of real estate heavily mortgaged. In this position of affairs, on or about October 1, 1877, they executed a general assignment of all their property, partnership and individual, for the benefit of their creditors, without preferences, the firm property to be distributed among their firm creditors, the individual property among their individual creditors respectively, and placed it in the hands of their attorney for him to procure the assent and signature of the assignee named therein, but his signature never was obtained. This assignment recited their insolvency. On October 10, 1877, Tomes and Watson executed a paper, whereby it was agreed that the partnership was dissolved, and that all the firm assets were transferred to Tomes, and he assumed all the debts of the firm. This agreement was kept secret between them. There was no publication of the dissolution. No notice was given to creditors. The books were not changed. The sign of the partnership was kept up. So far as appears, no new arrangements for credit or capital were made for continuing the business. On October 22, 1877, Tomes made an alleged assignment to the same assignee for the benefit of his creditors, reciting his insolvency, and also reciting the agreement of October 10, 1877. Although all the creditors have had notice of this application, and an opportunity to produce testimony, and the two classes of creditors, firm and individual, have been represented in the proceedings upon the reference, Tomes has not been called as a witness. The assignment of October 22, 1877, has been set aside as in fraud of the bankrupt law.

The proceeds of the property that have come into the hands of the trustee are wholly from the property formerly of the firm. Aside from this there are no individual assets. The firm debts are about seventy-seven thousand dollars. Tomes' individual debts, seven thousand dollars, besides ten thousand dollars on bond and mortgage, over and above the estimated value of the security. His liability on bond and mortgage is about one hundred thousand dollars. The question is whether the proceeds of the property, formerly of the firm, but transferred to Tomes by the agreement of October 10, 1877, are to be treated as his individual property for the purpose of distribution under the bankrupt law, or as firm property. If the former, all the creditors will share in it; if the latter, it must be applied to the payment of the firm debts.

There is no doubt that a partner may make a valid agreement with his copartner, dissolving the firm and transferring all the assets of the firm to his copartner, provided this assignment be made in good faith and for an adequate consideration, and the effect of such transfer will necessarily be, in case bankruptcy inures, to give individual creditors of the partner to whom the transfer is made a great advantage in the distribution of the estate. In re Long [Case No. 8,476]. And it seems that the rule is not otherwise, though the firm was, in fact, insolvent at the time. Same case, and cases cited therein, especially Howe v. Lawrence, 9 Cush. 553. But to the validity of such a transfer, as against the firm creditors, it is essential that it be in good faith, which requirement certainly includes that it be not designed, in contemplation of the distribution of the estate in bankruptcy or insolvency, to divert from them the firm assets to the individual creditors of the partner taking the transfer. Same cases.

Now, in the present case, there is no reasonable conclusion to be drawn from the facts except that the agreement of October 10, 1877, was made in immediate contemplation of the winding up of the estate and the distribution of the assets in insolvency, and with the design of diverting the firm assets from the firm creditors for the benefit of the individual creditors of Tomes. The first general assignment, which did not go into effect, shows that by the 1st of October both Tomes and Watson knew that they were insolvent, and that it was impossible to con-

tinue in business in the circumstances in which they then were placed. There is no reason to believe that they then had any other purpose or intention than that which that assignment was calculated to carry into effect. How far does the evidence show that that purpose was afterwards altered? There was no change of the circumstances, making the continuance of the business any more practicable afterwards. On the contrary, with the lapse of time, things were getting constantly worse. Then, on the 10th of October, they signed this agreement of dissolution. Is there any reason to believe, from this agreement and the acts of the parties in relation to it, and from the surrounding circumstances, that this was intended in good faith on Tomes' part with a real purpose to continue the business on his own account, which had been before carried on by the firm, and to pay the debts which he assumed? All the indications are the other way. If such had been his purpose, why should he not have advertised the dissolution and notified the creditors, opened new books, or new accounts in the old books? The change was kept secret, and in twelve days afterwards he made an assignment for the benefit of his creditors, bringing the property transferred to him by the firm into his individual estate. In fact, as soon as this change was made, he was, for the purpose of carrying on the business, in a worse condition than the firm had been; for, while he had the same assets as the firm, his debts became much larger than the debts of the firm had been. Nor can it be believed that, as between Tomes and Watson, in the existing condition of Tomes' affairs, it could have been thought possible that he could go on with the business and pay the debts. The great inadequacy of the consideration, the debts assumed being largely in excess of the assets, to the knowledge of both partners, also throws great suspicion upon the transaction, and tends to show that it was not a real transaction intended for the purpose which appears on its face. The real purpose of the transaction appeared clearly when, twelve days later, Tomes made the second assignment. The carrying on of the business for twelve days was for the purpose of giving an appearance of reality to the transaction, but it does not overcome the force of all the circumstances which tend to show that these partners never gave up from the 1st of October the purpose of having their affairs wound up in insolvency, although they did intend to change the mode of distributing their assets as between individual and firm creditors from that at first projected. The failure of Tomes to testify is also a strong circumstance against the bona fides of the transaction. The case is not to be distinguished from the cases of In re Byrne [Case No. 2,270] and In re Cook [Id. 3,150], and is in entire accordance with the case of In re Long, ut supra, where the transfer was held to have been made in good faith. See, also, Ex parte Burton, 1 Gl. & J. 207; Ex parte Usborm, Id. 358; Ex parte Ruffin, 6 Ves. 119; Wilson v. Robertson, 21 N. Y. 587. The assets in the hands of the trustee must be held to be firm assets, to be distributed accordingly.

Case No. 14,085.

TOMES et al. v. REDFIELD.

[7 Blatchf. 139.] [1]

Circuit Court, S. D. New York. Jan. 31, 1870.

TRIAL—VERDICT—RECORD OF—MISTAKE—STIPULATION—CUSTOMS DUTIES—PROTEST.

1. In this case, which was a suit against a collector of customs, for the return of duties, paid under protest, on commissions and charges, sundry words found in the record of the verdict, and which it appeared were not part of the verdict as rendered, but were inserted by a clerical mistake, were expunged by the court, and sundry other words, not found in the record of the verdict, and which it appeared were part of the verdict as rendered, but were omitted by a clerical mistake, were inserted by the court.

2. Effect of a written stipulation made by the attorney for the plaintiff with the attorney for the defendant, after verdict, in respect to the manner in which any question which should arise before the referee as to the sufficiency of a protest, should be disposed of, as an estoppel upon the right of the defendant to raise, by exception to the report of the referee, a question as to the sufficiency of such protest, considered.

3. The proper manner of adjusting a verdict for excessive duties on charges, stated.

This was an action, commenced in June, 1863, to recover back an excess of duties alleged to have been paid to the defendant [Heman J. Redfield], as collector of the port of New York, under protest, on sundry importations of merchandise from Europe. On the 6th of January, 1864, the case was brought to trial before the court and a jury, and a verdict was rendered in the following terms, as then recorded in the minutes of the court: "By consent of counsel, the jury find a verdict for the plaintiff, for the amount, with interest, of the excess of duties paid under protest, on more than two per cent. commission on all importations, specified in the bill of particulars in this cause, from the continent of Europe, except Paris, and on more than one and a half per cent. commission on importations from Great Britain; and a like verdict for the excess of duty paid under protest, on the importations, specified in the bill of particulars in this cause, *from the continent of Europe*, upon charges, above those set forth in the reports of Isaac Phillips, appraiser, dated October 13th, 1856, and of the several subsequent dates, the amount in this cause to be adjusted by the clerk of this court, or his deputy." On the 16th of March, 1865, an order was made revoking the reference of such adjustment. On the 28th

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

of March, 1867, an order was made referring it to R. E. Stilwell, Esquire, a commissioner of this court, to take and state an account of the claim of the plaintiffs [Francis Tomes and others] in the cause, and to assess their damages, upon the principles settled on the trial, being guided upon such reference by the rulings of law, and the charge to the jury, made by the court, and by the verdict rendered on the questions of fact submitted. On the 7th of August, 1869, it appearing to the court that the words "from the continent of Europe," above underscored, had been erroneously transcribed into the minutes of the court, as a part of the record of the verdict, and that those words formed no part of the verdict as given, an order was made expunging such words. On the same day that the verdict was rendered, January 6th, 1864, the attorney for the plaintiffs gave to the attorney for the defendant a written stipulation in reference to this case and several other cases, in which a like verdict had that day been given. The stipulation was in the following words: "As to the cases in which verdicts have been this day taken in the United States circuit court, and referred to the clerk, I do hereby stipulate, that if, in adjusting any of the verdicts in these cases, the clerk shall find the protests on which the verdict is based different from those in like cases which have been heretofore adjusted by himself, or by the custom-house, and any question shall arise as to the sufficiency of such protest, if it shall not appear to said clerk that the court has already passed upon it and held it to be valid, or the custom-house recognized it as sufficient, by refunding upon it in like cases, then the clerk shall report the same, with his findings, to the court, which shall decide the question." On the 3d of November, 1869, a motion was made by the plaintiffs to correct the record of the verdict as found in the minutes of the court, by inserting after the words, "and of the several subsequent dates," the words, "as modified by treasury instructions dated May 21st, 1863." That motion was ordered to stand over until the hearing on the report of the referee, without prejudice to its being then renewed.

On the foregoing state of facts, the reference proceeded before the referee. On the 20th of October, 1869, he filed his report. He reported that the plaintiffs were entitled to judgment on the verdict, for $3,078.66, as of the 12th of July, 1869. In the report, he said: "I do further find and report, that I have allowed, in such adjustment, a refund of duties on commissions on entries to which no specific protests are attached, but which are subsequent in date to the protest attached to entry per Pacific, January 9th, 1854, to which the first prospective protest against duty on commissions is attached, and that it is under such prospective protest that I allow all refunds upon commissions upon subsequent entries not specifically protested. Such protest was attached to an entry of portemonnaies from Paris, and is the same in form as other protests upon which adjustments have been made by me, under decisions of the courts, and I do further find and report, that I have allowed a refund on charges on entries to which no specific protests are attached, when such entries are of a date subsequent to the entry per Arctic, April 22d, 1854, to which entry is attached the first prospective protest against charges, and which is also in the same form as other protests upon which adjustments have been made by me, under decisions of the courts. The entries upon which refunds have been adjusted were made at different dates, between January 7th, 1854, and June 22d, 1857, and were for different kinds of goods, as shown by the entries and invoices." The case now came before the court on exceptions, filed by the defendant, to the report of the referee, and on a motion made by the defendant to vacate the order of the 7th of August, 1869, and on a renewal by the plaintiffs of their motion of the 3d of November, 1869.

William M. Evarts and Almon W. Griswold, for plaintiffs.

Edwards Pierrepont, Dist. Atty., and William Stanley, Asst. Dist. Atty., for defendant.

BLATCHFORD, District Judge. I see no ground for vacating the order of the 7th of August, 1869. The mistake in inserting in the record of the verdict in the minutes the words expunged by that order was, on the evidence laid before the court, clearly a clerical mistake, and those words formed no part of the verdict as rendered and as understood by both parties at the time.

As to the motion to insert in the record of the verdict, as found in the minutes of the court, after the words, "and of the several subsequent dates," the words "as modified by treasury instructions dated May 21st, 1863," I am satisfied, on the evidence produced, that the omission of those words was a clerical mistake, and that the verdict as given contained them The then attorney for the defendant in the suit, who was the then attorney of the United States for the Southern district of New York, made a report to the collector of the port of New York, on the 31st of March, 1854, as to the particulars of the verdict, reciting it as containing the words in question. The motion is, therefore, granted.

The exceptions to the report will now be considered. The first exception complains, that the referee has allowed amounts paid for duties on commissions, without any protest against such payment having been made at the time thereof, or at any time, and without any protest having been made except the protest attached to the entry by the Pacific, dated January 9th, 1854; and that such protest was not sufficient to warrant the recov-

ery back of the payments made subsequent to such protest and without reference thereto, because it was a protest against the payment of duties on commissions on an importation of portemonnaies from Paris, and the collector received no notice that the plaintiffs desired that notice to apply to importations of various other articles not portemonnaies, imported from Great Britain subsequently, the duties on which are included in the amount reported. The defendant seeks, by this first exception, to raise and obtain a decision on the question as to the sufficiency of the prospective protest attached to the entry by the Pacific, as a protest in this case. But I do not think that the defendant is in a position to raise any such question in this case. The making of a proper protest in writing, at the time the alleged excessive duties were paid, was, under the statute, an indispensable prerequisite to the right of the plaintiffs to maintain a suit to recover back such excessive duties, and the fact that a verdict was rendered for the plaintiffs is conclusive evidence, at this stage of the case, that proof was given at the trial that such a protest was made. The verdict finds, that the excessive duties paid by the plaintiffs were paid under protest, that is, under such a protest as the law requires. The legitimate effect of such verdict cannot be varied except by the consent of the plaintiffs. Nothing is shown which is claimed to vary such effect, except what is found in the plaintiffs' stipulation of January 6th, 1864. That stipulation concedes this, and no more—that if, in adjusting the verdict, the clerk shall find the protests on which the verdict is based different from those in like cases which had been adjusted by himself, or by the custom-house, prior to the 6th of January, 1864, then, and only then, may a question be raised as to the sufficiency of the protests. It is for the defendant to show affirmatively, that the clerk, in adjusting the verdict, has found the protests on which the verdict is based to be different from those in like cases which had been adjusted by himself, or by the custom-house, prior to the 6th of January, 1864. The defendant does not show, by the report of the referee, who stands in the place of the clerk, or otherwise, that the referee had found any such fact to exist in reference to the protests on which the verdict is based. Therefore, the defendant cannot raise any question as to the sufficiency of the protests.

These views dispose, also, of the second exception, which is, that the protest attached to the entry by the Pacific was a protest against the payment of duties on commissions exceeding two and one half per cent., and conceded that two per cent. could properly be exacted, and that the referee has allowed the plaintiffs to recover back all duties paid on commissions on importations from Great Britain which exceeded one and a half per cent. The defendant is concluded as to the sufficiency of the protests, and the referee has strictly followed the verdict in allowing such recovery.

The third exception complains, that the referee has allowed amounts paid for duties on charges, without any protest against their payment having been made at the time thereof, and without any protest against their payment having been made at any time, and without any protest having been made, except the protest attached to the entry by the Arctic, of the date of April 22d, 1854. The decision in regard to the first exception applies to this one, and it is overruled.

The fourth exception complains, that there was no evidence before the referee that any of the duties which the plaintiffs had paid were upon charges, above those set forth in the report of Isaac Phillips, dated October 13th, 1856, or in his reports of subsequent dates, and that nevertheless it appears, by the report of the referee, that he has allowed to the plaintiffs various amounts, upon the theory that such amounts were excessive duties paid upon charges, above those set forth in said reports.

The fifth exception complains, that it appears, by the evidence, that the referee has included, in the amount reported by him, items of charges for inland freight in England and elsewhere, which are not above those set forth in any report of Isaac Phillips, dated October 13th, 1856, or of any subsequent date, and that, therefore, the verdict does not authorize their recovery.

The process by which the referee arrived at the amount which he has reported as due to the plaintiffs for excessive duties on charges, was to deduct the amounts which appeared, by the invoices and entries, to be the amounts of the charges for the transportation of the goods from the interior of the country by land or water carriage, incurred prior to the time of exportation, from the total amounts of costs and charges upon which duties were paid. He took, as his authority for doing so, the treasury instructions of May 21st, 1863, which contain this direction: "Collectors and others are informed that this department concurs in the decisions of the courts, that charges for transportation of goods from the interior of the country by railroad or water carriage, incurred prior to the time of exportation, cannot be added to the value of the goods, for the purpose of establishing their dutiable value." The entries covered by the report in the present case were made at various dates between January 7th, 1854, and June 22d, 1857. The act governing the fixing of the dutiable values of the goods embraced in those entries was the act of March 3d, 1851 (9 Stat. 629). It was decided by the circuit court for the district of California, in Gibb v. Washington [Case No. 5,380], that, under that act, charges for inland transportation were not dutiable, and it is understood that other decisions were made by courts of the United States to the same effect, prior to

May, 1863. Forman v. Peaslee [Id. 4,941]. The instructions of May, 1863, did not prescribe any new rule, but only recognized the proper construction of the act of 1851, in respect to charges for inland transportation, to be that set forth in the instructions. The verdict in this case, as now amended, and as it must be held to have always read, for all purposes, in saying that the refund is to be of the excess of duty paid upon charges above those set forth in the reports of Isaac Phillips, as modified by the treasury instructions of May 21st, 1863, means, that such treasury instructions are to control in respect to the charges which are to form part of the dutiable value of goods. The same instructions provide, that port charges, drayage, commissions and export duty are to be added, to fix the dutiable value of goods. In respect to the charges so to be added, the reports of Mr. Phillips as appraiser were necessary, and were adopted, as appears from the verdict in this case, by the government, as fixing the amounts of the charges so to be added. Such amounts were average amounts, fixed for importations from any one country, but varying between importations from different countries. But, in respect to charges that were not to be added, and which could form no part of dutiable value, such as charges for inland transportation, the law having so declared, if any such charges are found to have been contained in the invoices and entries, and to have entered into the values on which duties were paid, the plain method of arriving at the accurate dutiable values, is to deduct the amounts of such charges from the total amounts of the invoices and entries. This is just what the referee has done. Verdicts, in form precisely like the verdict in this case, were rendered at the same time in thirteen other cases brought for return of excessive duties paid under protest, five against this defendant, and eight against Collector Schell, one of those eight being a suit by these plaintiffs. Each verdict was, as is seen, one for excess of duty paid upon charges generally—not merely for excess of duty paid on charges for inland transportation, which were not dutiable at all, but for excess of duty on charges dutiable in kind, where the excess was in the amount of the charges. Hence, the language of the verdicts. Where it was necessary to resort to the reports of Mr. Phillips to ascertain the proper amount of charges, such resort was to be had. Where the charges were not dutiable at all, such as charges for inland transportation, no such resort was to be had, because it was unnecessary, and because the instructions of May, 1863, reciting the law, were to control. So, also, such instructions were to control the reports of Mr. Phillips, where they covered any point as to which resort was to be had to such reports.

The exceptions are all of them overruled, and the report is confirmed, and judgment must be entered for the plaintiffs, on the verdict, for $3,078.66, with interest from July 12th, 1869.

Case No. 14,086.

TOMLINSON v. BATTEL.

[Nowhere reported; opinion not now accessible.]

Case No. 14,087.

TOMLINSON v. HEWETT.

[2 Sawy. 278.] [1]

District Court, D. California. Nov., 1872.

SEAMEN—RIGHT TO BE CURED—DAMAGES FOR PUTTING ASHORE.

A sick seaman is entitled to be cared for and cured at the expense of the ship, and the fact that his disease is malignant and infectious, will afford no justification or excuse to the master for setting him ashore, without any provision for his care, his subsistence, or his proper medication.

[Cited in Grimes v. Eddy, 126 Mo. 168, 28 S. W. 760; Scarff v. Metcalf, 107 N. Y. 216, 13 N. E. 796.]

[This was a bill by Thomas Tomlinson against Charles Hewett to recover damages for the sufferings occasioned by breach of duty on the part of the respondent.]

D. T. Sullivan, for libellant.

Hambleton & Gordon, for respondent.

HOFFMAN, District Judge. As to the material facts in this case, there is no substantial controversy.

On the second of October, 1868, the libellant, Thomas Tomlinson, a seaman on board the steamship Pacific, was found to be ill of the small-pox. The steamer was then at Gardner City, on the Umpqua river, where she had arrived on the preceding day.

The captain, on learning the nature of the libellant's malady, informed him that it was impossible to afford him proper treatment on board the ship, but that he had secured the services of a physician, and provided for the necessary attendance upon the libellant, at Scottsburg (a town about fifteen or twenty miles further up the river), and that he had a boat in readiness to take him there. The libellant replied that he was willing to go if proper provision had been made for taking care of him; but, if not, that he would remain on board the ship. He was assured by the master, as he says, that all necessary arrangements had been made. He thereupon went into the boat, and was rowed up to Scottsburg, by a man hired for the purpose by the respondent.

On arriving at Scottsburg, the libellant inquired of the man who had him in charge, where the doctor was, and was told that there was none in the place, or nearer to it than at Oakland, distant some sixty miles. He then proceeded to the store, which seems to have

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

the principal building of the town, and finding the purser of the steamer, asked him where the physician was to whom the captain had sent him. The purser, and also the store-keeper, informed him that there was none in the town.

The appearance of the libellant, with the eruption of small-pox unmistakably visible on his face, naturally created excitement and alarm in the village. He was without means, except $17.50, the balance due of his wages, which the respondent had given him on leaving the ship. He was furnished with no letter of recommendation or credit to any one. Even, therefore, if the inhabitants of the town would have permitted him to remain, and if he had been willing to dispense with the services of a physician, he was without the means of obtaining lodgings or employing a nurse or other person to attend him during his sickness. He was therefore obliged to return to the vessel, which he reached about nine o'clock in the night. On coming alongside, he informed the respondent that he had been driven away from Scottsburg; that there was no physician in the place, and he asked him why he had said that he had provided one. To this the master replied that he thought there was one at Scottsburg. The master admitted on the stand, that he had never been at Scottsburg, that he had made no arrangements whatever for the reception and care of the libellant; that he had given no instructions to the purser, nor communicated with any one on the subject, but had sent the libellant to Scottsburg on the strength of information which he obtained at Gardner City, that there was a drug store and a doctor in the town.

The libellant and the boatman also informed the respondent that the principal inhabitants at Scottsburg had recommended him to go to Winchester, about six miles further down the river, where a man resided from whom a horse could be procured to go to Coos Bay.

The libellant testifies, that on being asked by the boatman whether he should take him to Winchester, the master replied, with much irritation and even profanity, that he might take him and put him ashore anywhere. This the master denies; but he admits that he peremptorily and absolutely refused the libellant's urgent request to be received on board and carried to Coos Bay in the ship.

Denied an asylum on board the ship, the libellant had no alternative but to proceed to Winchester and endeavor to reach Coos Bay by land. He arrived at Winchester late at night, and found there a young man who, probably ignorant of the nature of his disease, permitted him to sleep in the house, and agreed to furnish him with a horse to proceed to Coos Bay in the morning.

Not the least melancholy incident in this painful case is the fact, that two weeks afterward the young man died of small-pox, contracted from the libellant. At an early hour the next (Sunday) morning, the libellant started on horseback and alone for Coos Bay. He was from eight to ten hours on the road, and arrived toward night at the river, across which communication is had with the town by a ferry. He was here directed by a person whom he met on the road to go to the flag-staff and raise the flag as a signal for the ferry-boat.

In attempting to reach the flag-staff, he fell fainting and exhausted from his horse. The man shortly afterwards returned, and, keeping at a safe distance, informed the libellant that he would cross the river in his boat, and inform the authorities of his condition. From this time (Sunday night) until Tuesday morning, the libellant lay upon the beach blind, unable to move, and unapproached by any human being from whom he might obtain even a cup of water to allay his thirst. He describes his sufferings during these thirty-six or forty hours as intense.

On Tuesday morning he was visited by Dr. Bryant, who had been employed for the purpose by the authorities. For some reason, not disclosed by the evidence, he was not taken to any house, but lay on the beach on blankets for about three weeks. Some sticks were put in the ground, and planks were set up against them to protect him, as he says, from the coyotes. They probably, also, served as a partial shelter from the wind. He appears, however, to have been attended with assiduity and humanity by the doctor, and he does not, in his narrative on the stand, seem to consider that the suffering incidental to the malignant disease under which he was laboring, was greatly enhanced by the exposure to which he was subjected.

At the expiration of three weeks, he was removed up the river to a logging station, where he remained five weeks, and until his cure was effected. He subsequently obtained a passage in a schooner, and came to this city.

It was suggested at the hearing that the libellant had probably contracted the disease before coming on board said vessel. The inquiry is, in my judgment, immaterial, but the fact is, I think, otherwise.

The libellant went on board the ship at this port, on Friday, September 18. On the twenty-sixth, the vessel reached Crescent City, where two men found to be sick with the small-pox were set on shore. One of these men was rowed ashore by the libellant, and had up to that time occupied the berth beneath his, in the forecastle. The libellant was obliged to cease doing duty on the twenty-ninth, and it was not until the second October, that the master became satisfied that his disease was the small-pox. Under these circumstances, it seems far more probable that the libellant contracted the disease from his comrades, in the forecastle, than that he had the seeds of it in his system, when he first joined the ship, some fourteen days previously to the time when it unmistakably announced itself. But, as before observed, the inquiry is immaterial. The libellant fell sick while in

the service of the ship, of a disease not caused by his own vices. He was entitled to be taken care of and cured at the expense of the ship.

The important question is thus presented—does the fact that the disease of the seaman is malignant, loathsome, and infectious, and that his longer continuance on board exposes the remainder of the ship's company to the danger of contracting it, justify the master in setting him ashore without any provision whatever for his care, his subsistence, or his proper medication, or nursing?

That such was the course pursued in this case by the respondent, is, I think, undeniable.

It has already been stated, that when the libellant was sent to Scottsburg, no arrangements whatever had been made by the master for his reception. He was aware that, without such arrangements, which could only be made by the personal influence of the master, and by the offer of a considerable sum of money, a poor seaman, afflicted with the small-pox, would not probably be allowed to remain in a small country town. He had already landed two men at Crescent City, who had been sent back to the ship, and it was only by going ashore himself and effecting an arrangement with a physician for their lodging and care during their illness, that he was permitted to leave them behind. He says that he was told there was a physician at Scottsburg, but he did not go there himself, or send any one to ascertain the fact; and his inquiries at Gardner City could not have been extensive, or he would have discovered what proved to be the true state of the case.

But, at all events, he knew, on the libellant's return, that he could find no physician there, and that he had been driven from the town. The refusal, therefore, with this knowledge, to receive the libellant on board, and his telling the boatman to carry him to Winchester, or anywhere else, puts the respondent in the same position as if he had then for the first time expelled the libellant from the ship, and set him ashore with $17.50 in his pocket, and under the full power of the terrible disease under which he was suffering, to find his way as best he might for a distance of twenty miles overland to a strange place, and there take his chances of succor and an asylum.

Undoubtedly the situation of the respondent was painful. The crew were greatly alarmed, and if, with due regard to the claims of humanity and the rights of the seaman, he could have been removed from the ship, it was desirable to do so.

The vessel was to sail the next morning. Coos Bay was distant about twenty-six miles. In a few hours the libellant could have been transported thither, and arrangements for taking care of him could have been effected, as at Crescent City.

It would not seem very difficult, during the brief period he would in that case have been on board, to have isolated him from the rest of the ship's company, and thus have reduced to a minimum the chances of the further propagation of the disease. The eruption of small-pox had appeared on the libellant before he left the ship. To those who had already escaped the infection, the additional risk occasioned by a few hours' longer exposure would not probably have been great, and certainly no humane person ought to have hesitated between accepting that risk or adopting the only other alternative, that of sending the seaman ashore to propagate the disease among unsuspecting inhabitants, and at a place twenty miles distant from all possibility of assistance or relief.

I think that the libellant has clearly established his right to recover damages for the sufferings occasioned by the respondent's breach of duty. That much of what he was obliged to endure was incidental to an attack of confluent small-pox of a malignant type, and must necessarily have undergone under the most favorable conditions, is apparent. But he has a right to recover for the additional and unnecessary pain of his trip to Scottsburg and back, his ride on horseback to Coos Bay, and the terrible agony he must have suffered during the time that he lay helpless and tortured by thirst on the beach.

With the exception of $5 paid to the boatman, it does not appear that the respondent or the vessel had contributed any thing towards the expenses of the seaman's cure. The doctor's services were paid for by the county, and the libellant himself only received the wages earned up to the moment of his leaving the vessel.

The vigor with which courts of admiralty maintain and enforce not only the right of the seaman to be cured at the ship's expense, but also the duty of the master to omit no reasonable exertions to remedy or mitigate the effects of any accident that may happen to him, is forcibly illustrated in the case of Brown v. Overton [Case No. 2,024]. In that case, Judge Sprague says:

"A seaman disabled in the service of a ship is entitled to be cured at the expense of the ship. To this his right is as perfect as to food and wages. It is incumbent on the master to furnish means of cure, and to use all reasonable exertions for that purpose. Scarcely a case can be presented where this obligation applies with greater force than the present. This seaman, at the command of his officer, had exposed his life and his limbs for the preservation of the ship. He was thrown from the yard-arm, and both legs were badly fractured. There was no surgical skill on board, and the increasing motion of the ship, and the accidents and discomforts to which he was necessarily exposed, were unfavorable to his cure. The master intended to go within sight of St.

Helena, and if he had shaped his course to go into port, he might, with only a few hours' detention, have consulted the American consul, obtained surgical aid and advice, and ascertained how far it was necessary, or would be useful, for the libellant to be left on shore. The reason assigned by the master since his return for not having left this seaman at St. Helena is that it would have occasioned additional expense. This presents not the least extenuation. It is merely saying that if he had performed his duty, the owners would have been subjected to a burden which the law imposes. The master ought to have gone into St. Helena, to have given to the seaman the means of cure which that place afforded; and for this neglect the libellant is entitled to recover such damages as he has sustained."

In this case, the seaman was permanently crippled and deformed by the injury he had sustained. But it was uncertain under the evidence what degree of surgical skill could have been obtained at St. Helena, and whether when the vessel arrived at that place it was not too late to remedy the distortion produced by the fracture. The court was, therefore, unable to give to the libellant the same measure of damages as if it were certain that the whole permanent injury arose from the master's default. $600 and costs were awarded.

But if, in that case, it was the master's duty to deviate from his voyage, and go into a foreign port in order to afford the seaman the chance merely of surgical aid, by how much more was it the duty of the respondent in the case at bar to touch at Coos Bay or Crescent City, ports which lay in his direct route, and are the usual stopping places of the steamer, from the nearest of which he was distant only twenty-six miles, and at either of which he knew that medical aid and care could be procured for the seaman. Instead of doing so, he induces him to leave the vessel under false assurances that he had made provision for taking care of him, without credit, and with but a small sum of money, and he sends him to a place fifteen or twenty miles distant, where, if there had been a physician and a drug store, the libellant would have been without the means of availing himself of their aid.

The circumstances of the case justify the suspicion that the design of the master was to get rid of the libellant at any risk to him, or to the people on whose charity he attempted to cast him, and that he hoped the vessel would have sailed before the libellant could rejoin her.

When he did return to the ship, the respondent peremptorily refused to receive him on board, and sends him to be landed almost at dead of night on a beach, to crawl from thence, over rocks and drift-wood, to a solitary house twenty miles distant from any possible medical aid or attendance; and to the occupant of which he communicates with fatal effect the infection of his disease. That he survived the fatigue of his ride to Coos Bay and his subsequent exposure on the bank of the river, is a fortunate and extraordinary circumstance which the respondent, when he sent him from the ship, had no right to anticipate.

It has appeared to me difficult to imagine a stronger case of either disregard by a master of his duty to a sick seaman, of the rights of the people on shore, whom he exposed to the infection of a malignant disease, and of the dictates of common humanity.

I shall decree damages in the sum of $2,500. The amount is large, but not as great, I am persuaded, as a jury would probably have awarded. And I have a right to presume that out of the damages, when recovered, the libellant will satisfy the just claims of those who afforded him the succor and care which the master refused.

TOMPKINS (ANDERSON v.). See Case No. 365.

Case No. 14,087a.

TOMPKINS v. The DUTCHESS OF ULSTER.[1]

District Court, S. D. New York. Jan. 31, 1851.

CARRIERS—ACT OF GOD—PERILS OF NAVIGATION—CARRIERS BY WATER—LOSS OF CARGO—USAGE.

[1. A steamboat loaded in New York for Peekskill sank in a storm in the North river. The libelants, owners of the cargo, proved by the pilot that there was fault and negligence in the management and equipment of the boat, and particularly that the boilers leaked and extinguished the fires, thus disabling the engines from working; also, that an ash hole was left open below the deck. The claimants contended that the vessel and cargo were lost on account of the violence of the storm, and denied the allegations of negligence and improper equipment. *Held*, that the vessel was liable for loss of cargo.]

[2. The "act of God" which excuses a common carrier from liability must be the immediate and distinct result of providential events, sudden or overwhelming in their character, which human sagacity or force could not foresee or prevent.]

[3. The carrier by sea, unless limited by contract, is not exempt from liability on account of loss through the ordinary perils of navigation.]

[4. The common-law doctrine of carriers' liability by land is applicable in admiralty to carriers by water. There is no distinction between the two kinds of carriers.]

[5. The liability of the carrier may be limited by contract, but there is no usage by which goods received for transport on the North river, in New York, are at the risk of the shipper, as against the perils of the sea and dangers of navigation.]

The steamboat plied, as a freight and passenger boat, between New York and Peekskill, on the North river. The libelant [Aaron Tompkins] is a trader at the latter place. On the 26th of March, 1849, he loaded on board

[1] [Not previously reported.]

the boat goods and merchandise to be transported to Peekskill. The goods were never delivered to the libelant. No bill of lading was executed, or other express contract entered into, upon the subject. The defense is that the boat encountered a violent storm on her passage, against which she struggled until the 29th of the same month, when she was sunk by force of the storm, and the goods were thereby lost, and for that cause the boat is discharged of responsibility for their delivery. There was conflicting evidence as to the seaworthiness of the vessel, and her sufficiency for the navigation of the Hudson river between those places under such circumstances as may be expected to occur on the passages in the stormy periods of the year.

BETTS, District Judge. Steam vessels employed in the transportation of property for hire are common carriers, and subject to the legal liabilities of that class of bailees, unless their responsibility is limited by express contract. Abbott, 417, note 1; Story, Bailm. § 496, note 5; Ang. Carr. § 83, note; McArthur v. Sears, 21 Wend. 190; New Jersey Steam-Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 381. In that capacity, they are only excusable for the loss of the property intrusted to them on proof made by them that the loss was occasioned by the act of God, or by public enemies. Ang. Carr. § 46, 148; Hollister v. Nowlen, 19 Wend. 238. The evidence offered by the claimants to show that the goods were lost in this case by the act of God is that on the night after the boat left New York a severe gale of wind blew from the northeast; that the boat got to the entrance of Tappan Bay, running up on the west shore, when it was found the wind was so violent that she could not make headway against it; that she attempted to cross the river to the east shore for a shelter, but was thrown into the trough of the sea, and had not power to extricate herself from that position where she rolled badly, nearly stopping the engine, and then had one end of her shaft thrown out of place so that she was obliged to anchor, and, the gale continuing, she rode at her anchor that night and the next day, and was sunk the succeeding night.

The libelant proved by the deposition of the pilot of the boat, and the declarations of her master made on two occasions soon after her loss, that the disaster was owing to the leakage of the boiler, which extinguished the fires, and disabled the engine from working. He also proved an ash hole was open below the deck, and two or three augur holes, prepared for discharge pipes, through which the water could readily enter, in the state of the weather, and position of the boat as anchored, sufficient to sink her. The master of the boat and engineer denied that the boiler leaked, on the passage in question, to the injury of the working of the machinery. The boiler was new, having made but one trip, and on that had leaked badly, but was made tight on this occasion. They also negatived the fact that the boat made water to any extent through the ash hole or the augur holes. There is, however, proof that the engineer took off his coat, and pressed it into the ash hole, to prevent water rushing in through that opening. The testimony as to the character of the gale or storm is not very precise or satisfactory. The wind was of such severity that the captain of the South America testified that, coming down from Albany with her,—she being a mail boat, and required to make fourteen landings with the mail,—he had only attempted to make three, and could not succeed in one at Kingston, and only landed at Coxsackie and Newburg, lying to at the wharf at the latter place till morning; that at Kingston the boat got into the trough of the sea, and experienced a good deal of difficulty in working herself out, and getting under way down the river. The Fairfield, coming down the river the same night, came to at Ray Hook, and did not deem it prudent to attempt coming through the bay. The next day (the night the boat sunk) the Fairfield left New York at 5 p. m., but, on account of the storm, made harbor at the Trinity Church Cemetery, and lay there till morning. The libelant proved that the ——, a propeller and boat of small power, compared with her bulk, left New York the same afternoon with the Dutchess of Ulster, and came up through the highlands to West Point without difficulty. She came to at the latter place for want of fuel. Other circumstances were in proof, on the one side and the other, for the purpose of showing the sufficiency or insufficiency of the boat, and her equipments and command, for the service she was engaged in; the libelant contending that there was fault and negligence in the equipment and management of the boat, and the claimant insisting she was well found and skillfully navigated.

In the aspect of the controversy, it might be important to examine particularly this branch of the case, because the rule of law seems explicitly settled that, when the loss is produced wholly by natural causes, still, if there be the least degree of negligence conducing to it, or it arises in any way from human actions or neglect, or any combination of such action or neglect, the carrier is not excused. McArthur v. Sears, 21 Wend. 190; Williams v. Grant, 1 Conn. 487.

I shall not lay great stress on this particular, because, in my judgment, the claimants have not succeeded in proving the loss occasioned by the "act of God," in that sense in which the phrase is employed in jurisprudence. It must always be exceedingly difficult to discriminate between natural events, or accidents which are necessarily operations of providential direction and superintendence, and those which fulfil the legal acceptation of "acts of God." The books supply

some criterion by which the distinction may be marked, yet there is no authoritative definition laid down which fixes with certainty when the disaster is to be classed among events resulting directly from natural necessity, or is ascribable to those fortuitous causes which comprise what are called "perils of the sea," or belongs to the family of "inevitable accidents," produced by no sudden or overpowering necessity. The phrases are not unfrequently used as bearing the same import. New Jersey Steam-Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 381; Jones, Bailm. 104, 105; Story, Bailm. §§ 25, 511. Yet usually the qualification attends them that the accident or necessity which excuses a carrier must be the immediate and distinct result of providential events, sudden or overwhelming in their character, which human sagacity or force could not foresee or prevent. Forward v. Pittard, 1 Durn. & E. [1 Term R.] 33; 3 Kent, Comm. (6th Ed.) 217. The illustrations Chancellor Kent gives as the summary of the doctrine on this subject are that the carrier is responsible unless the loss has happened by means of lightning, earthquake, or tempest. 3 Kent, Comm. 217.

Putting this case, then, in its aspect most favorable to the carrier, and considering it proved that the vessel sunk by means of the storm under which she had been riding for two nights and a day, there would be great difficulty in bringing the loss within the principle which exempts him from liability because of a peril of extraordinary character and violence. The vessel did not founder. She was not strained and opened by the tempest so as to send a rush of water into her and cause her to sink suddenly or inevitably, notwithstanding the efforts of her crew to relieve her. She was not disabled in her hull or machinery by the direct effects of the storm, in a manner to render her destruction inevitable, or even to peril her safety. Her engine was not disabled, nor the shaft of her wheel displaced, until after the fire in her was extinguished, and the evidence does not show that the water was driven in by the gale so as to disturb the fire. Upon this branch of the case, the just conclusion from the proofs, in my judgment, is that the boat was compelled to anchor from the extinction of her fires, solely. There was nothing in the severity of the storm which prevented her being manageable, with the use of her machinery, and to maintain, as she had for an hour or two previously, headway against it. If she had not sufficient power to work across the river to the eastern shore, there is no satisfactory evidence that the boat might not, with the use of ordinary skill, have been brought about on the western shore, and then run safely before the wind to a harbor below the bay. The act of God which excuses a common carrier for the loss of goods must be the immediate, and not the remote, cause of the loss. King v. Shepherd [Case No. 7,804].

It is manifest that the supreme court of this state, and the court of errors, hold common carriers by water, standing as insurers, to be liable for losses occasioned by perils of navigation of a very immediate character, unless those dangers are excepted in their contracts of transportation. The owners of a vessel capsized by a sudden squall of wind on Lake Ontario were held excused for the loss of cargo occasioned thereby because the dangers of the lake were excepted from their responsibility, and the defendants had proved they used ordinary skill and prudence in the navigation. Fairchild v. Slocum, 19 Wend. 329; s. c., in error, 7 Hill, 292. The accident was ranged in the list of dangers of the lake, or perils of navigation, and not considered the act of God. So, also, loss of cargo occasioned by the rolling of the vessel in a cross sea is not ascribable to the act of God, but is an ordinary peril of the sea. The Reeside [Case No. 11,657].

Upon the supposition of the claimants that the boat sunk by reason of the calking wearing out of her seams, from her long straining at her anchor and occasionally touching ground, the storm would be the remote, and not the direct and immediate, cause of the loss. This is not proved to have been the cause of the boat's sinking, and, had it been, was not sufficient in law to exempt the carrier from his liability. The Columbus [Case No. 3,043]. I cannot discover in the proofs any reason for regarding this storm the steamboat encountered on the occasion more than a peril of navigation on the seas, which the carrier by water is bound to bear, unless he exempts himself by his special undertaking. 19 Wend. 329; 7 Hill, 292. The wind was high, and of long duration; but it had not the character of a sudden squall or whirlwind, or anything more than the boisterous and tempestuous weather ordinarily encountered in voyages at sea, on the lakes, or broad rivers and bays.

The position contended for on the argument by the counsel for the claimants, that the common-law doctrine applicable to common carriers is no part of the maritime law, is supported by no authority. These cases, throughout, show that carriers at sea, or by inland navigation, are subjected to one and the same responsibility with those by land, when there is no qualification of it by a special undertaking. 2 Kent, Comm. (6th Ed.) 608; Story, Bailm. § 508; Ang. Carr. §§ 80, 83, and notes. In Elliott v. Rossell, 10 Johns. 1, the supreme court say there is no distinction between a carrier by land and a carrier by water. Master and owners of vessels are liable, as common carriers, on the high seas as well as in port. The counsel in that case endeavored to establish a distinction between the responsibility of the carrier for carriage of goods within the jurisdiction of the court, and when the transportation was beyond the jurisdiction and out of the reach, but the court held the rule to be universal. The doc-

trine was explicitly repeated, and applied to steam vessels on the North river. Allen v. Sewall, 2 Wend. 327. That decision was reversed, upon a special feature of the case, by the court of errors, but the principle of the liability of carriers, and that the owners of the boat were such, was approved by the court. Sewall v. Allen, 6 Wend. 335. The disaster the boat met on this voyage would very properly fall within the denomination of a "peril of the seas," or a "danger of navigation," and I do not perceive justifiable grounds for giving it any higher character. The claimants contend that every contract for transportation of goods by vessels upon the North river, implies this exemption, and that it need not be expressed in terms, or reserved by a bill of lading. There is no usage proved that goods are delivered or received for transportation on any such understanding. The cases in the State Reports import the contrary. If a usage or custom of that character is relied upon as a defense, it is incumbent on the claimants to prove it clearly.

The court cannot recognize as matter of law that this obligation of the carrier by river navigation is limited to losses happening otherwise than by such perils as amount to the "act of God," in its legal acceptation. It has been already sufficiently indicated that the law recognizes a distinction between dangers called "perils of the sea" and those falling within the meaning of the "act of God," in respect to the liability of carriers If, however, the counsel for the claimants could have succeeded in showing they were of the same import, the proofs in the case establish against the claimants the want of proper care and precaution in the fitment of the steamboat, and her management on the voyage. The weight of evidence is that the boiler leaked so badly as to prevent their maintaining a fire to propel the boat. It is also proved that holes were left open in her sides, through which water entered from the rough and high sea on at the time, and the presumption that those particulars contributed to her loss is not rebutted by proofs on the part of the claimants. They call no witnesses to prove, from the condition of the hull after the boat was raised, that she sunk from any other causes. The boat was so anchored in the gale as to expose the side in which these holes were towards the wind, to her greatest disadvantage. She was not supplied with any small boat, by which, in any emergency, the cargo could have been saved, or assistance brought to the vessel; and she was left lying at her anchor, quartering to the wind, when, by reasonable nautical skill and exertion, she might have been brought with her head directly to the wind, or put about to run before it. The captain had no experience as a navigator, nor was the person in charge of the engine an engineer regularly trained and accustomed to working engines. These various particulars are evidence of that want of due precaution which is always exacted of common carriers, and the omission of which render them chargeable for losses, although, by their agreement, exempted from responsibility for mere perils of the sea or navigation.

Upon the whole case, the libelant, in my judgment, is entitled to recover the value of his property placed on board this boat and not delivered to him, and the boat is condemned therefor, with costs. It must be referred to a commissioner to ascertain the value of the property. Interest at the rate of six per cent. will be allowed on the value from the time of loss. Decree accordingly.

Case No. 14,088.

TOMPKINS v. GAGE et al.

[5 Blatchf. 268; 2 Fish. Pat. Cas. 577.] [1]

Circuit Court, N. D. New York. Oct. 26, 1865.

PATENTS—SPECIFICATIONS—DOUBLE CLAIM—IDENTITY—STATE OF THE ART—WANT OF NOVELTY AS DEFENCE.

1. Where one claim in a patent claimed a combination of three mechanisms, and another claim in the same patent described and claimed the particular manner in which the three mechanisms were combined and made effective in producing the particular result, *held*, that the two claims claimed the same invention.

[Cited in Dudley E. Jones Co. v. Munger Imp. Cotton Mach. Manuf'g Co., 1 C. C. A. 158, 49 Fed. 65.]

[Cited in Burke v. Partridge, 58 N. H. 352.]

2. There being no evidence that the double claim was made with an intention to mislead, the patent was not void because of such double claim.

3. A defence of want of novelty in the invention, in a suit on a patent, must be made out by satisfactory and preponderating evidence. It is not enough, to raise a doubt on the question.

[Cited in Jordan v. Dobson, Case No. 7,519.]

4. A claim construed in the light of the preceding and descriptive parts of the specification.

[Cited in Johnson v. McCabe, 37 Ind. 539.]

5. The introduction of a mechanical equivalent, held not to relieve from the charge of infringement.

6. In construing a specification as against an objection that it points out no means by which a particular arrangement can be made to operate successfully, where a mechanical equivalent is introduced in place of one feature, the specification must be read in view of the preceding state of the art immediately connected with the particular subject matter.

7. Disapprobation expressed by the court, as to the loose manner in which the specifications of patents are very often drawn up.

[This was a bill in equity, filed to restrain the defendants [George Gage and George C. Gage] from infringing two letters patent for "improvements in rotary knitting machines," one granted to Daniel Tainter, November 30, 1852 [No. 9,435], and assigned to complainant, and the other granted to Clark Tompkins and John Johnson, September 18, 1855 [No.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 5 Blatchf. 268, and the statement is from 2 Fish. Pat. Cas. 577.]

13,586], reissued May 15, 1860 [No. 963], and assigned to complainant. The claims of these several patents were as follows:

[Patent to Daniel Tainter: "I do not claim the combining one or more draft rollers and a take-up roller or drum in one frame, which, when put in rotation, shall carry them simultaneously around with it, so as to draw forward and wind up a rope or cord, or like manufacture, formed of strands twisted together; nor do I claim the application of a take-up roller or mechanism, as used on either a common warp or flat-braid knitting machine. What I claim as my invention is to so combine a draft and take-up roller, and mechanism for revolving it, with a rotary series or set of needles and other mechanism of the above-mentioned peculiar kind for knitting, that such draft roller shall rotate simultaneously or with the same velocity with such series of needles, so as to prevent the longitudinal rows of stitches from being produced in helical lines, and the evil consequences resulting to the fabric therefrom. I also claim the arrangement of the draft and take-up mechanism, in connection with the knitting mechanism, supported by two separate frames, A, T, and also their connection with the mechanism for producing an equal and simultaneous rotation of these frames, A, T, all substantially as described, whereby there shall not only be no connection between the frames, A, T, to extend through the fabric, but no projection from the frame, A, to come in contact with the presser, stitch wheels and cam bar, or their respective supports, during the simultaneous and equal rotations of both or either of the said frames, A, T."

[Original patent to Tompkins and Johnson: "We claim: First. The manner in which we cause the frame which carries the take-up mechanism to revolve in the same direction, and with the same velocity, as the needle cylinder, as specified and for the purpose set forth. Second. Combining the web-shaping plates S and C with the take-up mechanism, substantially as described, for the purpose specified."

[Reissue to Tompkins and Johnson: "We claim the apparatus for revolving the take-up machinery in unison with the needle cylinder, as herein specified, substantially in the manner and for the purpose set forth. We also claim revolving the shaping plates S and C by a positive motion with and at the same velocity as the take-up motion, substantially as described and for the purpose specified."] [2]

George Gifford, for complainant.
Charles M. Keller, for defendants.

SHIPMAN, District Judge. [The bill, in this case, is founded upon two patents, alleged to be for new and useful improvements in rotary knitting machines. The first was issued to Daniel Tainter, of Worcester, Massachusetts, November 30, 1852, and on February 12, 1860, was by him assigned to the present complainant, who is now the owner of the same. The second patent was issued to Clark Tompkins, the present complainant, and John Johnson, of Troy, New York, September 18, 1855, and surrendered and reissued to them May 15, 1860. On the 18th of the last named month, Johnson assigned his interest therein to the complainant, who is now the sole owner.] [3]

The inventions alleged to be covered by these patents are of great utility and value. The bill charges the defendants with infringing both of them. As it is not my purpose to go, in detail, into the discussion of the evidence upon which the questions of fact in this controversy depend, it is important to set forth, as clearly as the subject-matter will admit, my construction of the patents, in order that the grounds upon which the decision rests may distinctly appear. This is especially necessary, inasmuch as there does not appear to have been any prior litigation of the questions involved, in which any judicial construction has been put upon the patents.

And, first, as to the construction of the Tainter patent. There are, in the specification of this patent, what purport to be two distinct claims, in the construction of which the parties materially differ. The first claim, as I understand it, is for a combination consisting of three distinct parts, and limited to them. These are, the peculiar mechanism for forming the stitches, described in the specification—the draft and take-up roller revolved by mechanism on its axis—and the mechanism so connecting the draft and take-up roller with the peculiar knitting device, that the two shall rotate coincidentally, or in unison. These three distinct members, in combination, form the organized mechanism embraced in the first claim. The second claim is, in its legal aspect, not materially different from the first. It is fuller, inasmuch as it embraces, substantially, a brief description of the particular manner in which the three parts are combined and made effective in producing the intended result. I, therefore, regard the invention as being embraced in both claims, though more fully described in the second one. The attempt to separate the invention into two distinct parts has certainly failed. The same invention described in the first claim is found in the second, and no other invention is found there. In the first it is called a combination, in the second an arrangement.

The defendants insist, however, that the fact that a single invention is made the subject of two distinct claims in the same specification—in other words, is claimed twice—renders the patent void. This objection to the validity of the patent is placed

[2] [From 2 Fish. Pat. Cas. 577.]

[3] [From 2 Fish. Pat. Cas. 577.]

upon what is termed by counsel "duplicity of claim," and the argument really is, that, as one claim is but a repetition of the other, this repetition destroys the patent. No authority is cited in support of this objection, and no reasons presented which give it weight or strength. None is perceived by the court. It is clearly not like the case where two distinct inventions, relating to wholly distinct subjects, having no objects in common, are embraced in the same patent; and the objections which would apply in such a case have no application to a patent like the one now under consideration. The blemish must, therefore, be regarded as mere tautology, which, while it may make the instrument less clear and exact, does not impair its validity. There is no evidence that the double claim was made with an intention to mislead.

The utility of the invention is conceded, and its infringement by the defendants, under this construction of the patent, is not denied.

The only remaining question arising under this patent is, whether or not Daniel Tainter is the original and first inventor. On this point, the burden of proof is on the defendants. The patent is strengthened, in this feature, by the testimony of Clark and Sandford, and I do not think that the proofs offered by the plaintiff are overcome by the evidence adduced by the defendants. It is not enough that the latter raise a doubt on this question. They must show, by satisfactory and preponderating evidence, that they antedate the invention set forth in the patent. After a careful comparison of the whole evidence on this point, I think they have failed to show that any combination substantially like the one described in the Tainter patent existed prior to his invention.

So far as the re-issued patent to Tompkins and Johnson is concerned, the defendants are charged with infringing the second claim only. This claim, when read by itself, is simply for revolving the shaping plates by a positive motion with, and at the same velocity as, the take-up motion, substantially as described. The object of this arrangement is to secure, by the lower and circular plate, an even pull of the fabric as it comes from the circular row of needles below, keeping the threads at uniform angles, and thus securing its uniform elasticity. The upper plate is oval, so as to pass the web in a partially flattened state to the rod or cloth spreader. The only difficulty with the claim is, that it is not so full and specific as it should have been. But, when read in the light of the preceding and descriptive parts of the specification, it must be understood to embrace the connection of the moving plates with the take-up mechanism, and their operation together in the peculiar manner set forth. This is the only construction which leaves any intelligent meaning in the claim. This peculiar arrangement of the plates and take-up mechanism, is not found in the Whitehead machine; nor is there satisfactory evidence that it existed in any other prior to the invention of Tompkins and Johnson.

As to the infringement, the only important difference between the arrangement and operation of these plates in the plaintiff's and the defendants' machines is, that, in the former, they are fixed to the rod or spindle, and are revolved by the gear which carries it, while, in the latter, the spindle to which they are attached turns freely and without gearing. This difference, in the judgment of the court, is not material, but is only a mechanical equivalent, as the arrangement is, in all other respects, nearly identical, and accomplishes the same result in essentially the same manner.

It is, however, objected by the defendants, that the specification points out no means by which this arrangement can be made to operate successfully in a machine where the spindle carrying the plates runs free, instead of being driven by gear. This point is not free from difficulty. But, on the whole, I conclude that the patentees had a right to assume that those who desired to understand all the conditions under which their invention could be operated, were acquainted with the preceding state of the art immediately connected with this particular subject-matter. A mere glance at the Tainter machine, with which all persons acquainted with this branch of business must be presumed to be familiar, and which is referred to by name in the specification, would at once show that it is immaterial, so far as the function and arrangement of these plates are concerned, whether they are carried round by force of gear applied to the spindle, or on a free spindle, by force of the web acting on the plates. Indeed, the patent itself says, that it is not essential that the plates should be immovably fastened to the spindle.

It is insisted, however, by the defendants, that this is an after-thought, inserted in the reissued patent after the patentees had seen the defendants' machines, and for the purpose of covering what was not embraced in the original patent. But the court has no means of judging of the force of this objection, as the original patent is not in evidence. As no comparison can be made between that and the reissued patent, no inference of this character can be drawn against the latter.

It follows, from these views, that an injunction must issue against the use of the invention described in the Tainter patent, and also against the use of the one described in the second claim of the Tompkins and Johnson patent.

Before dismissing this case, I deem it proper to express, in explicit terms, the disapprobation, by this court, of the loose manner in which the specifications of patents are very often drawn up. I am well aware that sometimes it may be difficult to clearly and exactly

state and describe the subject-matter of an invention. This is the case where the mechanism constituting or embodying the invention is extensive and complicated. But these difficult instances bear no adequate proportion to the cases in which specifications, and especially those parts of them which are devoted to stating the claim, are very loosely framed. Patents are constantly being reissued, for the purpose of restating the claims of the inventor, in order that the description may coincide with the invention, where the subject-matter is neither complicated nor difficult to delineate. In many cases where they are not reissued, the courts are called upon, under the rule of "liberal construction," to pass upon confused and obscure specifications, and upon claims which have very scant and imperfect relation to the more detailed descriptions in the bodies of the instruments. This loose practice is injurious to inventors, is the prolific source of litigation, and multiplies the embarrassments and labors of the courts, in their efforts to protect the fruits of inventive skill and meritorious ingenuity. If a small proportion of the acumen and ability which counsel exhaust upon the construction of patents, were originally expended by draughtsmen in framing them, the property of inventors in the products of their ingenuity would be much more secure, and its protection by the courts much more easy and certain.

Case No. 14,089.

TOMPKINS v. HOWARD.

[1 Spr. 167.] [1]

District Court, D. Massachusetts. Jan., 1849.

FISHERIES — SHIPMENT DURING VOYAGE — APPORTIONMENT OF LAY.

Where, after a part of a whaling voyage had been performed, a mariner shipped in a foreign port, for the residue of the voyage, at a lay of one-ninetieth, and performed his contract, and returned in the vessel to her home port: *Held*, that he was entitled to one-ninetieth of all the oil, and other products of the voyage, taken during his time of service.

In admiralty.

Adam Mackie, for libellant.

H. G. O. Colby, for respondent.

SPRAGUE, District Judge. The ship Cowper sailed from New Bedford, on a whaling voyage, to the Pacific Ocean, on the 3d day of June, 1845. On the 18th of February, 1847, after a quantity of oil had been taken, the libellant shipped at Valparaiso, as set forth in the answer, "for and during the remainder of the voyage," as boat-steerer, at a lay of one-ninetieth, and at that time, signed the shipping articles. The ship proceeded on her voyage, took more oil, and returned to New Bedford, on the 24th September, 1848.

The question is, whether the libellant is entitled to one-ninetieth of all the oil taken, after he joined the ship, or such a proportion of one-ninetieth of all the oil taken, during the whole voyage from New Bedford, until her return, as the time he served was of the whole voyage.

The shipping articles were in the usual form, as set forth in the appendix to Curtis's Merchant Seamen, and were signed by all the original crew, before sailing from New Bedford, and were subsequently signed by the libellant, without alteration, his share and station being at the same time entered opposite to his name. Although such contracts, in whaling voyages, are frequent, it is agreed that there is no established usage at the port of New Bedford, as to the mode in which the lay is to be calculated; nor has any authority been adduced, bearing forcibly upon this question. In the case of Shaw v. Mitchell, 2 Metc. [Mass.] 65, the plaintiff was shipped during the voyage, and discharged before its termination, and the decision turned upon the construction of the agreement made at the time of his discharge. In Luscom v. Osgood [Case No. 8,608], the whole controversy related to services performed before the shipping paper was signed, and the question decided was of a quantum meruit, and not a construction of any express agreement. In the case now before the court, the mode of estimating the lay is to be deduced from the articles, and the facts and circumstances existing at the time they were signed. The first article is as follows: "It is agreed between the owner, master, seamen, and mariners of the ship Cowper, Benjamin B. Howard, master, bound from the port of New Bedford, on a whaling voyage, in any oceans, bays, or seas in the world; that in consideration of the share against each seaman or mariner's name, hereunder set, they severally shall and will perform the abovementioned voyage; and the said owner and master, do hereby agree with, and hire the said seamen, or mariners, for the said voyage, at such shares of the net proceeds, or of the actual products of the voyage, to be paid pursuant to this agreement, and the custom and usage in the port of New Bedford." This phraseology refers exclusively to the whole original voyage, but is not adapted to the contract which, it is conceded on all hands, was made by the libellant. The answer itself expressly admits, that the contract of the libellant was made nearly two years after the commencement of the original voyage, and was for the remainder of such voyage. If then, at the time the libellant signed the articles, they had been so changed as to adapt them to his contract, they must have described the voyage to be one from Valparaiso "to any oceans, bays, or seas, until her return to New Bedford," or have stated the contract to be for the residue of said original voy-

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

age. And when it is stated, that the party is hired "for the said voyage, for such shares of the net proceeds, or of the actual products of the voyage," it is clear that he is to have such share of the proceeds of the voyage, for which he is hired, viz: from "Valparaiso," &c., or the residue of the voyage. This, as to the libellant, means the voyage after the 18th February, 1847. The seventh article begins as follows: "Each and every officer and seaman, who shall well and truly have performed the above-mentioned voyage, complied with the regulations and duties herein specified, and committed no dishonest or unlawful acts, shall be entitled to the payment of his share of the net proceeds of the voyage, pursuant to this agreement," &c. If this were to be construed as referring to the original voyage, the libellant could never be entitled to anything, as he could never have complied with the condition of performing that part of the voyage, which had expired before he contracted. It is clear, then, as to him, the article must read, if he shall well and truly have performed the voyage for which he engaged, "he shall be entitled to the payment of his share of the net proceeds of the voyage," which, as to the libellant, must mean the voyage for which he contracted. The seventh article provides, that "in case of sickness, or death of any mariner, his legal representative shall be entitled to such part of the whole amount of his stipulated share, as the time of his service on board shall be of the whole term of the voyage." It has been suggested, that if a person who shipped after the voyage had been partly performed, should die before its termination, his share must be of the whole original voyage, in proportion to the time he served. But that is not the necessary conclusion. The voyage, as to him, is that for which he contracted; and if he dies before the termination of his voyage, his share for such voyage is to be reckoned upon the principles of the seventh article, and to be such proportion of the stipulated lay of the voyage for which he engaged, as the time he served bore to the whole of such voyage. It has also been urged, that as the man shipped abroad takes the place of some predecessor, whose lay must be calculated upon the whole voyage, it would be proper, that the successor's lay should also be calculated on the whole voyage, each having his proportion; and thus the owners would pay the compensation of one man for the whole voyage. But it is not shown, and cannot be assumed, that the libellant was the successor of any particular person. It is known that ships sometimes sail on these voyages, without a full crew, intending to ship men at a foreign port. In other cases, men desert, to whom no compensation is to be paid, and, in all cases where men are shipped abroad, each makes his own contract, according to his skill and ability as a whaleman, and the circumstances in which he is placed, and stipulates for his own share, or lay, without being governed by that of any predecessor. In making this important stipulation, I think he would have reference to the services which he was to perform, and the voyage for which he was about to engage, rather than to the whole original voyage.

I am of opinion, therefore, that, construing these articles by the light of the facts and circumstances, existing at the time the libellant shipped, and of the contract, which it is known and conceded that he actually made, he is entitled to one-ninetieth of all the oil and other products of the voyage, taken during his time of service on board the ship, i. e., from the 18th February, 1847, until her return to New Bedford.

TOMPKINS (JOHNSON v.). See Case No. 7,416.

Case No. 14,090.

TOMPKINS v. RANKIN.

[3 Cent. Law J. 443.][1]

Circuit Court, D. Massachusetts. 1876.

COPYRIGHT—PLAY—ENTRY UPON TITLE PAGE—DATE.

This case has been litigated in most of the large cities, from the Atlantic seaboard to the Mississippi valley, and has now been decided upon its merits in the United States circuit court for the district of Massachusetts, by Mr. District Judge Lowell, Mr. Circuit Judge Shepley concurring. The style of the case in that court was Orlando Tompkins v. Arthur McKee Rankin et al. According to a brief report of the decision which we find in the Boston Advertiser, the bill set forth, among other things, that in 1873 Adolph D'Ennery and Eugene Cormon were the authors of the play in the French language; that they agreed to convey to N. Hart Jackson the right to produce the play in the United States and to translate and adapt the play to the American stage, and joint authors of the translation, and Jackson to be sole author of any adaptation that might be made of the play; that Jackson adapted the play to the American stage, and it has been performed in New York and had become popular; that the right to this play was assigned to the plaintiffs, Shook and Palmer; that on February 1, 1875, the translation was copyrighted, and the plaintiff, Tompkins, the manager of the Boston Theatre, purchased the right of exclusive representation in the city of Boston; that the defendant, Rankin, who was a dramatic artist, and actor, was formerly engaged at Union Square Theatre in New York at the time of the original production of the play, and became then familiar with it; that Rankin and the other defendants, who were proprietors of the Howard Athenæum, had combined together to reproduce the drama in violation of

[1] [Reprinted by permission.]

the plaintiffs' right. The plaintiffs asked that the defendants might be enjoined from publishing or performing the play, and from advertising such performance. The defendants in their answer denied that the plaintiffs had any valid copyright, in that they had not complied with the conditions of the copyright act. They further said that the play was translated into English by John Oxenford of England, and was acted in London; that in August, 1875, Rankin purchased the Oxenford translation of Henry Neville in London, which translation was prior in point of time to that of Jackson; that Rankin had the lawful right to produce the play; that Jackson's version was not identical with this, and that it is the translation of Oxenford, and not of Jackson, that it is proposed to produce at the Howard. Upon the title page of the Jackson translation the notice of the copyright is as follows: "Entered according to the act of congress in the office of the librarian of congress, by N. Hart Jackson, as author aforesaid, and the copyright thereof duly assigned to Sheridan Shook and Albert M. Palmer as proprietors thereof. 1875."

T. W. Clark, for plaintiffs.

S. J. Thomas and A. Russ, for defendants.

Before SHEPLEY, Circuit Judge, and LOWELL, District Judge.

LOWELL, District Judge. It was held that the entry on the title-page of the Jackson translation, taken in connection with the figures "1875," which were at the bottom of the title-page in the place where the date of publication usually appears, was not a compliance with either form of requirement of section 1, c. 301, pt. 3, 18 Stat. That section is as follows: "That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page, or the page immediately following, if it be a book, the following words: 'Entered according to the act of congress, in the year ——, by A. B, in the office of the librarian of congress, at Washington;' or at his option, the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: 'Copyright, 18—, by A. B.'"

The injunction was accordingly denied.

Case No. 14,091.

TOMPKINS v. TOMPKINS.

[1 Story, 547.] [1]

Circuit Court, D. Rhode Island. June Term, 1841.

RES JUDICATA—PROBATE OF WILL—COLLATERAL PROCEEDING—TITLE TO REAL ESTATE—PROBATE COURTS—EFFECT OF PROBATE IN ENGLAND.

1. In England, the probate of a will by the proper ecclesiastical court is conclusive as to personalty, but it is not even evidence as to the real estate, inasmuch as the court has no jurisdiction except over wills of personal estate.

2. The validity of wills of real estate is solely cognizable by courts of common law, and the verdict and judgment thereon are conclusive only as between the parties to the suit and their privies.

[Quoted in State v. McGlynn, 20 Cal. 241. Cited in Re Jackman, 26 Wis. 107.]

3. The courts of probate in Massachusetts have complete jurisdiction over the probate of wills of both real and personal estate, and its decrees are conclusive upon all parties, and not reëxaminable in any other court.

[Cited in Smith v. Fenner, Case No. 13,046; Langdon v. Goddard, Id. 8,060.]

[Cited in Rogers v. Stevens, 8 Ind. 467; Johns v. Hodges, 62 Md. 538; Parker v. Parker, 11 Cush. 528; Allison v. Smith, 16 Mich. 417.]

4. *Held*, in the present case, that the probate of a will by the supreme court of the state of Rhode Island, is, under the state laws, final and conclusive upon the validity of the will, to pass the real estate in controversy.

[Cited in Moore v. Greene, Case No. 9,763.]

[Quoted in State v. McGlynn, 20 Cal. 241. Cited in Olney v. Angell, 5 R. I. 202.]

Action of trespass and ejectment. The parties agreed to the following statement of facts: Gideon Tompkins, on the 31st day of December, A. D. 1836, made and executed his last will and testament, thereby disposing of all his estate, both real and personal, and afterwards died. The said will at a court of probate holden in Little Compton on the —— day of ——, A. D. 1837, was duly proved, approved, and ordered to be recorded. From the decree of the said court, approving said will, an appeal was taken to the then next term of the supreme judicial court, for the county of Newport, being the supreme court of probate in said county, on the ground of the incompetency of the testator at the time, to make a will. Upon the trial of the said appeal, the said supreme judicial court confirmed the decree of the said court of probate, proving and approving the said will. The present suit is brought by [Silas Tompkins] one of the heirs at law, residing in Massachusetts, against [Thomas G. Tompkins] the executor, named in the will, and devisee of the real estate, for his undivided share of the said real estate, as one of the heirs at law of the said testator, and as though the said testator had, in fact, died intestate; and he relies on proof, that he offers, of the insanity or incompetency of the said testator, at the time of the execution of the said will, as sufficient to set the same aside as void. If this honorable court should be of opinion, that the probate of the said will, made and confirmed as herein stated, is conclusive upon the parties, and sufficient to pass an absolute title to real estate to the said devisee, then the plaintiff agrees to become nonsuit. But, if the court should be of a different opinion, and decide that the plaintiff may in this action go to the jury with evidence of insanity, or incompetency as aforesaid, then the parties agree that the said cause shall be set down for trial at the next term of this court.

[1] [Reported by William W. Story, Esq.]

It was contended, in behalf of the plaintiffs, that the probate of the will in Rhode Island is not conclusive as to real estate, but only as to personal estate, and that the question, whether there is a devise of real estate or not, remains open, and can only be settled through an issue or trial at law. The cases of Smith v. Fenner [Case No. 13,046], and Spencer v. Spencer [Id. 13,233], recognize such to be the practice in Rhode Island, which, whether right or wrong, can only be remedied by the interposition of the legislature, and not by judicial determination. In the case of Smith v. Fenner [supra], it was alleged on the one side (says the reporter) and denied on the other, that by the law of Rhode Island a probate of a will was conclusive, as well to real as personal estate. But on the counsel for the defendant expressing a willingness to go into the evidence, and intimating that they would reserve the question ultimately for the consideration of the court, if the case should require it, the evidence was admitted to go to the jury. The court in that case say: "Supposing that in Rhode Island the probate of a will is not conclusive, (on which, says the presiding judge, I give no opinion,) an erasure or alteration in it after execution does not avoid the will in toto." This reference is made merely to show, that in 1812, this court had not decided the question now submitted for their consideration, and at that time some of the oldest, most experienced, as well as ablest lawyers of our bar, understood the law in this state to be, what, we contend, it then was, and now is. It will be recollected, that at that time, to wit, in 1812, the controversy was under a will of the testator made in March, 1871, and proved the 4th of February, 1788. In the case of Spencer v. Spencer [supra], the court say: "It is understood to have been the practice in Rhode Island to consider the probate of a will conclusive only as to personal estate, probably from a misapplication of the rule, as to probate in the ecclesiastical courts in England. The decisions in England rest on the ground, that the ecclesiastical courts have no jurisdiction, except as to personal estates. The law is otherwise in Rhode Island. Its probate courts have complete jurisdiction as to wills, in respect both to real and to personal estates. A will purporting only to affect real estate must still be submitted to their jurisdiction for probate. I have always understood, that a decree of a court of competent jurisdiction, upon the very point in controversy, is conclusive upon other courts, at least, unless fraud be shown. It is on this ground, that an ecclesiastical probate is conclusive, as to personal estate, in England. And by parity of reasoning, in Massachusetts, where the general laws in respect to wills are almost the same as in this state, the regular probate of a will is held conclusive, as well to real as personal estate. However, I do not mean to press the point; it will be time enough to decide it, when the case absolutely requires it. If the practice be founded in error, it ought to be corrected." This opinion of this court is quoted to show their recognition of the law, as, we contend, it now exists, and always has existed, in this state, which, as it is local in character and operation, the court will not hastily overrule. The cases of Bogardus v. Clarke, 1 Edw. Ch. 266; Montgomery v. Clark, 2 Atk. 378; Clark v. Dew, 1 Russ. & M. 103; Vanderheyden v. Reid, 1 Hopk. Ch. 413,—sustain the position, that such is the doctrine in England, which, being a portion of the common law, has been adopted in Rhode Island, in New York, and in other states of this Union, and which still continues in force. If the decisions in Massachusetts, with regard to this point, differ from the English decisions, it grows out of the fact, that the subject in relation to wills is, in Massachusetts, peculiarly of probate jurisdiction, and unlike the jurisdiction of probate courts in any other state. Laughton v. Atkins, 1 Pick. 535.

It was contended, in behalf of the defendant, that the probate of a will, devising real estate in Rhode Island, is conclusive; 1st. Because the powers of courts of probate are general, and include wills of real estate, as well as personal estate. 2d. Because, having such general jurisdiction, their decision is conclusive upon all the points involved in the probate of a will. The jurisdiction of the ecclesiastical courts in England is exclusive only with regard to personal property; and the practice in New York is similar to the English practice, because they have adopted the English law, and have never since repealed it. But, in Rhode Island, the settlement of the estates of persons deceased is matter of statute law, and provision is made thereby for the whole subject in "An act for establishing courts of probate" (Laws R. I., Dig. 1822, p. 211), by which power is given, to take the probate of wills, to make partition of estates, and to assign dower to widows, as prescribed by law. In both these latter cases, in order to execute the power given, the courts must have jurisdiction of real estate. That the intent of the legislature was to give this general jurisdiction, is further shown by the act passed in 1822, providing for, and directing the manner of filing and recording wills proved without the state. Laws R. I., Dig. 1822, p. 221. That act provides for the manner of proving a foreign will, where the testator has "real or personal estate," within the state, and gives the courts of probate jurisdiction over the matter. By the state laws (Id. pp. 224, 225, 227, 243) authority is given to divide the real estate of any person deceased, intestate. Sections 5 and 6 (page 227) of the state laws, invest courts of probate with power to divide "real estate, holden in common, by devise in any last will," which seems an express grant of jurisdiction of real property devised. The case of Smith v. Fenner [supra], intimates the opinion, that probate of wills in Rhode Island is conclusive; and the case of Spencer v. Spencer [supra], is

sufficient to decide the question. The doctrine, contended for in the present case, is fully confirmed and recognized by the decisions in Massachusetts. Osgood v. Breed, 12 Mass. 531; Laughton v. Atkins, 1 Pick. 535; Inhabitants of Dublin v. Chadbourn, 16 Mass. 433; Picquet v. Swan [Case No. 11,133]; Cassels v. Vernon [Id. 2,503]. And, also, in 8 N. H. 116; 1 Nott & McC. 326; 1 Day, 170; 3 Day, 318.

Turner & Pearce, for plaintiff.

Mr. Cranston and A. C. Greene, for defendant.

STORY, Circuit Justice. The only question in this cause is, whether, in Rhode Island, the probate of a will, by the proper probate court of the state, is conclusive, as to the real estate, as it certainly is, as to the personal estate of the deceased. We all know, that in England the distinction has been constantly maintained, that the probate of a will by the proper ecclesiastical court is conclusive, as to the personalty, but that it is not even evidence, as to the real estate. The reason is, that the ecclesiastical courts have no jurisdiction whatsoever, except over wills of personal estate; and, therefore, the probate thereof, by the sentence or decree of those courts, is wholly inoperative and void, except as to personal estate. The validity of wills of real estate is solely cognizable by courts of common law, in the ordinary forms of suits; and the verdict of the jury in such suits, and the judgment thereon, are by the very theory of the law, conclusive only as between the parties to the suit, and their privies. But it is far otherwise in cases of personal estate. The sentence or decree of the proper ecclesiastical court, as to the personal estate, is not only evidence, but is conclusive as to the validity or invalidity of the will; so that the same question cannot be re-examined or litigated in any other tribunal. The reason is, that it being the sentence or decree of a court of competent jurisdiction, directly upon the very subject matter in controversy, to which all persons, who have any interest, are, or may make themselves, parties, for the purpose of contesting the validity of the will, it necessarily follows, that it is conclusive between those parties. For otherwise there might be conflicting sentences or adjudications upon the same subject matter between the same parties; and thus the subject matter be delivered over to interminable doubts; and the general rules of law, as to the effect of res judicata, be completely overthrown. In short, such sentences are treated as of the like nature, as sentences or proceedings in rem, necessarily conclusive upon the matter in controversy, for the common safety and repose of mankind. This doctrine was fully considered and established in the great case of the Duchess of Kingston, before the house of lords, 11 Harg. State Tr. 261, s. c. 20 How. State Tr. 538, where Lord Chief Justice De Grey declared the opinion of all the judges. It has, also, on various occasions, been considered and recognized in the supreme court of the United States; and especially in Croudson v. Leonard, 4 Cranch [8 U. S.] 434; The Mary, 9 Cranch [13 U. S.] 126; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246; Armstrong v. Lear, 12 Wheat. [25 U. S.] 169; Elliot v. Piersol, 1 Pet. [26 U. S.] 338; and Thompson v. Tolmie, 2 Pet. [27 U. S.] 157. Lord Chief Justice De Grey, in delivering the judgment of all the judges, in the case of the Duchess of Kingston, said, that two deductions seem to follow as generally true: "First, that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea a bar, or, as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point, is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another court for a different purpose."

Now, it is upon the very ground of these principles, and of the courts of probate of Massachusetts having complete jurisdiction over the probate of wills of real estate, as well as of personal estate, that the doctrine has been constantly held in Massachusetts, in entire conformity to the true reasoning, maintained in the common law, that the decree of a court of probate, establishing a will, or setting it aside, as a nullity, has been held conclusive upon the very point, as to all the world, and that it is not re-examinable in any other court. The statutes of Massachusetts (Act 1783, c. 46; Act 1817, c. 190) contain no exclusive words; but merely declare, that a court of probate shall be held within each county, and a judge appointed "for taking the probate of wills, and granting administrations on the estates of persons deceased." And this has been universally understood, as giving that court, not merely a concurrent, but an exclusive jurisdiction as to the probate of all wills. Osgood v. Breed, 12 Mass. 525, 533, 534; Laughton v. Atkins, 1 Pick. 535, 547–549; Inhabitants of Dublin v. Chadbourn, 16 Mass. 433, 441. But the question now before the court, is one purely of local law, and to be governed exclusively by the actual jurisprudence of Rhode Island. If, therefore, there has been any fixed, and established rule, adopted by the courts on this subject, it will be our duty to follow it. If there has been none, our duty will be to follow out the case upon principle and the known analogies of the law. I am not aware, that there is any adjudication of the supreme court of Rhode Island on the point, applicable to the present state of its laws. When, many years ago, the question occurred incidentally before this court, in Smith v. Fenner [supra], and in Spencer v. Spencer [supra], no positive or established rule was known; and the most,

that could be said was, that there was a common opinion, prevailing among the bar in practice, but without any fixed authority to support it. I believe, that it was the opinion at that time of a very eminent person, then district judge, (the late Judge Howell,) that the question was entirely open. Since that period, nothing has been brought to our knowledge, that changes the posture of the question. We must, therefore, dispose of it upon principle, with reference to the laws of Rhode Island.

By the laws of Rhode Island, the probate courts of that state have complete jurisdiction as to the probate of wills, whether the wills respect real estate, or personal estate, or both; and no title can be made to any property, whether real or personal, under any will, unless and until there has been a due probate of such will before the proper probate court. The Revised Statutes of Rhode Island, of 1822 (Dig. 1822, p. 211), provide: "That the town councils in the several towns of the state, be, and they hereby are, constituted courts of probate, and they or the major part of them respectively shall have full power and authority to take the probate of wills, to grant administrations on the estates of persons deceased, being at the time of their decease inhabitants of or residents in the town, to which such court of probate may belong, and also on the estates of persons, who, at the time of their decease, were not inhabitants or residents within this state, &c., provided any of the rights, credits, or estate of such deceased person shall be found therein." No distinction is here taken between wills of personal estate and wills of real estate; and the word "estate," in the section, equally applies to both. The act goes on to authorize the courts of probate to "make partition of estates, and assign dower to widows, as prescribed by law"; and gives a right of appeal from the decrees of the courts of probate to the supreme court of the state. It further gives the courts authority to remove executors upon the complaint of an heir, devisee, legatee, creditor, or surety on the administration bond, who may have been injured or exposed to injury; and to appoint an administrator de bonis non with the will annexed. The act of 1822, prescribing the manner of devising lands, &c., and of disposing of personal estate by will (Dig. 1822, p. 218, § 10), requires such will to be proved, and recorded, or presented in the clerk of probate's office, by the executor within thirty days after the decease of the testator. And provisions are also made for the due filing and recording of foreign wills touching real or personal estate in the state, in the proper probate court. Id. pp. 221, 222. By the act respecting intestate estates (Id. pp. 224, 235, § 2), the real estate of the deceased is made chargeable with all his debts, which the personal estate will not satisfy; and the heir or devisee, within three years and six months after the probate of the will or administration, cannot incumber or alien the estate, but the same may be sold by the executor or administrator, for the payment of debts, by a license from the supreme court (Id. p. 235, § 27); and the executors and administrators are to account for the proceeds of the sale to the proper court of probate, by which the letters testamentary were granted. By a later enactment, the like power to license the sale of real estate is extended to courts of probate. Neither is it left to mere inference, whether the power of courts of probate to make partition or division of real estates, applies merely to cases of intestacy; for it is expressly provided, that it shall apply, as well to devised, as to intestate estates. Id. 1822, pp. 224, 225, § 3, and page 227, § 5.

These provisions sufficiently establish, that the probate of wills of real estate is equally within the jurisdiction of the courts of probate, as wills of personal estate. The very right of these courts to assign dower and make partition of estates, demonstrates, that their authority is not limited to personal estate. Now, if the probate of wills of all sorts is within the jurisdiction of these courts, why does not the common doctrine, which has been already stated, that the decree of these courts, affirming the probate of a will, or disaffirming it, (whether the courts have a concurrent, or an exclusive jurisdiction,) apply in the fullest manner to them? Infinite inconveniences would arise in practice from any other doctrine. Suppose a will should be approved by the proper court of probate, and a partition of the real estate of the testator be made accordingly by the decree thereof, would not such a partition be conclusive upon all the parties in interest? And how can it be conclusive, if the validity of the will is again reëxaminable at the common law, toties quoties, whenever any heir or devisee shall choose to contest it? Suppose a will should be pronounced invalid and a nullity by the proper court of probate, and the court should proceed to decree an assignment of dower, and a division of the real estate among the heirs, as in a case of intestacy; would not such an assignment and division be conclusive? And how can it be, if the validity of the will be again reëxaminable at the common law? Suppose a will is approved by the proper court of probate, and the executor is thereby recognized, and afterwards he procures an authority from the supreme court to sell the real estate of the deceased for the payment of debts, can his sale be overhauled, by contesting the validity of the will, or that he is truly executor, in a suit at the common law by any heir? And yet if the probate be not conclusive, how is this consequence to be avoided? Is not the probate conclusive as to the executorship; and how can it be, if there is no valid will? These are but a few of the practical difficulties, which would arise upon the subject. In short, there can be no difference, in point of principle, where the court of probate has

an absolute and positive jurisdiction, whether the will respects real estate, or personal estate. In each case, the will must be equally open to controversy in all other courts and suits, or it is closed in all. Yet no one pretends, that the probate is not conclusive, as to the personal estate of the testator, and the title of the executor thereto.

It may be added, that by the act of Rhode Island of 1822 (Dig. 1822, p. 212, § 3), upon an appeal to the supreme court in cases of wills, any question of fact in controversy, at the election of either of the parties, may be tried by a jury. Now, as all the parties interested in the estate devised by the will, may make themselves parties to the original proceedings, and also upon the appeal, and the verdict of the jury upon the matters of fact in controversy must be directly upon the very point so put in issue, it would be extraordinary, if any of the parties in the cause (and all the heirs and devisees are, or may be parties thereto) should be at liberty afterwards to controvert and to bring into contestation the very facts, found by such verdict, toties quoties, in any suit at the common law. That would be to enable them to defeat the whole purposes of the act, and to prevent the decree from having any effect whatever, or at least, any conclusive effect. So that, until the statute of limitations had operated on the will, and the titles derived therefrom, there would be no repose to any such titles. The act of 1822, in this particular, differs from the antecedent law under the Digest of 1798; and the introduction of this right of a trial by jury was undoubtedly intended to guard against the supposed inconvenience, which might arise from the conclusiveness of a decree of the supreme court upon matters of fact, without the intervention of a jury.

Upon the whole, in the absence of all controlling authorities under the local law, looking at the matter upon principle, I am of opinion, that the probate of the present will by the supreme court of the state, being a court of competent jurisdiction, is final and conclusive upon the question of the validity of the will to pass the real estate in controversy.

TOMS (UNITED STATES v.). See Case No. 16,532.

Case No. 14,092.

The TONAWANDA.

[32 Leg. Int. 229;[1] 11 Phila. 516; 7 Leg. Gaz. 201; 1 Wkly. Notes Cas. 497.]

District Court, E. D. Pennsylvania. June 17, 1875.

COLLISION — SAIL AND STEAM VESSEL — LIGHTS — LOOKOUT — MISTAKEN MOVEMENT — ACT OF CONGRESS.

1. The enactment by congress (Rev. St. § 4234) that every sail-vessel shall, on the approach of any steam-vessel during the night time, show a lighted torch upon that point or quarter to which such steam-vessel shall be approaching, does not apply in every case in which a steamer and a sailing vessel may pass near to each other.

2. Where the proximate cause of the collision of a steamer with a schooner was a mistaken movement of the steamer after the schooner's green light had been sighted, the steamer was condemned as responsible for the whole damage sustained by the schooner, though no torch-light had been shown by her, the lookout from each vessel having been insufficient.

[Cited in brief in The Margaret, Case No. 9,069.]

In admiralty. This was a libel on behalf of the owners of the schooner H. P. Blaisdell against the steamship Tonawanda, belonging to the Philadelphia and Southern Mail Steamship Company, in a cause of collision. There was also a petition of intervention on behalf of the Insurance Company of North America, insurers of certain locomotive engines laden on board the schooner at the time of the collision. The steamer filed an answer and also a cross libel against the schooner. The collision took place about twenty miles off Cape Hatteras, on the 10th of May, 1875, at half-past two o'clock a. m. The steamer heading north and the schooner south by east, close hauled. The steamer struck the schooner head on just abaft the main rigging, sinking her almost immediately. The night was somewhat hazy, the wind a moderate breeze from the southwest.

The nautical assessor reported as follows, June 14, 1875:

In the matter of the "Schooner H. P. Blaisdell v. Steamer Tonawanda," I am satisfied that a poor lookout was kept on board of both vessels; this seems to be verified by the mate of the steamer "Wyoming," (belonging to the same company,) who saw the Tonawanda's light fifteen minutes before they came up with each other. Now, as they were going nine knots each, or coming together at the rate of eighteen knots, this would give the distance at which the Tonawanda's light could be seen as not less than four and one-half miles. The schooner should have seen the steamer's light before her lights were visible to the Tonawanda. The captain of the schooner, when first seeing the bright light of the steamer, thought it was from one-third to one-half a mile distant. Now, under this impression, there was no necessity for doing any thing at all, as the schooner would have passed far clear of the steamer. The captain got the "night-glass" to make sure that he was correct, and during this elapsed time he found, on discerning the red and green lights, that the steamer was in much closer proximity than he had supposed; he then got the flash-light, but too late. Now, although he should have shown the flash, yet I do not think that the showing it would have prevented the collision. Had there been a good lookout on board the Tonawanda she would have seen

[1] [Reprinted from 32 Leg. Int. 229, by permission.]

the schooner's green light in time to have avoided any confusion on board the steamer, as there apparently was in giving the order to hard-a-port, which would have been quite correct had it been a white, natural light, but the report of the "lookout" was "green" light ahead. This was repeated. The only evolution with this report of green light ahead was for the steamer to "hard-a-starboard," and I assert that no possible contingency could place two vessels in such a position—"green light ahead" that would admit of any other than putting the wheel to starboard on the steamer. How the mate who was in charge of the deck at the time could have made so great a blunder (he is a man of undoubted experience and ability) is a mystery to me. The captain made an attempt to correct the error of the mate, by endeavoring to change the wheel to starboard, but too late. The blunder of the mate can only be accounted for by the impression made on his mind from the captain saying it was about time for them to see the New York steamers, and under this impression the order to hard-a-port was given. Another blunder was, the bell "to stop" was not rung until the instant of collision, for the engineer says (in the log) "bell rung to stop at same time I felt the shock."

In steamers navigating the American coast too much carelessness is practiced in not making frequent signals with the steam whistle in foggy or hazy weather or unfavorable nights. The whistle is so readily available that no possible excuse can be presented for the neglect thereof. The schooner did right in putting her wheel to starboard, as her captain knew that the approaching steamer, seeing his green light, must starboard her wheel under all circumstances, and pass "green to green." The captain of the schooner states that his starboarding did not cause her to fall off much, yet I feel confident she did fall off far enough to bring her at right angles with the steamer, but, under the dreadful excitement of the moment, the captain did not notice the change.

I therefore conclude that the Tonawanda was in fault: 1st, for an indifferent "lookout"; 2d, in going at full speed in the then condition of the atmosphere and also in not stopping before the order to "hard-a-port" was given; 3d, and principally, if not wholly, in porting the wheel instead of starboarding.

June 15, 1875, the assessor said:

An important reason suggests itself to my mind (which I overlooked yesterday) as more clearly showing the blunder made by the mate of the Tonawanda in porting the wheel. For instance, suppose he did think that the light was that of a steamer, he could not tell from the mere seeing the "bright light" how that steamer was steering, and consequently should not have moved the wheel at all until the "green and red" became visible, as those lights are intended expressly to show how the vessel is going. I think this very important, as the respondents endeavored to show that porting the wheel was the right, if not the only movement the Tonawanda could make.

On the subject of flash-lights the assessor said:

There are many cases in which showing the flash is entirely unnecessary; for instance, seeing a vessel in close proximity, either to the windward or to leeward, going either in the same or the opposite direction, crossing the bow or stern, the captains being fully aware of their relative positions, with the colored lights in sight, indicating the course steered, I say that under such a state of facts the necessity for showing the flash does not exist. Again, there are many cases in which it is altogether impossible to show the flash or any other naked light; for instance in blowing, or wet, or very bad weather the torch cannot be lighted on deck, having to depend on the ordinary matches for that purpose. The writer has been obliged frequently to resort to the cabin lamp for lighting the flash after ineffectual attempts to light it on deck, thereby losing many precious minutes, which might have led to most disastrous consequences.

Edward F. Pugh and James B. Roney, for the schooner.

Richard C. McMurtrie, for the insurance company.

Henry R. Edmunds and Morton P. Henry, for the steamship.

CADWALADER, District Judge. The immediate cause of the disaster was the mistake in porting, instead of starboarding, the wheel of the steamer. That the light which had been discerned from her was the schooner's green light, appears not only from the testimony of the man upon the lookout in the steamer, but likewise from the subsequent conduct of the master of the steamer. Almost instantly, but too late to remedy the evil, he endeavored to change the wheel to starboard, in order to correct the mistake. This effort he would not have made, unless he had known that it was the green light which he had seen. So I should think, and so the assessor informs me.

The proximate cause having thus been ascertained, secondary questions arise from the twofold consideration that the steamer and the schooner were each in fault in not keeping a proper lookout. How does this apply to the vessels respectively? If the schooner had been discerned in time from the steamer, the mental "confusion," to which the assessor attributes the blunder of porting instead of starboarding, would not have occurred. This only confirms the conclusion which has otherwise been reached, that the steamer was in fault.

The remaining question is, whether the schooner was also in fault in such wise that

she must answer for half the damages. The argument against the schooner is, that if the steamer had been discerned in time, the flash of the schooner's torch could have been exhibited soon enough to have warned the steamer. There is no reason to doubt, that if she had been thus warned in season, the collision would not have occurred. This gives an imposing aspect to the argument. But the true question is, whether, assuming that the torch-light ought to have been shown, the omission to show it was contributory, as a proximate cause to the collision.

It was contended in argument, that the enactment of congress requiring a sailing vessel in certain cases, to exhibit such a flash-light, was equivalent to the requirement, as to a steamer, that she shall have a white light. But the comparison fails in several respects. The torch which burns out in two or three minutes, and is relighted by hand, cannot exhibit a fixed and continuous uniform indication like a steamer's white light. Moreover, the white light is ordinarily discernable before the steamer's red or green light can be seen. The act of congress, on the contrary, does not, in ordinary cases, require the torch light to be shown till after the red or green light shall have been seen. Nor does the act require the exhibition of such a light in every case of a sailing vessel and a steamer passing near to each other. The enactment is, that "every sail-vessel shall, on the approach of any steam-vessel, during the night time, show a lighted torch upon that point or quarter, to which such steam-vessel shall be approaching." Certainly, if the lights are red to red, or green to green, this enactment does not apply, because, although the vessels may pass near to each other, the steamer is not, in either case, approaching, in a nautical sense, on any point or quarter. She is not approaching, within the words or meaning of the act, but is on a course to pass clear. It is not necessary to define all those other cases in which the enactment may or may not apply, or to consider how far it may, in such respects, be interpretable with reference to prior usages of navigation as to torch lights. Nor is it necessary to inquire whether it would have been the duty of the schooner to flash her torch at any given distance, if there had been a proper lookout from her, and the steamer had been discerned at the proper time. The reason that these questions do not require consideration is, that in the case which actually occurred, the insufficiency of the lookout, if it was, in any respect, a cause of danger, was not a proximate cause of the disaster. The sole cause to which the collision is properly attributable, was the mistaken movement of the steamer.

The question thus decided is between the two vessels. Whether any different or modified question might arise in a proceeding against the schooner at the suit of the owners of her cargo, cannot be determined upon the present state of the record. The steamer alone is condemned as responsible for the whole damage.

TONAWANDA. The. See Case No. 14,109.

Case No. 14,093.

TONG DUCK CHUNG v. KELLY.

[11 Chi. Leg. News, 273; 25 Int. Rev. Rec. 159; 7 Reporter, 741.] [1]

Circuit Court, D. Oregon. April, 1879.

CUSTOMS DUTIES—GENERAL DESIGNATION—SPECIFIC NAME—STARCH—SAGO.

1. The designation of an article by a specific name in a statute, as exempt from duty, excludes it from the operation of general words imposing duties in the same act which would otherwise include it, and make it subject to duty; therefore, the clause in section 2504, Rev. St., which imposes a duty on starch made from potatoes, corn, rice, or "any other material," does not affect sago, although it is starch, because the same is specifically exempted from duty by a clause in section 2505, Rev. St.

2. Production and manufacture of sago, derived from different plants, distinguished by the difference in appearance of granules under the microscope.

[This was an action brought by Tong Duck Chung to recover back the excess of duties demanded by John Kelly, collector of customs.]

Addison C. Gibbs and Mr. Bebee, for plaintiff.

Rufus Mallory, for defendant.

DEADY, District Judge. This action is brought to recover the sum of $256.45 paid by the plaintiff to the defendant as duties. The case was heard by the court without the intervention of a jury. From the pleadings and proofs it appears that in May, 1878, the plaintiffs imported from Hongkong into the district of Wallamet, and entered at this port, 92 boxes of merchandise, weighing 7,093 pounds, invoiced as "Sago flour," and valued at $216.89; that the collector refused to enter the article as "Sago flour," and required it to be entered under section 2504, Rev. St., as "starch," and imposed thereon, and exacted the payment of, a specific duty therefor, as such, of 3 cents per pound and 20 per centum ad valorem, which the plaintiff paid, under protest, on June 7, 1878. The complaint also contains a claim for $52.36 for an alleged excess of duties collected at the same time by the defendant upon 25 boxes of arrowroot flour, which was abandoned on the trial for want of some preliminary action in due season.

The only defense to the action contained in the answer is that the article imported "is in fact starch, not made from corn or potatoes, but made from rice, or some other material to the defendant unknown," the import

[1] [7 Reporter, 741, contains only a partial report.]

of which is that the article is starch, and therefore dutiable. Section 2505, Rev. St. p. 488, provides, among other things, that "sago, sago crude and sago flour," shall be exempt from duty. Section 2504 of the same (page 481) provides that "starch made of potatoes or corn" shall pay a duty of "one cent per pound and twenty per centum ad valorem; but, if "made of rice or any other material, three cents per pound and twenty per centum ad valorem." Sago being thus placed by congress on the free list, it is an immaterial question in this action whether it is starch or not. When an article is designated in an act of congress by a specific name, general terms in the same or a subsequent act, although broad enough to comprehend it, are not applicable to it. A designation eo nomine must prevail over general words. Homer v. The Collector, 1 Wall. [68 U. S.] 486; Reiche v. Smyth, 13 Wall. [80 U. S.] 162; Movius v. Arthur, 95 U. S. 144; Arthur v. Lahey, 96 U. S. 112; Arthur v. Rhums, Id. 143. But upon the argument the defense was shifted from the ground that the argument was starch simply, and it was insisted that it was starch and not sago; and, as all kinds of starch except sago are claimed to be dutiable under section 2504, supra, the argument is, if this article is not sago, then the duties were properly imposed, and the plaintiff cannot recover. The proof shows that the goods were imported from Hongkong in the American vessel Herbert Black and the British one City of Glasgow; that the article is used here principally among the Chinese for food, and to some extent for starch—mostly by the American laundries for the purpose of giving gloss and elasticity to the clothes, and in the proportion of one part to three of corn starch. Independently of the duty, it sells in this market at from 15 to 16 cents a pound, while Oswego corn starch sells at from 7 to 10. Like many, if not most, plants used for food, sago is largely starch. The manufacture or making of starch consists simply in separating the starch granules from the other matter of the plant; and this is usually done by the application of cold water to the material containing them after the same is ground or macerated. The minute starch granules, of the fineness of ordinary flour, are taken up by the water, and suspended therein until the water is saturated with the starch, when, the former being drawn off and allowed to settle, the fecula or sediment is found at the bottom in the shape of a soft white powder, crispy to the touch, like flowers of sulphur, and this is starch. Ure's Dict. New Am. Cy. verbum "Starch." The sago flour or meal is practically starch. It is obtained from the pith contained in the stems of a genus of palms called "sagus," that grow on the coasts and islands of the Indian Ocean. They seldom obtain a height of more than thirty feet, but the bole is large in proportion, and at a certain stage of its growth is filled with a spongy, medulary matter like the elder. The tree is cut into sections and the pith beaten in water until the woody fibre is separated from the meal. The water is then drawn off and the fecula or meal subsides and forms a powder of a dirty white color, which is commonly bleached with chloride of lime, and constitutes the crude sago or sago meal or flour. It is said that 500 or 600 pounds may be obtained from the pith of a single tree. While soft and undried it is moulded into cakes, and used by the natives as bread, to whom it is emphatically "the staff of life." Sago is also prepared for use by being granulated. This is done by forming the flour into a paste and passing it through a sieve or perforated disk, and allowing it to fall upon a heated surface. Formerly these grains were about the size of a coriander seed, and of a brownish-white color; but some time since the Chinese settled in Singapore—the principal depot for sago—and introduced there their methods of refining and granulating it. The sago made by them is of the size of a pin head; is hard and of pearly luster, and hence called pearl sago—sago perlatum. These granulated forms of the article, until lately, constituted the sago of commerce—at least in the United States. But the residence of the Chinese upon the Pacific coast has led to the introduction here of sago flour or meal in considerable quantities from Hongkong, where it is imported from Singapore as an article of food. Zell's Cy.; Am. Cy.; U. S. Dis.; Wood's Thera. & Phar. verbum "Sago." The microscope appears to be the only reliable test by which to determine from what plant a given granule of starch is taken. In this case four experts, who had made this article the subject of miscroscopic examination, were examined as witnesses. Three of them testified that the flour is sago, and one that it is not; but the latter, while inclining to the opinion that it is tacca, was not able to say certainly what it is. In addition to this, I had the benefit of a personal examination under the microscope, of the article in question, and pearl and common sago, as well as the starches of other plants, in the presence of and under the manipulation of the latter expert and two of the former.

In my judgment, the decided weight of evidence is in favor of the proposition that this article is sago. There is no evidence in the case tending to show that it is anything else than sago, except the conjectural opinion of the one expert, that it may be tacca. Now, so far as it appears, tacca comes from the Society and the Sandwich Islands. It is not produced in large quantities nor much used in commerce, and when it is, is often called arrowroot. The evidence tends to show that this article was brought from Singapore to Hongkong—a conclusion intrinsically probable when we consider the distance and means of com-

munication between the two places, the large amount of sago collected at Singapore and the fact that its manufacture and the trade therein at that place are largely in the hands of the Chinese. Neither is the arrow-root or tacca of the Society or Sandwich Islands likely to find its way to China and from there here. If brought to this country at all, it would probably come direct. But it is certain that this article was brought from Hongkong here. In my judgment it was imported from Singapore to that place, and it is the meal from the farinaceous pith of the sago palm, which being bleached may be very properly called sago flour. But it matters not what form of sago it is, as the paragraph of the statute exempting sago from duty includes the article whether crude or manufactured.

There must be a finding for the plaintiff that the article in question is sago and exempt from duty and that the plaintiff is entitled to recover back the sum paid upon it as duty.

Case No. 14,094.

In re TONKIN et al.

[4 N. B. R. 52 (Quarto, 13);[1] 3 Am. Law T. 221; 1 Am. Law T. Rep. Bankr. 232.]

District Court, E. D. Michigan. Aug., 1870.

BANKRUPTCY—ILLEGAL PREFERENCE—ACTION BY ASSIGNEE—PAYMENT OF DECREE—SURRENDER—PROVING CLAIM.

1. Where debtors gave a chattel mortgage as security, within three months of filing petition in bankruptcy—the mortgage was foreclosed, the property bid in by the mortgagees, and the proceeds applied to the debts. The assignee filed bill to recover the value of the property so mortgaged, alleging it to have been given with a view to preference, and a decree was rendered in favor of assignee, which the creditors paid in full. Creditors contend that the payment by them of the decree is a surrender, etc., and that they are entitled to prove their debts against bankrupt's estate. This is contested on the part of assignee and certain other creditors. *Held*, that the claimants accepted a preference on account of the debt or claim, having reasonable cause to believe the same to be contrary to the provisions of the bankrupt act [of 1867 (14 Stat. 517)].

[Cited in Bean v. Amsink, Case No. 1,167; Richter's Estate, Id. 11,803.]

2. The payment by said claimants of the decree obtained against them is not a surrender within the meaning of the bankrupt act.

[Cited in Re Stephens, Case No. 13,365; Re Kipp, Id. 7,836.]

3. Therefore, they are not allowed to prove their said debt or claim against the estate of said bankrupts.

[In the matter of Tonkin and Trewartha, bankrupts.]

On an issue made before the register, Hovey K. Clarke, Esq., in the matter of the proof of claim of Franklin Moore, George Foote, and George F. Bagley, constituting the firm of Moore, Foot & Co., against the said bankrupts' estate, and adjourned into court for trial. Moore & Foot also presented a claim against the said bankrupts' estate for proof. The assignee objected to the same, on the ground that the said creditors had accepted a preference, having reasonable cause to believe that the same was given by the said debtors contrary to the provisions of the bankrupt act, and have not surrendered to the assignee all property, money, etc., received by them under such preference, as required by section 23 of the said act.

The facts are as follows: On the 9th of May, 1868, the bankrupts being indebted to the above-named claimants, in the sum of about eleven thousand dollars, gave their creditors a chattel mortgage on substantially all their property, as security for the debt. This mortgage was afterwards foreclosed, and the property bid in by the mortgagees, and the proceeds applied on the debt. Subsequently, on the 3d of August, 1868, the debtors filed their petition in this court, to be adjudicated bankrupts, and were adjudicated bankrupts accordingly. The assignee of said bankrupts filed his bill in the circuit court for the Eastern district of Michigan, in equity, to recover the value of the property so received by the said creditors, under their said chattel mortgage, to which bill the said creditors appeared and made defense. Such proceedings were had in the said suit, that on the 5th of March, 1870, a decree was rendered therein, in favor of the assignee, and against the said creditors, for the full value of all the property so received by the said creditors, under their said chattel mortgage, which decree has been paid in full by the said creditors to the assignee. Copies of the decree and of the able opinion of Judge Withey, of the Western district of Michigan, before whom the case was tried, are submitted as evidence upon this issue by stipulation, as containing a true statement of the facts in the case. [Case No. 4,083.] From these proofs it appears: First. That the debtors were insolvent at the time the mortgage was given. Second. That the mortgage was given within four months before the filing of the petition for adjudication of bankruptcy by the bankrupts, and that it was so given with a view to give a preference to the said creditors. Third. That the said creditors had reasonable cause to believe that the bankrupts were so insolvent at the time they received said mortgage, and that the said mortgage was made in fraud of the provisions of the bankrupt act. Fourth. That the said decree in favor of the assignee, was based exclusively upon the facts above stated.

It is now contended on behalf of the said creditors that the payment by them of the said decree, is a surrender to the assignee of all property, money, benefit, or advantage, received by them under the said preference,

[1] [Reprinted from 4 N. B. R. 52 (Quarto, 13), by permission.]

within the meaning of section 23 of the bankrupt act; and that they are, therefore, entitled under said section to prove their debts against the said bankrupts.

On behalf of the assignee and of certain creditors, who have proved their claims against the bankrupts' estate, this position, and the said claim of the said Moore and others, are contested.

Lathrop & Meddaugh, for claimants.

Mr. Pond, for assignee.

LONGYEAR, District Judge. The decision upon the issue presented, depends entirely upon the construction to be given to the last clause of section 23 of the bankrupt act, which provides that, "any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of the act, shall not prove the debt or claim on account of which the preference was made or given; nor shall he receive any dividend therefrom, until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference." Have these creditors surrendered to the assignee all property, money, etc., within the meaning of this provision? In other words, is payment of a judgment or decree recovered against a creditor on account of a fraudulent preference, a "surrender" within the meaning of the act? In order to answer this question intelligently, it is necessary to consider the provisions of the act under which the decree paid by these creditors was obtained, in connection with the above provisions of section 23. This provision under which the decree was obtained, is found in the first clause of section 35, and is as follows: "That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition, by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally—the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act—the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited." To "surrender," under section 23, clearly implies action on the part of the person receiving the preference. To "recover," under section 35, as clearly implies action against the person receiving the preference. Under section 23, it is left to the option of the person receiving the preference whether he will give up the property, etc., he has received by the way of preference, or whether he will hold on to it. The only consequence being that he cannot prove his debt, or receive any dividend upon it, in case he chooses to pursue the latter course. In case of a recovery under section 35, he has no such option. If it were not for section 35, and there was no other provision than that contained in section 23, then in case the creditor receiving a preference did not surrender, the assignee and the other creditors would have no alternative. They would be utterly remediless, and the creditor, if he saw fit, could hold on to the property, etc., so received by him, if he so elected, regardless of any disparity there might be between his debt and the property, etc., so received by him, and thus the primary object of the bankrupt act, viz., to compel an equal distribution of the debtor's property, would be liable to be entirely defeated. Section 35 provides the alternative. From this analysis of sections 23 and 35, it therefore clearly appears that the recovery provided for in section 35 is the alternative of the surrender provided for in section 23. But when does this alternative arise, and in what case may it be resorted to? Clearly in those cases, and those only, in which there is a failure, refusal, or neglect to surrender. A surrender may probably be made so as to fully answer the requirements of section 23, at any time before judgment, because the word "recover," in section 35, is evidently used in its strict legal sense, and in that sense the obtaining of judgment by the assignee in his favor, is the recovery meant. As no question arises in this case, however, as to the right of a person receiving a preference to surrender after suit commenced against him by the assignee and before judgment, I refrain from expressing any positive opinion upon it. But how is it after the recovery is complete by the rendition of judgment, or decree, as in this case? What has the party receiving the preference then to surrender? If the recovery is of the property in kind, he certainly has not that to surrender, because it has already been transferred to the assignee, by the judgment or decree of the court. If the recovery is for the value of the property, in money, then the collection of the judgment or decree by the assignee is but receiving the fruits of the recovery, and it makes no difference in this respect whether the collection is enforced by levy and sale on execution, or by receiving the money upon it, without compulsory process. The recovery is complete when judgment or decree is entered, and anything done after that in satisfaction of the judgment or decree, is done by force of the recovery, and can in no sense be decreed a surrender, within the meaning of section 23. Judge Miller, of Wisconsin, in Re Princeton [Case No. 11,433], holds sub-

stantially the same doctrine, and says: "Under sections 23 and 35, when a creditor accepts a preference with reasonable cause to believe that his debtor is committing a fraud upon the act, he is barred from proving his debt, or receiving dividends, unless he make return of the matter so received, and, on failure to do so, he may lose both, and all benefits from the preference and dividends of assets."

But it was contended in the able arguments of counsel for claimants, that because there is an express prohibition against a creditor receiving a preference after a recovery, in cases arising in involuntary bankruptcy (see section 39), and none in cases arising under section 35, that, therefore, no prohibition was intended in the latter class of cases. From the views above expressed in relation to sections 23 and 35, the following conclusions are inevitable: First. Section 23 prohibits the proof of claims in the cases therein specified, without a surrender. Second. Such prohibition continues until such surrender is made. Third. No surrender can be made after a recovery under section 35. Fourth. Therefore, there having been a recovery, the prohibition of section 23 remains, and has become perpetual without a repetition of it in section 35.

The express prohibition contained in section 39, will now be considered. Sections 35 and 39 are very nearly related to each other in their provisions, and must be construed together, in pari materia. Section 35, in express language, applies equally to voluntary and involuntary cases. Therefore, all the qualifications and conditions prescribed by section 35, not inconsistent with the provisions of section 39, will apply to proceedings under the latter section, and all the qualifications, conditions, and prohibitions of section 39, so far as they relate to the same class of matters provided for by section 35, and are not inconsistent with its provisions, will apply to proceedings under section 35. See In re Montgomery [Case No. 9,728], and In re Davidson [Id. 3,599], where similar doctrine is held by Judge Blatchford, of the Southern district of New York. I have, however, been unable to find any adjudicated cases presenting the precise question now under consideration. But it is claimed that sections 35 and 39 are inconsistent in this. That by the first clause of section 35 above quoted in full, no preference can be attacked unless it was given within four months before filing the petition for adjudication of bankruptcy, whereas by section 39 such preference may be attacked if made within six months before the filing the petition, and that, therefore, that clause of section 35 (being the clause particularly applicable to this case) cannot be construed together with section 39. On a close inspection of the clause of section 39 referred to, it will be seen that the six months' limitation therein provided, applies solely to the time within which the petition for adjudication of bankruptcy must be filed, and not to the time within which a preference may be attacked. The objection, therefore, has no foundation. The class of cases provided for in the said first clause of section 35, is also provided for in section 39, and therefore, under the rule before stated, the express prohibition contained in the last clause of section 39, applies equally to section 35 as to section 39. This prohibition is as follows: "And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred, contrary to this act: provided, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on the act were intended, and that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy." I concede that this prohibition was unnecessary so far as concerns the class of cases to which the case at bar belongs, and it probably would not have been inserted if sections 35 and 39 had covered no other class of cases. The class of cases to which this belongs is a very limited one, viz., that of preferences only. The prohibition of section 23 does not cover any other class of cases than this, and does not extend to any preferences received before the approval of the act. Sections 35 and 39 provide for recovery in other cases than those of preference merely, such as payments, sales, etc., with a view to prevent the debtor's property from coming to his assignee in bankruptcy, etc.; and money, goods, etc., obtained by a creditor as an inducement to forbear opposition to the bankrupt's discharge; and assignments, gifts, sales, etc., with intent to delay, defraud, or hinder creditors. The express prohibition contained in the last clause of section 39, above quoted, was inserted there in order to prescribe one general rule, applicable alike to all cases of recovery of money or other property paid, conveyed, etc., to creditors, contrary to the bankrupt act. The claimants in this case are therefore prohibited from proving their claim under both sections 23 and 39.

I hold, therefore: First. That the claimants, Franklin Moore, George Foote, and George F. Bagley, after the approval of the bankrupt act, accepted a preference on account of the debt or claim presented by them, from the bankrupts William Tonkin and William Trewartha, having reasonable cause to believe that the same was made and given by the said bankrupts contrary to the provisions of the said bankrupt act. Second. That the payment by the said Moore and others of the decree obtained against them by the assignee, is not a surrender to the assignee within the true intent and meaning of the bankrupt act. Third. That, therefore, they are not allowed to prove their said debt or claim against the estate of the said bankrupts.

TONKIN (BROWN v.). See Case No. 2,031.

Case No. 14,095.

In re TONNE.

[13 N. B. R. 170;[1] 1 N. J. Wkly. Dig. 437.]

District Court, N. D. Ohio. 1875.

BANKRUPTCY—EXEMPTION—JOINT ESTATE.

1. The bankrupt is entitled to an exemption although his wife owns a house.

2. A partner cannot have an exemption set off to him out of the joint estate.

[Cited in Re Boothroyd, Case No. 1,652; Re Melvin, Id. 9,406; Re Corbett, Id. 3,220.]

[In the matter of D. H. Tonne, a bankrupt.]

WELKER, District Judge. Held: First. That where the wife of the bankrupt is the owner of a house, not occupied as a homestead by the family, nor allowed to be so occupied by the wife, such bankrupt is entitled to exemption of property to the value of five hundred dollars, notwithstanding such ownership by the wife.

Second. That a partner in a firm in involuntary bankruptcy, is not, under the Ohio exemption laws, nor the bankrupt law, entitled to have set off to him out of the joint property of the firm, property to be value of five hundred dollars.

Third. That such partner is only entitled to such exemption out of his individual property, if such he may have.

TONS OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the quantity or number of tons; e. g. "Tons of Coal. See Two Hundred and Thirteen Tons of Coal."]

TOOF (MARTIN v.). See Case No. 9,167.

Case No. 14,096.

In re TOOKER.

[18 Ben. 390; 14 N. B. R. 35; 23 Pittsb. Leg. J. 185, 196.][2]

District Court, E. D. New York. Feb., 1876.

BANKRUPTCY — ENFORCEMENT OF RESOLUTION OF COMPOSITION—JUDGMENT.

The provisions of the bankrupt act [of 1874 (18 Stat. 178)], as to the enforcement by the court of the provisions of any composition, cannot be invoked to compel a creditor to accept a composition heretofore proposed and accepted, and to enjoin the creditor from taking steps to collect his claim, where the creditor has been permitted to take a judgment by default for the full amount of his claim, the bankruptcy proceedings not being set up as a defence, in an action in a court of the state in which an order of arrest has been granted upon allegation of fraud. The bankruptcy court cannot be asked to interfere to give effect to a resolution of composition, where it would not interfere to give effect to a discharge.

[Cited in Re Hinsdale, Case No. 6,526.]

[In the matter of Samuel B. Tooker, a bankrupt.]

Childs & Hull, for bankrupt.
Henry H. Rice, for creditor.

BENEDICT, District Judge. This is an application to compel a creditor of the bankrupt above named to accept a composition, heretofore adopted and duly recorded as required by law, and for an injunction to restrain all proceedings of such creditor to collect his debt. It appears that this creditor has been permitted to take a judgment against the bankrupt, by default, for the full amount of his claim, in an action brought in the court of the state in which an order of arrest had been granted upon allegations of fraud. Consequently the bankrupt is now liable to be arrested on final process in said action. Wherefore he now prays for the interference of this court, and bases his application upon the provision of the bankruptcy act of June, 1874, which declares that "the provisions of any composition made in pursuance of this section may be enforced by the court on motion made in a summary manner by any person interested."

I am of the opinion that the provision relied on does not entitle the bankrupt to the interference of this court which is here sought. It cannot be supposed that it was the intention of the legislature that a resolution of composition should be more effective than an absolute discharge, or that the bankruptcy court should be asked to interfere for the purpose of giving effect to a resolution of composition, when it would not interfere to give effect to a discharge. If this bankrupt had been discharged, it would have been incumbent upon him to have pleaded his discharge, and so receive the benefit of it, at the hand of any court before which he might have been summoned. A composition can be in the same manner pleaded; and, when so pleaded, its legal effect is the same in the tribunals of the state as in the national tribunals. If, therefore, this bankrupt desired to have the benefit of his composition proceedings in the action brought against him, he should have there set up such proceedings, and if it was in law sufficient to relieve him as to the debt for which he is sued, his composition would then have been given its due effect. Instead of pursuing this course he has allowed judgment to be taken against him without any objection, and now asks to be protected therefrom by the summary order of this court. The provision in the bankrupt law relied on can be given effect, without holding that it entitles

[1] [Reprinted from 13 N. B. R. 170, by permission.]

[2] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 23 Pittsb. Leg. J. 185, 196, contains only a partial report.]

the bankrupt to the interference of this court under circumstances like those disclosed in this case. And I am of the opinion that it does not give the bankrupt the right to ask at the hands of this court the relief here sought. A similar conclusion has been reached by Judge Blatchford, as I am informed.

The present application must therefore be dismissed for the reason stated, without passing upon the question as to the effect of a resolution of composition upon a cause of action tainted with fraud.

TOOKER (FENWICK v.). See Case No. 4,735.

Case No. 14,097.

TOOKER et al. v. THOMPSON et al.

[3 McLean, 92.] [1]

Circuit Court, D. Michigan. Oct. Term, 1842.

DEPOSITION—PLACE OF TAKING—DISTANCE—WHEN WITNESS TO BE SWORN—CERTIFICATE—RECORD.

1. If in the caption of a deposition the place where it was taken is stated, it is sufficient.

2. If the person who takes the deposition certifies that the place is more than a hundred miles from the place of holding court, and that he does not know of an agent of the plaintiff, &c., nearer, it is sufficient.

3. The commissioner who took the depositions, having been appointed by the court, who made the appointment a matter of record, a copy of the record, to make it evidence, requires the certificate of the presiding judge.

[Cited in Bennett v. Bennett, Case No. 1,318.]

[Cited in Hutchins v. Gerrish, 52 N. H. 206.]

4. A witness may be sworn before or after his deposition is reduced to writing.

[This was an action by Tooker & Tubbats against Thompson and others.]

Joy & Porter, for plaintiffs.

Mr. Fraser, for defendants.

The defendants objected to certain depositions: (1) Because it does not appear that the depositions were taken one hundred miles from the place of trial. (2) It does not appear where the depositions were taken. (3) It does not appear that the person who took the depositions was appointed by the court to take depositions. (4) The witness should be sworn to testify the whole truth, and before the facts were stated.

BY THE COURT. By a rule of this court, all formal objections to depositions are required to be stated in writing, before the cause is taken up for trial, or such objections are considered as waived. The above objections come within this rule, as formal.—But, if this were not so, the objections, with one exception, are unsustainable. In his certificate, the person who took the depositions states that the witnesses live more than one hundred miles from the place of holding the court. This is sufficient. The place is named in the caption, and that complies with the statute. Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 604. And it is stated that the defendants have no agent known to the commissioner residing within one hundred miles of the place of taking the depositions.

The objection as to the authority of the commissioner, if made in time, must have been sustained. The certificate of the clerk of the circuit court where he was appointed is in due form. The only objection to it is, that the presiding judge has not certified that the attestation is in due form. But this is essential to make the certificate evidence. The words of the act of congress are, "the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form." This, in terms, applies to the state courts; but the rule is equally applicable to the courts of the United States. The clerk certifies that the person taking these depositions was appointed commissioner, &c. This appointment, being a matter of record, is properly certified by the clerk. But the certificate of the presiding judge is made essential by the act where any matter or judicial proceeding is certified from the record. The words are, "the records and judicial proceeding."

The fourth objection, if made in time, would not have been sustainable. Whether an individual be sworn before he or the justice writes the deposition, cannot be material. If written before the oath, the mind of the witness is drawn specially to the language used, and he swears to it.

But on the ground that the objections under the rule of this court should have been indorsed on the deposition before the cause is called for trial, the objections are overruled.

TOOL CO. (MALTBY v.). See Case No. 9,001.

Case No. 14,097a.

TOOLE v. WASHINGTON.

[Nowhere reported: opinion not now accessible.]

TOOLEY v. PASSENGER RY. ASSUR. CO. See Case No. 14,098.

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

Case No. 14,098.

TOOLEY v. RAILWAY PASS. ASSUR. CO.

[3 Biss. 399; 2 Ins. Law J. 275; 4 Chi. Leg. News, 311; 4 Bigelow Ins. Cas. 34.] [1]

Circuit Court, S. D. Illinois. Jan. 29, 1873.

INSURANCE—ACCIDENT—GETTING ON OR OFF TRAIN—RULES OF RAILROAD—DESTINATION—NEGLIGENCE.

1. Under a clause in an accident insurance policy limiting the liability to an accident received by the defendant "while actually traveling in a public conveyance provided by common carriers, and in compliance with all rules and regulations of such carriers," a recovery can be had for an accident happening while getting on or off the train.

2. Nor is the insured bound to examine the time card or ascertain all the minutiæ connected with the management of trains, but only such rules as a general traveler might be presumed, and ought to know.

3. If he attempts to get on a train after it has reached his destination, he does so at his own risk.

4. General rules of negligence stated.

This was an action by Daniel H. Tooley, administrator of the estate of John Tooley, deceased, against the Railway Passenger Assurance Company of Hartford, Connecticut, on two accident policies of insurance for $3,000 each, issued by the defendant to the deceased.

Robinson, Patton & Lee and Mr. Peacock, for plaintiff.

B. S. Edwards and W. H. Brown, for defendant.

Before DRUMMOND, Circuit Judge, and TREAT, District Judge.

DRUMMOND, Circuit Judge (charging jury). John Tooley, on the 24th day of January, 1871, took from the agent of the defendant, at Quincy, Illinois, two policies of insurance, for $3,000 each. That amount was to be paid on each policy in case of the death of Tooley within two days. It was provided that the liability should not exist unless while he was actually traveling in a public conveyance of common carriers, and in compliance with their rules and regulations, and besides he was not to neglect the use of due diligence for self-protection.

Tooley, on the afternoon of the 25th of January, took the Champaign accommodation train at Chicago and proceeded to Kankakee, where the train arrived shortly after seven o'clock.

It seems the practice was for the train to stop at the station and then pass on to the coal-bin, provided they took the entire train beyond Kankakee.

Accordingly, on this evening the train stopped at the station, and several persons left the cars, Tooley among others. The train remained at the station several minutes and took in water. The bell was then rung, the conductor signaled with his light, and the train went on to take in coal. There was a platform extending from the station house alongside of the railroad track towards the water-tank and coal-bin. When the train moved on, Tooley, who was standing by a door of the station house, started forward on the platform to overtake the train. When he reached the train, he extended his hands to grasp the car rails, and fell between the two passenger cars, and was run over and instantly killed.

The first question is, what was the measure of responsibility of the defendant under these policies of insurance? The language of the policies is: "Provided always that this insurance shall only extend to bodily injuries, fatal or nonfatal, as aforesaid, when accidentally received by the insured while actually traveling in a public conveyance provided by common carriers for the transporting of passengers in the United States or the dominion of Canada, and in compliance with all rules and regulations of such carriers; and not neglecting to use due diligence for self-protection."

These are the only conditions material to be considered in the examination of this case. Tooley must have actually been a traveler in or upon the train; but it cannot be said that the responsibility ceased whenever he stepped out of the car to alight at a station, and that it never became operative again until his foot entered the car to resume his journey. That would be giving too narrow a meaning to the clause of the policy. We think that the fair construction of the liability assumed by the defendant in this respect was, that it included injuries received by Tooley while necessarily getting on or off the train, as a traveler upon it.

Secondly—It is a question of fact to be determined by the jury—was Tooley, at the time the injury was received by him, a traveler on the train? And this will depend upon the fact whether his journey terminated at Kankakee. It is claimed on the part of the defense that that was the termination of his journey, and, if so, then he was not a traveler on this train at the time of the accident.

I will call your attention to some of the facts having a bearing on this question. The conductor states in his evidence that when he took up the tickets of the passengers, Tooley's ticket was only for Kankakee. That is a fact proper to be considered by the jury in order to determine whether or not his journey extended beyond Kankakee—not conclusive, of course—because, as a matter of experience, we know that where men commence a journey, they do not always buy their ticket to the termination of the journey; and various circumstances may happen during the progress of a journey, to change the purpose of the traveler.

Mr. Merwin states in his evidence that in a conversation he had with Tooley he said

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 Chi. Leg. News, 311, contains only a partial report.]

that he intended or expected to go to Mattoon, which was south of Champaign, where the train stopped. [The way that arose was this: It was in relation to the seats; he wanted two seats, as he said, so that he could sleep, as he "thought or expected to go to Mattoon."] [2] Now, as qualifying this, perhaps, and to some extent inconsistent with it, is the testimony of the conductor. He says that just before they arrived at Kankakee he woke up Tooley and told him that the next station was Kankakee, and that Tooley made no remark intimating in any way that he intended to go further than Kankakee, and, therefore, that it was not necessary for him to be disturbed. It is for you to say how much bearing this may have upon the question [whether his journey terminated at Kankakee, and how far it may affect the statement of Merwin.] [2]

There is this other fact, that when the train started at Kankakee, Tooley attempted to get on it. That is claimed to be conclusive evidence of his purpose to proceed further. [It is for you to say what bearing that may have upon this particular question that we are now considering. Then, again, in relation to whether or not he had any baggage with him. It is said that there was a satchel or valise there, and that it was not found after his death. How far this may have any bearing upon the question is a matter to be determined by the jury. The only light in which it is material this question should be considered is, how far it may affect the conduct of Tooley on the general question of negligence.] [2] If his journey ceased at Kankakee, then it cannot be claimed, under the undisputed facts of this case, that the defendant would be liable, because, on the assumption that he was going no further than Kankakee, in attempting to get on the train as he did, it was at his own risk. If he were going beyond Kankakee on the train, then there are other considerations which may affect the question of negligence. According to the view which we take of the contract between the parties, if he were a passenger proceeding beyond Kankakee, on the train, he had the right to leave the car at Kankakee and return to it; he was not bound to remain inside the car all the time.

There is, perhaps, one circumstance which I ought to refer to in connection with the question of the determination of the journey at Kankakee, and it is this, that he did not purchase a ticket at Kankakee, and it is in evidence that the train stopped there several minutes; and if you believe the testimony on this point, he certainly had ample time to purchase one. Still that of course is not conclusive. He had the right, I suppose, under the practice and management of the train, to pay his fare on the cars. One of the conditions of these policies is, as has been stated, that Tooley should comply with all the rules and regulations of common carriers. We are not prepared to say that it was incumbent on him, under the circumstances of the case, to make himself acquainted with all the rules which might be contained upon the time card. We must give this clause of the policy a reasonable construction.

A policy is issued, we suppose, to any applicant. It is what is called an accident policy, and we are to infer that the meaning of this clause was that the traveler should only make himself acquainted with those general rules, as to the management of trains, and the conduct of railroads which are presumed to be known to travelers under these circumstances. For instance, Tooley, as far as we know, was a stranger on this road. We cannot say that when he went on the train he was obliged because of this clause in the policy to examine the time card and ascertain all the minutæ connected with the management and running of trains, but only such rules as a general traveler might be presumed, and ought to know. Any other construction than this would operate as a snare upon travelers. [To hold that the traveler must become acquainted with every minute rule which may be prescribed on the back of a time card, we think cannot be said to be the true meaning of this clause of the policy.] [2] But, perhaps, if he did not know the time the train stopped at a particular place there might be a question whether it was not his duty to make some inquiries of the employés on the train. It is to be observed in deciding this question of negligence of Tooley, which is the last question to be considered, and to which I call the attention of the jury, that this is not an action between the representative of Tooley and the railroad, but between the representative of Tooley and the underwriter upon this clause in the policy, "not neglecting to use due diligence for self-protection." And perhaps there can be no better rule stated than that which was agreed upon by the counsel, namely, that it was his duty to use that degree of caution and diligence which a prudent man would use under the circumstances in which he was placed. We think, also, in determining this question of diligence on the part of Tooley, it is proper to take into consideration whether or not, when he alighted at Kankakee—which he had a right to do—any notice was given of the movement of the train.

If a person, having a right to leave a train at a station, is informed or notified in any way that the train is going to start, and an opportunity given to him to take his place again upon the train, and he chooses to remain until the train is put in motion and then is injured in getting on the train, it may be said that he is negligent—in other

[2] [From 2 Ins. Law J. 275.]

[2] [From 2 Ins. Law J. 275.]

words, that he takes the risk of getting on the train while thus in motion. But if, having alighted at a station he has no notice by bell, whistle, or otherwise, of the movement of the train, or he has not the opportunity, after notice is given, to get on the train, and intending to go further he attempts to get on the train and is injured, we think there is not the same measure of responsibility upon him. It would be natural for a man—for a prudent man—intending to go further on the train to make an effort, even when the train was in motion, to regain his place on the train.

[2] [But while that is so, it is to be understood he must use due diligence in trying to get on the train, and to that question I will now direct your attention for a few moments, on the supposition that he intended to go further, and he had not an opportunity to get on the train, or he was not notified that the train was about to move. It was after seven o'clock in the evening. Tooley proceeded along the platform. There has some question been made whether the bell was rung. We think it perhaps ought to be assumed in this case that that fact has been established. It is proved that was the practice of the engineer just before the train started; that it was a signal to the conductor that the engineer was ready to proceed. It is also distinctly sworn to by the conductor that the bell was rung, and it is a fact stated by one or two of the witnesses that the remark was made, "The bell is ringing," which, under the circumstances, of course is a very material fact. This is not otherwise contradicted than by the statements of several witnesses that they did not hear, or do not recollect that they heard, the bell. However, we leave this question to be determined by the jury. Of course negative testimony is not so material or important as positive testimony, if you believe that these witnesses stated the truth. There is some controversy as to the character of the night. Several of the witnesses say that it was a clear night; some that it was moonlight, and some state that it had been snowing or storming. There is no doubt of this fact, or I think we may assume it, that the intent of Tooley was when he heard the bell, or an intimation was given in that way, or by the movement of the cars, to get on the train. He proceeded rapidly along the platform. He tried to get on the train. Now did he act prudently, as a prudent man, in getting on the train? Mr. Lawrence says, when he came around the corner of the station house, and he saw a man running, or walking fast, that he called out to him that the train was only going to coal up, or something to that effect. Now it is true that Mr. Tooley was not bound to take any declaration made by an outsider or an indifferent person as true, in relation to the management of the train or its motions. The only effect of that is this, that it changes the measure of his responsibility, and gives color to his conduct,—to his action; and you are to treat it in a different manner from what you would provided he had no intimation whatever given to him, because if a man, after being notified of a particular fact, which should govern or rule his conduct, chooses to act in such a way as to encounter risk or danger, you will see that the rule of diligence is different. It is material for the jury to consider this in that light alone, and then it will be a question, as far as it bears upon the conduct of Tooley, whether or not he heard what was said by Mr. Lawrence, and of course it is simply a matter of inference whether or not he did hear; positively, we cannot know. This seems to be certain, that the words or the sounds attracted his attention, as he turned round; and it is for you to say whether he heard in such a way as to give him warning that the train was not to go farther than the coal-bins, whether or not he heard the language, or whether he heard a sound merely, without distinguishing or understanding what was said. All these are to some extent matters of conjecture, and it is for the jury to determine how far they may affect this question. He passed by the rear platform of the rear car. We think that is a fact to be taken into consideration by the jury in determining whether he did or did not act as a prudent man, if he believed that the train was going on, and wanted to get on the train to resume his journey. Of course you will understand that the danger was much less in getting on the rear platform than on the forward platform of the car. The fact is that he did not attempt to get on the rear platform of the car. The train was moving slowly. It does not appear that he was actually running, although walking very fast. He attempted to get on to the cars, either on to the forward platform of the rear car, or between the two cars. If, in point of fact, when he slipped and fell, he was attempting to get on between the cars, it is difficult to reconcile it with our ideas of prudence on the part of any man under such circumstances. That may be an important fact for you to inquire into, whether that is so or not, as I believe is stated by one of the witnesses. It is very much a question for the jury, under these rules which the court has laid down, whether this man, under the circumstances, conceding that he was going further, acted prudently; whether or not he was guilty of negligence. It is, perhaps, natural that the sympathies of a jury should be enlisted in favor of the man, or his representatives or family; but this case, like every other, has to be decided under the law and facts, and you are to apply your best judgment and intelligence to the facts, taking the law from the court, and drawing your conclusions upon those facts, without being influenced or biased by the relative positions

[2] [From 2 Ins. Law J. 275.]

of the parties. This is your imperative duty, and if you do any less than this you do not come up to the measure of your responsibility. It is not a question of sympathy or feeling, but of law and evidence.

[I will dismiss this case with one further remark. There has not been any light thrown upon the motives of the journey of Tooley from Chicago to Kankakee. We were left in ignorance of that when we tried this case before, and we are now just as ignorant. It may be that there is an impenetrable mystery hanging over this journey. It is said that he was going to Nokomis, in Montgomery county, which was his residence. In point of fact, when he was required to give his residence as a memorandum on the policy demanded, he gave it as Topeka, Kansas, not Nokomis, Montgomery county, Illinois. Of course this is no further material than as it may have a bearing upon the journey of Tooley. It is in one sense no matter of ours, or of these defendants, where he was going. That was not the question. He was insured for the two days, wherever he might go. There is nothing stated in these policies as to the proof of loss or damage, as the case might be, or as to the time within which the payment would be made if there were damage. It has been admitted that notice was given, so as to that there is no controversy. The policy required that notice should be given. Then we understand that the true construction of it would be that if notice were given, it was the duty of the company to pay within a reasonable time, and interest would run from the expiration of that time when the payment ought to be made. I do not know that it is necessary to trouble the jury with that. Probably counsel will agree about that matter.

[Mr. Morrison. Yes, your honor; we have agreed on that.

[THE COURT. Very well, then, you may simply say, by your verdict, whether you find for the plaintiff or the defendant.

[Verdict for plaintiff for $6,633.] [2]

NOTE. This case was appealed to the supreme court, and is now pending there. [Case dismissed in supreme court April 21, 1874, on appellant's motion. No opinion. Case unreported.] The company may be held liable for injuries sustained in alighting. Keller v. New York Cent. R. Co., 24 How. Prac. 172; Pennsylvania R. Co. v. Kilgore, 32 Pa. St. 292; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318, 37 Pa. St. 420; Fuller v. Naugatuck R. Co., 21 Conn. 559. Also for injuries in leaping from the train to avoid being carried by. Davis v. Chicago & N. W. R. Co., 18 Wis. 175; Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147. An accident happening to the assured while stepping from the carriage at his place of destination, is within the policy. Theobald v. Railway Pass. Assur. Co., 10 Exch. 44. The company may be liable, though the assured fell between the cars when attempting to get on them while in motion. Schneider v. Provident Life Ins. Co., 24 Wis. 28. The New York court of appeals have recently decided that an accident policy insuring against personal injury "when caused by any accident while traveling by public or private conveyances provided for the transportation of passengers," covers an accident happening from falling upon a slippery sidewalk, while walking from the steamboat landing to the railway station, that being the usual route, and she so walking in the actual prosecution of her journey; and the fact that there were hacks at the landing by which she might have ridden, does not affect the question. Northrup v. Railway Pass. Assur. Co., 43 N. Y. 516, reversing same case in the supreme court, reported in 2 Lans. 166.

[2] [From 2 Ins. Law J. 275.]

TOONE, The JOSEPH H. See Cases Nos. 7,540-7,543.

TOPEKA (CITIZENS' SAV. ASS'N v.). See Case No. 2,734.

TOPLIFF (CONCORD R. CORP. v.). See Case No. 3,093.

Case No. 14,099.

TOPPAN v. CLEVELAND, C. & C. R. CO.

[1 Flip. 74; [1] 9 Pittsb. Leg. J. 313; 4 West. Law Month. 67.]

Circuit Court, N. D. Ohio. March Term, 1862.

RAILROAD COMPANY — GUARANTY OF PAYMENT ON NEGOTIABLE SECURITY—LEGAL EFFECT OF—CONSIDERATION REQUIRED—PLEADING—WHEN ADMISSIONS ARE ESTOPPELS.

1. An indorsement of guaranty of payment upon a negotiable bond of a railroad company, having coupons attached and made before the security is delivered, as an evidence of indebtedness, is supported by the same consideration as that which upholds the original contract.

2. If such guaranty be general, it is negotiable, together with the instrument on which it is indorsed.

3. A consideration for the guaranty is required, where the instrument is made after the inception of the principal contract as security for indebtedness.

4. Where a railroad company has under general statute, though not by charter, authority to guarantee the payment of the bonds of another such company, in an action upon the guaranty it is not necessary to set forth in the declaration such authority for making the indorsement.

[Cited in Smith v. Tallapoosa County, Case No. 13,113.]

5. A statute authorized the indorsement by one railroad company of a guaranty of the bonds of another, and provided that "no such aid shall be furnished * * * or arrangement perfected until a meeting of the stockholders of each of said companies shall have been called by the directors thereof at, * * * and the stockholders, or at least two-thirds of the stock of such company represented at such meeting, in person or by proxy, and voting thereat, shall have assented thereto;" *held*, that it was sufficient in an action by a bondholder against the guarantor to aver in the declaration "that the guaranty was duly signed by the defendant through its president, who was authorized so to execute the same, and was afterwards," to-wit: on the same day, "duly ratified and confirmed by the stockholders of said company."

6. The principle of law is, that where one of the parties is a corporation and contracts as such, although it has no power except those

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

specifically granted or necessary to carry into effect the powers expressly granted, yet the presumption of law in regard to such contracts is always in favor of their validity until the contrary is shown. But this presumption only arises in cases where it appears that it had power to contract under its charter or the laws of the state

7. The true test of the sufficiency of a pleading is, whether the allegations in the declaration can be traversed by plea, for a traverse must be taken on a matter of fact, not of law. But where there is a mixed question of law and fact, there may be a traverse, for that is the only mode by which the facts are to be settled.

8. It is a principle of universal application that admissions, whether of law or fact, which have been acted on by others, are conclusive against the party making them in all cases between him and the party whose conduct he has influenced, and that a man shall not be permitted to repudiate his own representations. A corporation, quite as much as an individual, is held to a careful adherence to truth in its dealings with mankind, and cannot by its representations or silence involve others in onerous engagements, and then defeat the calculations and claims its own conduct has superinduced.

[This was an action by Christopher S. Toppan on negotiable bonds and coupons issued by the defendant, the Cleveland, Columbus & Cincinnati Railroad Company.]

Hitchcock, Mason & Estep, for plaintiff.

Ranney, Backus & Noble, for defendant.

WILLSON, District Judge. This case stands upon a demurrer to the first and second counts of the plaintiff's declaration.

Many grave and important principles were discussed by counsel in the argument, some of which it is deemed unnecessary to consider, in determining the issue of law raised by the demurrer.

The suit is brought against the defendant upon its guaranty indorsed upon sundry bonds of the Columbus, Piqua & Indiana Railroad Company. These bonds bear date April 1, 1854, and are all of the same tenor and effect, with interest coupons attached. The following is a copy of one of them:

"The Columbus, Piqua & Indiana Railroad Company acknowledge themselves to owe Elias Fassett, or bearer, one thousand dollars, which sum said company promise to pay to said Elias Fassett, or the holder hereof, at the office of the Ohio Life Insurance and Trust Company, Wall street, in the city of New York, on the first day of April, in the year 1869, and also interest thereon at the rate of seven per cent. per annum, semi-annually, on the first day of October next, and of each April and October thereafter until the said principal sum shall be paid on the presentation of the annexed interest warrants at said office. And the said company also agree to deliver to the holder hereof, at any time before said principal sum shall fall due, when such holder shall elect to receive the same, on the delivery of this obligation and the unpaid interest warrants to the trustee named in the annexed certificate, or to his successor in the trust, in the city of New York, or to the treasurer of said company, in the city of Piqua, Ohio, twenty shares, of fifty dollars each, of the capital stock of said company in exchange for and satisfaction of this obligation.

"And the said company further agree that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special indorsement, or by delivery, as if the same were a note of hand payable to bearer, and hereby waive all benefits, from valuation or appraisal laws."

Signed by the president of the company, with the corporate seal affixed.

The interest warrants or coupons are also payable to the bearer or holder.

After the execution of said bonds and coupons, and before their negotiation and issue, the defendant guaranteed their payment by indorsing on the back of the bonds the words following:

"The Cleveland, Columbus & Cincinnati Railroad Company, for value received, hereby warrant and guarantee the punctual payment of the interest and principal of this obligation.

"In testimony whereof the said company, in pursuance of a resolution of the board, passed the 6th day of March, 1854, have caused these presents to be signed by its president this 7th day of April, 1854."

Which guaranty was afterwards, to-wit: on said 7th day of April, 1854, duly ratified and confirmed by the stockholders of said company.

The plaintiff became the owner and holder of the bonds and coupons so guaranteed on the 4th day of August, 1854, by purchase in the regular course of business, and for a valuable consideration.

It is alleged that the Columbus, Piqua & Indiana Company is insolvent, and that certain of the coupons are due and remain unpaid.

Both the first and second counts of the declaration contain the averments that the Columbus, Piqua & Indiana Company was a corporation created and organized under the laws of Ohio, empowered to issue bonds, notes and other evidences of debt, to borrow money at 7 per cent. interest, and authorized to construct, maintain and run a railroad from Columbus, Ohio, to the west line of the state.

That the Cleveland, Columbus & Cincinnati Company is a corporation of like powers, organized to construct, maintain and run a railroad from Cleveland, in Cuyahoga county, to Columbus, in Franklin county, Ohio, and being interested in the construction of the Columbus, Piqua & Indiana road, and being authorized by the laws of Ohio so to do, did indorse and guarantee the bonds of the last named company as aforesaid.

This statement of the case, though much abbreviated, is nevertheless deemed sufficient for a full apprehension of the questions of law raised by the demurrer.

It is insisted by the defendant's counsel—

(1) That this contract of guaranty is not negotiable; (2) that no sufficient consideration for the undertaking on the part of the defendant is averred and (3) that the defendant having no power under its charter to make the guaranty, the legal authority and the facts and circumstances contemplated by the act of 1852, by which such power could be obtained, should be fully set forth upon the record.

"A guaranty," said Verplank, in McLaren v. Watson's Ex'rs [unreported], in its legal and commercial signification, "is an undertaking to be answerable for the payment of some debt, or the due performance of some contract by another, who himself remains liable for his own default." If the guaranty be of a prior debt or contract, then there must be some good consideration received by the guarantor, and such consideration should be averred in the pleadings and proved on the trial. But where the guarantor holds out his engagement of secondary liability as an inducement to any one who may, upon the faith of that promise, give credit in any way to a party, then if there be no special consideration of benefit received by the guarantor, yet the same consideration of debt or damage which supports the claim against the principal in default, equally applies to, and supports the right of action against the guarantor.

Hence, as the guaranty, in this case, is a contract collateral to the bond, there is no force in the objection, that a distinct consideration should be averred.

It would be different had the guaranty been made after the execution of the bond and its delivery and receipt as a complete contract.

But here the record discloses the fact that the guaranty was made and indorsed on the bond before its issue and delivery by the Columbus, Piqua & Indiana Company. It was done for the benefit of that company, to add strength to its paper, and to induce third persons to take the bonds and to advance money upon them. We are clearly of the opinion that the credit thus given to the Columbus, Piqua & Indiana Company, is of itself, a good and sufficient consideration to support the contract of guaranty. 8 Cush. 154; 12 Wend. 381; 26 Wend. 425; 3 Burrows, 1662.

Again, it is argued that this guaranty is a special contract, a mere chose in action, and therefore not negotiable. It is claimed to be analogous in principle to an ordinary mercantile guaranty of a debt or purchase where the primary liability can go no further than the first parties.

The ordinary mercantile guaranty of a debt, is a contract to become liable for another, for some specific debt in the hands of a creditor, whose right to sue and enforce it, cannot be transferred. In such a case, the offer of guaranty is only of some specific transaction, which becomes final as to parties when the offer is accepted.

In the language of the court in Walton v. Dodson, 3 Car. & P. 163, "such a guaranty will enure to the benefit of those to whom or for whose use it was first delivered."

But the rule of law is different where the guaranty is for the payment of negotiable paper. That is a positive undertaking to become liable in case of the default of the original parties to the bond, note or bill, and such undertaking is held out to every person who may, on the faith of it, become the legal holder of such paper. Not, say the authorities, that the guaranty is, in itself, negotiable as a separate contract, but that it is a collateral promise to any and each person, in his turn, who may give credit to a negotiable bond, note or bill coupled with such guaranty.

In Ketchell v. Burns, 24 Wend. 456, the supreme court of New York declare, that on a guaranty indorsed upon a note, whereby the payment of the note is guaranteed to a third person or bearer, an action lies by any subsequent holder in his own name. And in Story, Cont. 738, the author broadly declares the law to be that "where a general guaranty is made upon the face of a promissory note or bill of exchange, and is not limited to a particular person, or restricted in its terms, but purports to be a guaranty to the payee or his order, or to the bearer, the guaranty is as negotiable as the bill or note, and accompanies it in the hands of every holder." 26 Wend. 425; 19 Wend. 202, 557; [3 Greenl. 233;] [2] 6 Conn. 315; [Adams v. Jones] 12 Pet. [37 U. S.] 207; 16 East, 355; 3 Car. & P. 162.

Now, the bonds in question, of the Columbus, Piqua & Indiana Company, are made negotiable by distinct and unequivocal terms. The language employed is: "And the said company further agree, that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special indorsement, or by delivery, as if the same were a note of hand, payable to bearer."

The defendant's guaranty of payment, indorsed upon the bond, is not limited to any particular person, nor is it restricted in terms. The obligation, on the part of the defendant, is, in legal effect, an undertaking to pay the interest and principal as they severally become due, in default of the maker, and such undertaking extends to any person who may have become the holder of the paper by advancing money on the strength of the indorsement. Such clearly was the purpose and effect intended by the parties to the transaction.

We therefore hold, that, from the record in the case, it sufficiently appears, this guaranty was given for a good consideration, and also that it is negotiable, and as available in the hands of the holder as is the right to sue upon the bonds themselves.

It only remains to consider the third objection to the sufficiency of the pleadings,

[2] [From 9 Pittsb. Leg. J. 313.]

which is, that the defendant having no power under its charter to make the guaranty, the legal authority and the facts and circumstances contemplated by the act of 1852, by which such power could be obtained, should have been fully set forth upon the record.

The federal courts, sitting in any state, are bound to take judicial notice of the statutes of such state. Hence, a party in alleging a claim in his declaration, or a party in setting up a defense in his plea under a public law, is not required to set forth the statute in his pleadings.

It is sufficient that the facts are stated, which are necessary to bring the case within the operation of the statute, and to insist that upon those facts the right exists or does not exist. The court will then judicially notice the existence of the statute, and declare its legal effect upon the case as made by the pleadings.

The courts are, in like manner, bound to take judicial notice of the location of towns and cities, and the boundaries of counties, and of state lines.

There is still another principle of law which has application, where one of the parties is a corporation and contracts as such. And that is, that while corporations have no powers except those specifically granted, or such as are necessary for carrying into effect the powers expressly granted, yet the presumption of law arising in favor of such contracts, is always in favor of their validity, or, in other words, it will be presumed that the debt was due, or the obligation or other consideration was given in the lawful course of business, until the contrary is shown. This presumption, however, only arises in cases where it appears the corporation is empowered to contract under the authority of its charter, or the laws of the state.

The 24th section of the "Act to provide for the creation and regulation of incorporated companies in Ohio," passed May 1, 1832, declares that—

"Any railroad company heretofore or hereafter incorporated, may, at any time, by means of subscription to the capital of any other company, or otherwise, aid such company in the construction of its railroad, for the purpose of forming a connection of said last-mentioned road with the road owned by the company furnishing said aid; or any railroad company organized in pursuance of law, may lease or purchase any part or all of any railroad constructed by any other company, if said companies' lines of road are continuous or connected as aforesaid, upon such terms and conditions as may be agreed on between said companies respectively, or any two or more railroad companies whose lines are so connected, may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created: provided, that no such aid shall be furnished, nor any purchase, lease or arrangement perfected until a meeting of the stockholders of each of said companies shall have been called by the directors thereof at such time and place and in such manner as they shall designate, and the holders of at least two-thirds of the stock of such company represented at such meeting, in person or by proxy, and voting thereat, shall have assented thereto."

Here is the broad legislative grant of power to this defendant, to enter into any arrangement with another railroad company for their common benefit, consistent with and calculated to promote the objects for which they were created.

The question raised by the demurrer is, whether it was necessary for the plaintiff to aver in his declaration, that the aid or guaranty in question, was given by the previous assent of two-thirds of the stockholders of the company, at a meeting called by the directors for that purpose, in order to avoid the inhibition of the proviso contained in the act of 1852.

The averment in the declaration, is: "Which said guaranty was duly signed by the defendant, by its then president, who was authorized to execute the same, and was afterwards, to-wit, etc., duly ratified and confirmed by the stockholders of said company."

This is not a contest between a corporation and one or more of its stockholders, whose rights the proviso of the act was intended to protect. Nor is it a contest between a stockholder and a third person, who claims rights under alleged illegal acts of the officers of the corporation.

It is a controversy between a creditor and the corporation itself, in which the latter repudiates its own acts, and seeks to avoid a liability created by itself. The defendant, in legal effect, admits its liability by executing the guaranty and sending it forth to the world, challenging faith, credit and confidence in all who may be induced to act upon it. It is a principle of law of universal application (and as just as it is general) that admissions, whether of law or of fact, which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced; and the principle is founded upon grounds of public policy, that a man shall not be permitted to repudiate his own representations. It was forcibly said by Mr. Justice Campbell, in regard to the validity of this identical guaranty, that "a corporation quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot by their representation or silence, involve others in onerous engagements, and then defeat the calculations and claims their

own conduct had superinduced." Zabriskie v. Cleveland, C. & C. R. Co., 23 How. [64 U. S.] 381.

It is a legitimate presumption, then, that the defendant, in executing the guaranty, had complied with all legal requirements and regulations, and especially so since it appears by the record, that the obligation was given by order of the board of directors, and subsequently ratified by the stockholders at a general meeting.

The plaintiff has not alleged in his declaration, that the guaranty was given by the previous assent of two-thirds of the stockholders, at a meeting called for that purpose. But we think, so far as third persons are concerned, in a suit against the corporation, that fact is wholly immaterial, and therefore need not be averred.

It is further objected by the defendant's counsel, that a traverse of law, and not purely a matter of fact, is tendered by the plaintiff's declaration.

It is said that the allegation in reference to the execution of the guaranty, to-wit, of "the defendants being thereunto duly authorized by the laws of Ohio," etc., is an attempt on the part of the pleader, to put in issue a mere legal conclusion.

The true test of the sufficiency of the pleading, undoubtedly is, whether the allegations in the declaration can be traversed by plea, for it is true, that a traverse should be taken on matter of fact, and not on mere matter of conclusion of law.

But where the virtute cujus raises a mixed question of law and fact, there may be a traverse, for that is the only mode by which the facts are to be settled on which the law depends.

Mr. Sergeant Williams says, "that where the words, 'virtute prætextæ per quod,'" etc., introduce a consequence from the preceding matter, they are not traversable; but that matter of law connected with fact, or rather matter of right resulting from facts, is traversable.

In the case of Barker v. Mechanic Fire Ins. Co., 3 Wend. 94, the averment in the declaration was, that "John Franklin, being the president of said company, and being thereunto duly authorized, and acting within the scope of the legitimate purposes of the company, on, etc., made a certain promissory note."

The supreme court of New York held the averment good and sustained the declaration.

In the case before us we are of opinion that the demurrer is not well taken, and should therefore be overruled.

NOTE. See Hamilton v. Zimmerman, 5 Sneed, 48, where almost the identical expressions are used on estoppel. The opinion in that case was delivered by McKinney, J., who was one of the ablest jurists that ever sat on the Tennessee supreme bench, and, it would not be too much to say, had few or no superiors in the Southwestern states.

Case No. 14,100.

TOPPAN et al. v. NATIONAL BANK-NOTE CO. et al.

[4 Blatchf. 509; 2 Fish. Pat. Cas. 195.] [1]

Circuit Court, S. D. New York. Sept. 10, 1861.

PATENTS—PROVISIONAL INJUNCTION—PUBLIC USE—FORFEITURE—ABANDONMENT—TRIAL BY JURY.

1. An inventor, by permitting a public use of his invention for more than two years before he applies for a patent for it, forfeits all right to a patent, under section 7 of the act of March 3, 1839 (5 Stat. 354).

2. To obtain a provisional injunction on a patent, the title of the patentee must be strengthened by exclusive possession for some period of time, or by an adjudication sustaining the validity of the patent.

3. Such possession must be one as against the public, and, therefore, a use of the invention before the application for a patent, must, to constitute such possession, be a public use, under an avowed claim of a right to a patent.

4. Questions of forfeiture and abandonment, in a patent suit, ought to be passed upon by a jury.

[This was a motion for a provisional injunction, to restrain the defendants from infringing letters patent [No. 32,370] granted to George C. Howard, May 21st, 1861, for a machine for perforating paper. The bill alleged that Howard, after the issuing of the patent, assigned to the plaintiffs [Toppan, Carpenter & Co.] the exclusive right under it, for one year. It was not stated in the bill when the year began to run, nor was the date of the assignment stated. But I assume that the year commenced on the day of the date of the patent.] [2]

Charles Tracy, for plaintiffs.

Charles M. Keller, for defendants.

SHIPMAN, District Judge. From the allegations of the bill, and the affidavits filed in the cause, I must, in deciding this motion, assume the following facts: 1. That the machine patented was invented by Howard more than four years before he applied for a patent. 2. That, for a valuable consideration to the patentee, and for the profit of the plaintiffs, the former permitted the latter to use one or more of the machines for more than two years before any application was made for a patent. 3. That, at the instance of the plaintiffs, the patentee permitted the American Bank Note Company to construct one or more of the machines, and use them in their business; precisely how long, or upon what consideration, does not appear. 4. That only one month and ten days, or, at the longest, about two months, elapsed, during which exclusive possession of the invention secured by the patent could have been enjoyed either by the patentee or the plaintiffs.

Without touching upon the question of aban-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 4 Blatchf. 509, and the statement is from 2 Fish. Pat. Cas. 195.]

[2] [From 2 Fish. Pat. Cas. 195.]

donment, if I were called upon to decide this motion on the question as to whether or not the patentee had forfeited his right to a patent, under the 7th section of the act of March 3, 1839 (5 Stat. 354), I should, as the case now stands, be compelled to deny the relief asked. I could not resist the conclusion that the use of the machines by the plaintiff with the consent of the patentee, for a period of more than two years before the application for a patent, in the absence of any evidence that a single step was taken to secure one, or that either the inventor or the plaintiffs ever intended to secure one, worked a forfeiture of the right to a patent. It would be difficult, on the present evidence, to hold that the use was not a public one. And, if it was a public use, then the patentee, by permitting such use for more than two years before he made any application for a patent, forfeited all right to one, and his patent is void. This I understand to be the doctrine laid down in McCormick v. Seymour [Case No. 8,726]. In that case Mr. Justice Nelson remarked, in construing the 7th section of the act of 1839, that if a patentee "either sells a machine, or uses one, or puts one into public use two years before his application for a patent, it works a forfeiture of his right."

But I do not wish to prejudge this point of forfeiture in the present case, nor the question of abandonment. Courts should be very tender of the rights of inventors, and not draw hasty conclusions adverse to the validity of their rights secured by patent. I am, therefore, disposed to decide this motion on another ground, and one which will throw no doubt on the validity of this patent, although it is difficult to see how it can be saved, on the conceded facts. I will, therefore, assume, for the purpose of this decision, that there was no public use of this invention prior to the application for a patent, no forfeiture of the patentee's rights by a use of more than two years, and no abandonment and dedication to the public. I will assume that whatever use there was was secret, and under such circumstances that the right to a patent was not lost. But, after all these assumptions, it is equally clear that I can grant no provisional injunction. This extraordinary relief is never granted as a matter of course. It is never granted on filing a bill and producing a patent. The patent itself, although in a certain sense it is prima facie evidence of the validity of the grant, is never sufficiently strong per se to warrant the relief asked for on this motion. The title of the patentee must, in order to obtain this relief, always be strengthened by exclusive possession for some period of time, or by an adjudication in which the validity of the patent has been sustained. This patent never having been litigated, of course no judgment has ever been pronounced in its favor. The right could not have been in the exclusive enjoyment of any one for more than one month and ten days, or, at farthest, about two months, as the application was made on the 23d of April, 1861, and the patent was granted on the 21st of May, 1861, and, before the first of July following, the defendants asserted their right to use the machine, and insisted that the patent was void. The principle that exclusive possession for a time strengthens the title of a patentee, is founded on the idea that, as it is a claim of right adverse to the public, and the public acquiesce in that claim, such acquiescence raises a presumption that the claim is good. But no such presumption can be raised in this case. There is no evidence that the public, or that small portion of them which would be likely to avail themselves of this invention, knew even of its existence, much less of the existence of an exclusive grant to this patentee or to any one else.

Nor, in this view of the case, can I take into account the possession of the right, and the use of the invention, before the application for the grant of the patent. This is sometimes done on the principle laid down in Sargent v. Seagrave [Case No. 12,365]. But, of course, the use in such a case must be a public use, under an avowed claim of a right to a patent; otherwise, there is no exclusive possession as against the public, and no claim in which the public can acquiesce. In this case, I must assume the use prior to the application to have been secret, or the patent is clearly void. This unavoidably places the plaintiffs, so far as this motion is concerned, between Scylla and Charybdis. To hold that the use prior to the application was a public use, and was exclusive as against the public, would, as it extended beyond two years, wreck the patent. To hold that it was a secret use, away from the eye of the public, sweeps away the ground of exclusive possession and acquiescence by the public, and leaves no foundation upon which the motion can stand. But the latter result is least prejudicial to the patent. The motion is, therefore, denied.

As these questions of forfeiture and abandonment are peculiarly within the province of a jury, I think that unless the answer, when filed, should change the aspect of the case, they should be passed upon by a jury, before an injunction is asked for.

TOPPING (RUSSELL v.). See Case No. 12,163.

Case No. 14,101.

TOPPING v. The WARREN.

[34 Hunt, Mer. Mag. 453.]

Circuit Court, S. D. New York. Sept. 6, 1853.[1]

PILOTS—DISABLED VESSEL—EXTRA ALLOWANCE.

[Appeal from the district court of the United States for the Southern district of New York.]

[1] [Affirming Case No. 17,193.]

The ship Warren, of 500 tons, with a crew of 10 men and 60 passengers, left Glasgow for New York, 6th December, 1851. She received severe injury in a gale, lost her rudder, bowsprit, fore-mast head, foretop-mast, foretop-gallant-mast, head of mainmast, and head of main-topmast. A spar was rigged as a bowsprit, and a jury foretop-mast set up, a substitute for the rudder was rigged, made out of cable, ropes, &c., in a most ingenious manner, highly creditable to the skill and seamanship of J. G. Lawton, her captain. The ship could wear and be stayed, and was navigated to within 60 miles of New York, after a passage of 107 days, the usual passage being about 40 days. At this distance from port, the ship was placed under the charge of the libelant [T. Topping], a pilot, and navigated by him to within 15 miles of the Hook, when a tug was hired, and the vessel towed up. The pilot claimed compensation beyond the usual pilotage fees allowed, when a vessel was not disabled, which was refused. It was proved that, on approaching the coast, a vessel in her crippled condition would be exposed to enhanced dangers, a gale of wind on shore might be fatal, and one off might drive her again out to sea. That from the number of passengers, composed of men, women, and children, the great length of passage already, the danger of distress for provisions, &c., the ship having already frequently received supplies, a very serious responsibility devolved upon the pilot, to whom was confided the safety of the ship and passengers, and her valuable cargo,—a responsibility not strictly belonging to his duties as a pilot, and for which he was entitled to a liberal compensation, beyond what the strict tariff of mere pilotage fees would allow. The district court awarded to the pilot one hundred dollars in addition to the pilotage [Case No. 17,193]. and, on appeal to the circuit court, his honor, NELSON, Circuit Justice, affirmed the decree.

TORGE (UNITED STATES v.). See Case No. 16,533.

Case No. 14,102.

TORICES v. The WINGED RACER.

[39 Hunt, Mer. Mag. 458.]

District Court, S. D. New York. April, 1858.

CHARTER PARTY—MUTUAL COVENANTS—ADMIRALTY JURISDICTION.

In admiralty. This action is brought on a charter of the ship by the owners to the libelant [Rafael F. Torices] in July, 1857, for a voyage to China, and thence back to Havana, with a load of coolies, not less than 884 in number, for which the libelant was to pay freight, $67.50 apiece to the ship, and a further sum to the master. The clause of the charter which the libel was sought to enforce was as follows: "The penalty of non-performance of this contract is mutually fixed at half the amount of freight, and to the accomplishment of the same the charterer engages his whole responsibility, and the owners their vessel, rigging, etc., as by law; the ship to have a lien upon the passengers for the freight money." The libel was filed to recover this penalty, amounting to $28.951, alleging that the ship prepared for the voyage, cleared at the custom-house, but after its commencement the owners broke it up, and neglected to perform it.

HELD BY THE COURT (BETTS, District Judge): That by the maritime law a ship is not bound to the performance of a contract for her employment, unless there be mutually a liability charged on cargo on board for the satisfaction of those services. When the contract is for the prospective employment of a ship in transportation of cargo which is not placed on board, the remedy for a breach of such contract is in the common law courts. That the clause in the charter by which the owners engage "their vessel, rigging, etc., as by law," subjects the security to the operation of the law maritime upon credits of that character. That the libelant therefore shows no lien upon the vessel of which the court can take cognizance, and the exception to the jurisdiction of the court must therefore be allowed. Libel dismissed.

Case No. 14,103.

TORRANCE et al. v. AMSDEN et al.

[3 McLean, 509.] [1]

Circuit Court, D. Ohio. Dec., 1844.

ARBITRATION—HEARING—ABSENCE OF WITNESS—SURPRISE—SETTING ASIDE AWARD.

1. A court will set aside an award of arbitrators for misconduct, or where they have decided contrary to law.

[Cited in Lewis v. Chicago, S. F. & C. Ry. Co., 49 Feb. 710.]

[Cited in Anderson v. Imhoff, 34 Neb. 343, 51 N. W. 856; Graham v. Woodal (Ala.) 5 South. 688.]

2. Where, on the hearing, the defendants are surprised by evidence, and, from the unexpected absence of a witness, they are unable to explain the evidence—on this being shown, the arbitrators should have given time to produce the absent witness.

3. And having refused this, the testimony being important, it is ground for setting aside the award.

[This was a suit by Torrance & Daniels against Amsden & Chapman. Heard on motion to set aside an award of arbitration.]

Mr. Parrish and Mr. Beecher, appeared for plaintiffs.

Mr. Boalt and Mr. Wright, for defendants.

LEAVITT, District Judge. After the institution of this suit, and before the trial

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

term, the parties by their written submission, dated the 3d of May, 1844, agreed to refer the matters in controversy to arbitrators, who were to meet within ninety days from the date of the agreement, on ten days previous notice by either party, and were authorized "to hear all the proofs and allegations of the parties, in relation to the matters in difference, and determine the same as shall be legal and just." It was also agreed, that the award, having been made in writing, should be filed by the successful party, who was authorized to make it a rule of this court, and to cause judgment to be entered thereon, for the amount of damages and costs adjudged to be paid. The arbitrators met in pursuance of this agreement; and, by their award, dated the 20th of July last, report that there is due from the defendants to the plaintiffs, the sum of seven hundred and four dollars and ninety-one cents. The award was filed in this court, on the first day of the present term, accompanied with a notice of a motion for a judgment thereon. And on the same day, the defendants filed their motion for a rule to show cause, why said award should not be set aside. In support of the motion to set aside the award, it is insisted, that the defendants were deprived of an opportunity to present all their testimony at the hearing, by reason of the unexpected absence of an important witness, who was prevented by sickness from attending; and that the arbitrators unreasonably refused to adjourn or postpone the hearing, for the purpose of enabling the defendants to procure the testimony of this witness. It is also insisted, that the defendants were surprised at the hearing, by the unexpected character of the testimony of the witness, Hitchcock; which testimony, it is alleged, the defendants are able to contradict and disprove. Several affidavits have been read, to sustain these allegations, and to make it appear that great injustice has been done to the defendants, by the award of the arbitrators.

To understand fully the matters in controversy between these parties, and the bearings of the affidavits, on the points presented for the decision of the court, it will be necessary to refer briefly to the nature of the claim set up by the plaintiffs, and which it was the object of the present suit to enforce. The facts are substantially as follows: The plaintiffs, being citizens of the state of New York, engaged in the business of manufacturing flour, made advances in money, to the defendants, who are commission merchants in the state of Ohio, for the purchase of wheat, with an express stipulation, embodied in the receipts given for the cash so advanced, that the wheat was to be purchased at specified prices. It appears, that some time after these advances were made, there was a considerable advance in the price of wheat, and that the defendants continued to make purchases at these prices, though above the prices stipulated in the receipts; and, that the wheat so purchased was forwarded to, and received by the plaintiffs, who credited the defendants therewith, at the rates mentioned in the receipts, and not at the rates actually paid by them. And by this mode of crediting the wheat, a considerable balance was found due to the plaintiffs. It was claimed by the defendants, that one Hitchcock, who was a general agent for the plaintiffs in the purchase and shipment of wheat, was fully apprised that the defendants were purchasing at the advanced prices, and that he recognised and ratified these purchases.

It will be apparent from the foregoing statement, that the important question to be decided by the arbitrators was, whether the agent of the plaintiffs had authorised or assented to the purchases made by the defendants, at prices beyond those stipulated in the receipts. Such authority or assent, on the part of their agent, would be obligatory on the plaintiffs, and would entitle the defendants to a credit at the rates at which the purchases were made. And, on the other hand, without such authority or assent, the plaintiffs could rightfully insist, that the defendants were concluded by the prices specified in the receipts they executed. Do the facts exhibited in the affidavits in support of the motion to set aside the award, prove, that owing to any improper conduct on the part of the arbitrators, the defendants have been prevented from a full investigation of the important fact in issue between the parties, and that injustice has been done to the defendants by the award? It does not satisfactorily appear from the written submission of the parties, whether they intended this reference as at common law, or under the statute of Ohio. It may perhaps be regarded in either aspect. The statute regulating arbitrations does not take away the common law right of parties to arbitrate their controversies. Wright's Rep. 37. It is clear, however, that it was competent for the parties to refer the matters in controversy between them to arbitrators, under the statute. The right of statutory reference is not confined to cases in which no suit is pending. The first section of the statute secures to "all persons who shall have any controversy, or controversies, except when the possession or title of real estate may come in question," the right of reference to arbitrators. It is equally clear that parties litigant in this court, in any case in which the court has jurisdiction, have the same right to refer their controversies, as if the case was pending in a state court. For the present, this will be considered as a proceeding under the statute of Ohio. By the eleventh section of that statute, courts are authorised to set aside any award made under it, if it appear that it has been obtained by fraud, corruption, or undue means; or "that the

arbitrators have misbehaved." There is no pretence in the present case, that the award was the result of fraud, corruption, or any undue means. And viewed as a statutory reference, it cannot be set aside, unless the arbitrators have been guilty of some misbehaviour. The statute does not define what shall constitute such misbehaviour on the part of the arbitrators, as will be sufficient to invalidate their award; but it is clear the award may be liable to objection on this ground, in a case involving no moral turpitude, or wilful misconduct on the part of the arbitrators. If, while acting in perfect good faith, they have mistaken or misapprehended their duty, and injury or injustice have resulted therefrom to either of the parties, it is competent for the court to which the award is returned, to remedy the evil by setting it aside, and opening the controversy for a rehearing. The exception taken to the conduct of the arbitrators in this case, is founded mainly on the allegation, that they unreasonably refused to postpone the hearing, under circumstances in which it is insisted it was plainly their duty to have done so. And if this allegation is sustained, it affords a sufficient ground for the interposition of this court, in the manner sought for by the defendants.

The facts disclosed in the affidavits bearing on this point, will be briefly noticed. The defendant Amsden, in his affidavit, states that he considered Charles P. Davis as a material witness on the trial, and that, previous to the trial, he had obtained from him a promise to attend. He also states, that when the arbitrators and parties met, and before the hearing commenced, he made known the fact to the arbitrators, that Davis was an important witness for him, and that he had reason to expect his attendance before the termination of the trial; and with that expectation, he consented that the hearing should commence in the absence of the expected witness. It appears from the affidavits of others, that when the trial had proceeded for about an hour, the defendant Amsden received the information, by a person who then arrived at the place of trial, that the absent witness would not be able to attend, on account of sickness. And a motion was immediately made for the adjournment of the trial, on the ground of the unavoidable absence of the witness Davis; but the arbitrators overruled this motion, decided that the trial should then proceed, and made up their award, without giving the defendant an opportunity of introducing Davis as a witness. The affidavit of Davis is before the court. He corroborates the statement of Amsden, as to his previous promise to attend the trial, and says it was his purpose to attend, and that sickness alone prevented him from doing so. Davis also sets forth in his affidavit, that during the time the defendants were purchasing wheat for the plaintiffs, he was clerk for Chapman & Harkness, and that they purchased wheat for Hitchcock as the agent of plaintiffs, with funds received from the defendants, for which the agent allowed Chapman & Harkness the highest market price, and very considerably above the prices stipulated in the receipts, given by the defendants to the plaintiffs. The facts to which Davis would have testified, if present at the trial, show clearly that he was properly regarded as a material witness for the defendants, and that his testimony might have produced a result different from that to which the arbitrators arrived: for it is impossible to resist the conclusion, that the evidence of Hitchcock to the effect that he had not authorised the defendants to pay the advanced prices for wheat, and had not given his assent to the purchases made at such prices, had a controlling influence on the minds of the arbitrators, in making their award. And any testimony contradictory of that given by Hitchcock, on this material point in the controversy between these parties, could not be otherwise than important to the defendants. Though it may not have been sufficient, in the judgment of the arbitrators, to overthrow and set aside the statement of Hitchcock, yet if it would have conduced to that result, it was the right of the defendants to have the benefit of it; and that they were deprived of it, after the use of reasonable diligence to obtain it, and without any default on their part, affords a just ground of complaint. That the arbitrators possessed the power to adjourn from time to time, as they should deem necessary to the investigation of the merits of the controversy between these parties, cannot be disputed. And it was a matter of obvious justice and propriety to exercise this power, if, from any cause not attributable to negligence, either party was prevented, at the time set for the hearing, from producing material testimony. So far as any authorities have been found, bearing upon this point, they sustain the position, that the refusal of the arbitrators to grant a postponement in this case is a good ground for setting aside their award, and opening the case for another investigation. In 1 Am. Com. Law, p. 470, an abstract is given of the case of Coryell v. Coryell, reported in Coxe [1 N. J. Law] 385, in which the court say, "If the arbitrators refuse a request for an adjournment, founded on sufficient reasons, and offered at a proper season, it is a good ground for vacating an award."

It is also urged, as a ground for setting aside the award, that the defendants were surprised at the hearing, by evidence which they could not reasonably anticipate, and which they were not prepared to rebut. It may be questioned whether, viewing this as a mere statutory reference, the award is open to any exceptions, not specified in the statute. But as the allegation of surprise at the trial is closely connected with the refusal

of the arbitrators to grant an adjournment, it will not be improper to notice it. It is laid down in the books, that awards are put upon the same footing as verdicts at law; and the reasons which will induce a court to grant a new trial, will prevail on an application to set aside an award. 1 Am. Com. Law, 464; and the authorities there cited. And in Tidd, Prac. (New Ed.) 841, the doctrine is asserted as applicable to the English courts, that on an affidavit that the party has procured new evidence since the reference, and that there was some surprise at the hearing, against which he could not be required to guard, a new hearing will be granted. Do the facts disclosed in the affidavits bring this case within these principles? The defendant Amsden states in his affidavit, he was not aware, till the trial, that Hitchcock would deny the authority given to purchase wheat at the advanced market prices, and was, therefore, not prepared to prove this fact. He also states that he has been informed since the trial, that he can prove the admissions of Hitchcock, that such authority was given, but was not aware of this testimony before or at the trial. And the affidavits of several witnesses are produced, from whose statements the implication is strong, that the agent Hitchcock was apprised of the prices paid by the defendants for wheat, and gave his sanction to the purchases.

For the purposes of this motion, the facts stated in the affidavits being uncontradicted, are to be taken as true. Amsden asserts positively, that he was authorised by Hitchcock to give the increasing market prices for wheat. He prepared for the trial, under a belief that the agent of the plaintiffs would not deny this fact. His denial, therefore, was a surprise upon him; against which he could not, under the circumstances of the case, be expected to guard; and which, in the judgment of the court, affords an additional reason for giving to these parties another opportunity to investigate the matters in controversy between them.

Courts reluctantly interfere to set aside the verdict of triers, appointed by parties to settle their disputes. They will not do so from the mere fact that these triers have arrived at a different result from that to which the court would have been conducted from the evidence adduced; nor will they ordinarily disturb an award, on the ground that the arbitrators have mistaken the law; but where, in a proper case made, they have refused a postponement; or a party has been surprised, without any default on his side, by unexpected evidence at the hearing; so that the facts of the case have not been fully presented to the arbitrators, and a reasonable ground of suspicion is afforded that ample justice has not been done, it is a matter of the most obvious propriety, to give an opportunity for a re-trial. In the present case, less repugnance is felt to setting aside this award, from the consideration of the fact, that if the plaintiffs' demand is a just and equitable one, it will not be hazarded by this course, as they will have the amplest opportunity of reasserting and establishing it, on a second trial. On the other hand, if judgment is now entered on the award, the defendants will be forever concluded thereby; and if founded on injustice, the law affords no remedy, as the case cannot be taken by appeal or writ of error to any other tribunal, for trial or revision. The award is, therefore, set aside. And the defendants adjudged to pay the costs of the arbitration.

Case No. 14,104.

TORREY v. BEARDSLY.

[4 Wash. C. C. 242.] [1]

Circuit Court, D. Pennsylvania. April, 1818.

EJECTMENT—FRAUD IN PROCURING TITLE—PUBLIC LANDS—SPECIAL WARRANT—APPROPRIATED LAND—SURVEY—DATE.

1. In ejectment, the defendant was permitted to give evidence of fraud in the plaintiff, or one under whom he claimed, in obtaining the title derived from the defendant.

[Cited in Allin v. Robinson, Case No. 249.]

[Cited in Dobbs v. Kellogg, 53 Wis. 453, 10 N. W. 625.]

2. A special warrant for land before appropriated is a lost warrant, but may be laid as a general warrant on any other unappropriated land. And if the surveyor had traced the lines of a tract without a warrant, he may, without going again on the land, apply such warrant to such land, and the survey when returned bears date as of the day when the survey, and not the application, was made.

[3. Cited in Salmon v. Burgess, Case No. 12,262, to the point that, in contemplation of law, there is no fraction of a day, unless when an inquiry as to the priority of acts done on the same day becomes necessary.]

This was an ejectment [by the lessee of David Torrey against Beardsly] to recover a parcel of land lying in Wayne county. The plaintiff's title, the evidence, and the grounds of objection to the recovery, are fully stated in the charge.

WASHINGTON, Circuit Justice. The plaintiff comes before the jury with a regular paper title to the land in controversy, founded on two warrants for four hundred acres each, dated in 1793, granted in the names of Walter Kemble and Eliza Kemble; described as lying on the head waters of the north-east branch of Lacowaxen, to include an open meadow. The surveys bear date in July, 1794, and are of different tracts of land from those described in the warrants, to which they were

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

removed on account of the prior appropriation of the tracts for which they called. The surveys were returned into the office, and accepted in January, 1797. On the 13th of August, 1796, deeds were executed by Walter and Eliza Kemble to Jason Torrey, by which they conveyed to him all their right and title to the above warrants, and the lands surveyed, or to be surveyed under them, for the consideration of £20, being the amount of the original purchase money paid to the state for the warrants. In March, 1802, an order of resurvey was granted, on the application of Jason Torrey, and the whole quantity, not comprehended within prior surveys, was found to amount to three hundred and seventy-two acres, for which a patent was granted to Jason Torrey on the 1st of January, 1810, who in September, 1818, conveyed the same to the lessor of the plaintiff. The defendant claims the possession as tenant under Walter Kemble, and disputes the plaintiff's title upon the ground of fraud, in obtaining from him and Eliza Kemble the conveyances stated. Jason Torrey acted as deputy surveyor in the district where these surveys were made; and he is charged with having fraudulently concealed from Walter Kemble the fact, that the survey of the land in dispute had been made at the time he purchased the warrants from him, and with having deceived him by a representation that there was no vacant land on which to lay them. The court has permitted the defendant to go into proof to establish the alleged fraud, and if he has done so to your satisfaction, he is entitled to your verdict, it being agreed, that the lessor of the plaintiff purchased from his brother Jason, with full notice of the above charge, and that upon this ground a verdict had been rendered against him in an ejectment brought by Kemble against him in the state court.

I shall first lay before you a summary of the most material parts of the evidence on each side (taxing your memories with a recollection of those not deemed very material by the court), and will then lay down those principles of law which apply to the case. Mordecai Roberts has deposed, that the warrants in question, together with thirty others belonging to the witness, were placed in the hands of Mr. Beard, the surveyor, in the year 1793, to be surveyed; that Roberts's warrants being elder in date than Kemble's, were accordingly surveyed in that year by Jason Torrey. In consequence of these locations, as was stated to you by other witnesses, the land which Kemble's warrants described was appropriated, and could not be laid according to their calls. This witness further stated that, in the summer of 1796, Jason Torrey mentioned Kemble's warrants to him as being lost, and advised him to purchase them, which he declined, stating that Kemble suspected him of some improper conduct in appropriating the land his warrants designated, and, on that account, would not sell them to him; but he, Roberts, advised Torrey to become the purchaser, which he did in the course of that day. In 1806, the witness heard for the first time, that Kemble's warrants had been located by Torrey on the land in dispute. He further states, that after the location of his thirty warrants in 1793, he advised Kemble to lay his warrants on other vacant lands, which he refused to do, declaring that, unless he could obtain the land described in his warrants, he would have none. Schoonover, Benjamin and Charles Kemble, were also examined on behalf of the defendant,—who have deposed that in the summer of 1796 they were present when Jason Torrey called upon Kemble, and stated to him that he did not think he could find any vacant land on which to lay his warrants, as it had been appropriated, and inquired what was to be done with them? Kemble answered, that he supposed he must lose the land, but presumed he could get back the money which he had paid for the warrant. Torrey stated that this could not be done, and then offered to purchase the warrants from him for what they had cost him, as on account of money which he owed at the office, they would answer his purpose. This proposition was agreed to, and was accordingly carried into execution.

The conclusions of fact drawn by the defendant's counsel from this evidence, are, 1. That though these warrants were not surveyed according to their calls, still they were surveyed by Jason Torrey on other vacant land, in the year 1794, long before his purchase of them from Walter Kemble. 2. That he stated to Kemble that there was no vacant land on which they could be laid. And, 3. That he did not communicate to Kemble the fact that they had actually been surveyed. If these conclusions are fairly drawn, it will be difficult for Jason Torrey to escape from the charge of a fraudulent concealment of a material fact, known to himself, and of which Kemble was ignorant; a fact which, if true, would not fail to have had an important influence upon the mind of Kemble in deciding upon the value of the warrants, and a concealment which gave to the transaction a higher taint of fraud, from the circumstance of its being practiced by a public officer, especially charged with the duty of executing warrants placed in his hands. But the jury will bear in mind that this charge of fraud rests essentially upon the asserted fact, that Kemble's warrants were really laid on the land in dispute, at the time the surveys bear date, or at some period prior to that when the purchase was made. If not so, then the fact asserted to have been concealed did not exist, and could not therefore be concealed. As to the alleged misrepresentation in stating to Kemble that there were no vacant lands on which to lay these warrants, the jury will judge from the whole of the evidence taken together, whether Torrey could have intend-

ed to say, or whether Kemble could so have understood him, that there was no vacant land on which to lay lost warrants; or whether both parties did not understand the information as applying to the specific land called for in these warrants; if the latter, and the plaintiff's witnesses are believed, then Torrey was guilty of no misstatement, as the land described in these warrants had been appropriated.

I come now to the evidence given on the part of the plaintiff. Mr. Beard, the surveyor, has deposed, that after he had executed Roberts's thirty warrants, there remained no vacant land on any part of the north east branch of Lacowaxen to satisfy the calls of Kemble's warrant, which fact he stated on the ground to Mr. Roberts, and which was assented to by him. This being the fact, the witness considered Kemble's as lost warrants, the meaning of which the court understands to be, warrants which, being descriptive upon their face, lost their character as such, in consequence of the previous appropriation of the land for which they called. But though lost and ineffectual as to the particular land described in them, still they may assume a new character, and like warrants general and indescriptive in their origin, may be laid upon any other land not then appropriated. This witness proceeded to state, that it is never considered to be the duty of a surveyor, nor is it ever done in practice, to survey a lost warrant on other vacant land without the special direction of the owner, accompanied by a designation of the ground on which he wishes to lay it, and his furnishing chain carriers, provisions, &c., to enable the surveyor to perform the work. That it is a common practice for surveyors to survey tracts of vacant land, or as many of the sides as may be necessary to enable them to plot them, without having warrants at the time in their possession, and afterwards when a lost warrant is placed in their hands to survey, to apply it to some tract before surveyed, without again tracing the lines on the ground; and in these cases the survey is always returned, and bears date as having been made at the time when, in reality, it was made, and not as of the time when the application was made. The reason which the witness assigned for this practice is, that in any contest respecting those lands at a future day, the blocks in the trees will be found to correspond with the real time when the chops were made. The witness further stated, that in the autumn of 1796, Torrey informed him that he had purchased Kemble's warrants, and intended to apply them to the land now in controversy, instead of two other warrants, which he had before purchased for that purpose; that the application was accordingly made, and the warrants, deeds from Kemble, and a diagram of the land were delivered to him, to have the certificates signed by Caruthers, the deputy surveyor, and returned into the land office. This witness, as well as many others examined for the plaintiff, stated that the branch of Lacowaxen, on which the land in controversy lies, has always been known as the west branch, and that on which Roberts's warrants were laid as the north, or north-east branch; in confirmation of which, the more ancient surveys of Shields on the latter, and of three others on the former were laid before the jury. Moses Kellam deposed that in the year 1792, Kemble stated to him that he had discovered some good land on Big brook, a stream running into the north branch of Lacowaxen, which he was desirous to take up; and in 1793 he informed him that he had obtained two warrants for that land. That some time after the sale of the warrants to Torrey, he and Kemble were near Big brook, on the west side of it, when Kemble pointed across the brook to the land he had intended to take up. The witness then expressed his surprise that he had not retained his warrants, and laid them on other vacant lands, to which he replied, that he was glad he had sold them, as he would have no land unless he could have obtained that which his warrants described. These declarations were repeated after he knew that Torrey had covered the land in controversy by those warrants, accompanied by a wish that he might make out well with the land. The witness also expressed a decided opinion that Kemble's warrants could not have been located according to their calls, after the surveys of Roberts's warrants. Jason Torrey was also examined as a witness, who deposed that Kemble pointed to the land surveyed for Shields previous to 1792 as the land intended to be covered by his warrants, and being advised by the witness to lay them on other vacant lands, as they had then become lost warrants, he declined doing so, assigning the same reason which he had given to the other witnesses. This witness declares that at the time he purchased these warrants from Kemble, he had no intention of applying them to the land in dispute, or to any other in particular, having previously provided himself with two other warrants for this purpose. Two other witnesses, Jacob Kemble and Mr. Halbert, were examined, to prove that the land contemplated by Kemble as coming within the calls of his warrants, was on Big brook, and the first of the witnesses confined it to the tract surveyed for Shields.

From the above evidence, if believed by the jury, the following conclusions of facts arise, viz.: 1. That Kemble's warrants could not be located on the north east branch of Lacowaxen, according to their calls and his own declared intentions, and consequently they were, what Torrey stated them to be, lost warrants. 2. That they could not, agreeably to their calls, have been laid on the land in dispute, and that, as lost warrants, Torrey had no right, nor was it his duty, to lay, or apply them to other vacant lands, without the special instructions of Kemble. 3. That in

August, 1796, when the purchase of those warrants was made by Torrey, they continued to be lost warrants, unsurveyed, and unapplied to the land in controversy, or to any other, and were consequently worth no more than what Torrey paid for them; that it was customary with surveyors to make surveys of lands, which they supposed might be vacant, without warrants, and afterwards to apply lost or general warrants to them, without retracing the lines on the ground; and that the surveys so made were returned as of the date when they were made, and not that when the application of the warrant to the survey was made. 4. That although the survey of these warrants bears date in 1794, yet they never were in fact surveyed at any time, but were applied to those surveys after they were purchased. 5. That Kemble had no intention, or wish, to lay those warrants on any land but that which they described.

If these conclusions of fact be, in the opinion of the jury, fairly drawn, the court feels no difficulty in stating to you, that, in point of law, the charge of fraud is not made out. There was no falsehood asserted, or misrepresentation made, since the land called for by Kemble's warrants was not vacant, but appropriated by prior warrants and carried into survey. No material fact was concealed; for the land now in controversy was at the time vacant, unsurveyed and unapplied, and not even intended to be so. And although it had been so intended, yet Torrey would have been guilty of no fraud in concealing such intention from Kemble, a knowledge of the existence of vacant tracts of land being equally accessible to Kemble as to Torrey, if he had used the same industry. If from the official situation of the latter, from his superior judgment, or from any other cause, he had a better opportunity of gaining this information than others, he was fairly entitled to any benefit which he might legally derive from it, and was not bound to communicate it to the holder of a lost warrant, any more, than one merchant, who purchases a particular article from another, with a view to make a profit upon it at a market known to himself alone, is bound to communicate that fact to the vendor before he concludes the purchase.

It was contended by the defendant's counsel, that the purchase, in this case, was not of the land covered, or which might be afterwards covered, but of £20, the original price of the warrants. But there is no ground for this argument. It could hardly have been worth the while of Mr. Torrey to take all the trouble which this negotiation cost him, for no other purpose but to pay £20, and to receive in return the same sum. It is unlikely, therefore, that this was the intention of the parties. Besides, the deeds from the Kembles expressly convey their right to the land surveyed, or to be surveyed, under those warrants. In short, the purchase was of the warrants, which it was competent to the vendee to use for his own benefit as he might think proper.

Another point made by the defendant's counsel, was, that if, in truth, as contended for by the plaintiff, these surveys were not made in 1794, then the return of the survey as having been then made, was false, and could consequently afford no legal foundation for the patent which issued on it. This argument is equally unfounded with the other. If it was customary to make these surveys without warrants, and afterwards to apply lost warrants to them, which surveys were returned into the land office as of the day the survey was actually made, and were accepted; these facts not only negative the charge of fraud, but remove all objections to the title, unless, between the survey returned and accepted, some other person has acquired a title to the land from the commonwealth.

The last objection made by the defendant is, that the conveyance by Jason Torrey to the lessor of the plaintiff was a fraud upon the jurisdiction of this court, the transfer having been made after a decision in the state court against the title of Jason Torrey, and with a view to give jurisdiction to this court. If the two witnesses who have been examined on this point are believed by the jury, the conveyance was made bona fide, for a valuable consideration, without any secret trust or understanding between the parties, inconsistent with what the deed itself purports. If so, then the conveyance is not a fraud upon the jurisdiction of the court; and the parties being citizens of different states, both the constitution and laws of the United States vest this court with a jurisdiction of the cause, which cannot be affected by the circumstance that a verdict had been rendered in the state court for the grantor, prior to his sale and conveyance of the property to the lessor of the plaintiff. Verdict for the plaintiff.

TORREY (BEARDSLEY v.). See Case No. 1,190.

Case No. 14,105.

TORREY v. GRANT LOCOMOTIVE WORKS.

[14 Blatchf. 269.] [1]

Circuit Court, S. D. New York. June 26, 1877.

REMOVAL OF CAUSES—BOND—COSTS—STATUTES.

A suit was brought in a state court, in August, 1875, and proceedings for its removal into this court were taken, under subdivision 3 of section 639 of the Revised Statutes. The bond given was such a bond as is provided for by section 639, and not such a bond as is provided for by section 3 of the act of March 3, 1875 (18 Stat. 470). It contained no provision for costs. *Held*, that the suit was not properly removed.

[Cited in Farmers' Loan & Trust Co. v. Chicago, P. & S. W. R. Co., Case No. 4,665;

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

Webber v. Bishop, 13 Fed. 49; Deford v. Mehaffy, Id. 491; Harris v. Delaware, L. & W. R. Co., 18 Fed. 833; Sheldrick v. Cockcroft, 27 Fed. 579; Austin v. Gagan, 39 Fed. 628; Kentucky v. Louisville Bridge Co., 42 Fed. 242.]

[Cited in Bates v. Baltimore & O. R. Co., 39 Ohio St. 167; Stone v. Sargent, 129 Mass. 512.]

[This was a suit by Samuel W. Torrey against the Grant Locomotive Works.]

Joseph H. Choate, for the motion.
George H. Forster, opposed.

BLATCHFORD, District Judge. Whether subdivision 3 of section 639, of the Revised Statutes is or is not repealed by the provisions of the act of March 3, 1875 (18 Stat. 470), I do not consider it necessary now to decide. Even if, when a suit is one between a citizen of the state in which it is brought and a citizen of another state, the latter may still, notwithstanding the act of 1875, and although the term at which the cause may be first tried has passed, remove the cause, on his petition, whether he be plaintiff or defendant, provided he files the petition in the state court before the trial or final hearing of the suit, and, before or at the time of filing said petition, makes and files in the state court an affidavit stating that he has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such state court, yet such a suit is a suit in which there is "a controversy between citizens of different states," within the language and meaning of section 2 of the act of 1875. That section, and subdivision 3 of section 639, of the Revised Statutes, apply, each of them, fully and distinctly, to the removal of a suit of a civil nature, at law or in equity, pending at the time of the passage of the act of 1875, or thereafter brought in any state court, where the amount or matter in dispute, exclusive of costs, exceeds the sum or value of $500, if such suit is a suit between a citizen of the state in which it is brought and a citizen of another state, and each of them authorizes its removal by the latter, whether he be plaintiff or defendant. Under subdivision 3 of section 639, the petition for removal may be filed at any time before the trial or final hearing of the suit, and there must be made and filed, before or at the time of filing the petition, the affidavit above mentioned. Section 639 provides, that, in order to such removal, the petitioner, in the cases mentioned in it, must, with his petition, offer surety of a specified character. This includes merely surety that he will enter in the federal court copies of proceeds and proceedings, and appear there and enter special bail, if requisite. It does not include a bond, with surety, for paying any costs. But section 3 of the act of 1875 provides, that, whenever either party entitled to remove a suit mentioned in section 2, shall desire to remove it, he may file a petition in the state court, for its removal, "before or at the term at which said cause could be first tried, and before the trial thereof," and shall file therewith a bond, not only for entering in the federal court a copy of the record in the suit, and for there appearing and entering special bail, but a bond "for paying all costs that may be awarded by the said circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto." The limitation of time within which the petition may be filed, and the fact that, under section 639, it may be filed at a later period than it can be under the act of 1875, has nothing to do with the character of the bond. The present suit is one which falls within the provisions of section 3 of the act of 1875, in regard to the terms of the bond required. It is a suit at law of a civil nature, brought in a state court, in August, 1875, the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and it is a suit in which there is a controversy between citizens of different states. It is, therefore, a suit mentioned in section 2 of the act of 1875, and one of the parties to it has undertaken to remove it by filing his petition for removal in the state court. He may be in time, because within the time limited by subdivision 3 of section 639, although not within the time limited by section 3 of the act of 1875; but, even if he claims the benefit of the longer time allowed by section 639, he must give the bond prescribed by the act of 1875. He has not given such bond. The bond he filed contained no provision for costs.

It was held by Judges McKennan and Cadwalader, in McMurdy v. Connecticut General Life Ins. Co. [Case No. 8,903], that the act of 1875 takes the place of all former acts, in the requirements which it makes for the removal of all causes to which it is applicable; that, even though a removal was sought under section 1 of the act of March 2, 1867 (14 Stat. 558), embodied in subdivision 3 of section 639, of the Revised Statutes, the requirement of section 3 of the act of 1875, in regard to the nature of the bond, extends to such a case, as being a case mentioned in section 2 of the act of 1875; that, to that extent, at least, the act of 1875 repeals all prior acts on that subject; that the filing of the bond conditioned as required by the act of 1875, is a condition precedent to the removal of the cause to the federal court; and that, if the required bond has not been filed, that court has no jurisdiction, although it belongs to that court exclusively, and not to the state court, to decide that fact.

The plaintiff's motion to take from the files of this court the papers which the defendants have filed here is granted.

TORREY (TRACY v.). Case No. 14,127.

Case No. 14,106.

TOTTEN v. The PLUTO.

[N. Y. Times, May 25, 1852.]

District Court, S. D. New York. 1852.

COLLISION—EFFECT OF SWEARING TO PLEADINGS—CONFLICTING TESTIMONY—FAULT.

This was an action brought by [Richard Totten], the owner of the sloop Delaware, for damage occasioned by a collision with the steamboat Pluto, near the Battery. It appeared that the steamboat was bound from the North to the East river, with a raft in tow, and the sloop was bound from the East river to Jersey City; the wind blowing from the east, and the tide running ebb. The testimony offered by the respective parties failed to sustain the allegations of the libel and answer, but contradicted them in material points.

BY THE COURT (BETTS, District Judge). The libel and answer in admiralty being put in on the oath of each of the parties, his adversary is entitled to take the assertions or admissions pertinent to the issue as conclusive evidence against the party making them. Neither can contradict by proof the averments set forth in his pleading, and his only relief against misstatement of facts so made is to apply for leave to amend before going to trial. The answer in this case, containing the statement that the steamboat was in motion, precludes the claimants from denying that fact, and the libelant was not required by law to be prepared with testimony to rebut any evidence produced on the hearing by the claimant, to show a different state of facts. The statements of the witnesses for the libelant, as to the manner of the collision, are contradicted by witnesses for the claimant, preponderating both in number and intelligence, as well as opportunity to observe the accident, and show that the collision was occasioned by no fault on the part of the steamboat, but by the negligence of those in charge of the sloop, in luffing up so as to bring their vessel in contact with the raft. Libel dismissed, with costs.

Case No. 14,107.

TOUCEY v. BOWEN.

[1 Biss. 81.] [1]

Circuit Court, D. Indiana. Nov., 1855.

REMOVAL OF CAUSES—FORMS OF ACTION—FOLLOWING STATE CODE—REMOVED CASE—BANKING—INDIVIDUAL LIABILITY OF STOCKHOLDER.

1. Suits removed from the state courts into the courts of the United States are governed by the rules of the latter courts and must be made to conform substantially to the modes of procedure observed therein as in original cases.

2. But where the state has adopted a code, the plaintiff will not be held to any technical observance of the mere form of action.

3. Under the act of the legislature of Indiana, of May 28, 1852, "to authorize and regulate the business of general banking," and the act of March, 1855 [Laws 1855, p. 23], amendatory thereto, no suit can be maintained against a stockholder in any such bank in his individual character for the payment of any portion of the regular notes issued by such bank and protested for non-payment, until it is shown that the stocks deposited with the auditor of state, to secure the redemption of the circulation are first exhausted, or that the bank is insolvent.

This is a suit instituted by Toucey to recover the amount of certain bank notes issued by the Wabash Valley Bank and protested for non-payment at the place where the bank was located. The defendant is charged as the sole stockholder in the bank, and the declaration alleges that no such bank or banking house is in existence at the place,—Jasper, Dubois county, Indiana,—where the notes purport to be issued and are made payable. The plaintiff, after the necessary allegations to show that Bowen estab lished the institution and put the notes in circulation by virtue of the general banking law of the state, proceeds to charge him, in his individual capacity, for the amount of the notes and damages fixed by the law under which the institution was established. To this declaration the defendant filed a general demurrer.

Dumont & Torbet, for plaintiff.
David McDonald, for defendant.

HUNTINGTON, District Judge. This proceeding having been instituted in the state court, partakes both of a legal and equitable character—the new Code of Procedure having abolished the distinction between equitable and legal proceedings. In this court this distinction is maintained, and all our proceedings are governed by the principles of the common law, except in cases where we have for convenience adopted a different practice. By an act of congress, a non-resident sued in the courts of the state, may remove his cause to this court, and when it comes here the proceedings must thenceforth be governed by our own forms and rules of procedure. If the suit is in the nature of an action at law, it will take that distinct form here, and, if a purely equitable proceeding, will be governed by the rules of the court of chancery. Some inconvenience will no doubt grow out of this, so far as the mere forms of procedure are concerned, and in some cases it may be necessary to so amend the proceedings as to make them conform to our rules, or in other words, so as to give a distinct legal or equitable character to the proceedings.

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

The legislature, in abolishing the ancient forms of action, and the distinctions hitherto observed between proceedings in law and in equity, have not touched the old and long sanctioned principles which govern the rights of parties prior to this innovation. It has simply dispensed with certain forms, and the proceedings before the state tribunals are made to conform by operation of law to the nature of the case presented, whether it be legal or equitable.

The case before us is in the nature of an action at law, in form ex contractu, and should the declaration on examination lack any substantial requisite, which, according to the principles governing proceedings in this court, will allow the plaintiff to maintain his action here, the party will be compelled to amend it. In short he must show a cause of action, and in some sort make his proceedings conform to the rules which govern this court, though the court will not hold him to a technical observance of forms, so far as the mere title of the action is concerned. This case then being within our jurisdiction, I proceed to consider it, as if it had been originally commenced here.

There are various objections raised by the counsel who appears in support of the demurrer, some of which it may not be necessary to notice, indeed, if I am right in the view taken of one, and, as I esteem it the important question, it settles the case against the right of the plaintiff to maintain his suit at all, until it is shown that the securities deposited with the auditor of state,—namely the stocks,—have been fully exhausted. It is necessary, in order to a proper understanding of this question, to re-examine somewhat in detail the provisions of the general banking law. The "act to authorize and regulate the business of general banking," was approved May 28, 1852. The first section makes it the duty of the auditor of state, on application of "any person or association of persons," wishing to organize under the act, to cause to be engraved and printed, such quality of notes, in the similitude of bank notes, in blank, of different denominations as may from time to time be needed to meet the demands of these organizations for the purpose of banking. The 5th section provides that any person, or association of persons, formed for the purpose of banking, on transferring to the auditor a certain amount of a certain description of stocks, shall receive from the auditor an equal amount of these notes, &c. The 6th section designates the kind of stocks and securities allowed to be deposited with the auditor. The 8th section is as follows: "In case the maker or makers of any such circulating notes, countersigned and registered as aforesaid, shall at any time hereafter, on lawful demand at the place of business specified in such note, fail or refuse to redeem such note in the lawful money of the United States, the holder of such note, making such lawful demand, may cause the same to be protested for non-payment by a notary public, in the usual manner; and the auditor on receiving and filing in his office such protest, shall forthwith give written notice to the maker or makers of such note, to pay the same, and if he or they shall omit to do so for thirty days after such notice, the auditor shall immediately (unless he shall be satisfied that there is a good and legal defense against the payment of such note or notes) give notice in one of the newspapers published in Indianapolis, that all the circulating notes issued by such person or association, will be redeemed out of the stocks held by him in trust for that purpose; and it shall be lawful for the auditor to apply the said trust funds belonging to the maker or makers of such protested notes, to the payment and redemption of such protested notes, with costs of protests, and to adopt such measures for the payment of all such circulating notes, put in circulation by the maker or makers of such protested notes, pursuant to the provisions of this act, as will, in his opinion, most effectually prevent loss to the holders thereof."

On the 3d of March, 1855, the legislature passed an amendatory act, but without materially changing this provision. Before, then, a person or association of persons could procure the notes for banking, they were obliged to deposite an equal amount of stocks with the state auditor, to secure their redemption. These stocks are designated in the act as trust funds, and where any notes were protested, (as in the case before us) for non-payment, and filed with the auditor, the auditor is authorized and directed without delay, to redeem such notes out of these stocks, after thirty days notice to the bank. Can anything be more clear than that these funds were intended to be first applied to the redemption of this circulation, and first of that which had been protested for non-payment? Section 9 of the act, speaks of these stocks as security for the payment of these notes, and the 18th section provides that the notes on their face shall be stamped, "secured by the pledge of public stocks." The 13th section provides that these public stocks shall be held by the auditor "exclusively for the redemption of the bills or notes" put in circulation. But it is said that by the 25th section "every shareholder shall be liable in his individual capacity for any contract, or debt or engagement of such association, to an amount over and above his stock, equal to the amount of his shares of said stock." This is the provision on which the plaintiff rests his right of action, and it is contended that notwithstanding these stocks are still deposited with the auditor and subject to be applied to the redemption of these notes, (for there is no allegation to the contrary, nor any showing the insolvency of the bank) the plaintiff has the right to his election—either

to seek payment by means of the stocks, or have his remedy by action at once against the defendant, who is, it seems, the sole stockholder of this bank. But let us examine it a little minutely. Every stockholder shall be liable individually for "any contract debt or engagement" to an amount over and above his stock, equal to the amount of his shares of such stock. Not one word is said in this section about notes protested for non-payment, though in a certain event they would undoubtedly fall within the meaning of the phrase, "any contract, debt or engagement." The stocks were set apart solely for the security and redemption of the circulation, and could not be used for any other purpose. The individual liability was intended to cover all the engagements of whatsoever nature, which the bank should enter into, to an amount over and above the fund set apart as a trust, to be applied to the prompt redemption of their circulation. And it seems to me clear that such liability was to attach only when the funds of the corporation were exhausted. For by referring to the preceding (24th) section, it will be seen that all persons having demands against one of these banks, should first bring his action "against the president thereof"—in short, against the bank. "And all judgments and decrees obtained or rendered against such president, for any debt or liability of such association, shall be first enforced against the joint property of such association," which property is made subject to rule on execution. The plaintiff perhaps gives a sufficient reason for not suing the bank, as, according to the declaration, it has no place of business, no existence in fact, and if he had gone farther and shown that there were no stocks in the hands of the auditor for the redemption of these protested notes, I think it would be clear that the suit could be maintained against the defendant as a stockholder, for there are no other outstanding liabilities, equal to and over and above his stock.

If the doctrine contended for, by the plaintiff's counsel, can be maintained, there would be no security against innumerable and vexatious suits against individual stockholders, and as many suits might be brought as a man had bills in his pocket, if an unworthy feeling prompted him to protest them at different times for non-payment. Certainly the legislature never intended to open such a door for litigation and oppression; but by requiring a trust fund to be deposited with a state officer, liable at any time to be applied to the redemption of these notes, without suit and without delay, they require that fund to be first exhausted before this individual liability attaches. It is said, however, that the constitution governs the rights of these parties independent of the act. I do not think so. The 25th section of the act is but a transcript of the 6th section of the 11th article of the constitution, and I think warrants no other construction than that just given.

There are several other objections urged against the declaration, but it is not necessary to notice them. This is however a question of some magnitude and great interest, and if it is desired that this opinion be reviewed by the supreme court of the United States,—and I should be gratified if it could be,—the plaintiff can amend, if he thinks proper, his declaration in any particular he desires, so that it may be free from every objection except that just decided, and which goes to the very foundation of the action itself.

This is a question that does not depend on authority, for I have been unable to find in the books, a case which even resembles it; neither the case in 10 Ohio, nor in 8 Cowen, bear upon this question. In the former, the point decided, was that a suspension of specie payment might be carried so far as to work a forfeiture of chartered privileges. The case of Briggs v. Penniman, 8 Cow. 387, cited by the plaintiff's counsel, was a proceeding in chancery by one of the stockholders of an insolvent corporation. The important question in that case was, whether a stockholder in the corporation, liable by virtue of the statute creating the corporation, in his individual character, for an amount equal to the amount of his stock, could be sued by a creditor of the corporation, before its franchises had been taken away by due course of law. It was decided, that the corporation, ceasing to do business as such, and being without funds, was in contemplation of law, dissolved, and therefore the liabilities of the stockholders individually attached.

Demurrer sustained.

Case No. 14,108.

Ex parte TOUCHMAN.

[1 Hughes, 601.] [1]

District Court, E. D. Virginia. Feb. 4, 1875.

CONSTITUTIONAL LAW — STATE LAW UNCONSTITUTIONAL IN PART—ARREST—HABEAS CORPUS.

1. Where a prisoner, who is a non-resident of a state, is under arrest for an act which would subject a resident to prosecution, committed in violation of a law which in some of its provisions in regard to nonresidents is in violation of the constitution of the United States, he is not entitled to be released by a judge of a federal court on habeas corpus.

2. A law may be unconstitutional in some of its provisions and not in others, and in its effect upon some classes of citizens and not upon others; and may be treated as to those provisions and classes as pro tanto unconstitutional, while enforced as to other of its provisions and its effect upon other classes of citizens.

On habeas corpus. In the matter of H. P. Touchman, on habeas corpus, to the sergeant of the city of Richmond, brings the body of the prisoner into court and makes return that the prisoner is held in his custody as jailer, etc., under an indictment found by the grand jury of the hustings court, charging him with unlawfully selling and offering to sell goods, wares, and merchandise by card, sample, and other representation, without a license, according to law, so to do; and that he is detained for no other cause. The prisoner in his petition complains that he is unlawfully detained and wrongfully restrained of his liberty by arrest and imprisonment under an act of the general assembly of Virginia, approved 30th April, 1874 (section 110) [Laws Va. 1874, p. 317], entitled "An act for the assessment, levy, and collection of taxes." He alleges that he is a citizen and resident of the state of Pennsylvania, doing business as a merchant in the city of Philadelphia, and is entitled as such to the enjoyment of all the privileges and immunities in the state of Virginia which belong to the citizens thereof; and he complains that the aforesaid act of assembly contravenes the second section of the fourth article of the constitution of the United States in this, that it imposes a tax on citizens of the Union not residing in Virginia greater than it imposes on resident citizens of Virginia. The judge remanded the prisoner to the custody of the sergeant of Richmond.

E. Y. Cannon, for this prisoner, and George D. Wise, for others in like circumstances.

E. C. Cabell, for the Commonwealth of Virginia, and Alfred Morton, for certain resident merchants.

HUGHES, District Judge. The prisoner in custody is charged with violating the 110th section of the act of assembly approved April 30, 1874, entitled "An act for the assessment, levy, and collection of taxes." This law requires all sample merchants to take out a license to sell by sample, and to pay a tax of $100. No residents but licensed merchants and manufacturers can take out a sample merchant's license. Section 111 requires resident merchants and resident manufacturers, besides any other tax they may be required to pay, in order to sell by sample to take out a license and pay a tax of $25. It allows licensed manufacturers and merchants to exhibit samples of their wares and goods anywhere in the state. It makes the license of a merchant good not only in the city or county where it is taken out, but also over the whole state. It declares the license taken out by sample merchants to be a personal privilege not transferable, which can be used only by the person taking it out. It allows resident merchants who are licensed to exhibit their wares or goods anywhere in the state by agents, but forbids them to employ as agents non-resident travellers or salesmen. It allows a non-resident to take out a resident merchant's license. A law may be unconstitutional in some of its provisions and not so in others. It may be constitutional in its effect upon some classes of citizens and not so upon others. A law may be treated as to such provisions and as to such classes as pro tanto unconstitutional, and upheld as to other provisions and classes. If a prisoner has violated a provision of law that is constitutional, he should not escape because another provision of the same law is unconstitutional.

I am free to express the opinion that the act of the Virginia assembly under consideration is in two or three respects unconstitutional, under the ruling of the supreme court of the United States in the case of Wood v. Maryland, 12 Wall. [79 U. S.] 418.

1. If a manufacturer of another state were to exhibit samples of his wares in this, after having taken out a license to sell on sample under the 111th section of the act, which requires resident manufacturers duly licensed as such, in order to be allowed to sell by sample, to take out a "sample merchant's license," on paying $25, then, if he were arrested and imprisoned for so exhibiting his wares, it would be a question whether he might not be released on the ground that he was not allowed the same privilege as a non-resident manufacturer which was allowed the resident manufacturer.

2. So if a merchant of another state were to take out a license as a merchant here, both as a resident merchant and under section 111 paying the tax of $25, and then were to exhibit his goods by sample; in that case, if he were imprisoned for exhibiting his samples, it would be a question whether he might not be released on the ground that the same privilege was not allowed to him,

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

as a non-resident citizen, that was allowed to the resident merchant.

3. So, also, if a non-resident travelling agent of a licensed resident merchant were to be arrested for exhibiting samples of the goods of his employer, he might be released on the ground that he was denied the privilege of acting as agent which was given by this law to resident travelling agents.

But this prisoner is neither a non-resident manufacturer, nor a non-resident merchant licensed here as a sample merchant, nor a non-resident agent of a licensed resident merchant. He was not, therefore, in any way exercising a privilege as non-resident which could be exercised by a resident. He had not paid any tax or taken out any license. He had not secured the right in any of the modes prescribed by law to exhibit samples. He had acquired no right to exhibit samples by virtue of any similar right acquired by any resident, and the only privilege of which he has been deprived is that of disregarding every requirement of the law of which he complains. While, therefore, it may be that this act of the Virginia assembly of 30th April, 1874, operates unconstitutionally in several classes of cases where non-residents are liable to be prosecuted and imprisoned under it, yet it does not operate unconstitutionally in the case of this prisoner.

I have felt constrained to lean, as far as I consistently could, to the support of the law of the state, and, by a strict construction of the decision of the supreme court on this question, to apply it only as far as its very terms and language require. It declared the statute of Maryland, as to the especial provisions it had under review immediately affecting the plaintiff in error, pro tanto void. By limiting its decision to those provisions which directly affected the rights of the plaintiff, it impliedly forbade the courts of the United States to go farther and to invalidate other provisions of state laws not affecting the immediate rights of the non-resident citizen actually before the court.

Case No. 14,109.

The TOWANDA.

[34 Leg. Int. 394; 23 Int. Rev. Rec. 384; 5 Cent. Law J. 418; 13 Phila. 464; 12 Am. Law Rev. 401; 25 Pittsb. Leg. J. 59.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 22, 1877.

ADMIRALTY—JURISDICTION—DEATH BY WRONGFUL ACT—SUIT BY WIDOW.

The United States district court has jurisdiction in admiralty of a libel for damages for the death of the husband of libellant, who was chief mate, and whose death was the direct result of the negligence of the steamer in causing the collision.

[Cited in The Charles Morgan, Case No. 2,618; Hollyday v. The David Reeves, Id. 6,625; The Garland, 5 Fed. 926; The Harrisburg, 15 Fed. 614; The E. B. Ward, 17 Fed. 458; The Harrisburg, 119 U. S. 207, 7 Sup. Ct. 143.]

[See Armstrong v. Beadle, Case No. 541.]

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

[This was a libel by Mary Helmsley against Coggins, master of the Towanda, to recover damages to her resulting from the death of her husband in a collision between the Towanda and the H. P. Blaisdell. From a decree of the district court in favor of libellant (case unreported), respondent appealed.]

James B. Roney and R. C. McMurtrie, for appellant.

George P. Rich, for appellee.

McKENNAN, Circuit Judge. A statement of facts has been agreed upon in this case, by which it appears that the steamship Towanda, belonging to Philadelphia, on the night of May 10th, 1876, on the high seas, about twenty miles from Cape Hatteras, ran down and sank the schooner, H. P. Blaisdell. In pursuance of proceedings in admiralty in the district court, the steamship was condemned and sold, and the proceeds brought into court for distribution among those entitled to damages for losses occasioned by the collision. The husband of the appellee was the chief mate on the schooner, and was drowned, "his death being the direct result of the negligence of the steamer in causing the collision." The district court entertained her intervening libel, praying for an allowance out of the fund in court, of damages for the injury resulting to her by the death of her husband, and awarded her therefor the sum of $1,500. The jurisdiction of the court to entertain this libel is the only question in the case. The competency of the court to redress the injury complained of is denied upon the ground that the right to it had no existence at common law, but is purely statutory, and it is not, therefore, a subject of admiralty cognizance.

The jurisdiction of the admiralty courts embraces all torts committed on the high seas, and, if the nature of the alleged wrong entitled the appellee to redress at all, the locality of its commission brought it within the rightful cognizance of the court. The denial of the right to compensation for personal injuries resulting in death seems to have its authoritative source in the declaration of Lord Ellenborough in Baker v. Bolton, 1 Camp. 493, that "in a civil court, the death of a human being cannot be complained of as an injury." While the weight of authority in the common law courts is, perhaps, in favor of the principle thus stated, it has not been adopted with uniform sanc-

[1] [Reprinted from 34 Leg. Int. 394, by permission. 12 Am. Law Rev. 401, contains only a partial report.]

tion even by them. In Ford v. Monroe, 20 Wend. 210, damages were recovered by the father of a minor, who had been killed by the negligence of the defendant. But it does not appear that any question was made or adverted to that the action could not be maintained. In James v. Christy, 18 Mo. 162, where a minor was killed on board a steamboat by a defect in the machinery, a suit for the loss of his services, by the administrator of his father was maintained against the owner of the boat. In Sullivan v. Union Pac. R. Co. [Case No. 13,599], Judge Dillon fully considers the cases on the subject, and concludes that an action for such an injury is maintainable. As was said by Judge Sprague in Cutting v. Seabury [Id. 3,521]: "The question is not one of local law, but of general jurisprudence, and I cannot consider it as settled, that no action can be maintained for the death of a human being, * * * but natural equity and the general principles of law are in favor of it." These declarations received the decided approval of Chief Justice Chase in The Sea Gull [Id. 12,578], in which he said: "And certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules," and declining to follow the common law cases on the subject, said: "But these are all common law cases, and the common law has its peculiar rules in relation to this subject, traceable to the feudal law and its forfeitures." He therefore overruled a plea to the jurisdiction, and rendered a decree in favor of a husband, whose libel claimed damages against a vessel for injuries resulting in the death of his wife. So, also, in The Highland Light [Id. 6,477], he held that the widow and son of a hand killed on a steam-vessel by the negligence of the engineer, had suffered an injury for which they might have redress in admiralty.

Whatever, therefore, may be the course of the decisions of common law courts touching this question, the better opinion seems to be, that "the human providence which watches over the rights and interests of those who go down to the sea in ships, and do their business on the great waters," ought to afford redress for all the injuries to which they are unlawfully subjected. The exercise of such a jurisdiction by courts of admiralty is at least consonant with "natural equity and the general principles of law," and with the benign spirit of English and American legislation on the subject. The decree of the district court is therefore affirmed.

TOWER, Ex parte. See Case No. 1,085.

TOWER (BARTON v.). See Case No. 1,085.

TOWER (LINCOLN v.). See Case No. 8,355.

TOWERS (McCALL v.). See Case No. 8,674.

TOWERS (MUNROE v.). See Case No. 9,930.

TOWERS (SHEAN v.). See Case No. 12,731.

TOWLE (CLEVELAND v.). See Case No. 2,888.

Case No. 14,110.

TOWLE v. The GREAT EASTERN.[1]

District Court, S. D. New York. Nov. 12, 1864.

SALVAGE—BY PASSENGER—NATURE OF SERVICE—UNSUCCESSFUL EXPERIMENTS.

[The services of a passenger, who, after the officers of the ship in two days of effort have exhausted all their means to get control of the rudder, devises, and, with the aid of men put under his direction by the captain, executes, a plan for that purpose, thereby rescuing the ship from peril, are of such an extraordinary character, and beyond the line of his duty to assist in working the ship by usual and well-known means, as to entitle him to salvage, although he may have obtained his idea from a previous unsuccessful experiment of the engineer.]

[Cited in The Alaska, 23 Fed. 604.]

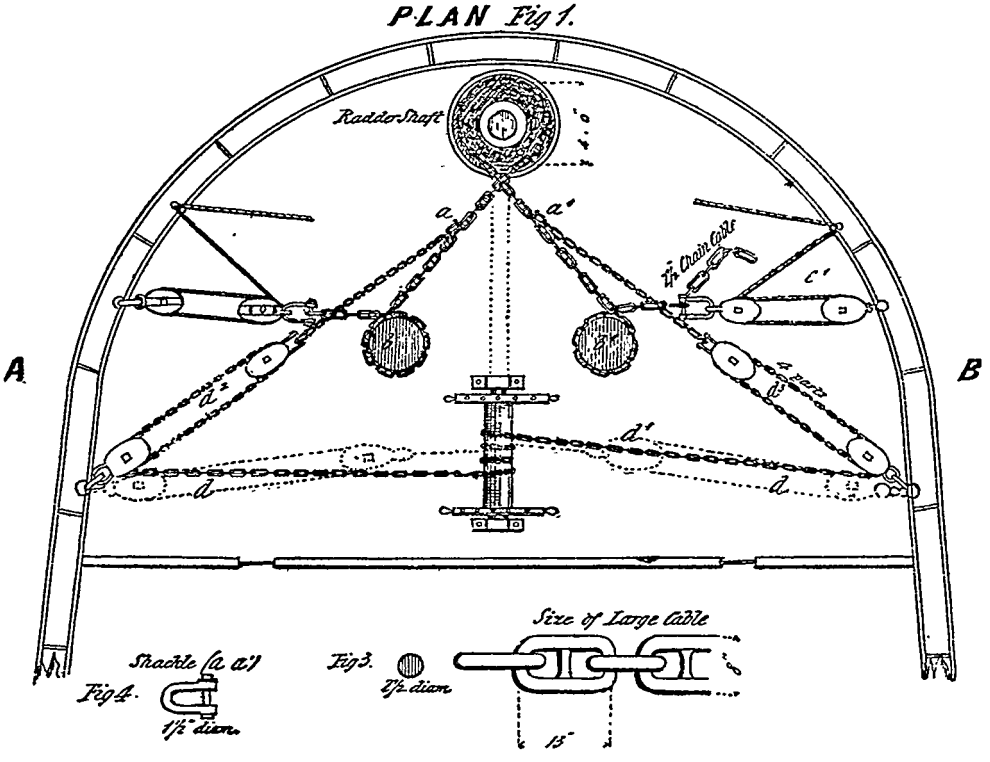
[This was a libel in rem by Hamilton E. Towle against the Great Eastern for salvage.]

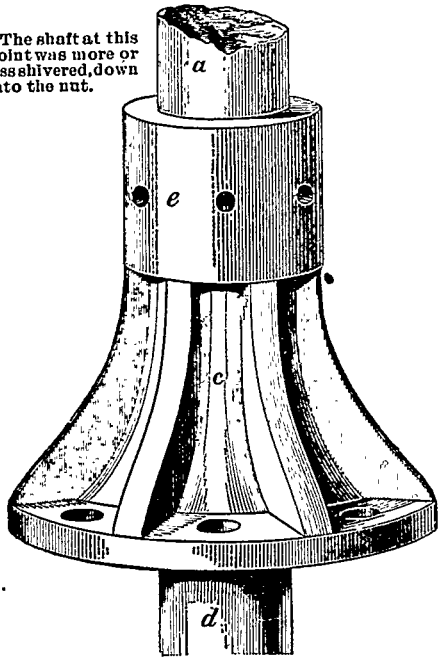
The following diagrams were used on the trial, for the purpose of explaining the nature of the injury to the ship, and the character of the services performed by the libellant:

[1] [From a pamphlet report prepared by and furnished for publication through the courtesy of the Honorable William D. Shipman, formerly United States district judge for the district of Connecticut. This pamphlet report contains the following prefatory note:]

The following case has never been published in this country, except in newspapers, though it appeared soon after it was decided (Towle v. The Great Eastern, 11 Law T., N. S., 516) in England, and subsequently in 2 Marit. Law Cas. 148. It was earnestly contended on the hearing by the eminent counsel for the claimants that there was no well settled authority for allowing a passenger salvage under such circumstances as those which characterized the services rendered by the libellant. As the doctrine laid down by the court in deciding the case was, by some, considered novel and the amount involved considerable, it was hoped and expected by the court that the case would be carried by appeal to the supreme court of the United States; but no appeal was ever taken. The opinion is now reprinted from the New-York Times, and is a verbatim copy of that opinion originally delivered and filed by the court. The illustrations used on the trial, which have never before been published, will be found in Appendix No. 1. [See statement.] It is said that since the decision, Judge Cadwalader, of the Eastern district of Pennsylvania, in an analogous case, followed the same rule as that laid down in this of The Great Eastern. The interest taken in the case at the time by those engaged in maritime affairs, as well as by the admiralty bar, and the increase of ocean steamships will probably justify this republication. W. D. S. February 28th, 1893.

[Temporary steering gear used on board the Great Eastern after the breaking of the rudder shaft in the gale of September 12, 1861. By Hamilton E. Towle, C. E., Boston, U. S.]





(a) The rudder shaft just below the point of fracture.
(e) The nut which was at one time attempted to be unscrewed.
(c) The ribbed frustum of cone.
(d) The rudder shaft below the base of the cone, and passing down through the middle, or steerage deck, terminating in the rudder blade.

Figure 1 is a plan of the middle deck of the Great Eastern, showing the arrangement of the temporary steering gear employed to operate the rudder after the accident. This sketch also shows by the dotted lines the lower tiller and its running gear before the accident. Figure 2 is a vertical cross section through the stern of the ship, showing where the rudder-shaft, ten inches in diameter, broke off, and the bitts (bb), which were made use of to receive the sudden strains transmitted through the cable from the rudder; also the end tackles (ee[1]), employed to keep the cable tight around the bitts, when the rudder was in proper position for steering any course. Figure 1 (d[2] and d[3]) shows the running gear after having been disconnected from the lower tiller and attached to the cable by shackles at (aa[1]). The rudder shaft broke two feet six inches above the middle deck, at the upper side of and partially in a nut fifteen inches in diameter, twelve inches high; which nut was screwed upon the rudder-shaft above a cast-iron bell-shaped disk, having a diameter of two feet nine inches, between the base of which and the deck were interposed iron balls six inches in diameter, to reduce the friction in moving the rudder. This disk being constructed with webs to support the broad part, greatly facilitated fastening the cable upon it so as not to slip; small chains, ⅜, ⅝ and ¾ inch, were used to lash the different turns of the cable to one another and to the conical disk. A single link of the large cable weighs about sixty pounds, and fifteen fathoms (ninety feet) in length of it was employed. The steering wheel was employed as usual, the end tackles (ee[1]) making corresponding motions. This apparatus was used for forty-eight hours continual steaming at nine knots per hour, when the big ship arrived at Queenstown harbor.

Curtis & Hall, for libellant.

Evarts, Southmayd & Choate, for claimants.

SHIPMAN, District Judge. On the 10th of September, 1861, the steamship Great Eastern left Liverpool for New York, with about four hundred passengers and a considerable cargo, together with about four hundred persons as officers and crew, including engineers, firemen, servants, &c. She was, as is well known, the largest ship that ever floated the sea, and was of great value. Her original cost was very large, but owing to her great draught of water and unwieldy proportions, which limited in many directions her general usefulness as an instrument of commercial enterprise, it is difficult to state her exact value at the time the events occurred upon which this suit is founded. But, from the evidence before this court, it is safe to conclude that she was at that time worth more than half a million of dollars. Beyond this, her value is not important for the purposes of this case. Among her passengers on this voyage was the libellant in this suit. On Thursday, the 12th of September, two days after the ship left Liverpool, and about two hundred and eighty miles west of Cape Clear, she encountered a heavy storm, which did great damage to, and finally swept away her paddle wheels and several of her boats. Her screw or propeller, however, remained substantially uninjured, and by this she could make very good headway when under steam. During the evening or night of the 12th, she fell off into the trough of the sea, and rolled with such violence as to carry from side to side of the ship all the movable objects on her deck and in her cabins. Much of her furniture was broken up and destroyed, several of her crew and passengers injured, and a great part of the luggage of the latter was drenched and crushed into a mass of worthless rubbish. The immense size of the ship rendered her motions, when rolling in the trough of a heavy sea, much more dangerous and destructive than those of a ship of ordinary dimensions. During the night it was discovered that her rudder shaft, which was large and of wrought iron, had been twisted off below all the points of connection with the steering gear. The ship,

therefore, lay helpless in the trough of the sea, rolling heavily with every swell. Her sails were blown away in a subsequent attempt to control her movements by them, and no means were left by which her head could be brought up, and her position on the sea changed. She was as unmanageable as if her rudder had been entirely gone. The only way, therefore, to get any control of the motions of the ship was to secure some kind of efficient steering-gear by attaching it to the rudder shaft below the point of fracture and connecting it with the wheel. This was a work of considerable danger and of great difficulty. It was, however, finally done, and the ship was again got under control, taken out of the trough of the sea, and steered safely back to port. The libellant claims that he devised and executed the plan of this new steering-gear, and the means by which it was made available, and that the ship was thus saved from great peril chiefly through its instrumentality. To recover compensation, in the nature of salvage, for this service, he has brought this suit.

Before passing upon the questions of law which have been raised and discussed on this trial, I will state the facts which I hold to be proved by the evidence. In doing this I shall not detail the evidence further than may be necessary to enable me to state my own conclusions:

1. The ship was brought into a condition of great peril by the breaking of her rudder shaft in the afternoon, or during the night, of the 12th. In consequence of this accident she fell off into the trough of the sea and there lay in a helpless condition. The storm was very violent during Thursday night, but began to abate on Friday morning, and had, in the main, ceased on Saturday evening. But the ground swell continued and kept the ship rolling more or less until about 5 o'clock on Sunday evening, when her head was brought up and she was started on her course. During all this time she lay drifting upon the waves; every attempt to get control of her rudder, or rig other steering apparatus, having failed. It requires no argument and little evidence beyond what the common history of the sea furnishes, to prove that this immense and unwieldy ship, on the ocean, nearly three hundred miles from land, with eight hundred souls on board, in this disabled and helpless condition, was in great danger and exposed to numerous perils.

2. Between Friday morning and Saturday afternoon the officers of the ship had made repeated attempts to get control of her motions. It is not necessary to detail these experiments. It is sufficient to say that they all proved fruitless. Finally the chief engineer commenced unscrewing a large nut on the rudder shaft. This nut was on that part of the shaft which was below the upper deck, and in an apartment on the deck below at the stern of the ship. This apartment has been termed, in this case, the steerage deck. The rudder shaft passed up through it. On the shaft within this steerage deck was the frustum of a ribbed iron cone, through the centre of which the shaft passed. The base of this cone rested on iron balls, the balls running in a circular groove sunk in an iron plate fastened to the deck, which constituted the floor of the apartment. The cone was fastened to the shaft firmly by appropriate means, so that they revolved together as if one piece of iron. On the rudder shaft, at the top of the cone, was a large nut, the one already referred to, which was screwed down firmly on the head of the cone. This nut, it will thus be seen, kept the cone down to its proper position, so that the base was made to traverse on the balls, and the cone and nut formed together a head or collar which contributed to support the weight of the rudder and shaft. The rudder shaft had broken off at or near the top of this nut. The last attempted experiment of the chief engineer was to unscrew this nut, with the design to secure, if possible, a tiller upon the end of the broken shaft, and thus, with the aid of the wheel in the steerage deck, to steer the ship. He had partly unscrewed the nut, though it was a work of considerable difficulty, as the nut and shaft turned by every blow of the sea on the rudder blade, when the libellant learned the fact. The latter regarded the nut as a very important means of supporting the rudder and the shaft, and looked upon its removal with alarm, on the ground that if this support were removed, it might lead to a total loss of the rudder. He communicated his fears to the captain of the ship, and the engineer was ordered to desist. It is impossible to tell what would have been the result of this experiment had it been carried out, although by unscrewing the nut an inch the rudder fell half that distance; but it appears from the testimony of one of the witnesses that the engineer did not expect to be able to fit the tiller to the end of the broken shaft under three or four days. The captain seemed now to have lost confidence in the chief engineer's ability to restore the control of the rudder. His own efforts had failed. Attempts had been made to secure control by winding chains around the cone on the shaft, and connecting them with tackles fixed to the ship's sides, to be worked by men at each end. This failed. A spar was rigged over the stern of the ship as a temporary means of steering, and that also failed. Sails had been hoisted to change her position, but had been blown to pieces. It is evident, from the testimony, that after the captain had arrested the unscrewing of the nut, both he and his officers had exhausted their expedients for getting control of the rudder so as to steer the ship, and bring her up out of the trough of the swell. The situation of the ship and the persons on board of her was now such as might well alarm

the most accomplished and intrepid navigator, and lead him to welcome any aid which gave any hope of relief, especially when it proposed no experiments which could involve the ship in new dangers.

3. The libellant is a civil and mechanical engineer, regularly educated for his profession, and, prior to taking passage in this ship, had had considerable experience in responsible stations, both at home and abroad, where high professional skill was required. He had not been an indifferent spectator of such of the various attempts as he had seen made to get the ship under control prior to the commencement of the unscrewing of the nut. He had revolved a plan in his own mind, drawn a sketch of it, had shown it to the chief engineer, who had treated it with rudeness, which is not surprising, when we remember that in every profession men are apt to be impatient of outside interference in times of perplexity and danger. The captain, however, having exhausted his own expedients and those of his officers, and evidently alarmed for the safety of the ship, decided that the libellant should try his. He put a sufficient number of men at his disposal, and the libellant entered upon his work. He had already matured his plan, and, after ascertaining by calculations the necessary strength of the materials which he knew he could use, he felt confident that his plan was secure from danger or failure. He proceeded to the steerage deck with the men detailed to work under his directions. This was about 5 o'clock on Saturday afternoon. There is some conflict in the evidence as to who superintended the operation of screwing the nut back again; but on the whole evidence I think the weight of it sustains the statement of Mr. Towle that he did. I will not here detail the progress of the libellant's labors. It is sufficient to state that after three hours' labor, he succeeded in screwing the nut back to its place, and having obtained from the forward part of the ship an immense chain, weighing about sixty pounds to the link, which was let down into the steerage deck through a hole cut in the upper deck by his directions, he succeeded in winding around the cone on the rudder shaft a sufficient portion of this chain to constitute a cylinder or drum, and thus secured a leverage obtainable in no other way. The ends of the chain were then extended from the cylinder to two strong posts or bitts which came up through this deck. A turn was taken round each of these bitts, and the ends of the large chain were then connected with tackles fastened to the respective sides of the ship for taking up the slack and easing the strain on the wheel used immediately for steering. Smaller chains connected the wheel with the large chain before described, and the size of the shackles making the connections were arranged so that in the event of a break it would not occur in the great chain or its lashings, but in the smaller or connecting chains or shackles. The links of the large chain composing the cylinder were lashed to each other and to the base of the cone, by smaller chains which were passed through the holes in its base. The alternate links of the large chain on the inner coil, sank in between the ribs of the cone, and thus tended to prevent slipping and to diminish the strain on the lashings. The smaller chains connecting with the wheel were fastened to the large chain composing the cylinder and extending to and around the deck-bitts at a point between the bitts and the cylinder, so that in the event of the breaking of the smaller chains, the rudder would still be held in position by the large chain, as the latter was wound around the bitts by one turn, and the end secured to tackles fastened to the sides of the ship and manned for the purpose of taking up the slack and easing away, as the rudder shaft was turned one way or the other by the movement of the wheel. This is a brief and general outline of the plan devised and executed by this libellant for rescuing this ship from her perilous situation. It is difficult to make the description of the arrangement clear without drawings and illustrations addressed to the eye. This arrangement was completed during Saturday night and Sunday, and at 5 o'clock, p. m., on Sunday, the ship was brought up to the sea and put on her course.

4. The labor of the libellant, both manual and mental, during the execution of this plan, was very considerable—so much so as to reduce him at one time to a state of great exhaustion. It was attended with some danger, owing to the size of the chain, and the spanner with which the nut was screwed back. The large chain weighed sixty pounds to the link, and the spanner or wrench weighed one hundred and thirty pounds. The latter was suspended from the upper deck by ropes or chains, and used by holding it to the nut, securing it to the latter by a pin to prevent it from slipping, and then a blow of the sea on the rudder blade drove around the shaft, and brought the nut down on the thread. As the cone turned with the shaft, the constant swell of the sea kept both in motion, which increased the difficulty of lashing the links of the large chain, and made it a more or less dangerous work.

5. While the libellant was engaged in perfecting his plan for steering the ship, Captain Walker, who was in command of the Great Eastern, and his officers were also at work in connecting a large chain to the rudder, by passing it round the latter and securing it at the outer edge of the rudder-blade by a shackle, and then bringing one end over the larboard and the other over the starboard quarter of the ship, and securing them on deck. The object of this arrangement was also to aid in steering the ship, by manning the ends of the chain on deck, so that the rudder could be moved either way, as either end of the chain might be hauled on. How much this contrivance was used it is difficult to determine exactly from the evidence. I am satis-

fied, however, that it was greatly inferior and subordinate, both in its use and capacities, to that arranged by the libellant in the steerage deck. That the latter was the efficient and principal means by which this great ship, with her valuable cargo and priceless freight of human lives, was saved from a condition of peril, I cannot doubt, in view of the evidence. Well might Captain Walker exhibit a lively sense of gratitude toward the libellant, as the evidence discloses that he did, when the success of the latter's plan was demonstrated by trial.

In view of these facts and the well settled rules of law applicable to salvage claims, had the libellant fallen in with this ship thus at sea, disabled and at the mercy of the winds and waves, and had gone from his own vessel on board of her and rendered these services, I should feel no hesitation in pronouncing him a salvor, and entitled to a liberal reward. It is well said by Dr. Lushington, in the case of The Charlotte, 3 W. Rob. Adm. 71, that "According to the principles which are recognized in this court in questions of this description, all services rendered at sea to a vessel in danger or distress, are salvage services. It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute; it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune, which might possibly expose her to destruction if the services were not rendered." This doctrine has been repeatedly sanctioned by the courts of the United States, and very recently by this tribunal. See also Hennessey v. The Versailles [Case No. 6,365]; Williamson v. The Alphonso [Id. 17,749]; Winso v. The Cornelius Grinnell [Id. 17,883]. In the case last cited, Mr. Justice Curtis remarks: "It has been strongly urged that both the peril and the service were too slight to bring the case within the technical definition of salvage; but I am not of this opinion. The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property constitute a state of salvage. It may be a case of more or less merit, according to the degree of peril in which the property was, and the danger and difficulty of relieving it. But these circumstances affect the degree of the service, not its nature." The authorities are abundant and decisive on this point. The Independence [Id. 7,014]; The Reward, 1 W. Rob. Adm. 174.

I come now to the consideration of much the most important question in this case, and one upon which the authorities are not very numerous, and, as I view them, not decisive. The claimants insist that, even if the elements of a salvage service were otherwise found in the case, yet the libellant is precluded from salvage compensation on the ground that, during the whole period of peril and of the performance of the service rendered, he was a passenger. The very able argument of the advocate for the claimants proceeds upon the ground that the connection of the libellant with the ship as passenger was not dissolved prior to the performance of the service, and that, as the relation of passenger imposed upon him the duty of aiding in the relief of the ship from the common peril in which he was involved with the rest on board, the law does not recognize him as a salvor. If this point is well taken, it is a complete answer to the libellant's claim for salvage compensation. The principal cases relied on to support this position are The Branston, 2 Hagg. Adm. 3, and The Vrede, 1 Lush. 322. The report of the case in 2 Hagg. Adm. is in these words: "This brig, homeward bound, got into distress, and a lieutenant of the royal navy, a passenger on board, contributed his assistance and claimed to be remunerated. Per Curiam: When there is a common danger it is the duty of every one on board the vessel to give all the services he can, and more particularly this is the duty of one whose ordinary pursuits enable him to render most effectual service. No case has been cited where such a claim by a passenger has been established, though a passenger is not bound like a mariner to remain on board, but may take the first opportunity of escaping from the ship and saving his own life. I reject the claim." The facts in the case of The Vrede, decided by Dr. Lushington, are reported as follows: "The plaintiffs were twenty emigrant passengers on board the Dutch bark Vrede, suing for alleged salvage services to that vessel and her cargo after she had received damage from a collision. The collision took place about five o'clock, a. m. of the 27th of November, 1859, off the South Foreland, and the Vrede sustained great damage, and began to make water rapidly. The plaintiffs manned the pumps, and kept working them. At 7 o'clock a steamtug took the vessel in tow. The passengers continued to work the pumps, and about noon the vessel was safely brought into Ramsgate harbor. The petition alleged that the plaintiffs might have left the Vrede in the boats, or in the steamtug, but remained on board to work the pumps at the request of the master, and that but for their services the Vrede must have foundered and been lost with her cargo. The answer admitted the facts generally, except as to the extent of the Vrede's danger." Dr. Lushington, after remarking that although passengers must have often rendered services at sea, yet, except the cases of The Branston and The Salacia [2 Hagg. Adm. 263], no claim had ever before been prosecuted in the admiralty court for salvage, and that this fact was sufficient to put the court on its guard against readily allowing the claim, says: "It is true, as the counsel for the plaintiffs have urged to-day,

that a pilot or master or ship's crew may sue as salvors in certain circumstances, and so I say that in certain circumstances passengers may also sue as salvors. But it is equally clear that it is only extraordinary circumstances, in the strict sense, which can justify a claim for salvage from persons so related to the ship as the first class of persons I have named. A master cannot be a salvor so long as he is performing his duties as master under his contract; nor can a mariner, until his contract is at an end; nor can a steamtug under a contract to tow make a title, unless, unforeseen dangers arising, she performs different services from those stipulated for in the original contract. With respect to a passenger, there is no engagement on his part to perform any service, but there is a contract between him and the ship-owner that for a certain money payment the ship shall carry him and his property to the place of destination. To a certain extent, therefore, he is bound up with the ship." Dr. Lushington then proceeds to comment upon the case of Newman v. Walters, 3 Bos. & P. 612, and to distinguish the one before him from it. He says: "The circumstances are not the same, or nearly the same." After considering the case of The Florence, 16 Jur. 572, and 20 Eng. Law & Eq. 607, where salvage had been awarded to a mate and seaman for services rendered their own ship by them after they had been separated from it, he adds: "That case again is no authority today. I say, that in circumstances such as these, passengers could not claim as salvors. Here the passengers were never separated from the ship, and their only service consisted in pumping. They pumped first, as they themselves admit, to save their own lives and property. For such efforts in a time of common danger they were not entitled to salvage, by the authority of The Branston. Then the steamer comes up and takes the vessel in tow. I am of opinion, that all danger then ceased, whatever danger might have been. The tug and the pilot-cutter were present; the water was smooth and the weather fine, and a harbor at no great distance. The passengers might, if they chose, have left the ship, but they remained on board and continued working at the pumps. I cannot consider the ship to have been in any danger of sinking, and I think I should be furnishing an evil example if I encouraged suits of this description. I pronounce against the claim of the plaintiffs, but without costs."

It is obvious that the language of Dr. Lushington in this case of The Vrede is very guarded. There must have been a reason for this, and it is important to understand the extent to which his decision has carried the law, for I should hesitate long before I should pronounce judgment in conflict with the opinion of this eminent jurist. In order to arrive at a correct conclusion on this point, we must notice the scope of The Branston as an authority. The latter case is a very simple one. The report is brief, and all that appears from it is that the libellant, a lieutenant of the royal navy, "contributed his assistance while the vessel in which he was a passenger was in distress." What the nature of that assistance was, or under what particular circumstances it was rendered, does not appear. I conclude that the service rendered was of the ordinary character, and consisted in assisting in working the brig in those ordinary ways well known to seamen. I can draw no other inference from the case, and upon such a state of facts, I think it very clear that any court would have rejected the claim. In the case of The Vrede, the services rendered were also of the ordinary kind, and consisted solely in pumping. I understand it to be a well-known rule that passengers are bound to render all such ordinary aid to the ship when she is in distress. They are bound to man the pumps, the windlass and the ropes, and to assist in working the ship in all ways known to seamen, as far as they may be able. The line of their duty extends, at least, thus far. But the question now before this court is whether there are not extraordinary services which a passenger may render that extend beyond the line of his duty, and which may entitle him to salvage compensation. That this question is not decided in the negative by The Branston or The Vrede is, I think, clear. It has been strenuously urged on the argument, that no services that a passenger can render to avert a common danger, while his relation as passenger continues, can exceed the limit of his duty. This doctrine certainly is not laid down in The Branston nor in The Vrede; for in the latter case the learned judge, in the vital part of his opinion, is careful to say: "Here the passengers were never separated from the ship, and their only service consisted in pumping." Surely, if he intended to lay down the rule that the passengers must in all cases be first separated from the ship before they can become salvors, he would have so declared in terms. The point is so sharp and decisive as to admit of no ambiguity in the language of a judicial opinion. I include in the term separation from the ship, both actual personal disconnection therefrom, and a severance of their ordinary relations as passengers, though they may still remain on the vessel. That there has been, for a long time, a general impression, that a passenger may become a salvor by rendering extraordinary services on board of his own ship, the language of decided cases and text writers abundantly shows. I am aware that this impression can, in many instances, be traced to the influence of Newman v. Walters, but I think it equally true, that it has derived strength from sound principles. In the case of New-

man v. Walters, the ship had struck on a shoal, and the captain and part of the crew had deserted her. The plaintiff took command of her and brought her safe into port. The jury gave him a verdict, and on a motion for a new trial Lord Alvanly, Ch. J., remarks: "Without entering into the distinctions respecting the duties incumbent on a passenger in particular cases, I think that if he goes beyond those duties he is entitled to a reward in the same manner as any other person. In this case the plaintiff did not act as a passenger when he took upon himself the direction of the ship; he did more than was required of him in that situation; and having saved the ship by his exertions, is entitled to retain his verdict in this action." Language substantially like this is used in various decided cases and by text writers. In several instances the doctrine is discussed and applied to cases where the capacity of a pilot to become a salvor was in question, but this strengthens the principle when applied to passengers. Hope v. The Dido [Case No. 6,679]; Lea v. The Alexander [Id. 8,153]; Hoburt v. Drogan, 10 Pet. [35 U. S.] 108; Abb. Shipp. p. 560; note 1 of Story and Perkins; Marv. Wrecks & Salv. §§ 140, 149; Le Tigre [Case No. 8,281]. The learned author of Marv. Wreck & Salv. p. 160, remarks: "It is agreed, too, that seamen may, while their legal connection with the ship still subsists, earn salvage for services rendered to ship or cargo, exceeding the line of their duty. But there is great difficulty in defining that line, and determining what services are within and what beyond it. No such determination can be made beforehand, and each case must be determined by its circumstances." In The Neptune, 1 Hagg. Adm. 227, Lord Stowell says: "I will not say that in the infinite range of possible events that may happen in the intercourse of men, circumstances might not present themselves that might induce the court to open itself to their claim of a persona standi in judicio."

The authorities cited show that officers and crew, pilots and passengers may all become salvors when they perform services to the ship in distress beyond the line of their duty. The duties of passengers are much more circumscribed than those of sailors or pilots; and it would seem that all the law imposes upon them is to assist in the ordinary manual labor of working and pumping the ship, under the direction of those in command of her. If they assume extraordinary responsibilities, and devise original and independent means by which the ship is saved, after her officers have proved themselves powerless, I see no reason, and know of no authority that can prohibit them from being considered as salvors. I think it follows, from the principles laid down by the authorities (1) that a passenger on board a ship can render salvage service to that ship when in distress at sea; (2) that in order to do this he need not be first personally disconnected from the ship; but (3) that these services, in order to constitute him a salvor, must be of an extraordinary character and beyond the line of his duty, and not mere ordinary services, such as pumping and aiding in working the ship by usual and well-known means.

That the services of the libellant in the present case were of an unusual character cannot be denied. After the officers of the ship had exhausted their means of getting control of the rudder, he devised, and with the aid of a large number of men put under his directions by the captain, executed a plan which, in the judgment of this court, was the efficient means of rescuing this great vessel from peril. The whole work of accomplishing this result was intrusted to him and to his directions. If it is said that he got his main idea of the plan he carried out from witnessing an experiment of the engineer, which I doubt; still the effort of that officer had entirely failed, and was an abandoned experiment. The merit of the libellant in overcoming the obstacles which had proved insurmountable to the engineer is, in my judgment, enhanced rather than diminished by the unsuccessful effort of the latter. That the service rendered by the libellant was a very difficult one is proved by the fact that the able and experienced officers of this ship had failed to accomplish the result which he finally secured. They had spent two days of fruitless effort, though stimulated by motives as powerful as can be addressed to the minds of men. It required no litttle moral courage for the libellant to interpose to arrest the unscrewing of the nut on the rudder shaft, and then assume the responsibility of a new and different experiment, which would consume precious time, and might thus produce appalling consequences. Had he failed, the consequences to him would have been injurious and humiliating. The whole circumstances of the case are so extraordinary as to leave no doubt in my mind that the services which he performed were wholly beyond his duty as a passenger, and therefore entitle him to salvage compensation. In fixing the amount of compensation it must be considered that, though the service was one of conspicuous merit, and the amount of property saved large, yet the personal danger encountered by the libellant was not very great; and the only things contributed by him were personal skill and labor. He supplied no materials and risked no property, though his labors were protracted and exhausting. On the other hand, he rescued the ship from great peril by his own ingenuity, courage and skill. That the peril of the ship was great, and her position critical in the judgment of her commander, is evident from the fact that he intrusted to this stranger a work, upon the success of which her salvation depended, and which for nearly two days had utterly baffled him and his engineers. The case is so novel a one, in all its leading features, that little light can be derived from

precedents to guide me in fixing the amount to be awarded; but I have concluded, on the whole, to allow fifteen thousand dollars. Let a decree be entered for the libellant for that amount with costs.

NOTE. After the hearing was concluded and after the decision was published, there were various comments made thereon, which, as they contain some facts that were unnecessary to be set forth in the opinion, are printed in the following pages:

The Great Eastern Case.

Mr. Hamilton Towle's Suit for Salvage against the Steamship Co.

How an American Engineer Saved the Ship from Disaster.

The argument in the now celebrated Great Eastern Case in the United States circuit court, before Judge Shipman, on the claim of Mr. Hamilton Towle to salvage compensation, was concluded yesterday. Mr. George T. Curtis and William Kemble Hall appeared for the libellant, and Mr. William M. Evarts and Joseph H. Choate for the company. The diagram given of the temporary steering-gear invented by Mr. Towle, and the explanation of it, will fully illustrate the mechanical merits of the case. The historical facts in regard to it are as follows: On the 10th of September, 1861, the Great Eastern left her moorings in the river Mersey, the pilot leaving her at 4 o'clock on the afternoon of that day. Putting on full speed she continued on her course, everything going on well until 4 o'clock on the afternoon of Thursday, the 12th, when it was discovered by accident that she would not obey her helm. A strong gale was prevailing at the time, and an attempt on the part of the captain to steady his ship while the tackle of one of the boats was repaired led to the discovery of the fact that the rudder was unmanageable. The fore-staysail was run up, but the wind split it into ribbons; the fore-trysail was then run up, but was blown away, and the engines were stopped while the boat was cut away. The vessel at length started again, and the passengers went down to dinner. "From that moment," according to the accounts of those on board at the time, "commenced a chaos of breakages, which lasted without intermission for three days. Everything breakable was destroyed. Furniture fittings, services of plate, glasses, piano, all were involved in one common fate. About six o'clock the vessel had to be stopped again to secure two rolls of sheet lead weighing some hundred weight each, which were in the engine-room, rolling about with every oscillation of the vessel with fearful force. These having been secured, another start was made, when a tremendous grinding was heard under the paddle-boxes, which had become twisted, and the floats were grinding against the side of the ship. The paddles were stopped, and thenceforward the scene is described as fearful in the extreme. The ship rolled so violently that the boats were washed away. The cabin, besides undergoing the dangers arising from the crashes and collisions which were constantly going on, had shipped, probably through the port holes, a great deal of water, and the stores were floating about in utter confusion and ruin. Some of the chandeliers fell down with a crash, a large mirror was smashed into a thousand fragments, rails of bannisters, bars and numerous other fittings were broken into numberless pieces. The luggage of the passengers, in the lower after cargo space, was lying in two feet of water, and before the deliverance of the ship was effected the luggage was literally reduced to rags and pieces of timber. Twenty-five fractures of limbs occurred from the concussions caused by the tremendous lurching of the vessel. Cuts and bruises were innumerable. One of the cooks on board was cast violently, by one of the lurches, against the paddle-box, by which he sustained fearful bruises on the arms, putting it out of his power to protect himself. Another lurch drove him against one of the stanchions, by which concussion one of the poor fellow's legs was broken in three places. The baker received injuries of a very terrible character in vital parts; and one of the most striking incidents of the disaster was this poor, brave man, crawling in his agony to extinguish some portion of the baking gear which at that moment had caught fire." Something must be devised by which the ship could be steered, if she was to be brought to land in safety, and at this juncture Mr. Hamilton Towle, an American engineer, who was a passenger on the vessel, constructed the steering apparatus by which it is claimed the vessed was saved. Mr. George T. Curtis, in the commencement of the argument, submitted his points to the court, claiming that the vessel laying entirely unmanageable in the trough of a heavy sea, with her rudder-shaft broken below both tillers, her paddle-wheels destroyed, her boats and part of her sails and her after sternpost carried away, and her whole internal condition disordered by the rolling incident to a structure of her enormous size, under the circumstances in which she was placed, and, consequently, that she was in a great and imminent peril of being totally lost, unless some means could have been devised and put in execution for effectually controlling her rudder, so as to take the ship out of the trough of the sea, and then to steer by means of the rudder, the ship could not have been saved, but must have drifted indefinitely at the mercy of the winds and waves, or have become disintegrated and foundered, she being incapable of being towed by any steam or other vessel likely to have fallen in with her.

The following points state that Mr. Towle prevented the unscrewing of the nut on the broken stump of the rudder, by which the rudder was sustained; that he restored the nut to its place by his personal exertions and labor, rendered under circumstances of great personal exposure; that he devised and put into operation at great personal exposure and risk the only competent steering gear by which the ship was safely directed; and that finally the services of the libellant were salvage services of the most meritorious character; and as the ship was of great value, and there were about eight hundred lives rescued from the peril to which the ship was exposed, the libellant is entitled to a large salvage compensation.

Mr. William M. Evarts occupied the session of the court on Monday in presenting the argument of the owners, claiming that the services rendered by the libellant, although meritorious, did not in any sense partake of the nature of salvage services, because he claimed the vessel was neither abandoned nor had the relation of passengers to the officers of the ship essentially changed, as in the case of a ship being captured by mutineers. The steering gear, he also claimed, was valuable only in connection with the gearing arranged by the officers of the ship around the rudder.

Yesterday Mr. George T. Curtis replied for Mr. Towle in an eloquent and able argument, re-asserting the points previously laid down and elucidating new ones in favor of Mr. Towle's claims. He dwelt upon the inadequacy of the attempts of the officers to steer; upon the partial removal of the nut from the broken rudder-post, and the necessity of retaining it, which was urged by Mr. Towle, who finally screwed it up by a peculiar process; that Mr. Towle designed and constructed the steering apparatus by means of which she was brought to port in safety. In regard to heroism as a feature in the case, he spoke of the danger incurred in arranging the gearing, and the fact of a man being killed and others wounded at the wheel and elsewhere. The argument throughout was full and comprehensive. Anonymous.

From the New-York Times:

Written by Robert D. Benedict, Esq., of the Admiralty Bar of New-York.

The Great Eastern Salvage Case.

We publish this morning, at length, Judge Shipman's opinion in the suit brought by Hamilton E. Towle against the steamship Great Eastern, to recover salvage for repairing her rudder, the shaft of which had been broken in a storm at sea. As will be seen, the judge decrees that he recover $15,000 salvage. The case is one of great interest. That it is connected with the Great Eastern would of itself increase the interest felt in the case, whether here or in England, for anything that relates to that enormous ship attracts attention which would not be felt where any other vessel in the world is concerned. Then again, all our sailors and shipping men have some national feeling in it. That an American passenger on board an English steamer should have been able to devise means of remedying the disaster occasioned by the breakage of that rudder-shaft, after the officers of the vessel had tried in vain to accomplish it, is felt to be something of a national advantage over John Bull, and almost every one who is interested in shipping will feel glad to have that advantage confirmed by the decision of a court in Mr. Towle's favor. The case is also one of intrinsic importance. It was sharply contested on questions of fact and questions of law. On behalf of the vessel, it was urged very strongly that Mr. Towle was a passenger on board the vessel, and that it was the rule of the admiralty courts that a passenger could not recover salvage for services performed while the relation of passenger still existed. Judge Shipman examines the authorities on this point, and comes to the conclusion that the true rule is, that a passenger may recover salvage for services rendered by him to the vessel on which he is a passenger, provided those services are not mere ordinary services, such as pumping or aiding in working the ship by usual and well-known means, but are of an extraordinary character and beyond the line of his duty. This principle being settled, there seems to be little difficulty in arriving at the conclusion that Mr. Towle was entitled to recover salvage. The ship was in great peril. Her paddle-wheels were disabled, so that she was dependent upon her propeller engine; her rudder-shaft was broken off so that she could not steer, and she lay in the trough of the sea for about thirty-six hours, during which time her officers had made repeated efforts to devise some means of steering the vessel, but in vain. Mr. Towle then, with the consent of the captain of the vessel, took hold of the affair and carried out a plan which he had already devised for steering the vessel, by means of which the ship was carried out of the trough of the sea and carried in safety into port. Such services as these are clearly not the ordinary services which it is the duty of every passenger to render to a vessel. A passenger might be required to pump, to pull and haul, or to do any other act under the direction and authority of the officers of the vessel; but to take charge and responsibility, to plan and to oversee the execution of his plan—these are clearly extraordinary services, within the meaning of the cases. If not, they might be required of every passenger. But no one would claim that it was the duty of every passenger on board the Great Eastern, even if ordered by her officers, to have devised means for repairing that broken rudder-shaft, or to have put those means in execution. Ordinary services they would be bound to render. Those which they would not be bound to render must be extraordinary. As to the amount of the salvage decreed, it is not large in comparison with the value of the property, the vessel being worth at least half a million dollars. And if any one thinks that Mr. Towle is pretty well paid for his day and a half of labor, let him think of the responsibility which he would have had to bear in case of failure.

The opinion is a long one, but it will be read by many who are interested in navigation both here and abroad, and may excite some comment in England, unless indeed they have become weary of the great ship and of everything connected with her.

From the London "Law Times" of January 28, 1865, page 146:

Unmerciful revealers of things kept secret are law courts. In many instances circumstances which, at the time of their occurrence, are of as great interest to the public as the law point which afterwards arises upon them is to the profession, first see the light in our reports. In 1861, when the success of the Great Eastern steamship was still in the balance, she left Liverpool on the 10th of September for New-York. She carried 400 passengers and a considerable cargo, with about the same number as officers and crew, including engineers and others below. It was hoped, as she started, that she would still retrieve the misfortune which had befallen her off the Devonshire coast. But in a few days she came back disabled into port. It became known to the public that, when she was about 300 miles west of Cape Clear, she encountered a heavy storm in the night of Thursday, the 12th, which swept away her paddle-wheels and some of her boats, and that as, with her rudder rendered useless, she lay in the trough of the sea rocking from side and side, her cabin furniture was broken up, and the luggage in the hold drenched and crushed into a mass of rubbish. But the real amount of the danger, which in fact became so great that it was a providential thing that she was ever seen again, was not allowed to transpire. What happened was this. When the force of the sea against her great bulk in one direction, and its strain in the opposite direction against her rudder had twisted the rudder pillar in two, like a piece of stick, so that part remained attached to the steering gear while the blade swung idle in the water, the officers of the ship made repeated attempts, between Friday morning and Saturday afternoon, to get control of the ship's motions. These attempts all proved fruitless. A further attempt made by the chief engineer, and commenced by unscrewing a nut which contributed to support the weight of the lower part of the rudder, threatened to make the case hopeless. It was denounced to Captain Walker by one of the passengers, and was ordered to be discontinued. Then the captain lost all confidence in the chief engineer, and, for aught that appeared, the vessel must be left to her fate. But this passenger, Mr. Hamiliton E. Towle, was himself an engineer of considerable experience. Immediately after the mishap occurred he revolved in his own mind the plan of a remedy, drew a sketch of it, and showed it to the chief engineer, but was repelled with rudeness. Captain Walker, however, having exhausted his own expedients and those of his officers, and being alarmed for the ship's safety, decided that Mr. Towle should try his plan, and placed men and materials at his disposal for the purpose. At five o'clock on Saturday afternoon Mr. Towle set to work, screwed up the nut with great labor, and, principally by means of an immense chain of sixty pounds to the link, (brought from the forward part of the ship,) which was let down into the steerage deck through a hole cut in the upper deck, and was wound round the cone of the lower part of the rudder, with its ends fastened to posts in the steerage deck, Mr. Towle, after working all Saturday night, at five o'clock on Sunday afternoon enabled the ship to be brought up to the sea and put on her course. The legal question was Mr. Towle's right to salvage for his service. It was decided in the United States admiralty district court, by Judge Shipman, Towle v. The Great Eastern, 11 L. T. (N. S.) 516. The difficulty in the case arose from the

incident that Mr. Towle was a passenger in the ship, the subject of the salvage. Had Mr. Towle fallen in with the ship thus disabled and in the power of the sea, and gone from his own ship, and rendered these services, there would have been no question of his right as a salvor. The authorities, the judge said, were abundant and decisive on that point. But in the case of The Branston, 2 Hagg. Adm. 3, where the claimant, a lieutenant in the navy, being a passenger on board the brig in distress, contributed assistance, the court held, that where there was a common danger it was the duty of every one on board to give all the services he could, and more particularly of one whose ordinary pursuits enabled him to render most effectual service. A passenger might, if he could, leave the vessel. The Vrede, 1 Lush. 322, was decided on the same principle. After a collision, the claimants, emigrant passengers, manned the pumps until the vessel was towed into Ramsgate harbor. Dr. Lushington was of opinion that there being, under the circumstances of the case, no danger, and the claimants not choosing to leave the ship, as they might, by means of a tug and pilot cutter which were present, but remaining to work, were not entitled. As to the stronger of these two cases (The Branston), Judge Shipman concluded that the service rendered by the lieutenant was of the ordinary character, and consisted in assisting in working the brig in those ordinary ways well known to seamen. But the present question, whether there were not extraordinary services which a passenger might render that extended beyond the line of his duty, and might entitle him to salvage compensation, was not decided in the negative by The Branston or The Vrede. The authorities showed that officers and men, pilot and passengers, might all become salvors when they performed services to the ship in distress beyond the line of their duty. "I think," said the judge, "it follows from the principles laid down by the authorities, first, that a passenger on board a ship can render salvage service to that ship when in distress at sea; secondly, that, in order to do this, he need not be first personally disconnected from the ship; but, thirdly, that these services, in order to constitute him a salvor, must be of an extraordinary character and beyond the line of his duty, and not mere ordinary services, such as pumping and aiding in working the ship by usual and well-known means." Accordingly the judge decided in favor of Mr. Towle's claim, and, putting the value of the Great Eastern at five hundred thousand dollars, awarded to him fifteen thousand.

Case No. 14,111.

In re TOWN et al.

[8 N. B. R. 38.] [1]

District Court, E. D. Michigan. 1873.

CONTRACTS — NOTES — ILLEGAL CONSIDERATION — LIQUOR SALE — BRINGING ORIGINAL PACKAGES INTO STATE — SALE IN STATE — CONSTITUTIONAL LAW.

A note was given in settlement of a balance due upon a previous account for spirituous and intoxicating liquors, part of the consideration of which was based upon the sale of liquors in original packages. There was also another note given for liquors bought in Massachusetts. *Held*, that as to the part of the first note which was based upon the sale of liquors in original packages, it was not in violation of the laws of Michigan and was valid; but as to the balance, there was nothing to take it out of the statutes of the state prohibiting the sale of spirituous and intoxicating liquors.

[In the matter of Richard, Mary, and S. R. Town, bankrupts.]

[1] [Reprinted by permission.]

The question decided, arose on the certificate of Register Hovey K. Clarke, of issues of law and fact relative to the claim of Messrs. George W. Torrey & Co., of Boston, Mass. These creditors proved and filed with the register their account, claiming as due to them from the estate of said bankrupts a balance of about four hundred and forty-nine dollars, a portion of which was founded upon a note for one hundred and seventy-four dollars and sixty-two cents, and the balance upon an open account in part for spiritous liquors. A note was given in settlement of a balance due upon a previous account for spirituous and intoxicating liquors, a portion of which was sold and delivered in the original imported packages. But nothing was made to appear as to the manner and place of sale of the balance of the liquors for which the note was given.

LONGYEAR, District Judge. So far as the consideration of the note was based upon the sale of liquors in original packages, it was not in violation of the laws of Michigan and was valid; but as to the balance of the consideration of the note there was nothing to take it out of the statutes of Michigan prohibiting the sale of spirituous and intoxicating liquors, and it was therefore illegal. The note having been given in Michigan, where the said statutes prevail, and the consideration being in part in violation thereof, the said note, according to the terms of the said statute, was void in toto. As to the open account, it appeared that so far as it was based upon a sale of spirituous and intoxicating liquors, the same was sold at Boston, Mass., upon the written note of the bankrupts, duly stamped. The note was made and signed in Michigan, and sent by mail to G. W. Torrey & Co., at Boston, their place of business. The sale was completed in Massachusetts, it was a Massachusetts contract, and was not affected by the Michigan statute, and that the sale being valid in Massachusetts must be held to be valid here. It is consequently ordered that so much of the claims of Torrey & Co., as was based on the note of one hundred and seventy-one dollars and six-two cents must be disallowed and expunged, and the balance of their claim must be allowed to stand as a debt against the estate of said bankrupts.

[See Case No. 14,112.]

Case No. 14,112.

In re TOWN et al.

[8 N. B. R. 40.] [1]

District Court, E. D. Michigan. 1873.

BANKRUPTCY—SURPLUS—INTEREST.

1. Where there is a surplus in the hands of the assignee after paying the creditors of a bankrupt it should be applied to the payment of interest, to be computed from the date of the adjudication.

[1] [Reprinted by permission.]

2. In re Haake [Case No. 5,883], commented upon and concurred in.

[In the matter of Richard, Mary, and S. R. Town, bankrupts.]

In this case the register certified that the assignee's final report exhibits a balance of one thousand nine hundred and ninety dollars for distribution, and that the debts proved, with interest to March 5, 1869, the date of commencement of proceedings, amounted to one thousand seven hundred and fifty-one dollars and twelve cents, leaving a balance of two hundred and thirty-eight dollars and eighty-eight cents, which sum the assignee, on behalf of the proving creditors, claims should be applied to the reduction of interest on their claims since the date of computation. It is claimed on behalf of Root & Midler, parties deriving their right from the bankrupts, that this surplus should be paid to them, and the question arises whether interest can be allowed on claims proved against an estate in bankruptcy after the date of adjudication. On this question the register gives the following opinion:

By HOVEY K. CLARKE, Register:

The right of creditors to interest upon overdue claims is so well established, that the onus of showing an exception to this right is clearly upon the party asserting it. So much I feel at liberty to assume. The exception sought to be established is, that in bankruptcy, such a change is wrought in the nature or effect of the obligation, that at the point of adjudication the value of the claim is fixed, and that from this period, however long the actual payment may be delayed, or ample the fund for full payment, no interest can be added. In support of this proposition I am referred to In re Haake [Case No. 5,883], decided by Hoffman, J. The judge is reported as saying: "By the nineteenth section of the bankrupt act [of 1867 (14 Stat. 525)] all debts due and payable from the bankrupt at the time of the adjudication may be proved against his estate. It is obvious that interest which accrues subsequently is not a debt due and payable at the time of the adjudication. Debts which do not bear interest, and which, though existing at the time of the adjudication, are payable at a future day, are, also, by the same section, allowed to be proved, but subject to a rebate of interest for the period between the time of the adjudication and the date of their maturity. By these provisions both classes of creditors are put on an equal footing, and the intention of the act to establish the date of the adjudication as the time at which the liability is to be ascertained and determined, is made manifest."

I have quoted this in full because it does not strike me as an accurate statement of the law, and an error here may be important. It will be observed that the two classes of creditors which are recognized are: (1) Those whose debts are existing and due at the time of adjudication; and (2) those whose debts are existing but not due at the time of adjudication, and are not bearing interest. On this classification of debts as the only provable debts, the conclusion in Haake's Case is founded. But in this classification it will be seen no place is found for debts existing and not due, but which do bear interest. It would be extraordinary indeed if this class of debts was not provable; but such would be the result if the classification in Haake's Case were an accurate one. It needs but a careful examination of the statute to see that a more accurate classification of debts provided for in section 19 would be: (1) Debts due at the time of adjudication. (2) "Debts then existing, but not payable until a future day." These last words quoted from the act are followed by a qualification requiring a rebate of interest in the case of debts not then due, the effect of which is, obviously, to subdivide this second class of debts, payable at a future day, into those bearing interest and those not bearing interest. Is there no difference, then, between debts bearing interest and those not? Is the estate, or rather are other creditors to have the benefit of a rebate of interest, when no interest was contracted for, and is an essential item in a contract for the payment of a sum of money and interest, to be arbitrarily stricken out? If so, why? It will certainly strike the business community with surprise to be told that an agreement in a promissory note, for instance, to pay interest, is not as much a part of the obligation as the agreement to pay the principal; or that his right to interest on an open account for merchandise after it has become due is not as well established as his right to recover the price of the goods. Of course, in a case where there is not sufficient to pay all debts in full, as are most of the cases in bankruptcy, it matters little to what particular time interest is added or rebated, provided that the relative value of each is fixed, as of a given day, in order to furnish a basis for an equitable distribution.

Hoffman, J., in his opinion in Re Haake [supra], cites several cases which show that to the facts of this case the one before him was not applicable, or, at any rate, the cases he cites are in opposition to the doctrine contended for in this. For instance, it was held, in Brown v. Lamb, 6 Metc. [Mass.] 210, that "subsequently accruing interest could only be paid out of any surplus remaining after satisfying all debts proved." So in New York (Ex parte Murray, 6 Paige, 204), and in New Jersey (Prichett v. Newbold, Saxt. [1 N. J. Eq.] 572). It thus appears, I think, that the Massachusetts, New York and New Jersey cases are certainly in favor of allowing interest accruing subsequently to the bankruptcy, after the debt as proved and computed to that date has been satisfied. It is added, however, that "under the English bankrupt laws, interest was not

allowed to be computed in any case of an insolvent estate after the commission;" and the reason given for this is that it is a "dead fund, and in such a shipwreck, if there is a salvage of part to each person on the general loss, it is as much as can be expected." All of which is well enough and true enough when said of insolvent estates, in the sense here evidently intended,—an estate of which a "salvage" of a part only is to be expected; or an estate the assets of which are not sufficient to pay all claims in full. But that is not this case; and it is to be remembered, moreover, that insolvency is not a necessary element in many of the cases, where, under our act, an adjudication of bankruptcy may be made. An allegation of insolvency is necessary in only one of the nine acts of bankruptcy as specified in section thirty-nine. Eight of these nine acts of bankruptcy contemplate acts of fraud, none of which are inconsistent with ample means to pay all debts in full; two of such acts were alleged as the ground for the adjudication in this case. To conclude from the reasoning of the English cases about a "dead fund," that the commencement of proceeding under our act against a fraudulent debtor, who has ample means to pay his debts, principal and interest, stops all thereafter accruing interest, must, I think, be regarded as inadmissible.

It is scarcely possible to avoid the conclusion that, notwithstanding the disclaimer of Hoffman, J., when reading his opinion, the unconscionable character of the contract before him, calling for interest at two per cent. a month, to be compounded monthly, a rate which had been running over two years, had too much influence in determining that case to make it a satisfactory one in which to look for principles to govern a case where creditors have been delayed nearly three years by active litigation, and now ask that out of a fund that must otherwise go back to the bankrupts, or to parties claiming under them, they may be allowed interest at the rate of seven per cent. I am, therefore, of the opinion that the balance in the hands of the assignee should be applied to the payment of interest, to be computed on the claims proved, from the date of the adjudication.

LONGYEAR, District Judge. I do not think the foregoing opinion of the register necessarily conflicts with the opinion of Hoffman, J., in Re Haake [Case No. 5,883]. In that case it does not appear there was a surplus. As applicable to such a case, I am inclined to concur in Judge Hoffman's views. But where there is a surplus, as in the present case, I think the foregoing decision of the register is fully sustained by the adjudicated cases, cited by him, as well as on principle. The decision of the register is therefore hereby approved.

[See Case No. 14,111.]

Case No. 14,112a.

TOWN v. The AMERICAN BANNER.

[Betts' Scr. Bk. 525.]

District Court, S. D. New York. 1855.

MARITIME LIENS—PRIORITIES—PROCEEDS.

[This was a libel filed by Mathew Town to recover payment for certain repairs to the sloop American Banner.]

INGERSOLL, District Judge. This was an inquiry as to the respective equities of the claimants to the proceeds of the sloop American Banner. Two parties claimed the fund paid into court, as follows: Mr. Town claimed payment of a bill of sailmaker's work he had furnished the vessel about one year before he filed his petition amounting to about $400. Mr. Nye, a mortgagee, claimed payment of the amount of a mortgage he held on the one-half of the vessel. The cause was argued before his honor, Judge Ingersoll, on the commissioner's report finding the facts, by Mr. McMahon for Town, and Mr. Hadly for the mortgagee. The following facts were conceded: In April, 1855, the sloop American Banner was sold, and the proceeds, $1,500, paid into court. In April, 1855, Town filed his petition claiming payment out of the proceeds of his bill. The sails were ordered by one Raftery who was master and half owner, and were furnished in June, 1854. Thus the lien in rem, was lost by lapse of time. Nye claimed as mortgagee by virtue of a chattel mortgage of one-half of the vessel executed to him by Raftery on the 7th of March, 1853, to secure $1,100, being part of the purchase money under a sale made three years before that. In March, 1853, Nye was a resident of Hudson, in this state. The vessel was then enrolled in Troy. The mortgage was an ordinary chattel mortgage, drawn up under the statutes relative to chattel mortgages. A year after the purchase, Raftery changes his residence to Gowanus, South Brooklyn. In May, 1854, Raftery sold one-half of the vessel to one Bayard, and, after the sale, the sails were furnished by Town. Two important questions arose: (1) Had Town the right to come in and claim his bill out of the proceeds into court after his lien was lost in rem? (2) Had the mortgagee, Nye, any standing in court where his mortgage did not possess some of the elements required by the enrolling and registry acts of the United States? The court decided that where proceeds were in court, and the question arose between the lien claimant and the owner, he would order the lien claimant if his debt was originally a maritime claim to be paid out of the proceeds; but if the question affected the rights of other parties he would hesitate to do so unless a proper case appeared. That where a mortgage lien appeared in court, even though informal

on its face, yet the court, in distributing proceeds, would equitably allow payment as between the owner and the mortgagee. Applying those principles to this cause, the court ordered Town's debt to be paid out of the one-half, and Nye's debt to be paid out of the other half.

Case No. 14,113.

TOWN v. DE HAVEN et al.

[5 Sawy. 146.] [1]

Circuit Court, D. Oregon. April 22, 1878.

TREATY—OREGON BOUNDARY—BRITISH SUBJECTS—LAND OCCUPANCY—TITLE—ACT OF CONGRESS—PROOF OF CLAIM.

1. David Gervais, the husband and father of plaintiff's vendors, was a British subject in the occupation of six hundred and forty acres of land under the provisional government of Oregon at the date of the Oregon treaty of June 15, 1846, and continued in the actual possession of the same until his death in 1853, when his widow and administratrix made a claim under said treaty for the premises for herself and children in the surveyor-general's office, and made proof of these facts, but her claim was disregarded and the land taken up under the donation act by the defendants and patented to them by the United States in 1866. *Held*: (1) That the stipulation in the treaty by the United States, that it would respect "the possessory right" of Gervais was not a grant but a mere promise which, of itself, conferred no right to or in the soil, and for the violation of which Gervais would only have a claim against the United States for compensation in money or kind: (2) Semble, that by the proviso to section 4 of the donation act of September 27, 1850 [9 Stat. 497], congress declared that Gervais was entitled to a grant of the land occupied by him as a possessory right, but provided no means by which he could claim the same or make proof of the facts necessary thereto before the land department of the country.

2. The ruling in Hall v. Russell [Case No. 5,943] followed and applied in this case.

This suit is brought by the complainant [George Town], a citizen of the state of New York, to obtain a conveyance from the defendants [William De Haven and wife and others], of a certain tract of land situate in Marion county, Oregon, and being parts of sections 29 and 30, in township 5 south, range 2 west, Wallamet meridian, containing six hundred and forty acres of the value of more than five thousand dollars.

Addison C. Gibbs, for complainant.
E. C. Bronnaugh, for defendant.

DEADY, District Judge. The material facts and allegations contained in the bill are briefly these: That David Gervais, a British subject, who was born in Oregon territory, in the year 1816, and died therein on August 22, 1853, settled upon the premises in controversy in November, 1845, while said territory was still in the joint occupation of Great Britain and the United States, and occupied and cultivated the same until his death; that said David died intestate, leaving Mary Ann Gervais to whom he was married in 1841, as his widow, and two children, Margaret Gay and Frank Gervais as his sole heirs at law; that said Mary Ann was duly appointed administratrix of the estate of the deceased, and as such administratrix, on behalf of herself and said children, did on November 10, 1853, notify the surveyor-general of Oregon of the claim of said estate to the premises, and that she claimed the same "as the possessory right" of the deceased by virtue of the treaty with Great Britain of June 15, 1846, in regard to limits westward of the Rocky Mountains, and at the same time filed with said surveyor "the necessary proofs" of these facts; that said widow and children thereupon "became the owners of said premises and entitled to a patent therefor, and to full protection of their possessory rights under the laws of the United States and the treaty aforesaid;" that no patent has ever issued to said widow or children, nor have their possessory rights been otherwise respected, but the same has been denied and a patent to the premies issued by the United States on September 6, 1866, to the defendants, Andrew De Haven, and Polly his wife, who, with the defendants, William De Haven and Michael Fahy, to whom said Andrew and Polly have conveyed an interest therein, claim the whole of said lands as their own, excepting one hundred acres, claimed in his own right by the defendant Earle; and that said widow and children inherited the premises from said David Gervais and have since conveyed the same to the complainant, who is now the owner thereof.

The defendant demurs to the bill for sundry causes. The fifth and last cause is a want of equity. In support of this, it is maintained that the possessory right guaranteed to David Gervais by the third article of the Oregon treaty of June 15, 1846 (U. S. Pub. Treat. 321), terminated with his death in 1853, citing Cowenia v. Hannah, 3 Or. 468. This article of the treaty reads as follows: "In the future appropriation of the territory south of the forty-ninth parallel of north latitude, as provided in the first article of this treaty, the possessory rights of the Hudson's Bay Company, and of all British subjects who may be already in the occupation of land or other property lawfully acquired within the said territory, shall be respected."

At the date of this treaty there were some thousands of American citizens and British subjects settled in the Oregon territory south of the forty-ninth parallel under and by virtue of the third article of the convention of October 20, 1818, commonly and properly called the treaty of "joint occupation," which in effect provided that the country should be free and open to the "citizens and subjects" of the two governments until otherwise provided. U. S. Pub. Treat. 299; McKay v. Campbell [Case No. 8,840]. The occupation of the territory by these citizens and subjects was regulated by the provisional government, an authority created and sustained by both, during

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

this period. As a rule, each male adult citizen and subject was allowed to occupy and possess six hundred and forty acres of land so long as he improved and cultivated the same. The settler might abandon or dispose of his location and take up another; but in case of his death his possession did not descend or pass to his children or relatives, but the "claim" together with the improvements thereon was disposed of by the administrator as personal property.

This was the "possessory right" which the United States in the future appropriation or disposition of the soil undertook to respect. As a just nation, the obligation to do this was binding upon her independent of the treaty stipulation. Soulard v. U. S., 4 Pet. [29 U. S.] 512; Delassus v. U. S., 9 Pet. [34 U. S.] 133; Mitchel v. U. S., Id. 734; U. S. v. Moreno, 1 Wall. [68 U. S.] 404.

Under the provisional government the possessory right of Gervais would have terminated with his death, and his widow and children would not have succeeded him therein, for there was no transmission of possession or right from one occupant to another, but each settler "took up" his "claim," so to speak, de novo. If a settler came lawfully into the occupation of land once possessed by another he did not do so as the successor in interest of such other, but the one for a consideration or any cause abandoned the location, and the other took it up "as though the foot of man had never been upon it." Lownsdale v. Portland [Case No. 8,578]. And if this were otherwise the widow and children of Gervais could not have succeeded to his possession, for they, because of the sex of the one and the nonage of the others, were incapable of "holding a claim;" but the value of the "claim" and improvements would have been distributed among them by the intervention of an administrator and sale of the same.

Did the third article of the treaty of 1846 enhance this possessory right, or increase the quantity of the occupant's interest or the duration or time of its enjoyment? Does it contain a grant of some interest in or right to the possession of the soil, or is it merely a promise by the United States to respect an existing right, whatever that might be? On the one hand it is hardly probable that Great Britain, while conceding so much as she did to the United States by that treaty, would also surrender her subjects, who had settled here upon the faith of her claim to the country, without taking some sufficient security or stipulation as to their possessions, upon which many of them had spent years of labor and care to make permanent homes for themselves and families. The possessory rights of the Hudson's Bay Company provided for in the same article were of no higher character and hardly as meritorious as those of these British subjects. Yet the two governments, by the convention of July 1, 1863 (U. S. Pub. Treat. 346), declared that it was desirable that all questions concerning "the possessory rights" of said company should be settled by the transfer of the same to the government of the United States for an adequate money consideration, and provided for an arbitration to ascertain the value thereof, upon which four hundred and fifty thousand dollars was awarded to the company.

Yet the language used in the treaty—possessory rights shall be respected—does not of itself indicate that any new or additional right was intended to be conferred thereby, but only that the existing right of possession, as defined by the local law should be respected, regarded, not infringed or denied without due process of law. Upon its face the stipulation appears to be a mere promise, which of itself confers no right to or in the soil, and for the neglect or violation of which the British subject would only have a just claim against the United States for compensation in money or kind. The legal power of the government to dispose of the territory south of the forty-ninth parallel as it saw proper was not limited by the treaty, and belonged to it thereafter as an incident of its sovereignty. The possessory right that it bound itself to respect was probably only that which the British subject then enjoyed under the local law, which practically terminated with his life. In Cowenia v. Hannah, supra, Mr. Justice Boise says: "The treaty of 1846 treated these lands as they then were; and had the parties intended to raise these possessory rights to a higher title, it would have been so provided. I think these possessory rights should cease on being abandoned, so that the possessor became disseised by his own voluntary failure to occupy; or, on his death, as such rights could not descend to heirs."

Yet, it is probable that justice required that the United States should have shown the same respect to the possessory rights of British subjects that it did to those of its own citizens in like circumstances. By section 4 of the donation act (September 27, 1850), the possessory rights of the American citizens then in the territory were confirmed to them in perpetuity. It is also true that all aliens having such possessory rights were entitled by the act to the benefit of this grant; but this was upon the condition that they should first become American citizens. Probably, by much the larger portion of the British subjects having possessory rights in the territory embraced this offer, and obtained title to the lands which they then occupied by becoming American citizens.

But this act, by means of which the United States first undertook to appropriate, dispose of, the territory—lands—south of the forty-ninth parallel, made no provision for ascertaining and protecting the possessory rights of British subjects, as such. In this respect it seems to have been framed in studied disregard of the treaty stipulation; except so far as the following proviso to said section 4 may have the effect to preserve them—

"that this section shall not be so construed as to allow those claiming rights under the treaty with Great Britain, relative to Oregon territory, to claim both under this grant and the treaty, but merely to secure them the election, and confine them to a single grant of land;" and this proviso to section 11 of said act arbitrarily appropriating—confiscating—the possessory right of Doctor John McLoughlin, a British subject, to the endowment of a university: "That nothing in this act contained, shall be so construed or executed, as in any way to destroy or affect any rights to land in said territory, holden or claimed under the provisions of the treaty or treaties existing between this country and Great Britain."

But, admitting that the possessory right guaranteed to a British subject by the treaty of 1846 amounted at most to a freehold or a right to occupy the land during the life of the settler, the question arises whether this proviso to section 4 does not have the effect to constitute it a grant of the land, the same as that made to American citizens or aliens who should become such. The proviso declares that it was not the intention of congress to allow a settler to claim under the act and the treaty both, but only to secure him the election to take a grant of land under either.

But the act made no provision for a British subject asserting a right to land under the treaty or otherwise, and therefore any one who did not submit to become an American citizen and claim under the act, as such, had no opportunity to give notice to the surveyor-general of his right or establish the facts constituting it. The result was that the right of an occupant was practically extinguished by his death, and those of his widow and children, if any were ignored. For instance, David Gervais, being born in Oregon of British subjects, while the territory was in the joint occupation of the United States and Great Britain under the treaty of 1818, was a British subject. McKay v. Campbell [Case No. 8,840]. At the date of the treaty of 1846 he was in the lawful occupation of six hundred and forty acres of land in the Oregon territory. By this treaty the United States agreed that in the future disposition of this magnificent domain his right to this land should be respected. By the act making such disposition, persons in his condition were recognized as being entitled to a grant of land, but no provision was made therein by which he or any one claiming under him could assert or establish his claim in the land department of the country. The consequence was that upon his death the land upon which he had lived for years, and upon which he may have expended the labor and savings of a life-time to provide a permanent home for his wife and children, was taken by the defendants, the De Havens, under the donation act, and acquired by them from the United States as a part of the public domain. That this result is far short of what might have been expected from the justice, not to say the magnanimity, of a great nation in dealing with the rights of humble and helpless individuals over whom it had acquired jurisdiction upon the faith of a solemn pledge that it would respect such rights, will hardly be denied. But whether in this state of the law, the widow and children of Gervais succeeded to any rights which can be enforced as against these defendants in a judicial proceeding is a matter of which I have serious doubt.

Upon the whole my mind inclines to the conclusion that the treaty stipulation was not a grant, but a mere promise to respect an existing right of possession which strictly speaking amounted to no more than a freehold, or an estate for the life of the settler, and that the United States in disposing of the territory by the donation act, construed and recognized the right of the British subject to a grant for his possession the same as an American citizen, but provided no means and prescribed no mode in which such right could be asserted or established in the land department. But as this case can be satisfactorily disposed of upon another point made by the demurrer, it is not necessary to consider this question further.

The third and fourth causes of the demurrer are in effect that the alleged cause of suit is barred by the lapse of time because suit thereon was not commenced within the time limited by section 378 of the Oregon Civil Code, which, among other things, prescribes that no suit in equity "shall be maintained to set aside, cancel or annul, or otherwise affect a patent to lands issued by the United States * * * or to compel any person holding under such patent to convey the lands described therein, or any portion of them, to the plaintiff in such suit, or to hold the same in trust for or to the use and benefit of such plaintiff, for or on account of any matter, thing or transaction which was had, done, suffered or transpired prior to the date of such patent or within one year from the passage of this act."

The act referred to in this section was passed October 20, 1870 [Laws 1870, p. 23], and the patent to the defendant was issued on September 6, 1866. This suit was commenced in October 1, 1877, nearly six years after the time limited by this act, and more than eleven years after the date of the patent. The case falls within the purview of the statute. It is a suit to compel the defendants, holding under a patent from the United States to convey the lands described therein to the plaintiff on account of certain matters, to wit: the possession and occupation of Gervais, which transpired prior to the date of such patent.

While this section 378 is not binding upon this court sitting as a court of equity, it has been held to furnish a convenient and safe rule for its action in a similar case. Hall

v. Russell [Case No. 5,943]. In that case the court said: "An action at law to recover possession of this property would not be barred by the laws of this state under twenty years. Whether the court shall follow that statute or the limitation of five years, contained in section 378, supra, is the question. It is conceded that, in a case of equitable cognizance like this, the court is not bound by the statute of limitations, but may, for good reason, apply a longer or shorter time in bar of a suit. There is nothing in the circumstances of this case or the period fixed by the statute which requires the court to lengthen the term, but the contrary. * * * The patent was issued nearly ten years ago. * * * No reason is given for the delay; nor does it appear that the plaintiffs have been deceived or misled in any way by the defendants, or in anywise induced to forbear the assertion of their alleged rights. There never was any actual relation of trust or confidence between these parties. They claim under titles adverse in their origin, and have always occupied the attitude of adverse claimants. Under these circumstances, we think that the court ought to apply the shorter limitation of the two. Statutes of limitation are measures of public policy and expediency, and it is desirable that the rule should be the same in the national and state courts. We think in this case the court may safely adopt the limitation prescribed by the laws of the state in its courts in like case."

Whatever may be thought of the manner in which the United States has kept its engagement, to respect the right of Gervais to this land, there is no apparent reason why those who claim under him should not have sought redress in the courts before this. This has become a stale claim. There has been an unreasonable delay in asserting the right claimed. The case falls within the rule applied in Hall v. Russell, supra, and the bill must be dismissed.

Case No. 14,114.

TOWN et al. v. The WESTERN METROPOLIS.

[28 How. Pr. 283.]

District Court, S. D. New York. [1] Jan., 1865.[1]

PLEADING IN ADMIRALTY—AMENDMENT—EXCEPTIONS—MARITIME TORT—JURISDICTION.

1. Where the claimants file exceptions to a libel, the libellant has a right, under the twenty-fourth admiralty rule of the supreme court, to move to amend his libel in any of the points excepted to, without submitting to the exception, as provided for in rule 94 of this court.

2. Where the offending vessel in a case of collision is arrested in this district, this court has jurisdiction of the cause of action, even though the collision occurred on the Potomac river, out of the district.

3. Cases of maritime torts committed upon navigable waters are cognizable in the admiralty within any district where the vessel may be apprehended.

4. Where the claimant excepted to eight distinct matters of form in the libel, it was *held*, that the points of exception embraced matters which are sufficiently explicit and certain to a common intendment, or are appropriately subjects of proof, and need not be set out in the pleadings.

In admiralty. The libellants filed their libels claiming $7,875 damages done to the schooner Mary C. Town, in a collision on the Potomac river, by the steamer Western Metropolis. The claimants filed eleven exceptions to the libel, eight of which were on matters of formal statement. Three of them, however, tended to a point of considerable magnitude, viz. as to whether or not this court had jurisdiction over a case of marine tort committed in the navigable waters of another district. On the exceptions coming in, Mr. McMahon, for the libellants, made a motion to amend his libel in three of the points excepted to, and claimed that he could do so without submitting to the exceptions on those particular parts, and referred to rule 24 of the admiralty (Sup. Ct. U. S.). Mr. Donohue, for the claimants, insisted that the regular practice was for the libellant to wait until the argument of the exceptions, and to submit to the particular exceptions against which the amendment was sought. The counsel referred to rule 94 of this district.

BETTS, District Judge. The libellant moved the court, on notice to the proctors of the claimants, for leave to amend the libel in particulars of form pointed out by notice. The counsel for the claimants opposed the motion on the ground that exceptions to the libel were pending in court, not submitted to by libellant, and unanswered by the libellant, and that he cannot be allowed, in such case, to amend his pleading. It appears to me the matter is specifically provided for by the rules of the supreme court. Admiralty Rules, No. 24. The libellant is entitled, of course, to have an amendment of his pleading until he shall be concluded by judgment of court against it upon exceptions taken to it on the part of the claimants. Betts, Adm. 58. The claimants have taken no steps to enforce their exceptions to the libel, and the party who brought the action is accordingly free to ask to rectify any error or imperfection found in his pleadings.

Motion granted.

The remaining exceptions to the libels, as thus amended, were brought on for argument before same judge.

C. Donohue, for claimants, in support of the exceptions.

(1) The courts of the United States rebuke any informal statement of the case in the pleadings which does not apprise the adversary of what he has a right to expect. Therefore, although the counsel for the libellants may denominate these exceptions as merely formal, yet they are on matters of substance, such as from which quarter the wind blew. He has stated the same as being from the

[1] [Reversed in Case No. 17,440.]

northward. Northward is not north. It is important for the claimants to know the exact quarter whence the wind blew. They are entitled to that information from the libel. Then, again, it is not definitely stated how far the vessels were apart at the time of the collision. The Potomac river, at the point of the collision, is two miles wide, and the claimants cannot know, save from a statement in the libel, as to what part of the river the vessel was in when collided against. So, also, the course the steamer was on is not definitely stated.

(2) This court has no jurisdiction over a marine tort committed on the navigable waters of another district. The collision here occurred on the waters of the Potomac river. In this court, by a number of decisions, such a jurisdiction has been denied. See Drummond v. Raft of Spars (Dec. Term, 1852;) Minute Book, 64, p. 96 [unreported]; Tuttle v. Hogg [unreported].

D. McMahon, in reply.

(1) The first exception is as to the jurisdiction of the court. The libel, it appears, was filed in this district, where the offending vessel was seized, and that the collision took place on the tide waters of the Potomac river. This court has jurisdiction. The Commerce, 1 Black [66 U. S.] 574. See, also, Nelson v. Leland, 22 How. [63 U. S.] 48.

(2) The second exception is involved in the first, and proceeds on the theory that the libel does not state or set up facts or a cause of action within the jurisdiction of the court. We assume that it does so state the necessary facts. The case presented is one of a collision between the schooner Mary C. Town, owned by the libellants, and the steamship Western Metropolis. The libel states the collision took place "within the admiralty and maritime jurisdiction of this honorable court, to wit, on the tide waters of the Potomac river" (second allegation of libel). In the third allegation of the libel, it gives more particularly the locality of the collision, viz. two miles above and to the west of Blackstone Island lighthouse, and about in the middle of the river, which in that vicinity is about two miles wide. In the first allegation of the libel it is alleged that the "offending vessel at the time of the filing of the libel was within the jurisdiction of the court." In the last allegation of the libel the general averment of jurisdiction is made, so that every fact is stated in the libel, within the case of The Commerce, sufficiently to clothe this court with the necessary jurisdiction.

(3) The third exception is that the libel does not state the point from which the wind blew at the time of the collision with certainty. In the third allegation of this libel it is stated "that the schooner was coming down, all sails set, a fair breeze from the northward, say about seven knots an hour." It then gives the course of the schooner, viz. southeast by east, half east, "the wind bearing on the larboard side of the vessel." At the end of the fourth allegation is this statement: "That owing to the wind the schooner could not have, prior to the collision, starboarded her helm, without running the risk of coming up in the wind and becoming unmanageable." Here, then, are all the elements necessary to show the course of the wind. First, wind from the northward; second, schooner on the southeast by half east course; third, wind bears on the larboard side of schooner; fourth, could not starboard helm without coming up into wind and becoming unmanageable. These allegations and this course of navigation show distinctly that the wind was due north, or nearly so.

(4) In the fifth exception the claimants complain that the libel does not set forth how far the vessels were apart when steamer was seen from schooner. In the third allegation of the libel, the libellants say: "About ten minutes before eight o'clock, p. m., she (i. e. schooner) descried the steamship Western Metropolis about two miles off, coming up the river under full headway." This statement, we admit, is sufficiently specific, and, even were it not in the libel, we admit that it is not important as to whether or not the libel should state how far apart the two vessels were at the moment of seeing each other, if the course of the two vessels otherwise properly appear in the libel, as we submit they do in this case.

(5) Matters of detail, matters of particularity, are the proper office of evidence, not to stuff into pleadings. In fact, all that the twenty-third rule (Sup. Ct. U. S.) in admiralty cases requires is, "that the libels shall propound and articulate in distinct articles the various allegations of facts upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article." This rule excludes all statements of detail and of minute particulars. Under this rule, all that would seem to be required would be: First, the names of the two vessels; second, the locality of the collision; third, the general directions of the wind and tide; fourth, the respective speed of the two vessels; fifth, the fact of the collision, and of the general course of the two vessels up to the point of contact; sixth, points of negligence; seventh, facts showing jurisdiction; eighth, damages. All the rest becomes matter of evidence. Conklin, in his Admiralty Practice (volume 2, p. 483), says, in speaking of the requisites of libels: "It may be said in general, therefore, as of the correspondent part of a bill in equity, that in this part of the libel every material fact to which the libellant intends to offer evidence, ought to be distinctly stated, for otherwise he will not be permitted to offer or require any evidence of such fact. But in the one case, as in the other, a succinct general charge or statement of the matters of fact is sufficient, provided it be clear, accu-

rate, and to all necessary and convenient extent certain, as to the essential circumstances of time, place, manner, and other incidents, and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge; for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proof." See Story, Eq. Pl. §§ 28, 241; The Palmyra, 12 Wheat. [25 U. S.] 13, when speaking of the requisites of libels in rem; Wade v. Leroy, 20 How. [61 U. S.] 43, 44, opinion; U. S. v. The Neuren, 19 How. [60 U. S.] 95, 96, opinion.

BETTS, District Judge. A libel was filed in this court April 13, 1864, against the above-named steamship, charging a tortious collision by her against the vessel of the libellants, the Mary C. Town. The claimants of the steamship filed eleven special exceptions against the sufficiency of the libel in point of law. The libellants obtained the leave of the court to amend their libel in respect to three of these special exceptions, and the case was heard before the court between the parties on the pertinency and validity of the remaining exceptions. The steamer was arrested within this district. The collision occurred upon the Potomac river, between two vessels navigating those waters, and the gist of the three first exceptions, therefore, denies the jurisdiction of the court in the case. If the practice of the local courts justifies that construction of the law, or stated rules of the court, it is clearly erroneous. Cases for maritime torts committed upon navigable waters are cognizable in the admiralty within any district where the vessel may be apprehended. Jackson v. The Magnolia, 20 How. [61 U. S.] 296; Nelson v. Leland, 22 How. [63 U. S.] 48; The Commerce, 1 Black [66 U. S.] 574. The other points of exception embrace matters which are sufficiently explicit and certain to a common intendment, or are appropriately subjects of proof, and need not be set out upon the pleadings.

Exceptions overruled, with costs to be taxed.

[NOTE. The libel was dismissed, and the libellants appealed to the circuit court, where the decree of the district court was reversed, and a decree entered for libellants, with a reference to ascertain the damages. Case No. 17,440.]

Case No. 14,115.

TOWNE et al. v. SMITH.

[1 Woodb. & M. 115;[1] 9 Law Rep. 12.]

Circuit Court, D. Massachusetts. April, 1846.

EQUITY PLEADING—EFFECT OF ANSWER—NOTES—LOCUS CONTRACTUS — FEDERAL JURISDICTION — INSOLVENCY — DISCHARGE — ATTACHMENT LIEN.

1. The sworn answer of a defendant in equity, when responsive to material allegations in the bill, must be taken as true, unless impugned by the testimony of more than one witness.

2. A note, made payable to the maker's own order, and by him indorsed, passes by delivery, as if it were payable to bearer; and the circuit courts of the United States have jurisdiction of an action brought against the maker, by a holder, who is a citizen of another state, where the amount in dispute exceeds $500.

[Cited in Brown v. Noyes, Case No. 2,023; Heckscher v. Binney, Id. 6,316; Phillips v. Preston, 5 How. (46 U. S.) 290.]

3. If a party be legally and properly discharged, as to any contract in the state where the insolvent system exists, the discharge must be held good in other states, and in the courts of the United States.

[Cited in Commercial Bank of Cincinnati v. Buckingham, 5 How. (46 U. S.) 316.]

[Cited in Bank of Utica v. Card, 7 Ohio (part 2) 171; President, etc., of Northern Bank v. Squires, 8 La. Ann. 318; Goodsell v. Benson, 13 R. I 249.]

4. But if the contract is made, or is to be performed abroad, such discharge is not a bar to the action.

[Cited in Perry Manuf'g Co. v. Brown, Case No. 11,015.]

5. It seems, that a negotiable note, not restricted on its face to be paid within the state, may be considered as payable wherever the indorsee may live; and if the indorsee live out of the state, it is not barred by a subsequent discharge in the state where the contract was made.

[Cited in Smith v. Babcock, Case No. 13,009.]

[Cited in Goodsell v. Benson, 13 R. I. 244; Brigham v. Henderson, 1 Cush. 432; Scribner v. Fisher, 2 Gray, 46.]

6. In such a case, the discharge will not avail in a court of the United States, unless the contract sued has been collusively assigned to a person living in another state, or the interest in it still remains in a citizen of the state in which it was made.

[Cited in Sohier v. Merril. Case No. 13,158.]

[Cited in Felch v. Bugbee, 48 Me. 19.]

7. Whether the actual seizure of the property of an insolvent, under process issuing from a court of the United States, before his assignees under the state insolvent law take possession of it, creates a lien which will, in all cases, be sustained—quære.

[Cited in Perry Manuf'g Co. v. Brown, Case No. 11,015; Mississippi Mills Co. v. Ranlett, 19 Fed. 196.]

8. Whether, where an insolvent, living in Massachusetts, gives to a creditor, also living in Massachusetts, in payment of a previous debt, a note payable to his own order, and by himself indorsed, and the creditor sells the note in New York to a third person, living in New York, the note is to to be considered a contract, as between the debtor and such third person, made or to be performed in New York—quære.

9. H. & H., debtors, living in Massachusetts, gave to W. A. H. & Co., also living in Massachusetts, in payment of a previous debt, a note, payable to the order of H. & H., and by them indorsed. W. A. H. & Co. carried the note to New York, and sold it there, for a good consideration, to S., living in New York. S. commenced a suit against H. & H. in the United States circuit court for the district of Massachusetts, and attached the property of H. & H. thereon. H. &. H. became insolvent under the law of Massachusetts, T. & T. were duly appointed their assignees, and H. & H. were discharged from their debts under such law. T. & T. then brought a bill in equity in the circuit court, praying that S. might be en-

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

joined from proceeding further in his suit against H. & H. in that court. The court, upon these facts, ordered that the bill be dismissed, on precedents in the supreme court of the United States, but doubting the correctness of their principles.

[See Banks v. Greenleaf, Case No. 959.]

[Cited in Goodsell v. Benson, 13 R. I. 253; Felch v. Bugbee, 48 Me. 15.]

[10. Cited in Taylor v. Carpenter, Case No. 13,785, to the point that a foreigner cannot, in the conflict of laws, enforce some rights, in cases of discharges in insolvency, which citizens may.]

This was a bill in equity, brought by the complainants [William B. Towne and another], as assignees of Christopher J. Horn and Benjamin F. Howe, insolvents under the statute of Massachusetts. It prayed an injunction against [James A.] Smith, a citizen of the state of New York, not to prosecute further in this court an action he had brought here against Horn & Howe, on a note given at Boston, in Massachusetts, to William A. Howe & Co., on the 29th of December, 1843, for $1,009.70, on demand, with interest. It averred, that the note run in form to Horn & Howe, the makers, or their order, and was by them indorsed, and that the suit thereon was commenced by Smith on the 6th of January, 1844, and the goods of Horn & Howe attached, which goods the complainants wished to have released under the injunction, in order that the complainants, or their assignees, might divide the proceeds equally among all their creditors. The bill farther averred, that Horn & Howe were insolvent when the last note was executed; that it was procured in the present form with a view to be sued in the United States court, by a citizen of some other state, in order to defeat the operation of the insolvent law; that it was sold for this purpose to Smith, he knowing the design, and that the action on it was prosecuted by collusion, for the benefit of William A. Howe & Co., and that Horn & Howe had since been discharged from all their contracts made in Massachusetts. Some other allegations were introduced, which it is not material to detail; and eleven interrogatories were propounded to the respondent, on matters connected with the bill. The answer professed ignorance, and left the complainant to prove some of the matters, but admitted the sale of the note to him at twenty-five per cent. discount in New York, by William A. Howe—saying, the promisors were related to him, and he did not like to push them, and that the delivery, and obligation given for it, were not completed till the respondent arrived in Boston. It also admitted, that some previous acquaintance had existed between Smith and Howe, but denied any relationship or secret trusts as to this transaction, or any knowledge of the insolvency of Horn & Howe, or any design in William A. Howe & Co. to evade, by the note and suit, the insolvent laws of Massachusetts. It further denied any consultation with them or their counsel on this subject, but the respondent was advised by his own counsel to sue, and attach property at once, if the note was not paid on presentment. It denied, also, any borrowing of money of them since, in connection with the present transaction, and insisted that the purchase of the note was bonâ fide, and for a valuable consideration. The answer was sworn to, and had, annexed, a copy of the note, to show it was not made payable, in express terms, at Boston. The only testimony offered in the case to impugn that part of the answer, which denied allegations in the bill, was that of William A. Howe. But it did not appear to conflict, in any respect, with the answer, except that it gave, as additional information, that the consideration of the note in suit was a former debt from the same promisors, for goods sold and delivered, and money lent; that, on the 29th of December, 1843, the promisors were insolvent, and before that he had expressed fears, if pressed hard, they would fail; that the note was then made in its new form at his request; that he went immediately to New York to sell it, knowing that a New York creditor had some advantage, and not liking to sue the makers himself, but said nothing to Smith as to their solvency or a suit, though informing him they were in business, with a stock of goods of considerable value. Smith did not say he would buy the note to accommodate him, nor was there any indemnity given, nor any advice to him, that he might evade the insolvent law of the state in this manner.

William Brigham, for complainant.
E. D. Sohier, for respondent.

WOODBURY, Circuit Justice. When this bill was filed, a temporary injunction was granted till the hearing. The question now is, shall it be made perpetual, or be dissolved? Both the facts and the law, as bearing on this question, are controverted. As to the facts, however, the answer to the bill must, under all the circumstances, be regarded as containing the truth in relation to the transaction. Because it is sworn to; is responsive to the material allegations; and, so far as contradicted at all, it is only by the testimony of one witness. But no answer, thus situated, can, as a general rule, be disproved or annulled by the testimony of one witness. See Daniel v. Mitchel [Cases Nos. 3,562 and 3,563], and the numerous other cases cited in Carpenter v. Providence Ins. Co., 4 How. [45 U. S.] 185, where the various exceptions and limitations on this point have been collected and explained. The answer denying any fraud, or collusion, or trust, all of those must be considered as out of the case. The testimony of William A. Howe would, to be sure, justify several inferences against the answer, which it does not, in terms, admit. Thus, the taking of a new note, after a knowledge that the makers of the old one were in-

solvent, and taking it in a new form at the creditor's request, so that it might be passed to persons living in another state and sued in this court; and going forthwith to another state and selling it, and the purchaser returning and ascertaining property could be attached to secure it, before closing the bargain, and then closing it, and making the attachment immediately; all these would furnish strong grounds to infer, not only that he intended to make the sale to evade the insolvent law, but that the purchaser took it under a like conviction, if not from a like motive. But these inferences, so far as they might otherwise affect Smith, the purchaser, and his rights, are repelled by his positive oath to his answer; and are impugned only by inferences from what is testified to by one witness alone. I am compelled, then, though with some reluctance and distrust, to regard the transaction, in point of fact, as the respondent asserts it to be, a bona fide purchase of the note in question, for a valuable consideration, by a citizen of another state, and without any secret trust or condition whatever.

The next objection which occurs, to proceeding further in the suit at law, and in favor of a perpetual injunction, is, that the plaintiff in it, though an honest purchaser of the note, cannot maintain a suit in this court on it, because chapter 20, § 11 [1 Stat. 78], of the judiciary act of September 24, 1789, deprives an assignee of a contract of that right, though living in a different state, if the assignor was an inhabitant of the same state with the maker, as in this instance. Humphreys v. Blight [Case No. 6,870]; [Montalet v. Murray] 4 Cranch [8 U. S.] 46; [Gibson v. Chew] 16 Pet. [41 U. S.] 315. But we have jurisdiction over this action, because a note, in the particular form of this, passes by delivery, and not assignment. It runs to the promisors and their order, and, being then indorsed by them, is regarded in law as if running to bearer. Smith v. Lusher, 5 Cow. 688, 711; Wildes v. Savage [Case No. 17,653]. And in the cases of Bank of Kentucky v. Wister, 2 Pet. [27 U. S.] 318, 326; Bonafee v. Williams, 3 How. [44 U. S.] 576, 577; Bradford v. Jenks [Case No. 1,769]; and Bullard v. Bell [Case No. 2,121],—it has been held, that an action lies in this court by the holder of a note to bearer, if living in a different state; because, it is a promise virtually to pay any person holding it, and not merely the original holder, and does not pass to others by any assignment. Even an indorsee, living in another state, can now sue his indorser in the United States courts on the new contract of indorsement; because he claims on the new contract, and against the indorser, and not on the old one, through the assignment, and against the maker. Young v. Bryan, 6 Wheat. [19 U. S.] 146; Mollan v. Torrance, 9 Wheat. [22 U. S.] 537. If promissory notes had been as extensively used in 1789 as bills of exchange, they probably would have been excepted from the stringent restrictions that still remain against them. The United States, when indorsees of a note, are now relieved from them, and may sue the maker in the federal courts under their peculiar powers, by a different clause in the judiciary act. U. S. v. Greene [Case No. 15,258].

The case standing in this attitude, the only remaining question is, whether the holder of the note can, on the facts, as proved, and heretofore detailed, be properly prevented from availing himself in payment of his attachment? The 5th section of the Massachusetts insolvent law, passed April 23, 1838, provides expressly, that "the assignment shall be effectual to pass all the said estate, and discharge any such attachment." If the holder then had brought his action in a court of the state of Massachusetts, or if it is here to be treated in all respects as if brought there, the suit could not proceed upon general principles, and must come within one of the exceptions, that will hereafter be explained, or the property attached ought at once to be restored to the complainants, who are the assignees of the debtors—to be divided equally among all the creditors, in comformity with the provisions of the insolvent law. It would be a proper case for a perpetual injunction, such as is prayed for by the complainants. 2 Story, Eq. Jur. §§ 874, 904; Logan v. Patrick, 5 Cranch [9 U. S.] 288. But the respondent resides in another state, and having secured his debt by superior vigilance and skill in the courts of the United States, without resorting to those of Massachusetts, he insists that this advantage ought not to be taken from him by any application of her insolvent system to his case. Whether it can be, under the words and true spirit of that system, or the principles of international and commercial law, or the rules proper for the construction of contracts, or the precedents applicable to the subject, is the next inquiry; and being an important one, it may be useful to pursue it with a scrutiny more close and extended than is usual in ordinary cases. The insolvent law (St. 1838, c. 183, § 7) provides that the debtor, by the certificate, shall be "absolutely and wholly discharged from all debts, which have been or shall be proved against his estate, assigned as aforesaid, and from all debts, which are provable under the said act, and which are founded on any contract made by him within the commonwealth, or to be performed within the same, and made since the passing of the act aforesaid." These words are certainly broad enough, in their common acceptation, to discharge the debtor living here, from all contracts made here and to be performed here, after the passage of the act; and not merely to relieve his body from imprisonment on such contracts in future. Most of the early insolvent systems in this country only discharged the body eo nomine on a surrender

of property, and were "Poor Debtors' Acts," as called here, or "Lords' Acts," as in England. 2 Tidd. 978; 6 Durn. & E. [Term. R.] 366. And such discharges were no bar to subsequent actions on the debts or contracts, or to attachments, and a satisfaction of the judgments on any property of the debtor, which could afterwards be found. [Sturges v. Crowninshield] 4 Wheat. [17 U. S.] 122, 200; [Mason v. Haile] 12 Wheat. [25 U. S.] 370; Beers v. Haughton, 9 Pet. [34 U. S.] 329. But the law, under which the defendant has already been discharged, is in respect to future contracts, which is this case, as extensive as most of the bankrupt laws abroad, or in this country, and purports to reach the contracts or debts of the insolvent, and to relieve him "absolutely and wholly" from them, and thus to be a bar to any suit whatever, and not merely to exonerate his body from future arrest.

The changes, in most of the state insolvent systems, do not seem to have been always noticed critically by the courts in acting on discharges; and decisions made and opinions formed properly—that discharges should not avail in other states, at a time when only the body, and not the debt, was professed to be released, and thus affecting only the remedy—have been retained, and applied, after material changes in many of those systems professing to release the debt as well as the body, and hence affecting the cause of action as well as the remedy; and, therefore, often requiring that discharges should avail in other states, and be treated everywhere as a part of the lex loci contractus. It is, I fear, in part, from some inattention to the nature and history of these changes, that some insolvent systems, though using general language discharging the contract or debt, like that in Massachusetts, have still been treated as if exonerating only the body, or such property as was then situated within the state that passed the law; and hence, have been restricted to a defeat of the remedy only or the action, and not extended so as to be a release of the contract or debt. The difference between these is very material; and whether the insolvent law of Massachusetts should be so treated or not, is, under some views, very decisive of the present case. Because, if the debt itself is not to be considered as discharged by it, but only the remedy affected, a suit can always be sustained in another state, or in the courts of the United States, on the old debt, after such a discharge. [Ogden v. Saunders] 12 Wheat. [25 U. S.] 213; 10 Wheat. [23 U. S.] 151; [Beers v. Haughton] 9 Pet. [34 U. S.] 329. Where the body, by the poor debtor's oath, had been discharged in Massachusetts on a judgment and commitment, it is no bar to debt on the judgment in New Hampshire, Hubbard v. Wentworth, 3 N. H. 43. But if the debt is to be considered as discharged, treating the system as a part of the lex loci contractus, no suit could afterwards, in cases generally, be sustained anywhere on a contract, made and thus discharged in the state in which the system exists, unless the contract was to be performed elsewhere.

The decided cases, that bear on the construction which ought to be deemed proper, are numerous, and somewhat conflicting. Some of them, looking to the influence of such discharges, as being confined to the remedy alone, have, as in Ogden v. Saunders, 12 Wheat. [25 U. S.] 213, 258, held, that they operate between citizens of the state where the suit is brought and the discharges were issued; even though a contract is sued there which was made abroad. Under that view, such discharges are deemed to be a modification of the remedy on everything prosecuted there against the insolvent, though on a contract made abroad. But such would not be the case in Massachusetts under its insolvent system; as by the certificate it is, in express terms, to discharge only such contracts as were made "within the commonwealth." Looking to the influence of such discharges on the contract, as other classes of cases do, it has been held, that when one of the contractors, the payee, after a discharge, both being in the same state, indorses a note made there to a citizen of another state, and it is sued in another state, the discharge is a bar. Baker v. Wheaton, 5 Mass. 509. Because the original creditor assented to the insolvent law, and lived under it when it took effect, and it operated on the contract itself wherever it went, having been a part of the lex loci contractus. Again, it has been held, if the note either had been given to a person belonging to another state, or had been indorsed to one, before the discharge issued, the latter would be no bar, when the contract was sued in the courts of another state. Ogden v. Saunders, 12 Wheat. [25 U. S.] 213, 363; Braynard v. Marshall, 8 Pick. 194 [6 Mass. 509].[2] The first hypothesis or position in this ruling, looks rather to the contract itself, as if made or to be performed elsewhere, while the last one looks more to the remedy, and is very near the case now under consideration. In Watson v. Bourne, 10 Mass. 337, a creditor, living in Massachusetts, sued the debtor in another state, and recovered judgment, which was afterwards there discharged by an insolvent law. Then an action was brought on the judgment, in Massachusetts, and the discharge held to be no bar, as the plaintiff never lived in the state issuing the discharge, and both parties must live in the state discharging the contract, in order to bar the action. This case must have been decided, looking to the remedy rather than the debt; but its correctness, in any view, is questioned in 12 Wheaton.

It has been laid down, also, generally, that the insolvent systems of each state are valid, as to its own citizens, on all posterior con-

[2] [From 9 Law Rep. 12.]

tracts, but invalid as to all other persons and contracts. [Ogden v. Saunders] 12 Wheat. [25 U. S.] 368, 369. This limitation to posterior contracts is not new; and the Massachusetts insolvent law, in terms, applies only to contracts "made since the passing of the act." But to say, virtually, that there is no power in states so to regulate the contracts made within them, as to affect those contracts in the hands of citizens of other states, is more novel, and seems to look rather to persons, than to contracts, or the remedies on them. To analyze further a few leading cases. In Potter v. Brown, 5 East, 124, a bill of exchange was drawn in the United States in favor of a citizen of the United States. though on a drawee in England, not accepted, and afterwards the drawer was sued in England; the action was held to be barred by a discharge in the United States under the bankrupt law of 1799. It was thought, that the comity of nations required such a course to be pursued. Hunter v. Potts, 4 Durn. & E. [Term R.] 182; Smith v. Buchanan, 1 East, 6; Folliott v. Ogden, 1 H. Bl. 123. But in Braynard v. Marshall, 8 Pick. 194, the court felt bound, by Ogden v. Saunders [supra], to hold, that the remedy alone was affected by insolvent systems, and hence that discharges under them operated only in suits that were brought in the states which created them. And if not bound by that case, the court seemed to think, that a discharge in New York, where a note was made, was to be treated as no bar to a suit on it by a citizen of Massachusetts, to whom it had been negotiated. It was not payable on its face expressly anywhere; and the court considered it as payable wherever it was held; and if in Massachusetts, by one of its citizens, he was not barred or estopped to recover by any laws in New York. See, also, 10 Mass. 337. But in Pitkin v. Thompson, 13 Pick. 64, the discharge is regarded as a part of the lex loci contractus, and hence a discharge of a wife in Rhode Island, on a contract there, the creditor also residing there, is a discharge to a subsequent suit in Massachusetts, against the wife of a new husband. It was not considered a question of remedy merely, but went to the cause of action, and was governed, not by the lex fori, but the lex loci contractus. The Massachusetts cases have almost inevitably got confused, by the doubts and differences of opinion among the judges in the United States court in Ogden v. Saunders and Sturges v. Crowninshield [supra]. See on this 8 Pick. 194. In Blanchard v. Russell, 13 Mass. 1, the place of the original discharge, was the place in which the debt arose and was payable, being an account for property sold belonging to a creditor in another state, and who brought an action in the other state. It was in this case regarded as a part of the lex loci contractus, or substantially as a part or condition of the contract itself, and the insolvent law was in deed, as it was in terms and design, a law, under certain specified circumstances, to discharge "the debt." See the form of it in 8 Pick. 194. In Proctor v. Moore, 1 Mass. 198, the discharge was not held to be a bar, as it did not appear that a contract was made in the state where it issued, or that the plaintiff resided there. But it would be too tedious, and is hardly necessary, to pursue this analysis of particular cases further, through all the variegated and conflicting views which have prevailed on this subject. These are adduced merely to illustrate some of the different positions which have been taken. As a legitimate consequence of them, it has been laid down, that if a party be legally and properly discharged, as to any contract in the state where the insolvent system exists, the discharge must be held good in other states. 2 Kent, Comm. 393. So it must be in other courts, as this of the United States. But this still leaves the great question open, what contracts can thus be legally and properly discharged? And whether that now in controversy has been so discharged in Massachusetts? Must we hold to be discharged only those sued in the courts of the state which has the insolvent system? or all those made or to be performed in that state, wherever they may be sued? The adjudications, as already seen, have been very different on this subject; some considering the discharge as affecting merely the remedy, and hence not respected, except in suits in the courts of the state, possessing the insolvent system; while others consider it as a part of the lex loci contractus, and thus to be respected in all states and courts wherever the contract goes, if the contract was made or was to be performed in the state where the insolvent system prevails. More cases of both of these descriptions exist, in addition to those already cited; and some, where the decisions seem to be of a mixed character, or to rest on some exceptions to the general rule. It may be useful to classify most of these, and examine their weight and bearing in this court and in this cause, before forming a final conclusion as to the construction of the discharge, which must be given in the present case. Thus, although the spirit of insolvent laws generally, which are passed by different states, is to relieve their own citizens on their own contracts, it has been held, in the courts of the United States, that this cannot be effected, usually, except where they are sued in the states which passed the laws; and one reason offered for it is, that such powers are local, and hence the operation of the laws must be local. See the leading cases before cited of Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122, and Ogden v. Saunders, 12 Wheat. [25 U. S.] 213. In conformity with this view, other cases in those courts and in the state courts, some of which have before been referred to, hold, that discharges under those laws are no defence to suits, even within the states passing them, if brought by persons not citizens of those states, and who have not proved their debts under the commission.

See in [Ogden v. Saunders] Id. 272; [Sturges v. Crowinshield] 4 Wheat [17 U. S.] 122; Clay v. Smith, 3 Pet. [28 U. S.] 411; Woodhull v. Wagner [Case No. 17,975]; Story, Confl. Law, § 340; 2 Kent, Comm. 390; 8 Pick. 194; 9 Conn. 314. And to them may be added the following authorities, as with them composing a summary of most of those which support the general doctrine that insolvent laws affect only the remedy: Boyle v. Zacharie, 6 Pet. [31 U. S.] 635; Beers v. Haughton, 9 Pet. [34 U. S.] 329; Watson v. Bourne, 10 Mass. 337; semble, 1 Mass. 199; Suydam v. Broadnax, 14 Pet. [39 U. S.] 75. Other cases deny this, unless the actions are brought on contracts either made or to be performed elsewhere. [Millar v. Hall] 1 Dall. [1 U. S.] 229; [Emory v. Greenough] 3 Dall. [3 U. S.] 369; 3 Caines, 154; 2 Johns. 198, 235; Hicks v. Brown, 12 Johns. 142. And to these may be added the following, as with them composing a summary of most of the authorities which support the general doctrine that insolvent laws, where relating in terms to the debt or contract, are to be considered a part of the lex loci contractus, and hence govern the contract, wherever the creditor may live: Le Roy v. Crowninshield [Case No. 8,269]; Baker v. Wheaton, 5 Mass. 509, 13 Mass. 1; Pitkin v. Thompson, 13 Pick. 64, 68; 3 Burge, Col. Law, 876-925; 3 Story, Confl. Law, §§ 281, 284; 2 Kent, Comm. 390. But if the contract is made or is to be performed abroad, the cases, with scarce an exception, hold that such discharges are not a bar to the action; and the following authorities may be regarded as a summary of most of those which sustain this exception: Cook v. Moffat, 5 How. [46 U. S.] 295; McMillan v. McNiel, 4 Wheat. [17 U. S.] 209; Ogden v. Saunders, 12 Wheat. [25 U. S.] 213, 272; [Farmers' & Mechanics' Bank v. Smith] 6 Wheat. [19 U. S.] 131; Suydam v. Broadnax, 14 Pet. [39 U. S.] 67; [Cox v. U. S.] 6 Pet. [31 U. S.] 172; [Boyle v. Zacharie] Id. 635; 5 Mass. 509; 10 Mass. 337; 3 Caines, 154; 2 Kent, Comm. 393, note; Story, Bills, § 165; Story, Confl. Law, § 342; 3 Burge, Col. Law, 925; Lewis v. Owen, 4 Barn. & Ald. 654; Phillips v. Allan, 8 Barn. & C. 477; Smith v. Buchanan, 1 East, 6; 3 Knapp, 265; Green v. Sarmiento [Case No. 5,760]; Sherrill v. Hopkins, 1 Cow. 103; Ory v. Winter, 8 Mart. [La.] 277. Neither are they considered a bar, if the contract has been sued and reduced to a judgment elsewhere. Green v. Sarmiento [supra]. Or if it was made before the insolvent act passed, and that undertakes to release the debt, and thus impair the obligation of the contract. Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122; Farmers' & Mechanics' Bank v. Smith, 6 Wheat. [19 U. S.] 131. And, in connection with one branch of the exception before referred to, as to contracts to be fulfilled elsewhere, it has been held in Braynard v. Marshall, 8 Pick. 194, that a negotiable note, not restricted on its face to be paid within the state, may be considered as payable wherever the indorsee may live; and is not bound by a subsequent discharge in the state where the contract was made. But Judge Story, in his treatise on Bills of Exchange (section 158), opposes this doctrine of the last case, and so do Blanchard v. Russell, 13 Mass. 1; Prentiss v. Savage, Id. 23; 9 Barn. & C. 208. Living out of the state is not enough. 16 Johns. 233; 3 Caines, 154. It must appear on the face of the contract to be payable elsewhere. Bank of Orange Co. v. Colby, 12 N. H. 520; Ory v. Winter, 8 Mart. [La.] 277. On this and all other doubtful points it may be proper, on the principle of the common law, to lean towards vigilant creditors, as against others less watchful, and against such debtors as have been improvident. For, although it is true, in some instances, that equality is equity in respect to an insolvent's estate and his creditors, yet, at the same time, vigilance in getting secured before a failure, is usually to be protected, if there be no fraud or collusion with the debtor.

Under these rules of construction, then, and such others as have before been adverted to, it seems to be certain from the precedents in the courts of the United States, that such discharges will not be allowed to avail there, unless the contracts sued have been collusively assigned to persons living in other states, or the interests in them still remained in citizens of the states in which they were made. Looking to their effect on the remedies only, as is the course of those courts, a suit in them is not considered as if brought in a court of the state of Massachusetts. Citizens of other states may sue there, when her citizens cannot. They may sue, also, in cases of equity when hers cannot. These courts hold, likewise, that a state law cannot, by its insolvent system, impair these rights of citizens of other states. Suydam v. Broadnax, 14 Pet. [39 U. S.] 67. And a discharge under it has been solemnly decided, after the fullest argument and repeated consideration, not to be a bar to actions in the United States, by citizens of states other than that one issuing the discharge. [Ogden v. Saunders] 12 Wheat. [25 U. S.] 213; Boyle v. Zacharie, 6 Pet. [31 U. S.] 635; and others before cited. Though a state bankrupt court may give notice to all the world, and attempt to bind all, yet it is held that the citizens of other states are not obliged to go there, but may stand on their rights elsewhere, and enforce them elsewhere, if they can find property. They are only estopped in the courts of that state so far as regards remedies. [Ogden v. Saunders] 12 Wheat. [25 U. S.] 368.

Having thus presented some of the leading precedents on this subject, and especially in the United States courts, with some of the reasons and the text-books, whether sustaining or impugning them, it will be seen that the cases in the supreme court of the United States have been so numerous, and

so fully argued and considered, as to make it difficult for any of the judicial tribunals of the general government to disregard and decide against them, till they are changed by the court which made them. But, at the same time, I feel compelled to differ in principle from some of their general reasoning and conclusions; and it may be proper, as due to myself and the importance of this case, to explain the grounds of the difference, even if unable to carry them out consistently with a proper respect to established precedents. It is difficult, to my mind, to discover any sufficient reasons, why states, if rightfully passing insolvent laws, which purport to discharge subsequent contracts or debts, and not merely remedies, should not have the discharges construed as controlling the contracts made under, or subject to them, and to be performed there, although they may happen to be prosecuted elsewhere. Insolvent laws of that kind, like any other state laws affecting contracts, seem entitled to be considered as a part of the lex loci contractus; and if so, are to be respected, and are to control the contract, travelling with it, and being inseparable from it wherever it goes. It is conceded, even by those holding a different doctrine on this subject, that states may rightfully pass insolvent laws when congress does not. They must be prospective, and not impair, as the Massachusetts act does not, the obligation of existing or prior contracts. Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122; [Ogden v. Saunders] 12 Wheat. [25 U. S.] 213; Farmers' & Mechanics' Bank v. Smith, 6 Wheat. [19 U. S.] 131. Johnson, J., in [Ogden v. Saunders] 12 Wheat. [25 U. S.] 273, says that was the whole decision in Sturges v. Crowninshield. 2 Kent, Comm. 392. It is probable that originally it was contemplated, that states might always pass insolvent laws, and congress never; but only bankrupt laws, and applying to merchants, and being retrospective as well as prospective. See 4 Wheat. [17 U. S.] 194, 195, on this, in Sturges v. Crowninshield. It has been held, too, in the courts of the United States, that states may discharge the body from arrest without impairing the obligation of the contract itself, though previously made. Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122, 209; [Farmers' & Mechanics' Bank v. Smith] 6 Wheat. [19 U. S.] 131; 2 Kent, Comm. 392; Beers v. Haughton, 9 Pet. [34 U. S.] 329; [Mason v. Haile] 12 Wheat. [25 U. S.] 370. Or they may discharge his subsequent acquisition of property. [Ogden v. Saunders] 12 Wheat. [25 U. S.] 213. In fine, the settled principle is now, on other matters, that the lex loci contractus, if the place of performance also, must govern the construction and extent and nature of the contract, but not the remedies on it. These last depend on the law of the place where it is sued. [Eliason v. Henshaw] 4 Wheat. [17 U. S.] 225; [Harrison v. Sterry] 5 Cranch [9 U. S.] 298. The lex loci explains the contract, but does not enforce it. It would then follow, that, although a mere local bar or discharge will not operate against a citizen of another state, or on property in another, different from that state, in which the insolvency occurred, nor will any mere local privilege ([Ogden v. Saunders] 12 Wheat. [25 U. S.] 361; [Harrison v. Sterry] 5 Cranch [9 U. S.] 298; 2 Kent, Comm. 392); yet, whatever goes further and avoids a contract there, or bars a debt absolutely, ought, on general principles, to avoid or bar them elsewhere. Though some cases then, in this country, hold, that a bankrupt's or insolvent's certificate is only a local privilege, yet, in others, in several of the states as well as abroad, such discharges, when professing to reach the contract or debt, as in this instance, are considered as not merely local, not merely affecting remedies within the state that grants them, but they are entitled, on principle, to exert power over the contracts, when going elsewhere, and to release them on the terms prescribed, within the state where made and where to be performed; wherever else the creditor may happen to reside. The whole difficulty in this view is, in deciding what relates to the remedy and what to the contract, or what is local and connected with judicial forms or proceedings only, and what relates to obligations themselves. Thus, priority on the part of a particular creditor has been considered as belonging to the remedy ([Harrison v. Sterry] 5 Cranch [9 U. S.] 298); and so has imprisonment of the body of the debtor ([Sturges v. Crowninshield] 4 Wheat. [17 U. S.] 200); so statutes of limitation and usury laws (Le Roy v. Crowninshield [Case No. 8,269]; 3 Johns. Ch. 190; [Sturges v. Crowninshield] 4 Wheat. [17 U. S.] 200); and so laws concerning processes in state courts till adopted by acts of congress or rules of this court, ([U. S. v. Robeson] 9 Pet. [34 U. S.] 319; [Bank of U. S. v. Halstead] 10 Wheat. [23 U. S.] 51); or any exemption of particular kinds of property, and of persons engaged in particular duties, from arrest (11 Mart. [La.] 730; 16 Johns. 244, note b); or any privilege clearly attached to the person or territory only, and not to a contract (3 Burge, Col. Law, 234, 1046; Story, Confl. Law, § 339; 7 Greenl. 337; Hinkley v. Marean [Case No. 6,523]; Titus v. Hobart [Id. 14,063]). But discharges of debts or contracts do not belong to the processes of courts or their forms. They relate to obligations, to duties, to the essence or gist of the action. See other cases in Bronson v. Kinsie, 1 How. [42 U. S.] 311; McCracken v. Hayward, 2 How. [43 U. S.] 608, 612. And though some books and cases speak of pleading a certificate as if it was a personal privilege and related to the remedy alone, and though the original debt is still held to be a good ground for a new promise, the conscience being, in some cases,

still bound, and the insolvent at liberty to waive the plea (1 Chit. Pl. 91; 12 East, 664; 1 Bos. & P. 52); yet this can often be said of any other defence going to the merits, and be used as an argument, that fraud, duress, gambling or bribery in a contract, are, or are no better than, mere personal privileges, and affect the remedy only as they may be waived or be pleaded and proved, as the defendant pleases.

The weight of reasoning, no less than many of the high authorities before cited, is, in my apprehension, in favor of an insolvent or bankrupt discharge, being considered, in respect to subsequent contracts made under the insolvent system, as if a component part of the obligation. And this view is very much strengthened by the exception before mentioned, and conceded usually on all sides to be correct, that the contract, if made or to be performed elsewhere, is not to be affected by a discharge issued in the state where it is sued. But if the discharge, attached to the remedy or action, and to those only, it would be a good defence to the action, though brought on a contract made or to be performed elsewhere; attaching, however, as it does, to the contract, and that alone, it is properly held, and only in that view, not to affect a contract not made under its jurisdiction or prevalence or not to be fulfilled under and with a view to it. Looking to these discharges in this aspect is, also, the only justification for foreign courts to respect them, as we have already shown that they often do; and though they are said sometimes to do this ex comitate, and not of right, and though to justify either such comity or right, an opportunity and full notice must be enjoyed to prove the debt, (Story, Bills, § 265; Wolff v. Oxholm, 6 Maule & S. 92); yet, in that event, by this comity it is usual; and, by sound principle as to the nature of contracts, it is right to hold, that a discharge of a debt, good by the laws of the place where the contract was made and to be fulfilled, is good every where. This applies in principle as well as practice to discharges under insolvent systems, extending in terms to the debt or contract, as well as to other kinds of discharges. 3 Burge, Col. Law, 876, 925; Story, Confl. Law, §§ 331–335; 2 Kent, Comm. 392; 4 Durn. & E. [Term R.] 182; 5 East, 124; 2 H. Bl. 553; Edwards v. Ronald, 1 Knapp, 259, 265; [Millar v. Hall] 1 Dall. [1 U. S.] 229; [Emory v. Greenough] 3 Dall. [3 U. S.] 369, and other cases before cited. In these, as in others, the parties seem impliedly to agree to this, when executing the contract. The sovereign operation of local laws on all local contracts demands it. "State rights" are feeble without it; and comity between different governments, whether at home or abroad, ought to respect it and give it effect, as widely as they do contracts themselves, they being interwoven with them as if a portion of the res gestæ, a part and parcel of their conditions; and if so, all must admit that they are to be regarded in construing and enforcing them, by all courts who treat contracts on any enlarged system of philosophical jurisprudence.

In this case, then, on principle, independent of precedents, and without reference to two exceptions, which will hereafter be noticed, my conclusions on the general question would be, that the insolvent law of Massachusetts was, in its spirit as well as words, designed to operate upon the debts or contracts formed under it, and not merely upon the remedy on them; and that the state possessed a constitutional right to pass such a law, applying, as this did, only to subsequent contracts, and hence not impairing them, as they are made with a view to it, made under it, and adopt it substantially as a part of their conditions. Bronson v. Kinzie, 1 How. [42 U. S.] 311, 315; McCracken v. Hayward, 2 How. [43 U. S.] 608, 617. That, in answer to several objections to these views, such, for instance, as the supposed existence of the debt for some purposes, after the discharge, it is so only when the proceedings were fraudulent and void, or only in foro conscientiæ at times, but not in the judicial tribunals without a new promise, if the discharge be duly pleaded. Or such, as that some of the insolvent systems use language clearly applying only to the remedy; for then I do not wish to extend that class beyond the remedy, but only those, which, like this under consideration, quite as clearly profess to reach the debt or contract. Or such, as we have seen, arguing that insolvent laws operate only on persons. For, when any of them do so in terms, I would not enlarge their operation against persons not resident in the state passing them. But when, as here, they in terms reach things, or debts themselves, property, it is a mere matter of construction, and, to my mind a very forced construction, to treat them as restricted to persons. So, in other cases, it is argued that the operation of such laws is merely territorial, and consequently cannot operate or be regarded in other courts than those of the state passing them. But most other laws may as well be thus restricted to the territory of the state passing them as these. if we look to their language and their origin; and, where we go beyond those to principle, it is almost universally conceded in other cases, that in questions out of the state, the titles to property within it, real and personal, the conveyances of it by deed and by will, the construction of contracts made and to be performed within it, must all be governed by the laws of the state wherever the parties may reside or the suits be brought.

But, notwithstanding these answers and

considerations against the arguments, which are often urged in favor of creditors living in other states, on the general question, those creditors certainly have some strong claims to success, when coming within either of the two exceptions before mentioned. Both of these exceptions are, in some views, applicable to this case, and will, therefore, be now briefly examined. The first one, which we have seen to be strongly sustained by authority and principle, is, that contracts, to be performed abroad, are not governed by the lex loci contractus, but by the law of the place where they are to be fulfilled; and hence it is argued, that, if in this case the contract was not to be fulfilled in Massachusetts, a discharge under the insolvent system of that state would not be contemplated when it was made, and would not become a part of its essence. The note sued was not made expressly payable in any place. But running as it did, to the promisors themselves, and by them indorsed, it is, as we have before shown, to be treated in law as a note payable to bearer. In this form, in order to sustain jurisdiction over the present suit at all, it is to be considered as a contract directly between the holder and the promisor. When payable to bearer, a note passes by delivery, but the contract is originally to whomsoever may hold and claim it, and the contract is not assigned, it is merely delivered to another. Gibson v. Minet, 1 H. Bl. 569, 606; 3 Burrows, 1516; Bank of Kentucky v. Wister, 2 Pet. [27 U. S.] 326; [Bonnafee v. Williams] 3 How. [44 U. S.] 574–577. In that event, perhaps, the consideration, as between these parties, must be regarded as advanced in New York, and the contract, as one between them, be deemed either made, or finished, or to be performed, there, where the holder resided. In this view it might be open to the same construction it would be if on its face payable in New York. Independent of this reasoning, it has been decided that an advance of money, made by A. for the benefit of B. or his agent at the place where A. resides, must be considered as a contract made to be fulfilled where the advance was made. [Boyle v. Zacharie] 6 Pet. [31 U. S.] 644; [Lanussee v. Barker] 3 Wheat. [16 U. S.] 101, 146; 15 Mass. 427; 3 Johns. Ch. 587. And in 8 Pick. 194, before cited, the court has gone still further, and adjudged, in this state, that a common promissory note, with no place of payment specified on its face, if indorsed to a citizen of another state, must be considered as payable or to be fulfilled where the holder resides.

The other exception is connected with a class of cases and a principle which have not been discussed by the counsel, but which look quite applicable to the facts in this cause. It is, that the actual seizure of the property of a bankrupt in another government or country, before his assignees take possession of it, creates a lien on it in favor of a foreign creditor, which will be sustained. 3 Burge, Col. Law, 923; 2 Kent, Comm. 406; 6 Mass. 378; 14 Mart. [La.] 99; 1 Har. & McH. 236; 2 Har. & McH. 463; 6 Bin. 353; 2 Hay (N. C.) 24; 4 McCord, 519; 13 Mass. 146; 14 Mart. [La.] 93; [Ogden v. Saunders] 12 Wheat. [25 U. S.] 213; 6 Pick. 286; 3 Wend. 538. In the present case, property is attached even before an assignment by a process from the courts of the United States; and it would seem to be within the above principle, not to pass the title to it by an insolvent law of Massachusetts to commissioners, or assignees, when it had been previously taken and secured by a citizen of another state, and in courts not belonging to that state. This court is as different a tribunal from those belonging to Massachusetts alone, as the court of any other state; and a creditor belonging to New York belongs, for most purposes, to a government and jurisdiction as foreign from those of Massachusetts, as if he resided in France or England. It has been held, that if an assignment of all his property is made by an insolvent, having his domicil in another state, it will not pass his property situated in a state not his place of residence, so that a creditor there cannot attach it, if done before the assignment or before possession is taken under it. The Watchman [Case No. 17,251]; Harrison v. Sterry, 5 Cranch [9 U. S.] 289; Dawes v. Head, 3 Pick. 128; 9 Pick. 315; Chevalier v. Lynch, 1 Doug. 170; sed contra, 4 Johns. Ch. 460. In Saunders v. Williams, 5 N. H. 213, and Goodall v. Marshall, 11 N. H. 88, 97, it is considered as established law in the United States that, notwithstanding proceedings in bankruptcy abroad, creditors here may afterwards attach and hold property here. 10 N. H. 264, 265. This has been questioned some by Story and Kent as to principle. Story, Confl. Law, § 409; 4 Johns. Ch. 460. But if there be a contract of sale abroad, or an assignment by law abroad is made of property here, and is in form valid here by law, then on principle the title passes, if completed before an attachment. Sanderson v. Bradford, 10 N. H. 263.

I do not, however, dismiss the bill on the ground of the validity of either of these exceptions, though both are plausible; because, without giving a decisive opinion in favor of either of them, and without being convinced by the reasoning against the operation of insolvent discharges like this, in cases generally of creditors living in other states, I feel compelled to refuse the prayer of the complainant, by force of the decisions in the supreme court of the United States. Those, in cases of this character, it is right as well as decorous for me to conform to, till changed by that court. Let the bill be dismissed.

TOWNER (WALKER v.). See Case No. 17,089.

TOWN OF.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the names of the towns; e. g. "Town of Gold Hill v. Caledonia Silver Min. Co. See Gold Hill v. Caledonia Silver Min. Co."]

TOWNS (UNITED STATES v.). See Case No. 16,534.

Case No. 14,116.

In re TOWNSEND.

[2 Ben. 62; [1] 1 N. B. R. 217 (Quarto, 1); 1 Am. Law T. Rep. Bankr. 2.]

District Court, S. D. New York. Dec. 27, 1867.

BANKRUPTCY—NOTICE OF MEETINGS OF CREDITORS —CERTIFICATE OF SERVICE BY THE CLERK.

Where the clerk of the bankruptcy court certifies, in due form, under the seal of the court, that copies of a notice for a meeting of creditors, "were duly mailed to each creditor," that is sufficient evidence of what is so stated, even though it is made to appear that a notice was mailed by the clerk to one of the creditors, naming a different day from the day fixed.

[In the matter of William E. Townsend, a bankrupt.]

By I. T. WILLIAMS, Register:

[2] [Under the provisions of rule 25 of this honorable court, the undersigned, one of the registers thereof, submits the following case for instructions.

[The meeting to show cause of the creditors of the above named bankrupt was duly fixed by an order bearing date Dec. 2d, 1867, for the 27th of Dec., 1867. The solicitor of the bankrupt now appears before me, and produces a notice served by the clerk upon one of the creditors who have proved their debts, which recites that the said meeting of creditors will be holden on the 2d day of December, which notice is hereunto annexed. The solicitor now moves for another order fixing the time of said meeting at some future day, unless indeed, the register shall be of opinion that the error in the notice could not operate to invalidate the bankrupt's discharge. I decided that the clerk's certificate being in due form under the seal of the court, certifying that true copies of the notice annexed to said certificate (in which the day fixed for said meeting is correctly recited), "were duly mailed to each creditor," and must control my action, and was to me conclusive evidence of the statements contained therein; provided it was really the purpose and intent of the act that such notices should be served by the clerk, which by the way I have never been able to believe, and therefore, at the request of the solicitor of the said bankrupt, I submit the question to the decision of this honorable court.

[I may also notice the fact that although the certificate recites that the notices were mailed on the 17th, yet the post-mark on the back of the annexed notice bears date on the 20th.] [2]

BLATCHFORD, District Judge. The certificate of the clerk to the effect stated is sufficient evidence of what is so stated.

[The clerk will certify this decision to the register, Isaiah T. Williams, Esq.] [2]

TOWNSEND v. The EAGLE. See Case No. 11,626.

TOWNSEND (LANE v.). See Case No. 8,054.

Case No. 14,117.

TOWNSEND v. LEONARD et al.

[3 Dill. 370; [1] 1 Cent. Law J. 69.]

Circuit Court, D. Kansas. Nov. Term, 1873.

BANKRUPTCY — POSSESSION OF SHERIFF — LEVY MADE BEFORE BANKRUPTCY PROCEEDINGS.

1. Property in the hands of the sheriff, under execution from a state court levied before the proceedings in bankruptcy were commenced, cannot, at the instance of the assignee in bankruptcy, be taken out of the possession of the sheriff by the federal court.

[Cited in Kimberling v. Hartley, 1 Fed. 575.]

2. In such a case, the possession of the sheriff is the possession of the court of which he is the officer, and while his possession as such officer continues, no other court can interfere with it.

Judgments against the bankrupt [O. H. Viergutz] were rendered in the state court, and levies made thereunder by the sheriff, before the proceedings in bankruptcy were commenced. The sheriff has made sales under the levies, and the proceeds are in his hands. This is a bill in equity by the assignee in bankruptcy [Cyrus Townsend] against the sheriff and the execution plaintiffs [Thomas Leonard and Charles H. Pond], attacking the judgment, levy and sale, as having been obtained and made contrary to the bankrupt act, and with intent to acquire an illegal preference. The federal district court granted an order restraining the sheriff from paying over the proceeds of the sales to the execution plaintiffs, and the proceeds are still in the hands of the sheriff. The bill prays for a perpetual injunction against the sheriff from paying over the proceeds to the execution plaintiffs, and asks that the proceeds shall be paid over to the complainant, as assignee in bankruptcy. An answer has been filed by the sheriff, and proofs taken, and the cause is now upon final hearing. The other defendants have not answered, not having been personally served.

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

[2] [From 1 N. B. R. 217 (Quarto, 1).]

[2] [From 1 N. B. R. 217 (Quarto, 1).]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

Z. E. Britton and F. P. Fitzwilliam, for plaintiff.

Clough & Wheat, for defendants.

DILLON, Circuit Judge. The property or money of which the assignee, by the bill of complaint, seeks to obtain possession, is in the hands of the sheriff, and was obtained under an execution, which was issued and levied upon the property of the bankrupt before the proceedings in bankruptcy were commenced. Assuming that the bill in other respects presents a case of equity cognizance, can this court take jurisdiction of the sheriff and the fund in his hands, and subject him and the fund to its control? That this cannot be done on general principles, is conclusively settled. Peck v. Jenness, 7 How. [48 U. S.] 612; Taylor v. Carryl, 20 How. [61 U. S.] 583; Buck v. Colbath, 3 Wall. [70 U. S.] 334.

Is the rule in this respect changed by the bankrupt act? The presiding justice of this circuit has held that it is not. Johnson v. Bishop [Case No. 7,373]. And such seems to be the opinion of the supreme court of the United States in the recent case of Marshall v. Knox, 16 Wall. [83 U. S.] 551. In the case last cited, Mr. Justice Bradley says, arguendo, that "where an execution on final judgment has been levied by a sheriff prior to the commencement of proceedings in bankruptcy, the possession of the sheriff cannot be disturbed by the assignee; the assignee is only entitled to claim the residue in the hands of the sheriff after satisfying the execution in his hands." In Johnson v. Bishop, supra, Mr. Justice Miller says: "The possession of the sheriff is the possession of the court, by the command of whose writ he seized the property. And so long as the proceedings in virtue of which it is taken, are pending, that possession will not be interfered with by any other court."

The bill must, therefore, be dismissed; but it will be without prejudice to any other action or suit by the assignee against the judgment creditors of the bankrupt or either of them. Bill dismissed.

NOTE. See Bradley v. Frost [Case No. 1,780], and Wilson v. City Bank of St. Paul (decided by the supreme court: Dec. Term, 1873) 17 Wall. [84 U. S.] 473, and cases following it decided subsequently by that court.

TOWNSEND (MECHANICS' & FARMERS' BANK v.). See Case No. 9,381.

TOWNSEND (ORNE v.). See Case No. 10,583.

TOWNSEND (TENNEY v.). See Case No. 13,832.

Case No. 14,118.

TOWNSEND v. TODD.

[See Case No. 14,075.]

Case No. 14,119.

TOWNSEND v. UNITED STATES.

[1 U. S. Law J. 533, b.]

District Court, S. D. New York. 1822.

IMPRISONMENT FOR DEBT DUE THE UNITED STATES —RELEASE—COSTS—POUNDAGE.

When an insolvent debtor to the United States is imprisoned on a ca. sa., and the secretary of the treasury discharges him from imprisonment, under the first section of the law of June 6, 1798 (3 Bior. & D. Laws, c. 66, p. 54 [1 Stat. 562, c. 50]), "on payment of costs," the marshal of the district in which such debtor is imprisoned has a right to charge poundage, as a part of his costs, provided the state laws existing in such district would permit a sheriff to charge poundage on a ca. sa. as a portion of his legal costs.

On a motion for a discharge from imprisonment on a ca. sa. Peter Townsend was indebted to the United States, to the amount of sixty thousand dollars. He was imprisoned on a ca. sa., and petitioned the secretary of the treasury for a discharge from imprisonment, under the act of congress. The discharge was granted, but there was a condition that the debtor should assign over his property to the United States, and pay costs which had arisen in obtaining judgment. A controversy arose as to what was included in the word "costs"; the marshal contending that it embraced poundage, the prisoner conceiving that it did not. The poundage amounted to about eight hundred dollars, and the bill of costs, including it, was duly taxed. The debtor now tendered to the marshal all the costs, excepting the poundage, and demanded his release from imprisonment. This being refused, the counsel for the prisoner appeared in the district court, in which the judgment was recovered, and on reading the proper affidavits, moved his discharge from the custody of the marshal, or rather from the custody of the sheriff, who is substituted for the marshal. This motion was argued by J. Wells and C. G. Haines, for the insolvent debtor, and by T. A. Emmet and J. O. Hoffman, for the marshal. It will be seen that the district judge denied the motion.

VAN NESS, District Judge. By the affidavit and papers in this case, it appears that the defendant, Peter Townsend, is in custody, on a ca. sa. issued in favour of the United States; that the secretary of the treasury, on the 15th of November, 1822, by virtue of the authority vested in him, by the act of the 6th of June, 1798, issued an order to the keeper of the prison, authorizing him to discharge from his custody "the body of the said Peter Townsend, on payment of costs, and on condition that the said Peter Townsend shall assign and convey, to the use of the United States, all his estate, real and personal and mixed, by instrument to be approved by Robert Tillotson, Esq., attorney of the United States for the said district of New York." It appears, further, that the defendant has executed an assign-

ment, agreeably to the condition of the discharge, and has paid the costs of the attorney of the United States, for prosecuting the suit. His counsel now moves, that he be discharged without payment of the fees, claimed by the marshal as poundage on the execution.

In support of this motion, it is contended: 1st. That the order of the secretary is not in conformity to the act; that in its present form, its legal operation must be an unconditional discharge. 2d. That the marshal is, in no case, entitled to fees, in the nature of poundage. And 3d. If he be, that the term "costs" does not include poundage.

It has been contended, first, that the condition inserted in the order to discharge the defendant is unauthorized by the act of the 6th June, 1798, and that the discharge thereby becomes absolute. I cannot yield to such construction of the statute. There are several stages of the proceedings under this act. The secretary of the treasury is, in the first instance, and in the manner prescribed by the act, to be satisfied, that the debtor has brought himself within its provisions, and this being ascertained, he is then authorized "to receive from such debtor, any deed, assignment, or conveyance, of the real or personal estate of such debtor, if any he hath, or any collateral security, to the use of the United States; and upon a compliance by the debtor with such terms and conditions as the said secretary may judge reasonable and proper, under all the circumstances of the case, it shall be lawful for the said secretary to issue his order, under his hand, to the keeper of the prison, directing him to discharge such debtor from his imprisonment under such execution." Under this provision of the statute, it has been urged, that not only the conveyance, or the collateral security directed to be taken, but that any other terms and conditions, which the secretary may judge proper to impose, must be perfected, or carried into full effect, before the discharge can issue; or in other words, that they are conditions precedent, to be performed before the right of the secretary to make the order attaches. This argument, if well founded, would prove too much, for it would then follow, that the discharge in the present case is illegal; for on its very face, it appears, that no deed, assignment, or conveyance, had been executed by the debtor, or any collateral security given, to the use of the United States, at the date of the discharge; and such conveyance, or collateral security, by the language of the statute, are, according to this argument of the defendant's counsel, to precede the discharge. If, therefore, I should adopt the reasoning, and decide that no condition can be inserted in the discharge, I must deny the present motion, and upon the ground, that the discharge is not partially inoperative, but wholly void. I cannot accede to this construction of the act. If it be established, that the debtor is entitled to the benefit of the provision of the statute, which is the primary inquiry, for all its other provisions are incidental thereto, then, whether the conditions are inserted in, or form a part of, the order, to be performed before it becomes effectual, or whether they are performed by the debtor, before the secretary signs the discharge, the objects of the law are equally promoted in both cases. The former course is most beneficial to the debtor. It must be obvious, that the construction contended for by the defendant's counsel, would necessarily prolong the imprisonment. The debtor is secured a more speedy liberation, by inserting the terms or conditions, such as the secretary shall decide to be just, in the order for the discharge. It can then be carried into prompt and immediate effect.

Secondly. The discharge is directed to the keeper of the prison. It is forwarded to the district attorney, the law officer of the government, and to him is confided its due execution. He is to see that the debtor performs its terms and conditions. In the instance before us, the conveyance required of the debtor is to be approved of by this officer. It is not available to the defendant until its terms and conditions are performed, and then only, and not before, does it acquire validity and effect, or become mandatory on the marshal, or keeper of the prison.

Thirdly. The practical construction of the act, since its passage, in 1798, has been uniform; and the secretary of the treasury, being satisfied of everything required, by the debtor, to enable him to take cognizance of the question of discharge, and the terms on which it is to be granted, these terms have always been inserted, as a condition to the discharge itself, to be carried into effect, under the advice or direction of the attorney of the district. I shall not be the first to overrule this construction of the statute, so long acquiesced in, so salutary to the United States, so beneficial to the debtor, and one evidently best promoting the benign intention and object of the law. I might add that the conditions themselves are to be performed, before the discharge, in contemplation of the law, can be considered as having issued; so that the performance of the conditions, in point of fact, precedes all claims of the debtor to its benefit.

In considering the second point, it will be necessary to examine what fees have been provided by the laws of the United States, for the service of executions. The act of September 24, 1789 [1 Stat. 73], entitled "An act to establish the judicial courts of the United States," provides no fees for the marshal. But on the same day, another act was passed, entitled "An act to regulate process in the courts of the United States." The third section of this act declares, that until further provision shall be made, all the forms of writs and executions, &c., and

rates of fees, except fees to judges, and in suits at common law, shall be the same, in each state respectively, as are now used in the supreme court of the same. This act was continued in force by an act of February 18, 1791 [1 Stat. 191], to May 8, 1792 [1 Stat. 275], the end of the next session of congress.

The act of March 3, 1791 [1 Stat. 216], however, intervened, and is the first act of congress providing specific fees for the officers of the courts of the United States. Besides other fees, it gives the marshal mileage "for serving and returning a writ (not executions) viz. five cents per mile for his necessary travel"; leaving fees on executions under the act of September 29, 1789 [1 Stat. 93], to be regulated by the rates of fees allowed in the supreme courts of the states respectively. This act is likewise limited to the end of the next session of congress, of May 8, 1792. On that day, this act of March 3, 1791, those of February 18, 1791, and of September 29, 1789, were all repealed by this act of May 8, 1792. The act of May 8, 1792, regulates process in the courts of the United States, and provides compensation for the officers of said courts, jurors, and witnesses. These two objects had not before been blended in the same act. The second section declares, that the forms of writs, executions and processes, &c., shall be the same as are now used, &c. The third section declares, that the marshal shall be entitled, for "the service of any writ, warrant, attachment, or process in chancery; on each person named therein, the sum of two dollars, besides fees for travelling, and for levying an execution; and for all other services not enumerated, such fees or compensations as are allowed in the supreme court of the state where the decision shall be rendered."

It is evident, from the phraseology of these acts, that although the words "writ" and "process" may be considered as generic terms, technically, and legally including "executions," yet that congress uniformly used them in their common and popular acceptation. By writs and process meaning mesne, not final process, and designating the latter, at least, ca. sas, and fi. fas, by the term "executions," as in general use. These acts show, further, that fees on executions were never provided by any of them, not through inadvertence, but they were intentionally, expressly, and very wisely, left to be regulated by the laws of the state. Thus the act, that of May 8th, 1792, declares, that "for the service of any writ, warrant, attachment, or process in chancery, the marshal shall be entitled to two dollars." "For levying an execution, and for all other services not enumerated, such fees or compensations, as are allowed in the supreme court of the state where the service shall be rendered." Showing clearly, that by the terms writ, warrant, attachment, or process, executions were not intended to be embraced, or provided for.

The next act giving fees to the officers of the courts were those of March 1, 1793 [1 Stat. 332], continued by that of February 25, 1795 [1 Stat. 419], and again by that of March 31, 1796 [1 Stat. 451]. They related, however, exclusively to admiralty fees, and have expired. That of March 1, 1793, gives the custody fee of $1.50, although the act has expired: the compensation for this service was, by the act of 1792, referred to the discretion of the courts. They have pursued the precedents furnished by that act, and continued it as reasonable. But it is contended, that the act of February 28, 1799 [1 Stat. 624], which repeals the third section of the act of May 8, 1792, differs from it in its language and provisions, and has ordained a fee for the service of executions. Let us examine it, and see wherein the difference consists. The first section is intended as a substitute for the third section of May 8, 1792. There are three clauses in these sections, respectively, which relate to corresponding services; I will compare them with each other. The first clause to which I refer, in the act of May, 1792, is in these words: "For the service of any writ, warrant, attachment, or process in chancery, &c., two dollars." The corresponding clause in the act of 1799, is thus: "For the service of any writ, warrant, attachment, or process, issuing out of any courts of the United States." It is admitted, in consequence of a subsequent provision, that congress did not mean to embrace executions, by these words in the act of 1792; and why it should be supposed they meant to include them in those of the act of 1799, is to me utterly inexplicable. The only difference in the enumeration is "process in chancery," in the first, and, in the other, "process issuing out of any courts of the United States." The one gives the fee of two dollars for the service of process issuing from one of the courts of the United States, and the other the same fee, for the same process, issuing from them all. The writs and process intended, are the same; the fee is the same; which furnishes evidence, that the two clauses refer to the same service. No reason what ever can be assigned why, in the two acts, the same words should be used in a different sense. It would, if it were so, be proof of a want of care and intelligence, which is not to be presumed.

It is further contended, that the second clause of the first section of the act of 1799 gives fees for levying a fi. fa. If this presumption were well founded, it would afford some support to the construction attempted to be given to the first clause, inasmuch as it would go to show, that fees on executions, were not entirely left to be regulated by the laws of the state. But in my judgment, this part of the act is too plain to admit of either doubt or argument. It is conceded that the corresponding clause of the act of 1792 relates to sales in the admiralty. It is in these words: "For each bail bond, fifty cents; for

selling goods, or vessel condemned, and for receiving and paying the money, three per cent." Plain and explicit as this provision is, it is certainly not more so than the phraseology of the act of 1799, which is as follows: "For every proclamation in the admiralty, thirty cents; for sales of vessels, or other property, and for receiving and paying the money," &c. It seems to me impossible to resist the conviction, that both acts here refer to sales in the admiralty. The only difference consists in a judicious modification of the latter, allowing the marshal a percentage upon all property sold, whether under decrees of condemnation, or interlocutory orders because the service and responsibility is precisely the same. The first allowed the compensation for "selling goods and vessels condemned"; the other, for "sales of vessels or other property," whether condemned or not. This is indubitably the true meaning of the act, and no ingenuity can assign a rational reason for the construction given to it by the defendant, or a plausible argument to show, that "other property" means property sold by the common law process of fieri facias. It is well known, that a very great portion of the sales in the admiralty are of property other than vessels, and of property not condemned. No reason whatever exists why the per centage should not be allowed on property sold in virtue of an interlocutory order, as well as on property condemned, the service and responsibility being the same. The word "condemned" was therefore very properly omitted in the last act. There is inconsistency, too, in the supposition, as connected with the argument upon the first clause. A fi. fa. is as much a writ or process, as a ca. sa.; and if the terms "writ or process" include the one, they necessarily must the other.

But it is said that executions cannot be considered as embraced in the first clause of the third section of the act of 1792, because by the third, the compensation for serving them is, in terms, left to be regulated by the laws of the several states. And so it most assuredly is, by the act of 1799, if serving, or levying an execution, is a service; and that it is, will not, I presume, be denied. The first act after enumerating and ascertaining the marshal's compensation for serving a writ, process, &c., and various other services, declares, that he shall receive, "for levying an execution, and all other services not enumerated, such fees or compensation, as are allowed in the supreme court of the state, wherein the services shall be rendered." The act of 1799, after enumerating the same and similar services, and annexing similar fees, concludes thus: "For all other services not enumerated, except," &c., "such fees and compensations as are allowed in the supreme court of the state," &c. It is too obvious, I think, to require an argument to prove, that if the levying an execution be not enumerated, it passes under the general reference to the state laws, as well by the words of this act, as by those of the former. If it be admitted, as I conceive has been amply shown, that it is not enumerated, or intended to be, then it would be futile to place the words "for levying an execution" before "all other services." They would be mere surplusage, tautological, and useless.

I shall dismiss this branch of the argument by observing, that I never have entertained the least doubt as to the construction of the first section of the act of 1799, and do not now. It is perfectly clear to my mind, that fees for serving or levying executions, were very properly intended by congress, to be regulated by the laws of the different states, and that the marshals, in that respect, stand on the same footing with the sheriffs. It is every way proper that it should be so. A variety of considerations, connected with the feelings, the prejudices, and local habits of the people, render it expedient. The same fees for the same services, in the courts of the two governments can generate no invidious comparisons, nor disturb the harmonious reverence due to both.

It has, lastly, been contended, that the poundage, or fees of the marshal for serving an execution, are not embraced in the term "costs," used in the discharge, and that it can only mean the costs which occurred prior to issuing the execution. It is not to be denied, that if I am correct in my preceding interpretation of the laws of the United States regulating the fees of the marshal, he is entitled to the same fees for serving an execution, either from the plaintiff or defendant, as the sheriffs of this state are entitled to claim. And if, in this case, the secretary of the treasury had directed the discharge, without inserting the condition, "on payment of costs," I have no hesitation in saying, that the United States are to be considered responsible for the marshal's fees, in the same manner, and to the same extent, as any other plaintiff in a suit. In such case, it would be the duty of the marshal to obey the mandate, and to look to the government for his compensation. It is on this principle, that the supreme court of this state have decided that when a plaintiff in a suit countermands an execution served, or directs the discharge of a defendant arrested, on a ca. sa., without directing the costs to be paid, the plaintiff, and even the plaintiff's attorney, is liable for the poundage. Suppose, in such a case, the plaintiff had countermanded the execution, and ordered the discharge of the defendant on payment of costs, and the sheriff had obeyed the order of the plaintiff, without exacting his costs of the defendant, no person can doubt that he had thereby waived all liability on the part of the plaintiff. The discharge in this case recites the judgment, and the execution, and the defendant is to be discharged from the latter on the payment of "costs." He is never discharged from the judgment; because his future property continues liable. The lien on it still remains.

He is to pay costs of what? Not simply of the judgment, but necessarily also of the execution. Confining myself, therefore, to the very language of the discharge, it would be to narrow its fair interpretation and meaning, to decide that the costs, only to the time of signing the judgment, are to be paid by the defendant; thus leaving the United States to satisfy the costs of the execution. There is nothing in the law, by which I am bound to affix to the term "costs," so restricted a sense.

I am aware, that in England the poundage of a sheriff is paid by the plaintiff, except where there is judgment for a penalty, and then it is permitted, to levy it in addition to the sum actually due. This very exception establishes, that it is a just charge against a defendant. The other cases, when the plaintiff is liable for the sheriff's fees, or the poundage, on the execution, proceed on the form of the judgment, and on technical rules, which have been a subject of complaint in that country. The distinction I have suggested is marked out by the cases reported in 1 East, 403, and 3 Bos. & P. 362. In the latter case especially, poundage is called "costs of the execution," as distinguished from the costs of the judgment, but clearly including both within the general appellation of costs. By whom to be paid, was the question to be decided; but whether it be paid by plaintiff or defendant, poundage was costs; or, in other words, the legal fees of the officers and ministers of the law. Whatever may be the law of England, I am not bound to declare. The laws of this state, and the decision of its supreme court, remove all doubt on the question, that fees, in the nature of poundage, are allowed by the laws of this state; and the practice of the supreme court has been too long and too well established, to admit of a doubt. The poundage of a sheriff, or his fees for serving an execution, are here regulated by statute, and are levied on the property of the defendant, or paid by him on an execution against the body, in the same manner, and in all cases, as the amount of the original recovery. And this poundage, by a statute of this state, shall be taxed on the application of the defendant; thereby showing his liability for the same. It was admitted on the argument, that it had always been the practice in this state, to indorse on the execution, that, besides the amount therein specified, the sheriff was to levy his poundage. This practice is certainly in conformity to the law; for the same statute which fixes the costs, anterior to the judgment, also defines and establishes those which may arise, and be demanded, subsequent thereto.

On a fi. fa. the sheriff is entitled, the moment he levies, to poundage on the amount that may be realized from the property seized, or upon a compromise between the parties. This doctrine is established in the case of Hildreth v. Ellice, 1 Caines, 192, and is supported by the case of Alchin v. Wells, 5 Term. R. 470. This case was decided in 1803, and its authority has never been questioned or disturbed. The practice has ever since been universal and uniform. In the case of a ca. sa. the sheriff, by the decision of the supreme court of this state, is entitled to his poundage, upon taking of the body in execution. It is then his responsibility attaches, and it is then his right to compensation is consummated. It does not depend upon the amount which may ultimately be recovered, and he may resort for his fees to the attorney who issued the execution. The law has been thus deliberately settled, in the case of Adams v. Hopkins, 5 Johns. 252, and Scott v. Shaw, 13 Johns. 378. I concur with these decisions, and think they have settled the law correctly. Even if I did not; still they must govern the present case; for the decisions of the supreme court of this state must be the rule of my decision in a question of this sort.

Upon the whole, I am clearly of opinion, that the marshal is entitled to poundage on the execution, to be taxed, and which, by the terms of the discharge, is to be paid by the defendant. Until the payment thereof, the defendant is not entitled to be discharged from custody under the execution, and I shall direct a rule accordingly.

TOWNSEND (WASHINGTON v.). See Case No. 17,234.

Case No. 14,120.

TOWNSEND SAV. BANK et al. v. EPPING et al.

[3 Woods, 390.] [1]

Circuit Court, S. D. Georgia. April Term, 1877.

HOMESTEAD — ANTECEDENT LIENS — SAW-MILLS — LIEN FOR LOGS FURNISHED — MORTGAGE — PARTIES — PRACTICE IN EQUITY — TAKING ACCOUNT.

1. A homestead exemption established by law cannot affect antecedent liens, and cannot be set up in derogation thereof.

2. An act of the legislature of Georgia gave to persons employed in any steam saw-mill, or who furnished it with saw logs or with anything necessary to carry on the work of the mill, a lien of the highest dignity for the wages of the employés, or for the saw logs and other necessaries furnished. *Held*, that it was not within the power of the legislature to make such lien paramount to that of prior judgments and mortgages, or other older liens.

3. An act of the legislature of Georgia, passed in 1842, established the lien mentioned in headnote 2, in favor of the employés of steam saw-mills, and those furnishing the mills with logs and other necessaries. On December 16, 1857, an act was passed which repealed the law, so far as it related to all saw-mills upon the several mouths of the Altamaha river, and declared that the term, "mouths of the Altamaha river," should include all the mills within ten miles of Darien, in straight line. *Held*, that a mill which was not strictly on one of the mouths of the Altamaha, but was em-

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

braced within the net-work of channels extending along the coast and connecting with the main channel of the Altamaha, and was within ten miles of Darien, by a right line, was fully within the terms of the repealing act.

4. A sale made on the foreclosure of a lien for logs furnished a saw-mill, where there was a prior mortgage, conveyed only the equity of redemption, subject to the mortgage.

5. When one of two joint mortgagors conveyed absolutely to the other his equity of redemption, *held*, that he was not a necessary party to a bill to foreclose. But his right to redeem, in case the mortgaged property did not satisfy the mortgage debt, would not be foreclosed by the decree.

6. Without being a party he would be bound, by an account taken, to ascertain the sum due on the mortgage, unless he could show collusion.

7. Courts of equity are always unwilling to turn a complainant out of court on an objection, for want of proper parties, made at the final hearing. If they deem it necessary that a new party be made, they will generally allow the cause to stand over for that purpose.

8. A mortgage lien was paramount to a claim for homestead in the mortgaged premises. *Held*, that the wife of the mortgagor was not a necessary party to a bill to foreclose. The right to homestead was to be considered in the light of a subsequent incumbrance.

9. The wife is only interested to see that the mortgage shall not absorb more than it ought, to the detriment of the homestead, and the husband, being primarily liable on the mortgage note, is the only necessary party to be present at the taking of the account. Such account will be binding on persons only collaterally liable, unless collusion is shown.

In equity. Heard upon pleadings and evidence for final decree. The facts are stated in the opinion of the court.

Thomas M. Norwood, for complainants.
W. S. Basinger, for defendants.

BRADLEY, Circuit Justice. The defendant [Isaac M.] Aiken, and one Goodrich, being in partnership and about to run a steam saw-mill on Herd Island, near the mouth of the river Altamaha, in September, 1866, borrowed of the bank corporation, complainant, the sum of fifteen thousand dollars, and, to secure the payment thereof, executed and delivered to the said bank their three promissory notes for five thousand dollars each, payable on demand, with interest half-yearly in advance, and a mortgage upon the whole tract comprised on Herd's Island, including the saw-mill thereon, with the engines, machinery, etc. The other complainants joined in the notes as sureties. The constitution of Georgia, adopted in 1868, secured to every head of a family a homestead of realty to the value of two thousand dollars, and personal property to the value of one thousand dollars, to be exempt from execution and sale. The legislature afterwards prescribed the mode of setting apart and securing such homestead and property to the sole use and benefit of the family of the party claiming the same. The legislature of Georgia also, in 1868, passed a law giving to employés employed in any steam saw-mill, and to any person furnishing any saw-mill with timber, saw logs or provisions, or with any thing necessary to carry on the work of said mill, a lien of the highest dignity upon said mill for any debts, dues, wages or demands against the owner for such service, timber or other necessaries, and prescribed the method of executing said lien. Goodrich having sold out his interest in the saw-mill and property to Aiken, the latter, in 1870, took the requisite proceedings for having set off, as homestead, a large part of Herd's Island (not including the saw-mill), but including for personal property, to be exempt from execution, portions of the machinery of the mill. Carl Epping, one of the defendants, in 1870 placed a lien on the mill for timber furnished thereto, and took out an execution to sell the same for a debt of about five thousand dollars. John Strickland placed another lien upon the mill for about one hundred and thirty dollars. Under the latter the mill was put up to sale, and sold to Epping for five thousand one hundred dollars—against the protest of the complainant corporation. Epping claims to hold the whole amount of his bid by virtue of his lien and that of Strickland's, as paramount claims to that of the complainant under its mortgage. The complainants in the present suit seek a decree to foreclose the mortgage given to the bank complainant (which has never been paid), and to set aside as null and void the sale under the lien of Strickland, and to declare the said lien, as well as that of Epping, subordinate to the said mortgage, and for a sale of the property under and by virtue of the mortgage, free and clear of said liens; or, if this cannot be done, that the purchase money bid by Epping at the lien sale may be declared to belong to the complainant. The complainants also seek to be relieved against Aiken's claim to a homestead.

The decision of the supreme court of the United States, in the case of Gunn v. Barry, 15 Wall. [82 U. S.] 610, has disposed of the question relating to the claim of homestead. That court held that the homestead exemption secured by the constitution of Georgia, adopted in 1868, does not affect liens created prior to that time, and cannot be set up in derogation thereof; and, accordingly, in view of this decision, the counsel for the defendants very properly abandoned that defense. It is difficult to perceive any difference in principle between the claim grounded on the lien law referred to and that grounded on the homestead law. The former, as well as the latter, if attempted to be carried out as against debts which became a lien on particular property before the passage of the law, would be obnoxious to the objection of impairing the validity of contracts. To give to a person furnishing timber to a saw-mill a lien for the price, paramount to that of prior judgments, mortgages and other prior liens on the mill, would simply amount to a subversion of those liens pro tanto, without adding any corresponding value to the property. Such a lien has not the merit of a mechanics'

lien, which is usually given for materials furnished and work done to a building, and presumably increasing its value to the amount of the claim. Indeed, the defendant's counsel does not insist that any claim can be set up against the mortgage by virtue of the lien given by the law of 1868. But he bases the lien upon which the defense rests upon a prior law passed in 1842 (Cobb, Dig. 428), amendatory of a steamboat lien law passed in 1841. By the second section of the law of 1842 it was declared that all the provisions of the steamboat lien law should apply to all steam saw-mills, at or near any of the water-courses in the state, in behalf of all and every person or persons who might be employed by the owner for services rendered, or for timber or pine wood, provisions or supplies delivered to any such saw-mill. If this law was in force in 1870, when the timber in this case was furnished by Epping and Strickland, the liens claimed were valid ones, unless liable to some of the other objections which have been urged against them.

But the complainant contends that the second section of the act of 1842 was not in force in 1870, but had been repealed in 1857, in respect of the territory in which the mortgaged premises are situated. Laws 1857, p. 225. The repealing act referred to, which was passed December 16, 1857, enacts that the second section in question, so far as it relates to all the saw-mills upon the several mouths of the Altamaha river, be and is repealed; and that the term "mouths of the Altamaha river," includes all the mills within ten miles in a straight line of Darien. It is conceded that the saw-mill in question is within ten miles, in a straight line, of Darien; but the defendant's counsel insists that it is not on one of the mouths of the Altamaha river. The state map shows, however, that Herd's Island is embraced within the network of channels which extend along the coast at that point, and which connect directly with the main channel of the Altamaha. Indeed, the description of the island in the mortgage bounds it on the south and east by the Altamaha river. But the positive language of the act, defining what is intended by the expression, "mouths of the Altamaha river," is controlling; and I do not see how it is possible to evade its force. In my judgment, the act of 1857 did repeal the second section of the act of 1842, so far as relates to the territory embracing the premises in question, and that no law existed in 1866, when the mortgage was executed, giving any such lien upon the mill in question, as that claimed by the defendants; and as the subsequent act of 1868 can not be invoked to derogate from the validity of the mortgage, neither Epping nor Strickland had any lien which could affect it. Therefore the sale under Strickland's lien must be considered as made subject to the lien of the complainant's mortgage. That sale could only affect the rights of Aiken. Epping, the purchaser, holds the property as Aiken held it, and has only the equity of redemption.

The defendants, however, raise an objection to the bill for want of proper parties. They contend that Goodrich, one of the joint makers of the mortgage notes, is a necessary party. Proper parties are not always necessary parties. It is laid down by Mr. Justice Story, in his work on Equity Pleading, that neither prior nor subsequent incumbrancers are necessary, though they are proper parties in a bill to foreclose. If not made parties, they are not bound by the decree. Section 193, and note. And he says distinctly that where the mortgagor has conveyed his equity of redemption absolutely, the assignee only need be made a party to the bill. Section 197. Goodrich conveyed his equity of redemption in the mortgaged premises to Aiken, and the latter is made a party. If Goodrich has any interest at all in the controversy, it arises from the fact that he may be resorted to ultimately as one of the makers of the notes if the property mortgaged does not bring enough to pay them. This may possibly entitle him to redeem, if he has to pay anything. Not being made a party, this right will not be extinguished. But without being a party he will be bound by the account taken as the amount due, unless he can show collusion. See Haines v. Beach, 3 Johns. Ch. 459. Courts of equity are always unwilling to turn a complainant out of court on the objection for want of parties, made at the final hearing. If they deem it essential that a person should be a party who has not been made such, they will generally allow the cause to stand over in order that he may be brought in. I do not consider that to be necessary in this case. The objection is overruled.

It is also objected that Mrs. Aiken, the wife of the defendant Aiken, should have been made a party, because the suit seeks to subvert the claim of homestead in the mortgaged premises. The mortgage, as we have seen, is paramount to the right of homestead. The latter is to be viewed in the light of a subsequent incumbrance only. The wife, like the joint maker of the note, is only interested that the mortgage shall not absorb more than the just amount due thereon shall require. As to the amount due, the husband, Aiken, being primarily liable therefor, is the only party necessary to be present at the taking of the account; and such account will be binding on persons only collaterally liable, unless collusion be shown. And as to the right of such persons to resort to the mortgaged premises and redeem the same in case they are called upon to bear any part of the debt, we have seen that it is not taken away if they are not made parties. The wife stands in this respect in the same attitude as the joint obligor. She is a proper party, but not a necessary one. The complainants omit her at their peril. Not being made a party, her right to redeem by paying

the mortgage debt is not cut off. In this case, I see no reason for holding the cause over in order to make the wife a party. It is apparent from the evidence in the cause, that the property is insufficient to pay the debt, and as Aiken, the principal debtor, is insolvent, no good would be accomplished by bringing the wife into the litigation. The objection that no demand of payment of the notes was made before filing the bill, is not sustained by the evidence; and, besides this, the bringing of suit is itself a sufficient demand, even in an action at law.

The view which I have taken of the case renders it unnecessary to consider various other questions which were discussed on the argument. A decree must be entered for the complainants, that the corporation complainant is entitled to have the mortgaged premises sold to raise and satisfy the amount due for principal and interest on the several promissory notes secured by the mortgage, and also the costs of suit free and clear of the claim for homestead and of any exemption of property under the constitution of 1868, or laws made in pursuance thereof; and free and clear of any claim under the liens set up by the defendants for furnishing timber or otherwise, and of all and any sale or sales made by virtue of such liens or either of the same; and that it be referred to a master to ascertain and report the amount due the corporation complainant on said notes and mortgage; and that the defendants be foreclosed of all equity of redemption and claim in and to the mortgaged premises that may be sold to pay the said debt.

Case No. 14,121.

TOWNSHEND v. The MINA.

[25 Leg. Int. 380; 6 Phila. 482.]

District Court, E. D. Pennsylvania. 1868.[1]

SEAMEN—WAGES—FOREIGN VESSEL—SUBMISSION TO CONSUL.

[If a seaman on a British vessel submits his claim for wages to the consul, but disregards the latter's award, and files a libel, the court will not take jurisdiction, unless the award was clearly wrong.]

This was a libel for wages by the first mate of the brig Mina. Owing to alleged disobedience of orders, whereby part of the vessel's tackle was lost, the captain claimed to defalk from the wages due to the mate the cost of a hawser, etc. The mate referred the question involved, with the concurrence of the captain, to the decision of the British consul at the port of Philadelphia. The consul investigated and decided the dispute. The mate then disregarded the award by the consul, and filed his libel just before the brig left port. Security was entered through the consul's intervention, the vessel sailed, a proctor was retained to defend the cause, and testimony was taken on both sides.

Charles Gibbons and Morton P. Henry, for libellant.

MacGregor J. Mitcheson, for defendant.

CADWALADER, District Judge. This was a British vessel. The libellant shipped under articles conformable to the present law of England; but as the voyage was ended on her arrival at this port, he had an option to invoke the jurisdiction of this court, or to ask and submit to the interposition of the British consul. He adopted the latter course; and had the application been rejected by the consul, or improperly acted upon by him, or had the master or owners of the vessel not responded to the libellant's request of consular interposition, I might still, with caution, have entertained the jurisdiction. The case, however, went on, in a friendly way, to a decision of the whole subject in controversy by the British consul. Had this decision been so extravagant as to shock the intelligence of a judicial tribunal in a civilized country, I might have disregarded the award or decision. I say "award or decision," without using the words in a strictly technical sense. The result of this case was the decision of a question of considerable doubt, in part, against the libellant. The consul appears to have taken great pains, and I have his written statement of the account of the libellant, particularly set forth, as he adjudicated and settled it. He decided that there was due to him, in the currency of this place, one hundred and three dollars and seventy-six cents ($103.76), and the money remains in the consulate for him.

It is not for me to decide whether I should have arrived at precisely the same conclusion as the consul did. I am quite sure that he had greater facilities for arriving at a correct knowledge of the facts than I can have. To disregard his decision would be to establish a precedent which might be very dangerous. It might tempt to much needless and improper litigation, and lead to double dealing on the part of those who, having submitted the decision of similar difficulties to the judgment of a consul, might afterwards, without reason, and for improper motives, claim the jurisdiction of this court. If the sum of one hundred and three dollars and seventy-six cents ($103.76) is sent within three days to the proctor for libellant, or, in the event of his refusing to accept it, is paid into court, the libel will be dismissed at the cost of the libellant. This would not be the form of adjudication in a court of common law, where judgment would be given at once for this amount. But I think the judgment of dismissal, after payment, more conformable to the proper method of procedure, in a court of admiralty, where it is unwilling to exercise jurisdiction.

I think it my duty to add that the conduct of the consul, in this case, deserves great commendation, and is in striking contrast with the former course of some other consuls in other parts of the world, who, with captious opposition to courts of maritime juris-

[1] [Reprinted from 25 Leg. Int. 380, by permission.]

diction, have sometimes raised diplomatic questions as to matters of slight importance, and not in themselves very intricate. Such captiousness may often occasion unjustifiable embarrassments, besides much expense and inconvenience. In this case, the consul in no respect interfered with the libellant's invocation of the subsequent interposition of this court, but merely suggested the improbability that the court would entertain the jurisdiction. The consul appears, very properly, to have employed Mr. Mitcheson as proctor and advocate in the cause, but, in form, as proctor and advocate for the respondent, and not of the consulate.

Whereupon MacGregor J. Mitcheson, as proctor and advocate for defendant, in open court, tendered to pay to Morton P. Henry, libellant's proctor, the sum of one hundred and three dollars and seventy-six cents as in the said decree adjudged; which said sum of money the said libellant's proctor then and there declined to accept, and appealed from the decision of the court to the circuit court of the United States. This appeal was dismissed.

TOWNSHIP OF.

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

TOWNSHIP OF PINE GROVE (TALCOTT v.). See Case No. 13,735.

TOWN TREASURER OF CRANSTON (HOLLAND v.). See Case No. 6,606.

Case No. 14,122.

TOWSEND v. ORNE.

[See Case No. 10,582.]

TOY LONG (CHAPMAN v.). See Case No. 2,610.

Case No. 14,123.

TOY WILLIAM v. HALLETT.

[2 Sawy. 261.] [1]

Circuit Court, D. Oregon. Nov. 11, 1872.

PLEADING AT LAW—MOTION TO MAKE CERTAIN—ALLEGATION OF PERFORMANCE—CONTRACT TO FURNISH LABORERS.

1. T. W. agreed to furnish H. sixty-six or more men, at different rates of wages, to work upon the N. P. Railway for an indefinite time. In an action to recover a balance alleged to be due T. W. upon such contract, the plaintiff alleged that he had duly performed all the conditions thereof on his part: *Held*, on a motion to make more certain that the allegation was not sufficient, because the contract did not limit and settle what number of men, or for what term the plaintiff was bound to furnish them, and therefore the averment was uncertain.

2. In an action upon such a contract it is not sufficient to allege that in pursuance thereof there became due the plaintiff a certain sum of money, but it must be alleged what amount of labor was furnished under the contract, and that there is due or became due therefor so much money.

3. Different breaches of same contract give rise to distinct causes of action.

[Cited in Broumel v. Rayner, 68 Md. 47, 11 Atl. 834.]

[This was an action by Toy William against J. L. Hallett to recover for the nonperformance of a contract.]

Charles B. Bellinger, for plaintiff.

Joseph N. Dolph, for defendant.

DEADY, District Judge. This is a motion to make the complaint more certain. The action is brought to recover a balance of $747.13, alleged to be due the plaintiff on a contract to furnish the defendant with laborers to work upon the North Pacific Railway; and for $116.28, damages alleged to have been sustained by the plaintiff by reason of the defendant's failure to furnish transportation for such laborers and their freight from their camp on said railway to Portland.

The complaint is upon an agreement dated June 18, 1872, between the plaintiff and defendant, whereby the former agreed to furnish the latter sixty-six, or more, Chinamen, in gangs of thirty working men, with one cook, water boy and interpreter to each gang, to work on the railway aforesaid, not exceeding three months. The working men, cooks and water boys were each to receive $30 per month, the interpreters $40, and the plaintiff as line boss was to receive $45 per month. The defendant was to furnish the plaintiff with passes over the railways and other lines of travel during the performance of the contract, and to pay all expense of taking said Chinamen from Roseburg to said railway and back again.

The complaint alleges that the plaintiff has duly performed all the conditions of said contract on his part, and that in pursuance of said contract there became due and owing him from defendant $4,317.64, of which sum $747.13 is still due and unpaid. In pleading the performance of conditions precedent, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the condition on his part. Or. Code [Gen. Laws 1845–64] p. 160. This is the general rule. But where the condition precedent is not definitely limited and settled in the contract, in the nature of things it cannot apply. In such a case there are no conditions precedent in the contract.

The written contract upon which the plaintiff complains in this case, provides that he shall furnish sixty-six or more laborers to the defendant. Now an averment that he

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

has performed this stipulation, amounts to nothing more than he furnished sixty-six or more laborers. Such an allegation is uncertain, unless it be construed to mean that he furnished sixty-six laborers and no more, as probably it should be, if issue were taken upon it. The allegation should be that the plaintiff, in pursuance of the contract, furnished so many men, or so many months' or days' labor. Again, no time is specified in the contract, in which the plaintiff is to furnish any number of laborers. True, it contains a stipulation that the defendant will return the laborers to Roseburg within three months from its date. But this is not an agreement by which the plaintiff became bound to furnish, and the defendant to pay for any number of laborers for the period of three months. This is another reason, why in this case a general averment of performance is insufficient.

Nor is it sufficient to allege that in pursuance of this contract, there became due the plaintiff a certain sum of money. If any money became due the plaintiff, it was in consequence of the furnishing by him of certain laborers to the defendant at a certain price per month, under the circumstances mentioned in the contract. Besides the price agreed upon varies—so much per month for common men, cooks and waiter boys, and so much for interpreters, and another sum for the plaintiff. In all these respects, the complaint is uncertain, so much so, that the defendant is not advised thereby as he should be, what number of months or days the plaintiff claims to have furnished labor worth $30, $40 and $45 per month, respectively. Of course, it is not necessary to specify the names of the laborers or the number of days' work each one did; the aggregate time of each class furnished is sufficient. In these respects the motion is allowed.

The complaint also contains an allegation numbered 5, in which damages are claimed for what is alleged "for a further breach of defendant's said contract," in failing to furnish transportation for the said laborers and their freight, as aforesaid. This is substantially a separate cause of action from that arising out of the alleged non-payment of the laborers' wages, and should have been so pleaded. Oh Chow v. Hallett [Case No. 10,469]. But this defect can only be reached by a motion to strike out.

The allegation is sufficiently certain, to enable the plaintiff to recover damages. If he has suffered any special damage by reason of the defendant's failure in this respect, as that he was required to pay such transportation himself, the facts must be alleged. Oh Chow v. Hallett, supra.

T. P. LEATHERS, The (MONTGOMERY v.). See Case No. 9,736.

TRABUE (SMITH v.). See Case No. 13,116.

TRACT OF LAND (UNITED STATES v.). See Case No. 16,535.

Case No. 14,124.

In re TRACY et al.

[2 N. B. R. 298 (Quarto, 98); 1 Chi. Leg. News, 123.] [1]

District Court, S. D. New York. Dec. 23, 1868.

BANKRUPTCY—DISCHARGE—OPPOSITION—FIDUCIARY DEBT.

On a specification in opposition to a discharge, setting forth that a debt due by bankrupts was created while they were acting in a fiduciary character, *held*, that the fact was no ground for withholding discharge.

[In the matter of the discharge of William W. Tracy, James Wilson, Thomas J. Strong, and Joseph U. Orvis.]

BLATCHFORD, District Judge. The specification filed by Sarah J. Irwin, executrix, is only to the effect that the debt due to her by Tracy and Wilson, was created while they were acting in a fiduciary character. This is no ground for withholding a discharge. She must show the fact in reply to a plea of the discharge in a suit on her claim.

TRACY (CADLE v.). See Case No. 2,279.

TRACY (FANSHAWE v.). See Case No. 4,643.

Case No. 14,125.

TRACY v. JANISCH.

[Cited in Goldmark v. Kreling, 25 Fed. 357. Nowhere reported; opinion not now accessible.]

Case No. 14,126.

TRACY v. SCOTT.

[4 Cranch, C. C. 250.] [2]

Circuit Court, District of Columbia. Oct. Term, 1832.

APPEALS—DISTRICT OF COLUMBIA—SEPARATE COUNTIES.

Appeals from the orphans' court of the county of Alexandria, D. C., are governed by the same rules as in the county of Washington, and must be taken within the time limited by the Maryland testamentary system (chapter 15, § 18).

[This was an action by R. M. Scott, administrator of Tracy, against Tracy.]

Appeal from the orphans' court of Alexandria county, District of Columbia, but not taken within the time limited by the Maryland testamentary system (chapter 15, § 18), which is in force in Washington county.

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[1] [Reprinted from 2 N. B. R. 298 (Quarto, 98), by permission. 1 Chi. Leg. News, 123, contains a partial report.]

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

Mr. Taylor, for appellant, contended that there was no limit to the right of appeal, and that the right of appeal is not governed by the Maryland law in force in Washington county.

But THE COURT, upon consideration of the act of congress of the 27th of February, 1801, § 12 (2 Stat. 103), decided that appeals from the orphans' court here are governed by the same rules as in Washington county, to wit, by the Maryland testamentary system (chapter 15, § 18), and dismissed the appeal, without prejudice to the appellant's equity or other relief.

Mr. Swann, for appellee.

Case No. 14,127.

TRACY v. TORREY et al.

[2 Blatchf. 275.] [1]

Circuit Court, N. D. New York. Aug. 12, 1851.

PATENTS — INFRINGEMENT — PROVISIONAL INJUNCTION—WHEN NOT STAYED.

1. Where a patentee of an improvement in cultivators claimed in his patent "the arrangement of the teeth in two rows, in combination with a pair of wheels the treads of which are in a line midway between the points of the two rows of teeth, substantially as described," and, in his specification, described the nature of his invention as consisting in the arrangement of the teeth in two rows, one back and the other front, when this was combined with a pair of sustaining and carrying wheels the bearing points of which were in a line midway between the two rows of teeth, so that any tendency which one row of teeth might have to cut too deep, was resisted by the weight of earth on the other row, the tread of the wheels between them acting as the fulcrum, so that the team, by this means, was entirely relieved of any strain which they otherwise would have to sustain in consequence of the motion of the beam up and down as the teeth ran too deep or too shallow, and stated that by that arrangement the necessity for guiding handles and the employment of four wheels were entirely dispensed with, and also described the teeth as seven in number, arranged in two straight rows, three teeth in one row and four in the other, the points of the three teeth being in front of the line of the wheels, and the points of the four teeth being behind the line of the wheels: *Held*, that a cultivator which differed from that described in the patent only in having the axle of the wheels thrown forward and the hind teeth thrown backward so far that the tread of the wheels was not midway between the points of the two rows of teeth, (which increased the leverage behind and reduced the strain on the horses still more than in the plaintiff's arrangement,) and in having the middle tooth of the forward three moved forward, and the two middle teeth of the four behind also moved forward, so that the two rows were not straight, infringed the patented combination; that the infringing machine contained the principle and substance of the patented invention, merely carrying it out further in practice than had been done by the patentee when he took out his patent; and that the infringing arrangement was not in law even an improvement on that of the patentee, because it was only the result of practical experience in the use of the patentee's arrangement, and involved no invention beyond what was embodied in that and was clearly set forth in the specification.

[Cited in McWilliams Manuf'g Co. v. Blundell, 11 Fed. 422; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 804.]

2. Another machine which differed from the former infringing machine in having the middle tooth of the forward three set back instead of forward, thus bringing the points of two teeth forward of the wheels and the points of five teeth behind the wheels, infringed the patented combination.

In equity. This was an application for a provisional injunction to restrain the infringement of a patent. The plaintiff [Samuel R. Tracy] was grantee of the exclusive right for Yates county, N. Y., under letters patent [No. 4,459], granted to Nathan Ide, of Shelby, Orleans county, N. Y., on the 18th of April, 1846, for an "improvement in cultivators." In his specification, the patentee described his cultivator as having but two wheels, and set forth the nature of his invention as follows: "The nature of my invention consists in the arrangement of the cultivator teeth in two rows, one back and the other front, when this is combined with a pair of sustaining and carrying wheels the bearing points of which are in a line midway between the two rows of teeth, so that any tendency which one row of teeth may have to cut too deep is resisted by the weight of earth on the other row, the tread of the wheels between them acting as the fulcrum, so that the team, by this means, is entirely relieved of any strain which they otherwise would have to sustain in consequence of the motion of the beam up and down as the teeth run too deep or too shallow. By this arrangement, the necessity for guiding-handles, or the employment of four wheels, is entirely dispensed with. In all the cultivators heretofore used with which I am acquainted, when two wheels only have been used, the attendant must guide the instrument by means of the handles, which is a very laborious operation, without avoiding the strain on the team by the tendency of the teeth to run in or out of the earth; and, when three or four wheels are employed, to avoid this strain and relieve the attendant of the labor of guiding, the teeth do not follow the slight irregularity of the surface of the ground, for, when either the front or rear wheels pass over a slight elevation, the teeth are necessarily drawn partly out of the earth, which increases the resistance, and renders the operation on the soil less perfect; but, by my improved arrangement all these difficulties are avoided, and, as I employ large wheels, which extend considerably above the upper surface of the frame, by turning the whole implement upside down, it answers the purpose of a cart, in going to or from the field." The patentee described the teeth as seven in number, arranged in two straight rows, three in one row and four in the other, the points of the three teeth being in front of the line of the wheels, and the points of the

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

four teeth being behind the line of the wheels; the teeth being twelve inches in perpendicular height and fourteen inches long and curving forward, and so disposed that no two should work in the same furrow; the horses being attached to a tongue. The patentee's claim was as follows: "What I claim as my invention, and desire to secure by letters patent, is the arrangement of the teeth in two rows, in combination with a pair of wheels the treads of which are in a line midway between the points of the two rows of teeth, substantially as described." The defendants [Reuben S. Torrey and Hiram Torrey] were manufacturing and selling, within the plaintiff's territory, cultivators which the bill claimed to be the same thing as Ide's. In the defendants' cultivator there were but two wheels, no guiding handles, and seven teeth, the points of three being in front of the wheels and the points of four behind. But the defendants threw the axle of the wheels forward and the hind teeth backward so far that the tread of the wheels was not midway between the points of the two rows of teeth, and, by thus increasing the leverage behind, reduced the strain on the horses still more. They also moved forward the middle tooth of the forward three and the two middle teeth of the four behind, so that the two rows were no longer straight.

Samuel Blatchford, for plaintiff.
Alvah Worden, for defendants.

THE COURT held that the defendants' cultivator was an infringement of Ide's; that the defendants were using the principle and substance of Ide's invention, merely carrying it out further in practice than he had done when he took out his patent; and that the defendants' form of construction was not in law even an improvement on Ide's, because it was only the result of practical experience in the use of Ide's, and involved no invention beyond what was embodied in Ide's and was clearly set forth in his specification.

The defendants' counsel asked that the injunction be stayed on the defendants' giving security to the plaintiff for his damages and rendering a periodical account of their sales of cultivators. This application was based on the fact that the defendants were men of pecuniary responsibility. But THE COURT refused the application, on the ground that the infringement was clear and the right to the injunction manifest. Injunction ordered.

NOTE. In the case of Chamberlain v. Ganson, argued at the same time, which was a motion for a provisional injunction for an infringement of the same patent, the defendant's cultivator was like that of the Torreys, except that it had the middle tooth of the forward three set back instead of forward, thus bringing the points of two teeth forward of the wheels and the points of five teeth behind the wheels. An injunction was granted in this case also.

Case No. 14,128.

TRACY v. TRACY et al.

[5 McLean, 456.] [1]

Circuit Court, D. Ohio. April Term, 1853.

JUDGMENT—LIEN—EFFECT OF REVIVAL—PRIORITIES.

1. If a judgment become dormant its lien is lost, as against a mortgage executed by the judgment creditor, during the continuance of the judgment lien.

[Cited in Flagg v. Flagg, 58 N. W. 111; McCormick v. Wheeler, 36 Ill. 124.]

2. A revival of the judgment cannot affect prior liens.

3. But such revival gives a lien on the land of the defendant, not included in the mortgage, and which has on it no prior liens.

In equity.

Swan & Andrews, for complainant.
Mr. Curtis, for defendant.

OPINION OF THE COURT. This case is brought before the court to have determined the priority of certain liens. There are seven distinct parcels of land. The liens of Morrison, Young, and Vose, stated as liens 1, 2, and 3, extend to the seven parcels of land. A judgment in favor of Hurd was rendered in the year 1841. The mortgage of H. D. Tracy was executed in 1843, on four of the seven tracts of land. The judgment of Hurd became dormant, and was revived in 1847. The proceeds of the sales of all the lands amounted to the sum of $10,940. The proceeds of the four tracts included in Tracy's mortgage amounted to the sum of $8,375. The proceeds of the remaining three parcels, not included in the mortgage, but embraced in the levy under Hurd's judgment are $2,545. The amount of the first three liens, which are prior to both the judgment of Hurd and mortgage of Tracy, with the costs of this suit, and the charges of the administrator, amount to about the sum of $8,950, leaving a balance applicable to liens No. 4 and 5, of the reported liens of $1,970. If after judgment and levy on lands, the judgment debtor executes a mortgage, and the judgment becomes dormant, the revival of the judgment does not operate to the prejudice of the mortgage lien; but in such case the mortgage lien becomes perfect, and the judgment lien on the mortgaged premises is lost. Norton v. Beaver, 5 Ohio, 178; Miner v. Wallace, 10 Ohio, 403; Lessee of Paine v. Moreland, 15 Ohio, 435. In this case Hurd's judgment having become dormant, and Tracy's mortgage having intervened, the mortgage lien become paramount to that of the judgment. The three prior liens must be satisfied out of the proceeds of all the tracts of land. The revived judgment gives a paramount lien to that of the mortgage on the land, not included in the mortgage.

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

TRACY (UNITED STATES v.). See Case No. 16,536.

TRACY v. WALER. See Case No. 14,129.

Case No. 14,129.

TRACY et al. v. WALKER et al.

[1 Flip. 41;[1] 3 West. Law Month. 574.]

Circuit Court, N. D. Ohio. Nov. Term, 1861.

PARTNERSHIP — PARTNERSHIP EFFECTS — THE EFFECT OF DISSOLUTION—PARTNERSHIP DEBTS —JOINT TENANTS.

1. Mercantile partners are joint tenants in the stock and effects of a copartnership. Each member of the firm has a specific lien upon the assets, but this is not applied only to property and effects brought into the concern at its organization, but to everything else coming in lieu thereof during the continuance, or after the determination, of the partnership.

2. Upon dissolution, the lien of the individual members of the firm continues, as well for the indemnity of each as for his proportion of the surplus.

3. In strict law, creditors have no lien upon the partnership property for their debts. It is only worked out through the equity of the partners, over the whole funds, in a court of chancery.

4. The property of the company should be, first, liable for the debts of the company, and joint creditors should have a priority or privilege of payment before separate creditors. These are rights which the law secures to each and all the members of the firm. But they may relinquish these rights to one and the other, or to third persons, or they may enforce them in a court of equity for their own benefit, or become the instrument by which creditors may, in like manner, enforce them for the benefit of creditors.

5. The general creditors of a firm, before levy or seizure have not, as such creditors, any specific lien on the assets of the firm, and the preference of the creditors of the company over the separate creditors in the distribution of the joint assets arises from, and must be worked out through, the rights of the partners to insist upon such application.

6. Mere insolvency, in the absence of fraud, will not deprive the partners of their legal control over the property, or of their right to sell and dispose of it as to them shall seem just and proper.

7. Where the retiring partner sells and transfers all his interest in the partnership to his copartner, who thereupon assumes exclusive control over it and disposes of it to bona fide purchasers, the former should not be permitted to follow such property into the hands of third persons, but should be remitted to his action at law for a breach of the agreement.

8. Fraud may be inferred from facts and circumstances that work an imposition and deceit on other persons, who are not parties to the fraudulent agreement.

[This was a suit to enforce the payment of a judgment by Frederick Tracy and James Irwin against Joseph Walker, Thomas W. Ouland, William C. Hedges, and others.]

WILLSON, District Judge. This cause was heard upon bill, answers, replication, exhibits and testimony. The complainants are judgment creditors of the late firm of Walker & Ouland, of the city of Tiffin, Ohio. They seek, by this proceeding, to subject certain equities in the hands of some of the defendants, to the payment of their judgment.

The leading facts, disclosed by the record, are not controverted. In the fall of 1856, the defendants, Walker & Ouland, were a mercantile firm of good credit, doing business at Tiffin. They had purchased goods of the complainants, from time to time for cash, and on deferred payments. One of their notes for $570.41, matured on the 15th of May, 1857, and was protested for non-payment. The complainants, becoming anxious about the safety of their claim, immediately called upon Walker for security, but failed to obtain it. On the third day of June, 1857, they again attempted to obtain security, and for that purpose sent their agent to Tiffin. Walker then and there made an exhibit of the affairs of the concern to this agent, in which he represented the assets at his disposal to be worth $54,500, and the liabilities of the firm of Walker & Ouland not to exceed $13,000, leaving an excess of assets over liabilities in his hands of $41,500. Upon this representation the paper was renewed without security. On the same day, to-wit, the 3d of June, 1857, Walker sold and transferred all of the aforesaid property and assets to his father-in-law, Josiah Hedges, and other relations, in payment of his own individual liabilities. It appears, that some time in the spring of 1857, Ouland sold to his partner his entire interest in the property and effects of the firm, and in retiring from the concern took Walker's agreement to furnish him a bond of indemnity with good security, against the liabilities of the firm, which bond of indemnity has never been given. It further appears, that the complainants obtained judgment against Walker & Ouland in this court at the July term, 1857, for $684.25 damages, upon said renewed note. Execution was issued on the judgment in January, 1859, and duly returned by the marshal, but he found no goods, chattels, lands or tenements, of either Walker or Ouland on which to levy. The judgment remains wholly unsatisfied, and it is conceded that both Walker and Ouland are insolvent.

It is insisted by the complainants—1st—that the creditors of the firm of Walker & Ouland have an equitable lien upon the property and assets of the partnership, and that such property cannot be diverted to the payment of the individual debts of the partners, to the prejudice of the creditors of the firm. 2nd—That if such lien shall be held not to exist, it is nevertheless insisted, that the sale by Walker to Hedges and others was, in fact, fraudulent, and therefore void.

Mercantile partners are joint tenants in the copartnership stock and effects. Each has a specific lien upon the assets. This lien is not only applied to the property and effects

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

brought into the concern at its organization, but also to everything coming in lieu thereof, during the continuance, or after the determination of the partnership. Upon a dissolution, the lien of the individual members of the firm continues, as well for the indemnity of each as for his proportion of the surplus. But, in strict law, creditors have no lien upon the partnership property for their debts. It is only worked out through the equity of the partners, over the whole funds, in a court of chancery. That the company property should first be liable for the company debts, and that joint creditors should have a priority or privilege of payment before separate creditors, are rights which the law secures to each and all the members of the firm. They may relinquish these rights to one and the other, or to third persons, or they may enforce them in a court of equity for their own benefit, or become the instruments by which creditors may, in like manner, enforce them for the benefit of creditors. Hence, when the primary rights of partners to apply the partnership property to the extinguishment of the company debts is gone, the right of the partnership creditors to enforce the application of the property of the firm to the payment of their debts, is also gone. That the general creditors of a firm before levy or seizure, have not, as such creditors, any specific lien on the assets of the firm, and that the preference of the company creditors over the separate creditors in the distribution of the joint assets, arises from, and must be worked out through, the rights of the partners to insist upon such application, are principles now too well established to admit of question. Sigler v. Knox County Bank, 8 Ohio St. 511; 5 Ohio St. 101, 516; 11 Ohio, 399; Ex parte Ruffin, 6 Ves. 126–129; Ex parte Williams, 11 Ves. 3; Hoxie v. Carr [Case No. 6,802]; Story, Partn. § 357 et seq.

Nor does the right of appropriation of the joint assets to the separate creditors, by consent of the other partner, depend upon the solvency of the firm. "Mere insolvency, as commonly understood, no fraud intervening, will not deprive the partners of their legal control over the property, and their right to sell and dispose of it as to them shall seem just and proper." A contrary rule would produce incalculable mischief and great inconvenience, and would be attended with absolute injustice to bona fide purchasers of such property. But, it is said, that in this case, the legal right, title and interest of Ouland in the partnership effects, never passed to Walker, inasmuch as the latter failed to comply with his agreement to give bond with surety, against the company debts. And the objection is put on the ground, that the agreement between the parties was executory. The case of Ex parte Rowlandson, 1 Rose, 416, would seem to sustain this doctrine. In that case, after a dissolution and assignment of the partnership effects to one of the partners, a bill was filed by the retiring partner against the other, alleging fraud in the non-performance of the articles of dissolution, and praying an injunction and receiver, which was ordered. It was held, that such interference of the court, arising from the non-performance of the articles, restored the property to its original character as joint property, unless the plaintiff in equity, by his conduct, rendered nugatory the effect of such interference. But in Young v. Keighly, 15 Ves. 558, where the agreement to convert separate into joint property was only in part performed, the court treated the conversion as complete.

It seems just and reasonable, that where the retiring partner thus sells and transfers all his interest in the joint property, to his copartner, who then assumes exclusive control over it, and disposes of it to bona fide purchasers, he should not be permitted to follow such property in the hands of third persons, but should be remitted to his action at law for a breach of the agreement. As between the partners themselves, when the property has not changed hands, a court of equity will always interpose and protect one of them against the fraudulent contract or fraudulent conduct of the other, and for that purpose will appoint a receiver, and finally adjust the affairs of the partnership. But what are the facts of the case in this regard? In the spring of 1857, Ouland sold to Walker his interest in the concern, including the goods in the store and the entire assets. Walker took exclusive possession, and exercised absolute control over them. He traded them off on his own account, paid company and private debts from their proceeds, without objection or interference on the part of Ouland. So far as his dealing with third persons was concerned, they had a right to treat and regard such property as his own, and they should be protected in the purchase of it, when made in good faith, unless such purchase was tainted with fraud.

And this brings us to the consideration of the other branch of the case, to-wit: Was the transfer of the property from Walker to Hedges and others, attended by such circumstances of fraud, as to vitiate the sale of the property, or any part of it? When Pratt, the plaintiff's agent, called upon Walker for security, early in June, 1857, the latter evidently made false statements as to his solvency. By these false representations, he obtained a renewal of the note, and thereby gained sufficient time to dispose of the property in question, to his father-in-law, without any hindrance from the plaintiffs, by attachment proceedings, or otherwise. The individual indebtedness of Walker to Josiah Hedges, on the 3d of June, 1857, is alleged to have been $10,608. On that day, Walker assigned and delivered to Hedges, certain of his book accounts, amounting to $865.53, and also put into Hedges' possession, goods in the store valued at $12,385.55, of which amount it is

claimed $9,742.55, were applied in payment of the indebtedness of Walker to Hedges. It appears from the testimony of Pratt, that on the 5th of June, 1857, finding Walker's store and stock of goods in the possession of Hedges, he called upon the latter for an explanation of the transfer. In his testimony, in relation to this interview, Pratt declares that he (Hedges) said, "The goods in the store all belonged to him —that he had bought them of Walker. I asked him the consideration, and he replied that Walker owed him a great deal more than he could get out of the goods, and that the indebtedness was for money borrowed a long time ago." It further appears, that afterward, Walker disposed of a portion of the goods thus held by Hedges, to Reed, Jennings & Co., and other creditors, in compromise or payment of the debts of Walker & Ouland, and that the goods so disposed of amounted to $2,643. The effect of this transaction, so far as the $2,643 worth of goods is concerned, was a direct fraud on the complainants. The legal representatives of Josiah Hedges have failed to explain the transaction upon any ground consistent with fair dealing. An inventory of the goods was made at the time of the alleged transfer, and a bill of sale to Hedges was drawn up and executed by Walker. These papers have not been produced in evidence. Their non-production forces upon us the conviction, that the goods, to the amount of $2,643 at least, were covered up by Hedges, either to defraud the complainants, or to hinder and delay them in the collection of their debt, and to enable Walker to force a compromise with his creditors on terms favorable to himself.

In the celebrated case of Chesterfield v. Janssen, 2 Ves. Sr. 155, Lord Hardwicke, after remarking that a court of equity has an undoubted jurisdiction to relieve against every species of fraud, declares that to be fraud which may be collected and inferred, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement.

Without impinging the application of the $9,743.55 to the payment of Hedges' debt, or inquiring into the validity of the sales made by Walker to Baldwin and other defendants, it is sufficient to answer the purposes of equity in this suit to charge the estate of Josiah Hedges for the payment of the complainants' judgment and costs, and this, in consideration of the fraudulent conduct of the parties in relation to the $2,643 worth of goods taken by Hedges in excess of his claim. A decree will be entered accordingly.

The claim of Hedges was only for $10,608, June 3, 1857. He received on that day $865.53 in book accounts, and $12,385.55 in goods.

Case No. 14,130.

TRACY et al. v. WOOD.

[3 Mason, 132.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1822.

BAILMENT—WITHOUT REWARD—GROSS NEGLIGENCE —NATURE OF GOODS.

1. A bailee without reward is guilty of gross negligence if he omits that reasonable care of property committed to his charge, which persons in the like situation exercise, or which the bailee is accustomed to exercise in like cases.

[Cited in Brown v. The Elvira Harbeck, Case No. 2,005.]

[Cited in Conner v. Winton, 8 Ind. 318; Grant v. Ludlow's Adm'r, 8 Ohio St. 48; Graves v. Ticknor, 6 N. H. 540; Jenkins v. Motlow, 1 Sneed, 248.]

2. Gross negligence is to be considered with reference to the nature of the goods delivered to a bailee without reward. If money is delivered, it is to kept with more care than common property.

[Cited in The New World v. King, 16 How. (57 U. S.) 475; Atchison, T. & S. F. R. Co. v. McClurg, 8 C. C. A. 322, 59 Fed. 868.]

[Cited in Pattison Syracuse Nat. Bank, 80 N. Y. 99; United Society of Shakers v. Underwood, 9 Bush. 613.]

[3. Cited in Carrington v. Ficklin, 32 Grat. 678, to the point that the question of negligence, as a general rule, is one of fact for the jury.]

Assumpsit [by Frederick A. Tracy and others against Joshua B. Wood] for negligence in losing 764½ doubloons, entrusted to the defendant to be carried from New York to Boston, as a gratuitous bailee. The gold was put up in two distinct bags, one within the other, and at the trial, upon the general issue, it appeared that the defendant, who was a money broker, brought them on board of the steamboat bound from New York to Providence; that in the morning, while the steamboat lay at New York, and a short time before sailing, one of the bags was discovered to be lost, and that the other bag was left by the defendant on a table in his valise in the cabin, for a few moments only, while he went on deck to send information of the supposed loss to the plaintiffs, there being then a large number of passengers on board, and the loss being publicly known among them. On the defendant's return the second bag was also missing, and after every search no trace of the manner of the loss could be ascertained. The valise containing both bags was brought on board by the defendant on the preceding evening, and put by him in a berth in the forward cabin. He left it there all night, having gone in the evening to the theatre, and on his return having slept in the middle cabin. The defendant had his own money to a considerable amount in the same valise. There was evidence to show that he made inquiries on board, if the valise would be safe, and that he was informed, that if it contained articles of value, it had better be put into the custody of the captain's clerk in the bar, under lock and key. There were many other circumstances in the case. The

[1] [Reported by William P. Mason, Esq.]

argument at the trial turned wholly on the question of gross negligence, and all the facts were fully commented on by counsel. But as the case is intended only to present the discussion on the question of law, it is not thought necessary to recapitulate them.

Whipple & Robbins, for defendant argued, that the suit could not be maintained, unless there was gross negligence, and that the evidence in this case, and the known habits of brokers repelled any notion of gross negligence. They cited Exodus, c. 22, vv. 7, 8; Paley, Moral Phil. 125; Jones, Bailm. 8–10, 21, 22, 46, 62, 119, 120; Coggs v. Bernard [2 Ld. Raym. 909], Id. Append. Swift, Dig. 387; Finucane v. Small, 1 Esp. 315; Robinson v. Dunmore, 2 Bos. & P. 419; Batson v. Donovan, 4 Barn. & Ald. 21.

Searle & Webster, for plaintiff argued e contrâ; that here there was a gross negligence, and that what constituted such negligence, depended in a great measure upon the nature of the thing bailed. That the contract of a bailee, without reward was for that degree of diligence, which men, ordinarily prudent, would give to such property. That no legal distinction existed between bailees with, or without reward, in respect to the care of money. That a carrier beyond the notice value was a carrier without reward, and yet liable for mere deviation from the usual course of the business. They cited Rooth v. Wilson, 1 Barn. & Ald. 59; Batson v. Donovan, 4 Barn. & Ald. 21; Smith v. Horne, 2 Moore, C. P. 20.

STORY, Circuit Justice. After summing up the facts, said, I agree to the law as laid down at the bar, that in cases of bailees without reward, they are liable only for gross negligence. Such are depositaries, or persons receiving deposits without reward for their care; and mandataries, or persons receiving goods to carry from one place to another without reward. The latter is the predicament of the defendant. He undertook to carry the gold in question for the plaintiff, gratuitously, from New York to Providence, and he is not responsible unless he has been guilty of gross negligence. Nothing in this case arises out of the personal character of the defendant, as broker. He is not shown to be either more or less negligent than brokers generally are; nor if he was, is that fact brought home to the knowledge of the plaintiffs. They confided the money to him as a broker of ordinary diligence and care, having no other knowledge of him; and, therefore, no question arises as to what would have been the case, if the plaintiffs had known him to be a very careless or a very attentive man. Jones, Bailm. 46. The language of the books, as to what constitutes gross negligence, or not, is sometimes loose and inaccurate from the general manner in which propositions are stated. When it is said, that gross negligence is equivalent to fraud, it is not meant, that it cannot exist without fraud. There may be very gross negligence in cases where there is no pretence that the party has been guilty of fraud; though certainly such negligence is often presumptive of fraud. In determining what is gross negligence, we must take into consideration what is the nature of the thing bailed. If it be of little value, less care is required, than if it be of great value. If a bag of apples were left in a street for a short time, without a person to guard it, it would certainly not be more than ordinary neglect. But if the bag were of jewels or gold, such conduct would be gross negligence. In short, care and diligence are to be proportional to the value of the goods, the temptation and facility of stealing them, and the danger of losing them. So Sir William Jones lays down the law: "Diamonds, gold, and precious trinkets," says he, "ought from their nature to be kept with peculiar care, under lock and key; it would, therefore, be gross negligence in a depositary to leave such deposit in an open antichamber; and ordinary neglect, at least, to let them remain on the table, where they might possibly tempt his servants." Jones, Bailm. 38, 46, 62. So in Smith v. Horne, 2 Moore, C. P. 18, it was held to be gross negligence in the case of a carrier, under the usual notice of not being responsible for goods above £5 in value, to send goods in a cart with one man, when two were usually sent to see to the delivery of them. So in Rooth v. Wilson, 1 Barn. & Ald. 59, it was held gross negligence in a gratuitous bailee to put a horse into a dangerous pasture. In Batson v. Donovan, 4 Barn. & Ald. 21, the general doctrine was admitted in the fullest terms. It appears to me, that the true way of considering cases of this nature, is, to consider whether the party has omitted that care which bailees, without hire, or mandataries of ordinary prudence usually take of property of this nature. If he has, then it constitutes a case of gross negligence. The question is not whether he has omitted that care, which very prudent persons usually take of their own property, for the omission of that would be but slight negligence: nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but ordinary negligence. But whether there be a want of that care, which men of common sense, however inattentive, usually take, or ought to be presumed to take of their property, for that is gross negligence. The contract of bailees without reward is not merely for good faith, but for such care as persons of common prudence in their situation usually bestow upon such property. If they omit such care, it is gross negligence.

The present is a case of a mandatary of money. Such property is by all persons, negligent as well as prudent, guarded with much greater care, than common property.

The defendant is a broker, accustomed to the use and transportation of money, and it must be presumed he is a person of ordinary diligence. He kept his own money in the same valise; and took no better care of it than of the plaintiffs'. Still if the jury are of opinion, that he omitted to take that reasonable care of the gold which bailees without reward in his situation usually take, or which he himself usually took of such property, under such circumstances, he has been guilty of gross negligence.

Verdict for the plaintiffs for $5700, the amount of one bag of the gold; for the defendant as to the other bag.

Case No. 14,131.

The TRACY J. BRONSON.

[3 Ben. 341.] [1]

District Court, N. D. New York. June, 1869.

COLLISION—SCHOONERS MEETING—MUTUAL FAULT—INSCRUTABLE FAULT—APPORTIONMENT.

1. Two schooners, the Barney and the Bronson, came in collision in Lake Huron. They had been sailing, the Barney, west by north half north, on her port tack, and the Bronson southeast by east half east, on her starboard tack. Each claimed that she was close-hauled, and that the other had the wind free. The helm of the Barney was starboarded and the helm of the Bronson ported, when a collision was seen to be inevitable. The evidence as to the direction of the wind was conflicting, and without preponderance in favor of one side or the other, and it was agreed, by both parties that the case must be determined by the 12th article of the act of 1864 [13 Stat. 60], as being one of vessels crossing: *Held*, that under that article the Barney must prove satisfactorily, in order to recover full indemnity, that she was close-hauled and that the Bronson was free, and that she had failed to do this;

2. It being impossible on the pleadings and proofs to determine the direction of the wind, or which vessel was close-hauled, the case might be properly considered as one of mutual fault or of inscrutable fault;

3. In either case, the damages must be divided;

4. The case was, more properly, one of vessels meeting instead of crossing, and should be determined under the 11th article instead of the 12th;

5. Both vessels should have ported, and as neither ported until the collision was inevitable, both vessels were in fault, and the damages must be divided.

In admiralty.

Geo. Willey, for libellants.
G. B. Hibbard, for claimants.

HALL, District Judge. This is a case of collision, prosecuted to recover damages for the loss of the schooner F. T. Barney and her cargo, which were sunk by a collision with the Bronson in October, 1868.

The collision occurred in Lake Huron, about five miles from land, and between 12 and 1 o'clock at night. The Barney was proceeding up the lake, on a course of west by north half north, and the Bronson was coming down the lake, on a course of southeast by east half east,—by their respective compasses. Thus, there was only a difference of a single point in the lines of their respective courses; and, as they were both in the usual track of vessels going up or down the lake, near the place of collision, it is quite likely that the lines of their actual courses were even more nearly parallel.

The libel alleges that the wind was from the south southwest; that the Barney was close-hauled, and on her port tack; that she was kept steadily on her course down to the very instant of the collision, when her helm was put hard down (to the starboard); and that the Bronson struck the Barney, stem on, just forward of the cabin, cutting her down so that she sunk in about fifteen minutes after the collision. The answer states that the wind was from the south; that the Bronson was kept steadily on her course, close-hauled, on the starboard tack, until a very short time before the collision, and when a collision was imminent and unavoidable; that her helm was then ported, and she swung to starboard; and that in a very short time the stem of the Bronson struck the Barney on her starboard side.

The evidence in regard to the angle at which the vessels struck, renders it quite probable that the change of helm by the two vessels, or by one of them, was made at an earlier time than the pleadings would indicate; but there is no means of determining whether the libel or the answer is most nearly correct in respect to the time of the change of helm, or whether the helm of either vessel was changed until it was too late for either, by any change of helm, or otherwise, to avoid the collision.

The evidence given by the crews of the respective vessels is distinct and positive that their own vessel was close-hauled on the wind; and the testimony of several other witnesses who were on other vessels in the vicinity of the Barney and Bronson at the time of the collision, and who state their recollections in respect to the direction of the wind, is conflicting and irreconcilable. Indeed, the evidence upon this question is so nearly balanced, that it is impossible to determine to which side the preponderance of the testimony inclines.

A careful examination of the whole testimony has not enabled me to discover any means of determining that the wind was south southwest, as alleged in the libel, or south, as stated in the answer; or that either of the vessels was close-hauled; and, if not most probable, it certainly is not very improbable, that each had the wind one and a half to three and a half points free. In fact, the testimony upon which this case must now be decided, is even more conflicting and unsatisfactory than that ordinarily given in collision cases; and it may also be doubtful what rule of navigation must be held to apply to the case.

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

It was substantially agreed by the counsel for the respective parties, that the case was within the provisions of the 12th article of the act of 1864, fixing certain rules and regulations for preventing collisions. This article provides that, "When two sailing ships are crossing, so as to involve risk of collision, then if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship on the starboard side; except in the case in which the ship with the wind on the port side is close-hauled and the other ship free, in which case the latter ship shall keep out of the way."

Under this rule, the libellants, to entitle themselves to full indemnity, must prove affirmatively and satisfactorily, that their own vessel was close-hauled, and that the Bronson had the wind free. This they have certainly failed to do; and they can only recover a portion of their damages upon the ground that the case is one of inscrutable fault, if article 12 must be held to furnish the rule of decision.

That at least one of the vessels was in fault is clear, and it is quite probable that both were so; and it being impossible, upon the pleadings and proofs, to reach any satisfactory conclusion in regard to the direction of the wind, or to determine which, if either, of the vessels was close-hauled, the case may, under the 12th article before referred to, be properly considered as one of mutual fault, or else one of inscrutable fault—requiring, in either case, a division of the damages. Indeed, such must be the decision if the case is disposed of under the 12th article. 1 Conk. Adm. 378–382, and cases cited; Code de Commerce, art. 407.

I am the more willing to make this disposition of the case because I think the 11th article, and not the 12th, should furnish the rule of decision. This 11th article provides that, "if two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other;" and it is quite clear, that although one of the colliding vessels might have been properly considered as nearly close-hauled, or as "running with a good full," neither was so close to the wind that a slight change to starboard might not have been made without going about, or being thrown in stays; and that, therefore, the vessel on the starboard tack was not relieved from the duty of porting her helm by the provisions of the 19th article. The Princessan Lovisa v. The Artemas, Holt, Rule of Road Cas. 75–77.

The libel states that the light of the Bronson, when first seen, was on the Barney's starboard bow. The libellant's proof is that it was seen about a point or a point and a half off that bow; yet, as the libel states that the light seen was a green light, and that her red light was not seen until a very short time before the collision, and when a collision was inevitable, this, with the whole testimony in the case, shows that the light of the Bronson was probably first seen more directly ahead of the Barney than would be inferred from the statements of her witnesses alone. The pleadings and proofs on the part of the claimants, show that the red and green lights of the Barney were both seen at the same time, and nearly ahead, or about a half a point off the Bronson's port bow; and the proof in behalf of each vessel is that her own course was not changed until a collision was inevitable.

Under such circumstances, and under all the proofs in the case, I think these vessels were meeting end on, or nearly end on, as provided for in article 11, and that they were not crossing, as provided for in rule 12.[2] I am also strongly inclined to think that neither was running as close as possible to the wind, and as neither ported her helm in time, both must be held in fault. The Princessan Lovisa v. The Artemas, Holt, Rule of Road Cas. 75; The Amalia v. The Catharina Maria, Id. 87.

The damages sustained by the two vessels will be aggregated, and then equally divided between them.

TRADER, The, v. The JAMES ADGER. See Case No. 7,188.

Case No. 14,132.

TRADER et al. v. MESSMORE et al.

[1 Ban. & A. 639;[1] 7 O. G. 385.]

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

PATENTS — INTERPRETATION OF CLAIM — PATENT OFFICE FILE—CHANGES IN ORIGINAL SPECIFICATIONS—SIGNIFICANCES—SEED PLANTERS.

1. Where it becomes important, in interpreting the language used in the specifications and claims of the patent, to determine the construction the patentee himself placed upon it, recourse may be had to the files in the patent office, to ascertain what changes were made in the original specification and claims, and the significances of those changes.

2. The claim of the patent, granted to William Blessing, December 13, 1859, for "an improvement in seed planters," is for "the arrangement of the top portion of the distributor, made with a semi-lunar opening, and the recess under the covered portion of the said top, when the periphery of the said top is made with the chaff openings, H, on either side of the reciprocating seed bar, so that the said bar, by its reciprocating action, shall work out the chaff through the passage H H on either side of the bar," must, in view of the record of the case in the patent office, be interpreted, so as to limit the invention to a particular arrangement of a particular top with particular openings, so that the chaff may be removed in a particular way.

3. So limited, it is not infringed by the defendants' device, in which there are no lateral chaff openings in the periphery of the distributor through

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[3] That the case comes under the 11th article referred to, see The Nichols, 7 Wall. [74 U. S.] 656.

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

which the chaff is worked out by the vibrations of a feed bar, but in which the chaff falls directly to the ground.

4. While patents should be liberally construed, they should not be so interpreted as to enable patentees to reach out and cover every improvement or invention which, after seeing, they conclude they might have embraced and included within their patent, but which were not so embraced or included.

[This was a bill in equity by James F. Trader and others against A. L. Messmore and others for the infringement of letters patent No. 26,410, granted to William Blessing December 13, 1859.]

Wood & Boyd, for complainants.
Fisher & Duncan, for defendants.

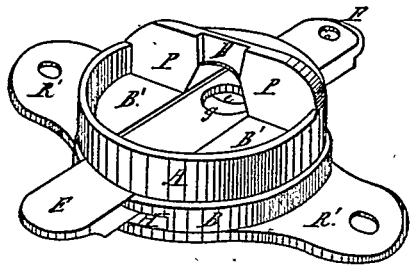
SWING, District Judge. This suit is brought by the complainants against the respondents for the infringement of letters patent, granted to William Blessing, December 13, 1859, for an "improvement in seed planters," and extended for seven years from December 13, 1873, the title to which, for certain territory described in the bill, has become vested in complainants.

The respondents admit the manufacture and sale by them, within the territory claimed, of a certain planter, which has been introduced in evidence as the "Bowman Distributor," but deny that this is an infringement of the invention claimed in the Blessing patent. They also deny that Blessing was the original and first inventor.

The determination of this case depends upon the construction which shall be given by the court to the patent of the complainants. It is said by the courts that, "patents should be liberally construed;" that we should look at the whole instrument, the patent, specifications, drawings and claim, and ascertain from them the nature and extent of the patentee's invention. This is undoubtedly true; but, in doing so, Mr. Justice Woodbury, in Smith v. Downing [Case No. 13,036], said, we should not put a broader construction on the language of the patentee than the whole subject matter and description and nature of the case seem to indicate as designed; no fancied construction, but rather what is natural and clear, considering what already exists upon the same subject.

With these general suggestions, let us approach the examination of this particular invention. In the specification first filed by William Blessing, his claim was for "the employment of the feed bar, in combination with the chaff chamber;" but this application was rejected, for the reason that the patent granted to Chapin Street, for grain drill, May 29, 1855, contained substantially the same device claimed by him. Whether it did so or not may not be material, except in this, that it did contain a feed bar and chaff chamber; but it becomes important, in interpreting the language subsequently used by the applicant in his amended specification and claim, to know the construction he himself placed upon it.

[Drawing of patent No. 26,410, granted December 13, 1859, to W. Blessing. Published from the records of the United States patent office.]



The rejection was on the 5th of October. Afterward, on a subsequent day in October, the applicant empowers his attorney, L. D. Gale, to amend the papers; and, soon after, Mr. Gale files with the commissioners, by way of amendment: "In reply to your letter of 5th instant, refusing the claim of William Blessing, for a distributing apparatus for a corn planter, I have amended the claim to modify the application, and confine the claim to the construction of the semi-lunar top, with its recess and the side openings H. You will please, therefore, correct the existing claim and substitute therefor the following: 'What I claim as my invention and desire to secure by letters patent is: The arrangement of the top portion of the distributor made with a semi-lunar opening, and the recess under the covered portion of the said top, when the periphery of the said top is made with the chaff openings H, on either side of the reciprocating seed bar, so that the seed bar, by its reciproating action, shall work out the chaff through the passages H H on either side of the seed bar, and thus prevent the choking of the distributor.'"

On the 27th of October, the specifications were returned to him, so as to enable him to amend or erase the nature of his invention, so that it might not conflict with the claim as amended; on the 28th day of October he filed his amendment, by striking out, or cancelling, lines fifteen to twenty-four inclusive, and inserting in place thereof the following: "The nature of the invention consists in the arrangement of the top part of the seed distributor, having on its periphery or sides peculiar chaff openings, for removing chaff and other obstructions, more particularly described in the specification." The original claim was the employment of the feed bar, in combination with the chaff chamber, but the amendment was: "The arrangement of the top portion of the distributor, made with a semi-lunar opening, and the recess under the covered portion of the said top, when the periphery of the said top is made with the chaff openings H, on either side of the reciprocating seed bar, so that the said bar by its reciprocating action, shall work

out the chaff through the passages H H on either side of the seed bar. And he said the object of this amendment, was to confine the claim to the construction of the semi-lunar top, with its recess and side openings; and without looking to what he said was his object, does not a fair construction of the language show plainly, that he had limited the invention, originally claimed by him, to a particular arrangement of a particular top, with particular openings, so that the chaff may be removed in a particular way? He certainly did not intend to claim a chaff chamber, however constructed, and certainly not every mode of removing chaff.

We think it, therefore, clear, that this patent must receive the limited construction indicated. If so, it is very clear, that the respondents' device does not embrace, either the particular top with its particular arrangement, or its particular openings. But suppose we give it a broader construction, and say complainants are entitled to a chaff chamber, and one of a different form, and openings of a different form, and at a different place; still, in order to find that the respondents infringe, we must find that they have a chaff chamber and openings substantially alike in mode of operation and results.

If the respondents' device can be said to have a chaff chamber at all, it is so different in operation, that it can hardly be said to be substantially the same. The complainants' chaff chamber is for the reception of the chaff, and openings are made necessary for its escape, and the operation of the seed bar is necessary to carry it from the chamber through the openings. In the respondents', by the arrangements of the parts, the chaff falls directly to the ground, or upon that portion of the mechanism upon which the device is fastened; no other openings are necessary; and the seed bar performs no office, such as is required by the seed bar in complainants' device.

But there is another view of this matter. Their devices are very different in form. The respondents have received a patent for them from the government; and the presumption of law is, that it is novel, and that it involved intention; and the proofs of complainants' and respondents' experts show, very clearly, that it is of superior utility to that of complainants. Under such circumstances, I do not feel disposed to give such a construction to the complainants' patent as will embrace the respondents' device; and more so, as complainants had been using their device for thirteen years, without ever ascertaining that their patent covered such a device, or its suggesting to them the valuable changes and alterations made by respondents' invention. While patents should be liberally construed, they should not be so construed as to enable patentees to reach out and cover every improvement or invention which, after seeing, they conclude they might have embraced and included in their patent, but which was not so embraced and included.

TRADERS' BANK (DOWNING v.). See Case No. 4,046.

TRADERS' INS. CO. v. The MANISTEE. See Case No. 9,027.

TRADERS' NAT. BANK (CAMPBELL v.). See Case No. 2,370.

TRADERS' NAT. BANK (SHERMAN v.). See Case No. 12,770.

TRADESMENS' NAT. BANK (HOTCHKISS v.). See Case No. 6,719.

Case No. 14,133.

Ex parte TRAFTON.

In re TRAFTON.

[2 Lowell, 505; [1] 14 N. B. R. 507.]

District Court, D. Massachusetts. Nov. 2, 1876.

BANKRUPTCY—COMPOSITION—CREDITORS—MISTAKE—UNLIQUIDATED CLAIM.

1. The word "creditors," in the section of the bankrupt act relating to composition, means all whose debts are provable in bankruptcy.

[Cited in Re Shafer, Case No. 12,695.]

[Cited in Mudge v. Wilmot, 124 Mass. 496. Cited in brief in Scott v. Olmstead, 52 Vt. 212.]

2. A mistake, without fraud, made by the debtor in his statement of the amount due to a creditor will not vitiate a composition.

[Cited in Hewes v. Rand, 129 Mass. 523.]

3. The true amount of a disputed claim may be proved by the creditor.

4. The court may provide for an unliquidated claim in composition cases, as if the case were in bankruptcy, by permitting the prosecution of a pending action in the state court, or by ordering an inquiry in the matter at the bar of the court of bankruptcy.

[Cited in brief in First Nat. Bank of St. Albans v. Wood, 53 Vt. 494.]

The bankrupt, having offered a composition of twenty per cent to his creditors, now informs the court by petition that Charles F. Roberts claims a considerable sum as due to him, which the bankrupt wholly denies. He has placed the name and residence of Roberts on his list, but with a statement that he disputes the whole claim. An action is pending between the parties in one of the state courts upon this alleged debt; and the prayer is, that the bankrupt may have thirty days after the determination of that action in which to tender twenty per cent of the amount therein ascertained to be due to Roberts, if any thing; or that Roberts be required to come into this court and prove his claim, or for other relief.

G. R. Fowler, for bankrupt.

B. D. Washburn, for creditor.

LOWELL, District Judge. The composition act says that any bankrupt may propose

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

a composition to his creditors, and that he must state their names, residences, and the amounts due them, and that the composition, if duly accepted, shall be binding on all the creditors whose names and addresses, and the amounts due them, shall be stated, and shall not affect or prejudice the rights of any other creditors. Creditors here plainly means all who have debts provable in bankruptcy; and there is express provision that in bankruptcy, unliquidated demands, and those which are disputed, may be proved after being liquidated or ascertained either in the courts of bankruptcy or in the state courts; and, if in the latter, no execution shall issue on the judgment until the question of the discharge of the bankrupt is decided. The provisions for composition seem to take for granted that a debtor will be able to state the amount due to each creditor; but this is impossible in a case like that now before me, and the question is, whether disputed claims are to share in a composition. I say that this is the question, because it is impossible to admit that if the debtor does all he can, by putting down the name and residence of the person who alleges himself a creditor, it shall be optional with the latter to come in or not, as he chooses. No doubt, this is his privilege, if his name is omitted altogether, because the debtor cannot object to any creditors sharing with the others; but this option arises out of the default of the debtor in omitting the name. When he has made no omission, the debt is either provable or not provable, and, if provable, there seems to be ample power given to the court to enforce the composition and to arrive at the amount due.

My opinion is, that if any thing is due on a disputed claim, it is provable. If it be not so, no debtor whose liabilities are unliquidated to any important extent can make a composition. The law says that the amount shall be stated. But suppose that without fraud there is a mistake in the amount given. Does this vitiate the composition? I think not. The creditor has a right to come in and prove the true amount, and, if he fails to do so, it will be for the state courts to say whether he is bound by the composition; but I do not see how they can draw any very sharp line, except at fraud. Under an insolvent debtors' law in England, it was held that the creditor might sue for the difference between the debt stated and that actually due. If this is so, then the amount is not so essential to the matter as the name and residence, giving the opportunity of correction; and the clear intent, that all creditors are to be treated alike, must somehow or other be worked out for both parties, whichever may, in the particular case, be the one who desires to have the law put in operation.

In the cases which have arisen heretofore this has been taken for granted, and counsel have agreed upon a mode of liquidation. In one case they prosecuted a pending action, and in another they agreed the facts and submitted the law to me. And it seems to me they were right. The law intends that the debtor's statement should be as accurate as he can fairly make it, but not, on the one hand, that a creditor should be bound by the statement, nor, on the other, that the debtor should be obliged, at his peril, to admit a debt to be due which he truly believes he does not owe; or that a creditor who has a dispute with his debtor should be put in the position, so much better or worse, as may happen, that he is not to be considered a creditor, and must take his chance against the future acquisitions of the bankrupt for the collection of his debt. This would open a door to all sorts of evils, which would result in the end in a virtual abrogation of this mode of settlement.

[The statute intends, I think, that the court should provide for an unliquidated debt of this kind, as if the proceedings were in bankruptcy.] [2] The bankrupt law shows how this may be done, either by permitting a pending action or suit to be prosecuted to judgment, in order to ascertain the amount, or by ordering an inquiry at the bar of the bankrupt court in the matter.

My order is that Roberts have leave to prosecute the action now pending against Trafton to judgment, in order to ascertain the amount due him; but that he take no execution on such judgment as he may obtain until the further order of this court. If he shall elect to discontinue that action, he may apply to this court to ascertain the amount due him. So ordered.

Case No. 14,134.

TRAFTON v. NOUGUES.

[4 Sawy. 178; [1] 4 Cent. Law J. 228; 13 Pac. Law Rep. 49.]

Circuit Court, D. California. Feb. 5, 1877.

REMOVAL OF CAUSES—CASES ARISING UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES — MINING CLAIMS — PETITION — SUFFICIENCY OF.

1. Only suits involving rights depending upon a disputed construction of the constitution and laws of the United States can be transferred from the state to the national courts, under the clause "arising under the constitution and laws of the United States," of section 2 of the "act to determine the jurisdiction of the United States courts," passed March 3, 1875 (18 Stat. 470).

[Cited in Gay v. Lyons, Case No. 5,281; Murray v. Bluebird Min. Co., 45 Fed. 386; Southern Pac. R. Co. v. Whittaker, 47 Fed. 530; Butler v. Shafer, 67 Fed. 163.]

2. Where the only questions to be litigated in suits to determine the right to mining claims are, as to what are the local laws, rules, regulations and customs by which the rights of the parties are governed, and whether the parties have in fact conformed to such local laws and customs, the courts of the United States have no jurisdiction of the cases under the provisions of the act giving jurisdiction in suits "arising under the constitution and laws of the United States."

[Cited in Re Helena & L. Smelting & Reduction Co., 48 Fed. 611.]

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[2] [From 14 N. B. R. 507.]

[1] [Reported by L. S B. Sawyer, Esq., and here reprinted by permission.]

3. A petition for the transfer of a suit from a state to a national court, on the ground that it arises under the constitution and laws of the United States, must state the facts and indicate the questions arising therein which are claimed to give the national court jurisdiction, so that the court can determine for itself from the facts the question of jurisdiction.

[Cited in Woolridge v. M'Kenna, 8 Fed. 677; McFadden v. Robinson, 22 Fed. 12; Hambleton v. Duham, Id. 465; Theurkauf v. Ireland, 27 Fed. 770; Austin v. Gagan, 39 Fed. 626; Strasburger v. Beecher, 44 Fed. 214; Fitzgerald v. Missouri Pac. Ry. Co., 45 Fed. 819; Burke v. Bunker Hill & S. Mining & Concentrating Co., 46 Fed. 648; Los Angeles Farming & Milling Co. v. Hoff, 48 Fed. 341.]

[Cited in Forncrook Manuf'g Co. v. Barnum Wire Works, 54 Mich. 555, 20 N. W. 582.]

4. A petition which only states the opinion, or conclusion of the petitioner, that the case arises under the constitution and laws of the United States, is insufficient, and a suit transferred on such petition will be remanded.

[Cited in Bluebird Min. Co. v. Largey, 49 Fed. 291.]

[This was a suit brought by Charles Trafton in the state court of Placer county to recover for trespass upon a placer gold mining claim, and seeking an injunction restraining the working of the same by defendant, P. T. Nougues. Removed to the circuit court upon defendant's petition.] Motion to remand case to the state court, whence it came, on the ground that it does not appear from the facts alleged, either in the pleadings, or the petition asking a transfer, that the case is one arising under the constitution or laws of the United States, within the meaning of the act of congress of March 3, 1875.

C. A. Tuttle, for the motion.

M. Mulany, contra.

SAWYER, Circuit Judge. I have had no little difficulty in satisfactorily construing this act. In the broad sense claimed by some, nearly all cases relating to title to lands would be swept into the national courts; for in the new states, in every action of ejectment involving a question as to the real title, one party or the other goes back to a patent, or other grant under the laws of the United States. Since the passage of the act of congress of 1866, and subsequent acts upon the same subject, expressly declaring the public lands to be free and open to exploration and occupation for mining purposes, subject to the local laws, regulations and customs of miners; also, authorizing a sale and patent to parties establishing a right under such local laws, regulations and customs, it seems to be claimed, on this broad principle, that all suits relating to disputes about mining claims may be transferred to the national courts. But, clearly, the great majority of such cases only involve a litigation of precisely the same questions as were litigated in those classes of cases for the many years since the acquisition of California prior to the passage of those acts of congress; and they turn upon no disputed construction of the constitution or statutes of the United States. In fact, where a patent is authorized to be issued to the possessor under these acts in a contested case, the statute refers the parties to the ordinary tribunals of the country to determine, under the local laws and customs, irrespective of the acts of congress, which party is entitled to the mining claim, and the patent issues to the party so determined to have the right. Four Hundred and Twenty Min. Co. v. Bullion Min. Co. [Case No. 4,989]. Thus the rights of the parties are determined by the laws, regulations and customs of the locality outside the acts of congress, without any discussion or controversy as to the construction of those acts. Since some of this class of cases transferred to this court were retained, but with no little hesitation, the supreme court of the United States has decided several cases, which afford a rule for the future, and which, it seems to me, exclude jurisdiction in many cases which the bar appears to have supposed could be transferred. The case of McStay v. Friedman, 92 U. S. 723, was a case in which one of the parties relied: 1. On the statute of limitations; 2. On title acquired through the city of San Francisco, under the well known Van Ness ordinance, and the act of the legislature confirming it. On a writ of error to the state court, it was sought to sustain jurisdiction of the United States supreme court, on the ground that the title derived through the city depended upon the act of congress of 1866 (14 Stat. 4), granting the land to the city, in trust for those who held under the ordinance of the city, state statutes, etc.

The court says: "At the trial no question was raised as to the validity or operative effect of the act of congress. * * * The city title was not drawn in question. The real controversy was as to the transfer of that title to the plaintiffs in error, and this did not depend upon the constitution or any treaty, statute of, or commission held, or authority exercised under the United States." Romie v. Casanova, 91 U. S. 380, is a similar case. At the present term of the supreme court, in a case which was actually transferred from the state court to this court, under section 2 of the act of 1875, the same ruling was made. One party claimed certain lots in San Francisco, by virtue of possession, in pursuance of the provisions of the Van Ness ordinance and the statutes of the state, and of the United States, confirming said title; while the city claimed the same as being part of the public squares reserved and set apart for public purposes in pursuance of the same ordinances and statutes. After the transfer a demurrer was interposed to the jurisdiction of this court, on the ground that it presented no question arising under the act of congress, the rights of the parties depending upon the construction of the ordinances of the city and the state statutes alone. On the other hand, it was earnestly urged that it was necessary to construe the

act of congress in order to find out who the beneficial grantee intended by the act of congress was. The court, however, held that the act of congress referred the question as to who was entitled to the land to the city ordinances and the statutes of the state upon the subject, and that their rights must be determined by a construction of those ordinances and statutes. The supreme court affirmed this ruling at the present term, thus holding that the same principle adopted in relation to the section providing for writs of error to the state courts, is, also, applicable to cases of transfer from the state to the national courts, under section 2 of the act of 1875; that is to say, that unless there is some contest as to the construction of the act of congress, there is no jurisdictional question in the case. Hoadley v. San Francisco, 94 U. S. 4.

So with reference to mining claims. The act of congress grants certain rights to those who discover, take up and work mining claims. But it refers the parties to the local laws of the states and territories, and to the rules, regulations and customs of miners of the district where the mines are situated, for the measure of their rights. If a dispute arises, as in the cases referred to, the act of congress refers the parties to the ordinary tribunals to determine it by the local laws and customs, and not by the act of congress. Upon the trial of the right to a mining claim, precisely the same questions are tried, and they are determined by the same laws and customs that were invoked as the measure of the rights of the parties before the act of congress had been passed. Clearly, the great mass of these cases cannot involve the discussion or any dispute as to the construction of any act of congress; and when they do not, under the decisions cited, this court is without jurisdiction, so far as this provision of the act is concerned. Where the controversy is upon matters other than the construction of the constitution or an act of congress, the "correct decision" of such controversy cannot possibly "depend upon the right construction of either." No controversy can possibly arise upon the construction of an act of congress, where all parties agree as to its construction. There may be a contest as to other matters, but not as to the construction of the constitution or laws in such cases.

This action was brought in the state court in Placer county, to recover for trespass upon a gravel gold mining claim, and seeking an injunction restraining the working of the claim by defendant. There is no fact alleged, either in the complaint or the petition for transfer, indicating that there is any question involved other than those that usually arise in a trial of a right to a mining claim. And it affirmatively appears from the issues stated in the petition that such are in fact the questions to be tried. It is alleged generally in the petition, it is true, that defendant located and held his claim under the several acts of congress relating to the subject. But this is no more than can be said, in a general sense, of all mining claims since the passage of the several acts referred to. But as we have seen, that does not, necessarily, nor even ordinarily, in this class of cases, involve any question of disputed construction of the act, or any right or question which is not to be determined by the local laws, rules and customs, without reference to the acts of congress, precisely as they were before there was any such act in existence.

The only other allegation is, that the "right to said mining ground by plaintiff depends upon the laws of congress, and the right or title of defendant to said mining ground, aforesaid, must also be determined by the acts of congress, under which defendant and petitioner claims title; and that the rights of the plaintiff as against defendant must be determined under the laws of congress of the United States." This is in substance two or three times repeated; but it is only the statement of a legal conclusion rather than a fact; and a conclusion manifestly founded upon the general idea that all mining claims are so held; that an action relating thereto involving the rights of the parties to the mine necessarily arises under the acts of congress within the meaning of the act giving jurisdiction to the national courts—an erroneous conclusion, if I am right, in the views before expressed. These allegations express merely the opinion of the petitioner that a jurisdictional question will arise. In my judgment, such averments are insufficient to justify a transfer, or retaining the case when brought here. The precise facts should be stated out of which it is supposed the jurisdictional question will arise; and how it will arise, should be pointed out, so that the court can determine for itself whether the case is a proper one for consideration in the national courts. Otherwise the administration of justice will be greatly obstructed, and intolerable inconveniences be the result. Under the fifth section of the act, it is made the imperative duty of the court, at any stage of the proceedings, when it appears that "such suit does not really and substantially involve a dispute or controversy properly within its jurisdiction," to stop the proceeding and remand the case. Where a suit presents no disputed construction of an act of congress; where there is no contest at all as to what the act means, or what rights it gives; where the only questions are as to what are the local mining laws, rules and customs, and as to whether the parties have in fact performed the acts required by such local laws, rules and customs, how can it be said, in any just sense, that such a suit "really and substantially involves a dispute or controversy" arising under an act of congress? The location of the mine involved in the case is more than one hundred and fifty miles from San Francisco, where the court is held, and many oth-

er cases may arise in this state, Nevada and Oregon, in regard to claims lying from three to five hundred miles distant from the place where the national courts are held, and between which places the means of communication are by no means easy or cheap. Generally, in this class of cases, the testimony rests mainly in parol, and there is a multitude of witnesses. The expense of prosecuting or defending such suits at a great distance from the mines would be enormous. If the court should accept a petition containing a bare statement of the opinion of the petitioner, that the rights of the parties are derived under an act of congress, as in this case, the result in most cases would be that the court would not be able to determine whether the case "really and substantially involves a dispute or controversy properly within the jurisdiction of the court," until the close of the testimony, when it would be necessary to remand the case at last. Such results would largely obstruct the due administration of justice, and work an intolerable inconvenience to honest suitors. Besides, it would encourage transfers of cases over which the court has no jurisdiction, by unscrupulous parties for the very purpose of deterring the adverse party from pursuing his rights by reason of the delays, inconvenience and enormous expense of prosecuting an action of this class at a great distance from home. These difficulties would be especially onerous in cases relating to mining rights, where time is often as important as the right in the several large states of the Pacific coast and interior of the continent, and where a court is held at but one point. A single state, in some instances, it must not be forgotten, contains more territory than all the middle and New England states together.

In view of these, in my judgment, weighty considerations, therefore, I think it of the highest importance to the rights of honest litigants, and to the due and speedy administration of justice, that a petition for transfer should state the exact facts, and distinctly point out what the question is, and how and where it will arise, which gives jurisdiction to the court, so that the court can determine for itself, from the facts, whether the suit does really and substantially involve a dispute or controversy within its jurisdiction.

Whenever, therefore, the record fails to distinctly show such facts in a case transferred to this court, it will be returned to the state court, and under the authority given by section 5, at the cost of the party transferring it. If I am wrong in my construction of the act, and the recent decisions of the supreme court, the statute (section 5) happily affords a speedy remedy by writ of error, upon which this decision and the order remanding the case may be reviewed without waiting for a trial, and the question may as well be set at rest in this case as in any other. It is of the utmost importance that a final decision of the question be had as soon as possible. If counsel so desire, I will order the clerk to delay returning the case till they have an opportunity to sue out and perfect a writ of error.

Let an order be entered returning the case to the state court whence it came, with costs against the party at whose instance it was brought here.

Case No. 14,135.

TRAFTON et al. v. UNITED STATES.

[3 Story, 646.] [1]

Circuit Court, D. Maine. May Term, 1845.

JOINT CONTRACTORS — EFFECT OF JUDGMENT AGAINST ONE UPON SUIT AGAINST BOTH — POSTMASTER'S ACCOUNTS — DEPOSIT OF RECEIPTS — SUBAGENTS ACTING EX CONTRACTU.

1. Where an action is brought against two joint contractors, a judgment recovered against one may be set up as a bar to the suit.

[Cited in Sloo v. Lea, 18 Ohio, 306; North v. Mudge, 13 Iowa, 499.]

2. The doctrine in the case of Sheehy v. Mandeville, 6 Cranch [10 U. S.] 253, commented on and questioned.

3. Where a contract is both joint and several, a judgment against both contractors is not a bar to a several action against either one of them; and a several judgment against either is not a bar to a joint judgment against both.

4. Where A, being postmaster, gave an official bond to the United States, and subsequently employed B as his assistant, and the receipts from the post office were deposited in their joint names, and an action was brought against A on his bond, and judgment recovered,—but, he having subsequently become bankrupt, the present action was brought against A and B,—it was *held*, that the deposit in the joint names of A and B did not make them jointly responsible.

[Cited in Com. v. Phœnix Bank, 11 Metc. (Mass.) 148.]

5. There was no privity of contract between B and the United States; and even if there were, the former judgment against A was a bar to the present suit.

6. A postmaster is not bound to keep the monies received for postage distinct from his own, nor to deposit it specifically in the name of the United States.

7. In general, sub-agents, acting ex contractu, are responsible only to the immediate agents who employ them, and not to the principals of such agents; and there is no necessary exception to this rule in the case of public officers, although, under particular circumstances, an exception may arise.

Writ of error upon a judgment rendered in the district court of the district of Maine. The original action was assumpsit for money had and received, and was commenced in September, 1841. The material facts as they appeared on the record, in the bill of exceptions, were as follows: Mark Trafton was the postmaster of the city of Bangor, and in January, 1837, gave a bond, with sureties, for the faithful performance of the duties of his office. In June, 1839, he was removed from his office; and during his continuance in office, John Bright (the

[1] [Reported by William W. Story, Esq.]

co-defendant), acted, for a certain salary, as his assistant in office. It further appeared in evidence, that during this period, all the deposits of monies made in the banks at Bangor, were made in the joint names of Trafton and Bright; and all the checks drawn therefor, were drawn by Bright, and signed in their joint names. There was also evidence in the case conducing to prove, that the monies so deposited were received by the postmaster, as postage, in the course of his official duties; but it did not appear, that all the monies so received were placed in deposit in the banks. It farther appeared, that the amount paid out of the post office between the 1st of April, 1837, (up to which time the accounts seem to have been properly settled, except a balance of $10.79, founded in a mere mistake detected in a prior account rendered), and the 30th day of June, 1839, in quarterly balances, and for clerk hire and other incidental expenses of office, far exceeded the amount deposited in the banks to the credit of Trafton and Bright, during that time; but there was more deposited in the said banks, during that time, than accrued to the government. It was also proved, that Trafton had the general oversight, superintendence and control of the office, and free access to and disposition of the money collected therein; and that Bright received a stated salary for his services. Upon the removal of Trafton from office, a balance was found due from him to the government, of $444.41; to recover which, the government brought a suit upon his official bond, against him and his sureties, in which, at the June term, 1841, judgment was rendered against Trafton and his sureties for the sum of $444.41, with $8.89, interest, and costs of suit taxed at $44.40, which judgment still remains in full force and unsatisfied. The sum claimed in the present suit is precisely that in which the judgment was obtained. Trafton has since become insolvent; but Bright (his co-defendant), is solvent. At the trial, the counsel for Trafton and Bright requested the district judge to charge the jury, that the facts stated in the brief of the defendant's counsel, proved and admitted in the case, were a bar to the present action; and further, that if the jury were satisfied, that, if Trafton used the money so collected in the post office, on his own account, so that not enough was left to pay the government, the said Bright would not be answerable. These instructions the district judge declined to give. But he did instruct the jury, that the facts set forth in the brief statement of the defendants, did not furnish a bar to the action; and that if the jury were satisfied that the defendants did deposit money collected in the post office, in a bank or banks, in their own names, it made such money their own; and if the jury were satisfied that Trafton and Bright had deposited the money collected in the post office, in their own names, then they were jointly answerable in this action. The jury thereupon returned a verdict for the United States, of $470.33. And the present writ of error was brought to reverse the judgment rendered therefor.

Wm. Abbott and Howard & Shepley, for defendants.

Mr. Williamson, for the United States.

STORY, Circuit Justice. It does not appear to me, that the objections taken to some portions of the depositions and evidence, are well founded; and if they were, the merits of the case before the court do not depend upon them. Two questions are presented by the bill of exceptions. First; whether the former judgment against Trafton and his sureties, for this identical money, is a bar to the present suit? Secondly; whether the present suit is, upon the other admitted facts, maintainable in point of law, against the present defendants, even if the former judgment is no bar.

The first question is not without its difficulties, resulting from the state of the authorities; not one of the cases disposed of, in those authorities, has been, in all its circumstances, precisely like the one at bar. I pass over, without observation, the point, whether there being a bond given by Trafton, for his official conduct, an action of assumpsit would lie against him for the money received by him officially; or, in other words, whether in the case of a contract by a sealed instrument for the payment of the money, an action of assumpsit would lie for the same money founded upon a simple contract. That question does not necessarily arise in the present case; and if it did, it would be necessary to compare the decision in Atty v. Parish, 1 Bos. & P. [N. R.] 104, with what was said by Mr. Justice Bayley in Tilson v. Warwick Gas Light Co., 4 Barn. & C. 962, 968, and other later cases. If the bond would per se have barred the right of suit in the present case, a fortiori, a judgment upon that bond would amount to a bar and extinguishment. In Sheehy v. Mandeville, 6 Cranch [10 U. S.] 253, the supreme court of the United States held, that a judgment, rendered in a suit against one of the makers of a promissory note only, (it being a partnership note), was not a bar to a joint suit against both the partners. But, then the bar was not set up by the partner who was sued in the former suit, but by the other partner not sued; and as to the latter, the court thought, that as he was not a party to the former judgment, it did not bind him and would not operate as a merger in his favor. On the other hand, in Ward v. Johnson, 13 Mass. 148, the original suit was brought against one partner upon a partnership contract, and judgment obtained against him; and afterwards assumpsit was brought against both partners, and each of them pleaded the former judg-

ment in bar; and the court held it a good bar. It is observable, that in Sheehy v. Mandeville the court did not rely upon the fact, that the other partner did not join in the plea of the former judgment. In point of fact, he had been discharged as an insolvent debtor, and no farther proceedings seem to have been had against him. In Robertson v. Smith, 18 Johns. 459, the supreme court of New York held, that a joint judgment against one or more partners on a partnership contract was a bar to another action against other partners not sued; and held the case of Sheehy v. Mandeville not to be sound law. In Lechmere v. Fletcher, 1 Cromp. & M. 623, although the case turned upon some special considerations, the opinion was clearly indicated by Mr. Justice Bayley, in delivering the opinion of the court, that unless a contract was both joint and several, a judgment obtained against both would bar a judgment suit on the same contract against either of them alone; and e converso, a judgment against one of the joint contractors would be a bar of a subsequent trial against both. And he relied upon Higgens' Case, 6 Coke, 44, as fully bearing out these positions, as by implication, it certainly does.

It was in this state of the authorities that I was called upon to review and consider their force and bearing in U. S. v. Cushman [Case No. 14,908]. The conclusion to which I there arrived was, that where the contract was both joint and several, a judgment against both was no bar to a several action against each of them; and a several judgment against each was no bar to a joint judgment against both. The ground in both cases was the same; that as the parties had expressly made the contract several and joint, the merger of either in a judgment would not be a merger of the other. Since that decision, the question has arisen in England, and been directly decided by the court of exchequer in the case of King v. Hoar (Dec., 1844) 8 Jur. 1127. There the contract was a joint simple contract; a judgment had been obtained against one of the co-contractors, and then another action was brought against the other co-contractor, who pleaded the former against the other co-contractor; and the question, upon a demurrer, was whether a judgment recovered against one of two joint contractors, without alleging execution or satisfaction, was a bar to an action against the other. The court held that it was. Mr. Baron Parke, in delivering the opinion of the court, reviewed all the leading authorities, and pronounced what appears to me to be a very sound and satisfactory judgment. It proceeds directly upon the ground, that when once judgment is given upon any demand, it passes in rem judicatam, and it cannot, upon the established principles of law, be sued for in another action. If the demand be founded on a joint contract, it is certainly merged and barred in the judgment as to the first contractor sued; and if so merged and barred, it would seem equally barred as to the other, since no joint suit can be maintained thereon; and it would seem to follow, that the contract being an entirety, and merged or extinguished by the judgment as to one, might be gone as to the other by operation of law. If the latter were such alone, he might, even as a matter of pleading, insist, that the contract was joint, and, therefore, both contractors ought to be joined. If sued jointly, there could be no judgment obtained against the parties jointly, because the contract as to one would be gone by the merger; and the suit must be good and maintainable as to all the defendants, or not at all. On this occasion, the learned baron referred to the case of Sheehy v. Mandeville, 6 Cranch [10 U. S.] 253, and expressing a great respect for the judgment pronounced by Mr. Chief Justice Marshall, said he was not satisfied with the reasoning thereof. I must confess, that for years I have entertained great doubts, as to the propriety of the same decision; and have thought the distinction taken as long ago as in Higgens' Case, 6 Coke, 44, 46, between joint contracts and joint and several contracts, to be a sound one. If, however, the present case were precisely identical with that of Sheehy v. Mandeville, I should deem my judicial opinion bound by it, and should follow it without question. But there is this distinction between the two cases, that there the bar was not set up by the judgment debtor, who was sued in the second suit; here he does set it up and rely upon it; and the identity of the contract and demand in both is admitted by the parties. The United States sue for the same debt against both parties, assuming the debt to have been originally and equally due from them as a joint contract. Now, I confess myself to be unable to perceive, how Trafton can be sued again upon a contract or debt, which has passed in rem judicatam; and if he cannot be sued again, the present suit is not maintainable, since, unless a joint judgment can be rendered thereon as upon a subsisting joint contract, the very foundation, on which the suit rests, is gone. It may be said, that Bright was neither a party to the former suit, nor a surety, and that the joint contract here sued on, is not the same joint contract sued on in the former suit. In one sense, that may be true; but then, as to Trafton, it is precisely one and the same identical debt—and that debt is certainly merged in the judgment against him. If merged as to him, it seems (as has been already suggested) very difficult to see how it can remain against Bright. The case Ex parte Rowlandson, 3 P. Wms. 405, which seems to have been overlooked in all the cases before cited, contains a doctrine strongly corroborative of what has just been stated. Lord Chancellor Talbot there said, "At law, when A. and B. are bound jointly and severally to J. S., if J. S. sues A. and B. severally, he cannot sue them

jointly; and on the contrary if he sues them jointly, he cannot sue them severally, but the one may be pleaded in abatement of the other." My judgment upon the whole, upon this point, is, that the present case is not governed by the decision in Sheehy v. Mandeville; and therefore, being at liberty to follow the dictates of my own opinion, I am prepared to hold the former judgment a bar to the present suit.

But supposing the former judgment not to be a bar, it appears to me, that, upon the facts of the case, the present action is not maintainable. It is to be taken into consideration, that there is not the slightest evidence in the case of any joint and express promise of Trafton and Bright to pay the money sued for to the government. The promise, if any arises, is by mere implication of law. In the first place, there is no privity whatsoever, between the government and Bright. He was a mere assistant of the postmaster, and received the money for him, and deposited it with his consent in their joint names. Bright never undertook with the government for the receipt or safe custody of their money. His contract was merely with Trafton, as his principal. Trafton had the sole control, and management, and right of disposal of all the monies received and deposited; and Bright was bound to obey his orders as to the disposal of them. In the next place, the argument for the United States must necessarily assume, that the monies daily received as and for postage, belonged specifically to the United States, and that the postmaster was bound to keep it specifically and distinctly separated from all his own money, and to deposit it in the name of the United States, or in the name of the proper public officer thereof. Now there is no evidence in the case, which establishes any such matter of regulation on the part of the post office department, or contemplates its existence. Indeed, the practice in the post offices is, I conjecture, from convenience, if not necessity, almost universally the other way. The postmaster does not deem the daily sums received by them as postage in coin and bank bills to belong to the government, as their specific coin and bank bills; but they treat them as sums to be debited to the postmaster, and carried to the general credit of the government as matters of account, precisely as agents, and consignees, and commission merchants are accustomed to charge themselves with the sums received by them for their principals in the course of sales made or demands collected by them. If a postmaster were, in the course of his employment, to receive by mistake base coin, or forged bank bills, or if, after having received genuine coin, or genuine bank bills, they were to be lost or destroyed without any negligence on his part, I do not understand, that he would be exonerated from responsibility therefor, unless, indeed, the money should, by the orders of the government, be required to be kept specifically, and apart from all other money, and in a particular place, or deposited in the name of the government in a particular bank. Neither do I understand it to be a wrongful conversion of the monies of the government, for a postmaster to deposit the monies, received by him for postage, in his own name in a bank, unless the government should, by some regulation, prohibit it, and require the same to be deposited in its own name. There is nothing in the present record, which leads to any such conclusion. And no act of congress has been brought to the notice of the court, which imposes any such regulation. In former times, I believe, it was a general practice among the collectors of the customs, to make deposits of the public monies in their own names; but of late years, that practice has been in a great measure put an end to, by regulations and orders from the treasury department. I entirely concur in the opinion of the district judge, that by the deposit of the monies in a bank or banks, in the name of the defendants, they made these monies their own. But if made their own by such deposit, it must be because it was a lawful act; for if it was an unlawful act, or conversion of the property of the United States; then the monies did not become their own; but remained the monies of the United States, as Bright must be presumed to have known all the facts. My difficulty is, how to come to the conclusion, that if the deposit was a lawful one, any joint contract with the government can be inferred from the mere fact, that the deposit was made in their joint names. It may here have been made, and for aught, that appears, was, in fact, made by the orders and direction of Trafton, for his own personal convenience, and the more ready disbursement of the monies for purposes either of his own private convenience, or connected with the duties of his office. I am unable, therefore, to concur in the instruction of the learned judge, that the deposit of the monies in the joint names of the defendants, made them personally and jointly answerable in the action.

In the next place, there is a most important fact stated in the case, "That the amount paid out of the said post office between the 1st day of April, 1837, and the 30th day of June, 1839, (between which periods the balance due to the government must have accrued), in quarterly balances, and for clerk hire, and other incidental expenses of the office, far exceeded the amount deposited in the banks to the credit of Trafton and Bright during that time. But there was more deposited in the said banks during that time than accrued to the government." Now, upon this uncontradicted statement the government cannot be entitled to recover the monies, which were so de-

posited, as monies belonging to the United States, unless it is shown by the government, that the monies have been misapplied to other purposes than such payments and expenses as above stated; for Trafton had a perfect right to apply those monies to reimburse himself for such payments and expenses, or to treat them as his own when he had paid or advanced an equivalent amount for the government. As to the monies received and not deposited, the case finds this important fact also, that "it was proved, that Trafton had the general oversight, superintendence, and control of the office, and free access to, and disposition of the money collected therein." He, therefore, must, in the absence of all contrary proof, be presumed to have had the sole possession, custody, and disposition of all the monies not so deposited. Bright was merely his assistant, and the receipt of the monies by him as such assistant, was a receipt thereof for Trafton, and not jointly for himself and Trafton. In general, sub-agents, acting ex contractu, are responsible only to the immediate agents who employ them, and not to the principal, for there is no privity between them. See Story, Ag. §§ 203, 205, note, §§ 217a, 387. And there is no necessary exception to this rule in the case of public officers, although under particular circumstances an exception may arise. But what I proceed upon, is, that there is no proof in the case, that Bright ever received or appropriated to the joint use of himself and Trafton any of the monies not deposited; and it is quite consistent with the whole evidence in the case, that there never was any such receipt or appropriation on their joint account. It appears to me, therefore, that the charge of the court puts the case to the jury upon this point, as if there were evidence before the jury competent in point of law to enable it to infer, that there was such a receipt or appropriation of the monies upon joint account. The defendants also asked the court to instruct the jury "that if they were satisfied that the said Trafton used the money so collected in the post office on his own account, so that not enough was left to pay the plaintiff's (the United States), the said Bright would not be answerable." Now I confess myself to be under some embarrassment as to the true nature and interpretation of this instruction. If it meant, that, if Trafton had used the money so collected on his own account, and that Bright had not received or appropriated any part of the deficit on joint account, then Bright was not answerable in the action, then it appears to me, that it ought to have been given. But if it meant, that Bright would not be liable for any part of the deficit, even if he had received or appropriated it on joint account, then it might be a question of more difficulty, and perhaps, stated in so abstract a form without reference to the other facts in the case, it might have been properly referred; which interpretation the learned judge gave it, does not appear.

Upon the whole, my opinion is, that the judgment ought to be reversed; first, because, the former judgment was a bar to the present suit; and secondly, because, upon the admitted facts of the case, the charge of the court is not maintainable, in point of law, in the abstract form in which it is given.

TRAIN (LOWELL NAT. BANK v.). See Case No. 8,571.

TRAIN (WESTON v.). See Case No. 17,456.

Case No. 14,136.

TRAINER et al. v. The SUPERIOR.

[Gilp. 514.] [1]

District Court, E. D. Pennsylvania. Nov. Term, 1834.

SEAMEN—WAGES—WHO ARE SEAMEN—MUSICIANS—ADMIRALTY JURISDICTION.

1. To justify a person employed on board a vessel in suing in the admiralty for his wages, the services rendered must contribute to the preservation of the vessel, or of those employed in her navigation.

[Cited in The D. C. Salisbury, Case No. 3,694; Packard v. The Louisa, Id. 10,652; Gurney v. Crockett, Id. 5,874; The Sultana, Id. 13,602.]

[Cited in Holt v. Cummings, 102 Pa. St. 216.]

2. Musicians on board of a vessel, who are hired and employed as such, cannot enforce the payment of their wages by a suit in rem in the admiralty.

[Cited in Thackarey v. The Farmer of Salem, Case No. 13,852.]

This was a claim by the libellants [William Trainer and James Crawshaw] for wages, under circumstances somewhat peculiar. The vessel was originally built for a canal boat, but was now employed as a museum, for the exhibition of various articles for public amusement at the places to which she went, along the shores of the bays and rivers in the United States. The libellants were shipped at Philadelphia, on the 15th December, 1833, at twenty-five dollars a month, as musicians to play for the attraction and amusement of the audience or spectators, who should attend the exhibition, which was made on board of the boat at the wharf or shore of the places where they stopped. The contract of the libellants was, that they were to receive their pay for their "performances as musicians on board the canal museum boat." This boat or floating museum left Philadelphia soon after the libellants were shipped, passed down the Delaware, went through the canal to the Chesapeake, to Chesapeake village, Elkton, Annapolis, thence to Norfolk, and thence to various places in North Carolina; making exhibitions, and remaining at each place as long as any advantage

[1] [Reported by Henry D. Gilpin, Esq.]

was found in doing so. The boat was navigated, sometimes by the use of sails, sometimes by her oars, and through the canals she was drawn by horses. The libellants proved that they occasionally assisted in rowing the boat, with other services on board of her, in passing from place to place, and they claimed their wages generally as mariners. The question was, in order to give jurisdiction to the court, whether this was a maritime contract; whether the services rendered by the libellants were maritime.

For the libellants it was alleged that their labour was necessary for the navigation of the boat; that their services as musicians were required only at the stopping places; that, in the mean time, they rendered all the services of mariners; that there were not hands enough on board to carry the boat from place to place without their assistance; that the boat had sails and two masts; that they assisted in rowing and in attending the sails under and by the orders of the master of the boat; that there was but one man on board, and a boy except the musicians; and that a woman was there as cook.

On the other hand, proof was given that the libellants were hired as musicians; that their contract was for that service, and no other; that when the contract was made with one of them, it was mentioned that the musicians, generally, would sometimes assist in working on board, and he said he should have no objection. The master was to navigate the boat, and had one man to assist him, and afterwards added a man for that service. On former voyages, the boat had been managed with this force, on the Chesapeake Bay, when blowing hard. It was admitted that the musicians worked sometimes, but it was as they pleased, and no right was claimed of them for such services. When tired they stopped at their own pleasure, and went below to read. They frequently refused to work when requested. They always denied any right to call upon them to work, and appealed to their written contract, which was "for their performances as musicians on board the canal museum boat." Once, when it was blowing hard in the bay, they were asked to come up and assist, but refused, saying that they were sea sick.

The case was argued by Grinnell, for libellants, but the court stopped the counsel for the respondent.

HOPKINSON, District Judge. It is incumbent on the libellants to show that this was a maritime contract, or that the services performed by them were maritime. The courts, from the convenience of the jurisdiction in such cases, have gone a great way in considering services on board of a vessel to be maritime, although, strictly speaking, the persons were not mariners, nor employed in the navigation of the vessel. Their cooks, carpenters, stewards, and even surgeons have been allowed to sue in the admiralty as mariners, or as persons rendering maritime services under a maritime contract. The broadest principle, however, that has yet been recognized is, that the services rendered must be necessary, or, at least, contribute to the preservation of the vessel, or of those whose labour and skill are employed to navigate her. Thus a carpenter is required for the preservation and repair of the ship, in case of accident; the cook and steward to feed the crew; the surgeon to attend to their health and minister to the sick. This, certainly, is opening a ground sufficiently extensive for every case that, with any reason or under any pretence, can be considered as a case of maritime service. But to obtain a jurisdiction over the claim of these libellants, we must go much beyond that limit. The contract was expressly for services having nothing to do with the navigation or preservation of the boat or her crew, and, in truth, were required only at times when the boat was at rest, and employed as a place for the exhibition of curiosities. They did sometimes work, but at their own will and pleasure. They took up an oar when tired of the fiddle bow, and handled a sail as a change from their music books.

The libel must be dismissed, and, if wages are due to the libellants, they may be recovered in another place.

Decree. That the libel be dismissed with costs.

Case No. 14,137.

The TRANSIT.

[3 Ben. 192.] [1]

District Court, S. D. New York. April, 1869.

COLLISION—AT SEA—SCHOONER AND PILOT BOAT—FREE WIND—VESSEL LYING TO.

1. Where a schooner, heading south southwest with the wind northwest, saw a pilot boat about a mile and a half off and about two points on her port bow, and the pilot boat, which was lying to, under a reefed mainsail and a jib with one bonnet out, and with her helm lashed to starboard, was heading about north, and making about a mile an hour, luffing up so as to cause her sails to shake and then falling off, and the schooner kept on without changing her course, although this luffing up and falling off of the pilot boat was seen several times, until the pilot boat, when about eighty yards off, took another luff across the bows of the schooner, which then, but too late, starboarded her helm, *held*, that, under the twelfth article of the act of April 29, 1864 (13 Stat. 60), it was the duty of the schooner to keep out of the way of the pilot boat, because the latter, though having the wind on her port side, was close hauled.

2. The schooner was in fault in not sooner changing her course.

3. The pilot boat was bound, under article 18, to keep her course, but she kept no course at all. It was her duty, when the schooner was seen ap-

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

proaching, to have unlashed her helm and kept steady on a course.

4. The damages must be apportioned between the two vessels.

[Cited in The Haverton, 31 Fed. 567.]

In admiralty.

Beebe, Dean & Donohue, for libellants.
Benedict & Benedict, for claimants.

BLATCHFORD, District Judge. This libel is filed by the owners of the pilot boat A. T. Stewart, to recover the sum of $4,969.20 for the damage caused to that vessel by a collision that occurred between her and the schooner Transit, on the morning of the 22d of May, 1866, about sunrise, in the Atlantic Ocean, some twenty miles east of Cape May lightship. The Transit was on a voyage from New York to Chesapeake Bay, and was on her course down the coast, heading south southwest, the wind being northwest, and two points abaft her beam on her starboard side, and blowing so much that, just before the collision, she had to take in her top sails. The pilot boat was heading about north, with a reef in her mainsail, her foresail furled and one bonnet out of her jib, and her helm lashed to the starboard. She was, therefore, closehauled, within about four points of the wind and with the wind on her port side. She had been in that condition all the preceding night, and was making headway at the rate of not over one knot an hour. It appears, by the testimony of the second mate of the Transit, that he and the master of the Transit saw the pilot boat at the distance of about a mile and a half off, about two points on the port bow of the Transit; that he noticed, as the two vessels approached each other, that the pilot boat was luffing up and then keeping off, her luffing up being to such an extent as to cause her sails to shake, and her falling off being to the extent of two points, and that, when she fell off and went ahead, her course would be for the port quarter of the Transit, and when she luffed up she would shoot across the bows of the Transit, and that this luffing up and falling off by the pilot boat was repeated several times, and noticed from the Transit, while the two vessels were so approaching each other. During all this time, notwithstanding this wild manœuvring on the part of the pilot boat, no change was made in the course of the Transit. She might easily have put her helm to starboard and gone under the stern of the pilot boat, but she persisted in trying to go to the windward of the pilot boat and across her bows. Finally, when the two vessels were about eighty yards apart, the pilot boat took another luff sharp across the bows of the Transit, and then, but too late, the helm of the Transit was put to the starboard and she tried to go to the leeward of the pilot boat, but failed to clear her, and struck her on her starboard bow, about eight feet from her stem, breaking her foremast into three pieces, and causing other damage. Under article 12 of the act of April 29, 1864 (13 Stat. 60), it was the duty of the Transit, because she had the wind free, although she had it on the starboard side, to keep out of the way of the pilot boat, because the latter, although she had the wind on the port side, was closehauled. The Transit was clearly in fault in not starboarding her helm sooner, in view of the movements of the pilot boat, which were plainly to be seen and were seen from the Transit. But I think the pilot boat was also in fault. It was her duty, by article 18, to keep her course, in order to allow the Transit to keep out of the way. But she kept no course whatever. She was making headway at the rate of about a knot an hour, and, when she saw the Transit approaching, her helm should have been unlashed and she should have been kept steady on a fixed course, and not have been suffered to luff and fall off. It was reckless in her to keep her helm lashed, when she saw the Transit thus approaching, and it was equally reckless in the Transit to try and cross the bows of the pilot boat, under the circumstances. The damages, when ascertained, on a reference, must be divided. The question of costs is reserved, till the coming in of the report.

[For hearing on exceptions to commissioner's report, see Case No. 14,138.]

Case No. 14,138.

The TRANSIT.

[4 Ben. 138.] [1]

District Court, S. D. New York. May, 1870.

COLLISION — PILOT BOAT — DEMURRAGE — PERMANENT DETERIORATION — EXCEPTIONS.

1. Where the owners of a pilot boat, injured in a collision and repaired, were held entitled to recover the damages, *held*, that the pilots were not bound to hire a fruiter or a fishing smack, for the purpose of carrying on their business, while their vessel was being repaired.

[Cited in The James Farrell, 36 Fed. 501.]

2. In the absence of a market for the chartering of pilot boats, it was proper to resort to the judgment of persons acquainted with the piloting business, as to the value of the time of the vessel, based upon the employment she was in, its character and constancy, and its then recent results.

3. Such value must include only the value of the use of the boat, as a vessel, without pilots or crew or stores.

[Cited in The Emilie, Case No. 4,451; Johanssen v. The Elvina, 4 Fed. 575.]

4. Objections to the admission of evidence before a commissioner cannot be raised by exception to his report.

[Cited in The Beaver, Case No. 1,200.]

5. Where exception is taken to the method adopted by a commissioner in ascertaining the damages, either the report or the exception should show what such method was, or the exception will be unavailing.

6. Damages for permanent deterioration will be allowed, where they are clearly proved.

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

[This was a libel to recover damages caused by a collision between the A. T. Stewart and the Transit. The court decreed the damages to be divided, with a reference to ascertain the amount. Case No. 14,137. The cause is now heard on exceptions to the commissioner's report.]

W. R. Beebe, for libelants.
R. D. Benedict, for claimants.

BLATCHFORD, District Judge. In this case, the commissioner has reported, as items of the damages sustained by the libellants in the collision between their vessel, (the pilot boat A. T. Stewart,) and the claimants' vessel, demurrage for 25 days, at $60 per day, amounting to $1,500, and permanent damage or deterioration, $500. The demurrage is presumed to be for the detention of the pilot boat while she was being repaired, although the report does not so state; nor does the report state from what time to what time the demurrage is calculated, or whether the 25 days includes any period before the pilot boat reached New York, her home port, after the disaster. Any ambiguity in this respect must be taken most strongly against the party excepting to anything in respect of the item, as it was his duty to have caused the report to be made unambiguous.

The claimants have filed five exceptions to the report: (1) Because the commissioner allowed the $500 for permanent damage or deterioration, whereas he should have allowed nothing; (2) because he adopted an erroneous method of ascertaining the damages occasioned by the "loss of time" of the pilot boat; (3) because he allowed $60 a day, as damages for such "loss of time," whereas he should not have allowed over $20 a day; (4) because he admitted improper evidence on the question of such damages, under objection from the claimants; (5) because he allowed damages for 25 days' detention contrary to the evidence.

The second exception is overruled. It does not appear, by the report, what method of ascertaining the damages occasioned by the "loss of time" of the pilot-boat, the commissioner adopted. Nor does the exception state what method it refers to, or what method the claimants suppose was adopted, or what method they insist ought to have been adopted, or wherein any method that was adopted was erroneous. The exception, in order to be of avail, must be pointed to some definite and certain statement, in the report, as to the method referred to. It cannot be left for the court to infer it, from an examination of the evidence, in connection with the simple item in the report—"demurrage, 25 days, at $60 per day, $1,500." It was open to the claimants to have moved the court to make the report definite and certain, in this respect, before excepting to it.

The fourth exception must be overruled. Objections to the admission of evidence before the commissioner cannot be raised by exception to his report. The E. C. Scranton [Case No. 4,272].

As to the first exception, the item of $500 for "permanent damage or deterioration" must, I think, be allowed. Williams, who built the pilot-boat, and who also repaired her, fixes her permanent deterioration at that amount, at least. She was only five months old, and the commissioner appears to have adopted the lowest sum testified to by any witness. The weight of the evidence is decidedly with the allowance of the item.

As to the third exception, it is pointed at the per diem allowed for demurrage, namely, $60 per day, and not at the number of days allowed for. I think, on the evidence, that the allowance of $60 per day was not excessive. The only evidence as to the rate of charter of a pilot boat, was as to a rate of over $80 a day for fifteen days. The $60 allowed would seem, on the evidence, not to have included anything for the worth of the time of the pilots during the detention of the vessel, though it is impossible to tell, from the report, what it includes, as the report simply calls it "demurrage." It ought to include only the value of the use of the boat as a vessel—what, without pilots, or crew, or stores being furnished with her, she could have been chartered for to others, to use as a pilot boat. On the evidence and the report, I do not think the $60 a day is too much. The proof as to what fruiters or fishing smacks could have been hired for, is away from the case. The libellants were not bound to hire a fruiter or a fishing smack. The question is, what their pilot boat was worth, for her time. In the absence of a market for the chartering of pilot boats, the only other resort proper to be had, is to the judgment of persons acquainted with the piloting business, as to the value of the time of the vessel, based upon the employment she was in, its character and constancy, and its then recent results in the way of earnings. The Cayuga [Case No. 2,535]. Such evidence was given on the part of the libellants, and no counter-evidence was given on the part of the claimants.

As to the fifth exception, I am unable to ascertain, from either the report or the evidence, how the twenty-five days are computed, and the case is referred back on this exception, with leave to either party to put in further evidence, if desired, as to the number of days that ought to be allowed for, as detention. I find in the evidence, that the vessel arrived at New York, after the collision, on the 25th of May, but I do not find when her repairs were completed.

Case No. 14,139.

The TRANSIT.

[4 Ben. 567.] [1]

District Court, S. D. New York. Feb., 1871.

MARITIME LIEN — SUPPLIES — CREDIT OF VESSEL.

Coal was furnished by B. to a steamboat, on the procurement of her master. B. billed the coal to the vessel and owners. The vessel was owned within the state of New York. She was under charter to a person residing out of that state, but this fact was not known to B. till after the coal was furnished. No circumstances existed, to the knowledge or belief of B., showing a necessity for a credit to the vessel. *Held*, that the credit was not given to the vessel, and that there was no lien upon her for the coal.

This was a libel by Albert R. Bass, to recover the value of a quantity of coal, furnished by him to the Transit, a steamboat owned in New York, but chartered to a person residing out of that state.

W. R. Beebe, for libellant.

W. J. Haskett, for claimant.

BLATCHFORD, District Judge. In this case, the libel must be dismissed, with costs. The credit was not given to the vessel. No circumstances existed, to the knowledge or belief of the furnisher of the supplies, showing any necessity for a credit to the vessel. The furnisher had no information, until after the supplies were furnished, that the vessel was under charter to a person residing out of the state of New York. The fact that, in this case, the libellant billed the coal to the vessel and owners, makes no difference, nor does it make any difference that the master had to do with procuring the coal. There may be, in both cases, a good claim against the owners of the vessel, her charterer, and her master, in personam, but there is no lien on the vessel, which can be enforced in admiralty. The difficulty is, that credit was not, in fact, given to the vessel.

TRANSPORT, The (QUINN v.). See Case No. 11,516.

Case No. 14,140.

Ex parte TRAPHAGEN.

In re ELY.

[1 N. Y. Leg. Obs. 98.]

District Court, S. D. New York. Nov., 1842.

BANKRUPTCY — DISCHARGE — WHO MAY OPPOSE — PERSONS IN INTEREST.

Where a claim is contingent and unliquidated, so as not to be capable of being proved as a debt, it is sufficient to entitle the creditor to look to the disposition of the estate of the bankrupt, and places such creditor amongst "other persons in interest" besides creditors (who have proved their debts) authorized by the fourth section of the bankrupt act [of 1841 (5 Stat. 443)] to show cause against the discharge of the bankrupt.

This was a case on exceptions to objections filed to the discharge of the bankrupt [John Ely], and was submitted on the papers and briefs of the respective counsel.

E. H. Ely, for bankrupt.

Benedict & Belknap, for creditor.

BETTS, District Judge. Mrs. Traphagen filed objections to the discharge of the bankrupt. Exceptions were taken to these objections, on the ground that Mrs. Traphagen was not a creditor, and therefore not a competent party to interpose an opposition to his discharge. The objections and exceptions were referred to Commissioner Radcliff, and from his report of proofs it appears that the bankrupt, on the 9th of March, 1835, executed a bond and mortgage to Mrs. Traphagen, to secure the payment of $2,500. That on the 1st of May, 1836, Mrs. Traphagen assigned that bond and mortgage to a Mr. Simpson, as a collateral security for a note of hand of $200, and also for the payment of rent and taxes on a house leased her by Simpson. On the 14th of May, 1836, Simpson assigned his interest in the bond and mortgage to Jacob Crane. In 1841 a suit was brought on the bond in the name of Mrs. Traphagen, but at the cost and under the direction of Crane, and judgment was rendered thereon against the bankrupt for $1,400, debt and costs. Crane's claim against Mrs. Traphagen was then about $1,000, independent of a bill of costs of $70 in a suit of Simpson against him, and the residue of the judgment belonged to her. Crane also paid the costs on the judgment $127.27, and if these two bills of costs were deducted from the judgment there would stand due to her, on its face, somewhere about $200. On the 12th of April, 1841, Mrs. Traphagen, under a creditors' bill in chancery prosecuted against her by Messrs. Graham, and in obedience to an order in that suit, executed an assignment of all her estate and effects to a receiver, but the receiver never actually took possession of anything under the assignment, and the creditors' bill is in contestation between her and the complainants therein. Mrs. Traphagen is still indebted to Mr. Crane, to the full of his claims.

The counsel for the bankrupt contends that the assignment made to Simpson was to become absolute on her failing to make the payments stipulated, and that her default in that respect vested the entire interest in the bond and mortgage in him and Crane, as his assignee. This would not be the construction of those conveyances. The bond and mortgage are not dealt with as a purchase, nor does Simpson acquit Mrs. Traphagen of any part of her original indebtedness in consideration of holding the bond and mortgage. He brought his action and recovered judgment against her for the full amount of his demand, which is inconsistent with the idea that he took the bond and mortgage as absolute property. But, however strong and positive the terms of assignment might be, if the whole transac-

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

tion denoted that it was made for the purpose of securing a debt or liability, and not as a sale, chancery would control the authority of the assignee, and compel him to deal with it merely as a security. 2 Story, Eq. Jur. p. 287, §§ 1018, 1019. The evidence, however, shows that this was so regarded by the parties, and that Mr. Crane only claimed out of the securities the amount of Mrs. Traphagen's indebtedness to him. The assignment to the receiver cannot divest her interest in this claim, the property being merely deposited in the custody of the court of chancery, until the rights of the parties are definitely settled. No decree having yet been rendered as to the right, and the receiver not having disposed of this interest by sale or sequestration in any form, and no decision being yet had on the merits of the creditors' bill, there must be considered to be a right to the debt yet subsisting in Mrs. Traphagen. She would, accordingly, as judgment creditor, having a legal and equitable title to part of the amount of the judgment still appertaining to her, possess the capacity to appear and oppose the discharge of the bankrupt.

It may, however, be further observed that if the operation of the assignments of Simpson and Crane, and that to the receiver, should transfer the indebtedness of the bankrupt from her to those assignees, so that she could no longer appear against him upon that debt as a creditor, yet clearly her interest in the fund is not extinguished; and if the money could be made from the bankrupt, there would, after satisfying the demand of Mr. Crane, be a surplus which would be applied to her advantage on the creditors' bill, or, if that demand is displaced, be restored through an order of the court of chancery by the receiver to her. This interest in the matter, though so far contingent and unliquidated as not to be capable of being proved as a debt, would well entitle her to look to the disposition of the estate of the bankrupt, and would place her at least amongst "other persons in interest" besides creditors (who have proved their debts) authorized by the fourth section of the bankrupt act to show cause against the discharge of the bankrupt.

I think, accordingly, the exceptions to the objections must be overruled.

Case No. 14,141.

In re TRASK.

[7 Ben. 60.] [1]

District Court, S. D. New York. Nov., 1873.

WITNESS—PRIVILEGE—REFUSAL TO TESTIFY AS TO PRIVATE BUSINESS.

It is not sufficient reason for refusing to testify before a register, as to the actual consideration paid for claims by a witness, who is assignee of certain debts due from the bankrupt to some of his creditors, that the consideration did not come from the bankrupt or his estate, and that to answer would be revealing the private business of the witness unnecessarily, and possibly to his prejudice, in another suit then pending.

[In the matter of Benjamin J. H. Trask, a bankrupt.]

The register certified to the court, upon request, the question, whether a witness should not be compelled to give the actual consideration paid for certain claims against the bankrupt, which he held by assignment. The witness objected to answering, because the consideration did not come from the bankrupt or his estate, and to testify would be to reveal his own private business affairs, and he further alleged that a suit against him was then pending elsewhere, in which the counsel for the creditors making the inquiry was counsel against him, and he believed the information now sought was to be for the counsel's benefit in that suit, and not for the interest of the creditors of the bankrupt in this proceeding. The counsel for the creditors alleged suspicion of fraudulent concealment of the property of the bankrupt, as the reason for seeking the testimony of the witness. The register ruled that the witness must answer the questions, and certified the questions and refusals to the court.

BLATCHFORD, District Judge. No sufficient reason is presented why the witness should not answer the questions above set forth which he declined to answer.

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

Case No. 14,142.

TRASK et al. v. The DIDO.

[1 Haz. Reg. Pa. 9.]

District Court, E. D. Pennsylvania. Dec. 21, 1827.

PRACTICE IN ADMIRALTY—PRIVATE SETTLEMENT—COSTS.

[When a private settlement is consummated of a suit for seamen's wages, without the knowledge of libellant's attorney, the respondent is not relieved from his liability to pay the costs of the suit, for which the said attorney had become security.]

Attachment for wages, Friday 21st December, 1827.

Mr. Troubat, for libellants, stated this to be a claim for wages up to the time when they were discharged from the Dido, which had been wrecked in the Delaware, the libellants having remained on board five days after she grounded, and assisted in saving the spars, rigging and part of the cargo, and further stated that the respondent [John Welsh] refused to pay wages for the said five days, which the libellants insisted on as just and proper. The respondent claimed a postponement until the evening, Friday, in order to prepare himself to resist the claim, which he intimated to contest as far as re-

spected the rights of wages, even to the time when the ship grounded.

THE COURT allowed the postponement.

On Friday the 28th, this claim was again urged on the part of the libellants, when the respondent appeared, and informed the court that he had since settled with the libellants, and taken their receipts in full. It appeared, too, that the libellants had shipped and gone to sea.

Mr. Troubat then stated that he had not seen the libellants since the last Friday, that they had settled without his knowledge or privity, and had not paid the costs of suit for which he himself had become surety. He therefore concluded by moving for a decree against Mr. Welsh, the respondent, for costs, contending that his alleged settlement with the libellants would not protect him from payment of the usual costs.

PETERS, District Judge, granted the motion, and decreed the respondent to pay the costs.

Case No. 14,143.

TRASK et al. v. DUVAL.

[4 Wash. C. C. 97.] [1]

Circuit Court, D. Pennsylvania. April Term, 1821.

PLEADING AT LAW—VARIANCE WITH PROOF—ABSOLUTE PROMISE—CONDITIONAL PROMISE.

The declaration stated that the defendant promised "as soon as the plaintiffs should have delivered certain goods to Coucier and adjusted the freight, he the defendant would pay," &c. The promise proved was, "that as soon as the goods were delivered to Coucier, and the freight was adjusted, he the defendant would pay, &c. if Coucier did not." The variance is fatal; the promise laid being absolute, and that proved, conditional.

This was an action brought by the owners of the ship Ann, to recover the freight due for certain goods belonging to Mr. Coucier, and delivered upon the promise of the defendant to pay the freight. The declaration stated the promise as follows: "That as soon as the plaintiffs should have delivered the goods to Coucier, and adjusted with him the amount of the freight, he the defendant would pay it." The evidence of the plaintiffs' agent, to whom the promise was made, was, that "as soon as the plaintiffs should have delivered the goods to Coucier and adjusted with him the amount of the freight, he the defendant would pay it, if Coucier did not." The counsel for the defendant moved to nonsuit the plaintiffs on account of the variance between the promise alleged and that proved.

Mr. Sergeant, for plaintiffs.

C. J. Ingersoll, for defendant.

WASHINGTON, Circuit Justice. The promise stated in the declaration is absolute, to pay when the goods should be delivered, and the amount of freight ascertained. The promise proved is conditional, to pay the freight, if Coucier, the owner of the goods, did not. In the one case, there was no necessity to demand payment of Coucier before the defendant's liability would arise; in the other, such demand was essential. The variance therefore is substantial, and the plaintiffs ought to be called. Nonsuit.

On motion the nonsuit was set aside, and leave given to amend, on paying costs.

[See Case No. 14,144.]

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

Case No. 14,144.

TRASK et al. v. DUVALL.

[4 Wash. C. C. 181.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1821.

CONTRACTS — CONDITIONAL PROMISE — PROOF OF CONDITIONS PERFORMED—AFFREIGHTMENT—ASSIGNEE OF BILL OF LADING.

1. Promise by A, "that, upon the freight of certain goods shipped to B being adjusted with him by the plaintiffs, the owners of the vessel, he, A, would pay the freight, if B did not." Quære, if it is incumbent on the plaintiffs to prove that they gave due notice to A, of the adjustment of the freight with B, and his non-payment thereof.

[Cited in Bashford v. Shaw, 4 Ohio St. 267. Cited in brief in Wead v. Marsh, 14 Vt. 82.]

2. The assignee of the bill of lading, who received the goods, is bound to pay the freight; unless the assignor is bound by charter party to pay it, or unless the assignee had bound himself by an express agreement to pay it as surety for the assignor.

This was an action to recover the freight due for the carriage of a parcel of hides, from Maldonado to Philadelphia, shipped at that port, and deliverable as per bills of lading to A. Curcier of Philadelphia, or to his assigns, he or they paying freight. The declaration contains two sets of counts. One upon a special promise made by the defendant to Mr. Von Lengerke, the agent of the plaintiffs [Trask & Davis], in the following terms: "As soon as you shall have adjusted the freight with A. Curcier, I will pay you, if he does not." 2. Upon the carriage and delivery of the said hides to the defendant, the assignee of the bills of lading. The promise stated in the first set of counts, was proved precisely as laid by the deposition of Mr. Von Lengerke; who also proved, that the freight had been adjusted with Mr. Curcier, and amounted to the sum of $1823.32, which has never been paid by him. On the part of the defendant, it was proved, by two witnesses, that they were present at two conversations between Von Lengerke and the defendant, the one prior to, and the other after the delivery of the hides, at both of which, the defendant refused to become se-

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curity for Curcier, or to guaranty the payment of the freight, and utterly denied his having ever entered into such engagement. The deposition of Von Lengerke states, that after having delivered to Curcier about one half of the hides, the plaintiffs became suspicious of his ability to pay the freight, and refused to make any further delivery, unless he would give security for the whole freight. That he proposed the defendant, and after many interviews between the agent and the defendant, at all of which the former repeats the determination of the plaintiffs not to deliver the residue of the cargo without security, the promise, as laid in the declaration, was made. That the residue of the cargo, which was fully sufficient to pay the whole freight, was delivered to a young man, in the service of the defendant, and that the defendant advertised the hides for sale. It was further proved by the defendant's books, and other evidence, that more than three-fourths of the cargo was shipped to foreign ports, or sold in this city by the defendant. In support of the second set of counts, the plaintiffs gave in evidence the bills of lading, with the following indorsement on each, "Deliver the within contents, to Duvall." Signed, A. Curcier. One of the assignments is without date; the other is dated the 24th of May, 1819. Also a list of securities assigned by Curcier to the defendant, (amongst which are the bills of lading above mentioned,) as security for a large sum of money due by the former to the latter, with a receipt at the bottom, signed by Curcier, and bearing date the 10th of January 1821, stating that the said securities had been that day restored to Curcier. The vessel arrived at this port the latter end of April, or early in May, 1819.

[See Case No. 14,143.]

J. Sergeant, for plaintiffs, contended, that as assignee of the bills of lading, although that fact was unknown to the plaintiffs, or their agent, at the time and the delivery of a part of the cargo to the defendant, he was bound to pay the whole freight; and that in fact there was sufficient evidence to show that the part delivered to Curcier was to him as agent of the defendant, who, by the assignment of the bills of lading, was the real owner of the whole. He cited, Lawes, Chart. Part. 303, 304; Cock v. Taylor, 13 East, 399; 2 Holt, Shipp. 163, 164; Bell v. Kymer, 1 Marsh. C. P. 146.

2. That the express promise was fully proved, as well as the adjustment of the freight with Curcier, and that he had not paid the same.

C. J. Ingersoll, for defendant, denied that the assignee of the bill of lading was bound to pay the freight. 2 Holt, Shipp. 133; Lawes, Chart. Part. 142; Wilson v. Kymer, 1 Maule & S. 157; Artaza v. Smallpiece, 1 Esp. 23; The Theresa Bonita, 4 C. Rob. Adm. [Am. Ed. 194] 236; Moorson v. Kymer, 2 Maule & S. 303, 2 Holt, Shipp. 167.

2. Upon the other count, he insisted, that there was no consideration for the promise. That the promise, if proved, was merely collateral; and that it was incumbent on the plaintiff to prove, not only that he had used due diligence to obtain payment of the freight from Curcier, but that he had given due notice of the adjustment and nonpayment of the freight by Curcier. [Russell v. Clarke] 7 Cranch [11 U. S.] 70; Philips v. Astling, 2 Taunt. 206; 19 Johns. 69.

WASHINGTON, Circuit Justice (charging jury). In support of the counts upon the special promise, it was necessary for the plaintiff to satisfy the jury (1) that the promise was made as it is laid in those counts; (2) that the freight was adjusted with Curcier; and (3) that Curcier has not paid it. The promise is proved by Von Lengerke, in the very words in which the declaration states it. In opposition to this proof, two witnesses have been examined, who speak of two conversations which occurred between Von Lengerke and the defendant, at which they were present, when the defendant refused to become responsible for the freight, and denied that he ever had come under any such engagement. If you are satisfied that these interviews, or either of them, refer to that which Von Lengerke speaks of when the promise was made, then the witnesses are in opposition to each other, and it will be for you to weigh the testimony, and to decide upon the credit of the respective witnesses. As to the last conversation spoken of by the defendant's witnesses, it is quite clear that that took place after the hides were delivered, and, consequently, it is in no respect inconsistent with the evidence of the plaintiffs' witness. It appears, from the deposition of Von Lengerke, that he called more than twice upon the defendant, in order to know if he would become security for the freight; and it is possible, at least, that the first conversation, alluded to by the defendant's witnesses, was not the same spoken of by Von Lengerke, when the promise was made. He says, that when the promise was made, he and the defendant were standing at the door; whereas the defendant's witnesses speak of a conversation which took place in the store in their presence. There are two circumstances which seem strongly to corroborate the evidence of Von Lengerke. The first is, that he had constantly assured the defendant that the residue of the cargo would not be delivered unless satisfactory security for the freight should be given; and the fact is, that it was delivered, and to the defendant. The other is, that it now appears that the defendant was in reality the owner of the hides, as assignee of the bills of lading; and it was therefore his interest to remove the scruples of the owners upon the subject of the freight, by agreeing to become security of Curcier, in order to obtain possession of the property. To prove that the amount of freight was ad-

justed between Von Lengerke and Curcier, and the same had not been paid, the evidence of Von Lengerke is relied upon, who states that he fixed the amount of freight with Curcier at $1823.32; that it was fixed by the bills of lading, and Curcier acknowledges that statement to be right. That Curcier, though repeatedly called upon for the freight, has not paid it, and that it still remains due.

It has, nevertheless, been objected by the defendant's counsel, that the plaintiffs are not entitled to a verdict upon these counts:

1. Because there was no consideration for the defendant's undertaking. The consideration was the delivery of the hides to Curcier, which was abundantly sufficient.

2. That due notice of the adjustment of the freight with Curcier, and non-payment by him, was not given to the defendant. That notice in a case like the present, where there is no evidence of the insolvency of the person for whom the guarantee was given, and more particularly, where the property was delivered to the surety, exceeding in value the amount of the sum stipulated to be paid, was necessary to be given, is by no means to be admitted, although it is not necessary in this case to decide that point. One thing is clear, and that is, that the cases cited by the defendant's counsel do not prove that notice in this case was necessary. Russell v. Clarke proceeded upon the ground, that the letter of credit was unlimited; and it was held, therefore, that the person to be charged should be duly notified of the advances made upon the faith of his guarantee, that he might put a stop to further advances if he thought proper. In the case from 2 Taunt. 206, the defendant, by his promise, placed himself in the shoes of the drawer of the bill of exchange, and was therefore entitled to notice of the dishonour of the bill. In the case from 19 Johns. 69, the guarantee was, that the note was good, and was collectable after due process of law. The defendant did not undertake that the note would, to any indefinite period, be good and collectable; and the court very correctly decided, that forbearing to sue for seventeen months, did not prove that it was not collectable after due process of law. If the jury should be of opinion that the evidence establishes the promise as laid, that the freight was adjusted with Curcier, and that he has not paid it, the plaintiffs are entitled to a verdict; and the jury need not trouble themselves with the counts upon the implied promise.

But as they may not be satisfied that all these points have been proved, it will be proper for the court to express an opinion upon the question which has been so earnestly debated at the bar; viz. whether the defendant was, under all the circumstances of this case, and independent of an express promise, bound to pay this freight? The facts on which the question rests are, that, previous to the delivery of any part of the hides, the bills of lading were indorsed by Curcier to the defendant. We infer this, not altogether from the date of the assignment affixed to one of the bills of lading, but from the terms of the assignments indorsed upon both of the bills, "to deliver the contents of the within bill to Duvall." One half of the hides was delivered to the defendant; and although the delivery of the other half was made to Curcier, it may nevertheless be fairly concluded that he received them as the agent of the defendant, who was constituted the owner of the whole by the assignment of the bills of lading; who advertised them for sale, and who, it is proved by his books and by the clerks, did, in fact, sell more than three-fourths of the whole quantity. We should have required no decided case upon the point to satisfy us that the assignee of a bill of lading, for a valuable consideration, who receives the property mentioned in it, is liable to the owner of the ship for the freight. This arises from the terms of the bill of lading, which contains an engagement by the master with the shipper, to deliver the goods to the consignee, or to his assigns, he or they paying freight for the same. The consignee is not bound to receive them; but if he does receive them, he makes himself a party to the contract, and the law raises a promise on his part to perform the condition upon which alone the delivery was to be made to him. The engagement of his assignee is precisely the same. The delivery is to be to him, he paying freight. The consignee is no more an original party to the contract than his assignee. Both are named, and the terms upon which the delivery is to be made to either, are precisely the same. If, however, a doubt could exist as to the liability of the assignee, it is removed by the case of Cock v. Taylor, 13 East, 399. In the case of Moorson v. Kymer, the assignee of the bill of lading was held not to be liable upon an implied promise to pay the freight, because, by the charter party, the charterer had bound himself to pay it by an express agreement under seal.

This case is somewhat different from Cock v. Taylor, or any of the cases which were cited at the bar. Here there was an express promise by the defendant, if you should think that fact proved, to pay the freight, not absolutely as owner, but conditionally if Curcier did not, and as surety for him; and, in fact, the delivery was to the defendant, not as the assignee of the bills of lading, but as the agent and surety of Curcier, the supposed owner. I am not prepared to say that, under such circumstances, the law would raise an implied promise by the defendant to pay the freight. I am induced to think it would not, and shall for the present so decide, in order that the defendant may have an opportunity, if it should become necessary, of bringing the point again before the court, upon a motion for a new trial, when it may be more deliberately argued at the bar, and considered by the court. The ground of our pres-

ent opinion is, that where there is an express promise to pay freight, there is no ground for implying one; particularly where the two kinds of promise are altogether different from each other, as in this case, and where the delivery was made upon the faith of the express promise. If, however, the express promise is proved to your satisfaction, your attention need not be drawn to the other point; unless you should be of opinion that the conditions upon which the defendant agreed to guaranty the freight were not complied with by the plaintiffs.

Verdict for plaintiffs for the whole freight and interest.

Case No. 14,145.

TRASK v. MAGUIRE.

[2 Dill. 183, note.] [1]

Circuit Court, E. D. Missouri. 1873.

RAILROAD COMPANIES—STATE AID—FORECLOSURE SALE—EXEMPTION FROM TAXATION—ENJOINING COLLECTION.

[1. Where a railroad company which was exempt by charter from taxation had been aided by the state, and was purchased by the state under foreclosure proceedings, and afterwards sold to other parties, who organized a corporation of the same name, *held*, that the right to exemption from taxation did not pass to the latter company, the state having, in the meantime, adopted a new constitution, which prohibited it from thereafter exempting private property from taxation.]

[Cited in Atlantic & P. R. Co. v. Cleino, Case No. 631; Bailey v. Atlantic & P. R. Co., Id. 732.]

[2. The fact that a tax on part of the property of a railroad company is admittedly illegal does not authorize the court to enjoin the collection thereof, where enforcement is sought by a sale of personal property only.]

[Cited in Power v. Kindschi, 58 Wis. 542, 17 N. W. 691.]

This was a bill by Spencer Trask against Constantine Maguire, the St. Louis and Iron Mountain Railroad Company, Thomas Allen, and others, for an injunction to restrain the state collector from selling certain engines, etc., seized to satisfy the tax. The court refused to interfere, and an appeal, which is yet pending, was taken to the supreme court of the United States. No opinion was written, but the following memorandum of the conclusions of the court was made at the time.

Mr. Rombauer, for collector.

Dryden & Dryden, for Iron Mountain Railroad Co.

[Before DILLON, Circuit Judge, and TREAT and KREKEL, District Judges.]

DILLON, Circuit Judge. Conceding, but not deciding, that under the act of March 3, 1851 [Laws Mo. 1851, p. 479], incorporating the St. Louis & Iron Mountain Railroad Company, as amended, February 17, 1853 [Laws 1853, p. 296], whereby the "stock" (defined by the statute to include the property of the road) "of the said company was declared to be exempt from all state and county taxes" constituted in favor of the said company an irrepealable legislative contract, exempting its property from taxation by the state, or under its authority, we are of opinion that this exemption or immunity from taxation is not possessed by the present corporation known by the same name.

The state aided the original corporation by the issue of its bonds, reserving a statutory lien or mortgage upon "the road of the company and every part and section thereof, and its appurtenances." See Murdock v. Woodson [Case No. 9,442]. This lien or mortgage did not embrace the franchise of the road to be a corporation, and the mortgage was not foreclosed until after the present constitution of Missouri went into operation. The lien of the state was foreclosed under the act of February 19, 1866, and the state itself became the purchaser in September, 1866, and subsequently (November 8, 1866) sold the road to McKay and others, who afterwards (January, 1867) sold the same to Allen. Pursuant to the act of March 20, 1866, authorizing purchasers of railroads from the state to incorporate, Allen and others incorporated themselves and adopted the name of the old company. Allen assigned all his right to the new corporation, and the title of Allen and the new company was confirmed by the act of March 17, 1868 [Laws 1868, p. 95]. State v. McKay, 43 Mo. 599.

Although the state, by legislative act passed after the adoption of the present constitution, undertook to declare that whoever purchased said roads from the state should have all the rights, franchises, and immunities, which were had and enjoyed by the companies for whose default the road was sold (Act Feb. 19, 1866, § 9, known as the "Sell-Out Act"); yet we are of opinion that the state could acquire by its purchase at the foreclosure sale no greater rights and interests than such as were mortgaged to it by the companies, and this did not embrace the corporate franchises of the roads except so far as were necessary and reasonable in order that the purchaser might enjoy the benefits and advantages of his purchase. The right to hold the property exempt from taxation by the state was not acquired by its purchase at the sale, and thus such right did not pass to the state to be held by it without merger or extinguishment. And under the new constitution of the state, which went into effect July 4, 1865, the state was expressly prohibited from thereafter exempting private property from taxation. Const. art. 11, § 16.

Although the tax upon a portion of the property of the company is admitted to be illegal, yet as it is sought to be enforced only by a sale of personal property there is no ground for equitable interference, at the instance of the company, by injunction. Dows

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

v. Chicago, 11 Wall. [78 U. S.] 108; Susquehanna Bank v. Board of Sup'rs of Broome Co., 25 N. Y. 312; State v. Dulle (Sup. Ct. Mo.; 1871) 48 Mo. 282; Dill. Mun. Corp. § 738, and cases cited; Union Pac. R. Co. v. Lincoln Co. [Case No. 14,379].

[See 18 Wall. (85 U. S.) 391.]

Case No. 14,146.

TRASK v. PELLETIER et al.

[N. Y. Times, August 9, 1853.]

District Court, S. D. New York. 1853.

ADMIRALTY PROCESS—WARRANT AND ATTACHMENT—GARNISHMENT.

[Courts of admiralty have authority to issue a warrant of arrest, with a clause that, if defendants cannot be found, their goods and chattels, and also their credits and effects in the hands of parties named, shall be attached; but such process is defective, and must be set aside after service, as to any garnishees who are not named in the writ.]

[This was a libel by Benjamin J. H. Trask against Antonia Pelletier and Henry J. Overmann.]

Motion to set aside a warrant of arrest. The libel prayed for a warrant of arrest, with a clause therein that, if the defendants be not found, then their goods and chattels, and also their credits and effects in the hands of the American Exchange Bank, be attached. The marshal's return was: "Defendants not found. I have attached the funds of the defendant Overmann in the American Exchange Bank and the Broadway Bank." Counsel for the defendant Overmann now moved to set aside the process, on the grounds—(1) That a court of admiralty has no right to issue a warrant of arrest with an attachment clause; (2) that the process does not name any garnisees; (3) that the service of the attachment was irregular, inasmuch as the defendant resides in the city, and might have been found.

Before INGERSOLL, District Judge.

Held, that a court of admiralty was authorized to issue the process, but that the process was defective in not containing the names of the garnishees. Held, also, that the affidavit read is not sufficient to contradict the marshal's return that the defendant could not be found. Ordered, therefore, that the attachment be set aside, so far as regards the Broadway Bank, which was not named in the libel, and the process be amended by inserting therein the name of the American Exchange Bank, the garnishee mentioned in the libel, with leave to the defendant to renew the motion on further affidavits.

TRAVELERS' INS. CO. (UNTHANK v.). See Case No. 16,795.

TRAVELERS' INS. CO. (WHITEHOUSE v.). See Case No. 17,566.

Case No. 14,147.

The TRAVELLER.

[6 Ben. 280;[1] 16 Int. Rev. Rec. 198.]

District Court, E. D. New York. Dec. 5, 1872.

PILOTS—HALF PILOTAGE—NAVIGATING HELL GATE.

Under the Hell Gate pilotage act of the state of New York (Sess. Laws 1847, p. 85, and 1865, p. 197), when a vessel in the port of New York has entered upon a voyage, which will carry her through Hell Gate, she is bound to employ the first pilot who tenders his services to pilot her through Hell Gate, or, in case of refusal, to pay him half pilotage; and she is none the less liable to pay the half pilotage, if, for any reason, the voyage through Hell Gate is not completed.

[Cited in The Kalmar, Case No. 7,601; The Glaramara, 10 Fed. 680.]

In admiralty.

Wilcox & Hobbs, for libellant.

R. H. Huntley, for claimant.

BENEDICT, District Judge. This is an action by Francis Bell, a Hell Gate pilot, to recover half pilotage, brought before the court upon an exception to the libel that it states no cause of action.

The libel avers that the schooner Traveller was a licensed vessel, of over 100 tons burden, drawing nine feet of water, and about to navigate the channel known as Hell Gate, and bound from Hoboken to Portland, Maine; that the libellant discovered the schooner in the North river, at a point off Hoboken, and thereupon put off to and hailed her, and duly offered his services to pilot her through said Hell Gate channel, and was refused, and that libellant was the first pilot so offering to pilot the schooner.

To this averment the objection is made, that it fails to show that the vessel, at the time of the alleged tender, was navigating the channel of Hell Gate, whereas, it is claimed, only vessels so navigating are made liable to pay half pilotage by the seventh section of the Hell Gate pilot act.

I have had occasion heretofore to consider the effect of the language of the section referred to, in the case of an inward bound vessel boarded to the east of the Gate. The present is the case of a vessel on the west side of the Gate, and, as said in the case referred to (Horton v. Smith [Case No. 6,709]) so here it is to be said that the words, "navigating the channel of Hell Gate," if considered as intended to limit the effect of the section to vessels which come within this description, do not require the pilot's tender of service to be made while the vessel is in the act of passing the Gate. By reference to other parts of the statute, it appears that vessels, inward bound while as far to east as Execution Rock, are intended to be included within the description of vessels referred to in the seventh section; and, by reference to the subsequent part of the eleventh section,

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

it will be seen that vessels outward bound through the sound, not yet having reached the sound, are also intended to be included within its scope.

The latter part of the seventh section provides for the liability of vessels under 100 tons burden, and then describes them as "vessels navigating the said channel to and from the port of New York." It is clearly to be seen, however, that the object of the section is to provide for two classes of vessels, namely, those over and those under 100 tons burden, without any design of providing for more than two classes of cases, and distinguishing them by the size of the vessel. The words "navigating the said channel of Hell Gate," used in the first part of the section, must, therefore, be considered as intended, at least, to cover any vessel coming within the description repeated in the latter part of the section, that is to say, navigating to or from the port of New York, and from any part of the port, when on a passage through the Gate.

This construction of the act derives support from the consideration, that a more narrow construction of the statute would have the effect to prevent pilots from tendering their services to vessels until just as they enter the Gate, a result contrary to the general design of pilot laws, which in most cases aim to secure the services of a pilot at the earliest possible time; while, understood as I have here indicated, the tendency of the statute will be to furnish a class of vessels, often short handed, with an extra man competent to give efficient aid in the navigation of a crowded harbor, where great care and watchfulness is required, and this without any additional charge upon the vessel, as the amount of pilotage depends on the tonnage and not on the distance to west of the Gate.

My conclusion, therefore, is, that it is no objection to a recovery in this case, that the libel avers that the vessel was, at the time of the tender, in the North river, off Hoboken, that being a point within the port of New York.

Nor do I attach any weight to the suggestion, that the libel omits to aver that the vessel ever in fact passed through the Gate.

Half pilotage becomes due by reason of a tender made to a vessel at the time supposed by the law to require a pilot. If the vessel at the time of the tender was on a voyage bound through the Gate, a subsequent change of voyage, or failure for any reason to attempt to pass the Gate, can have no effect upon the right of the pilot, which became fixed by the refusal of his services.

But I am of the opinion, that in order to recover in this action, it must appear on the face of the libel that, at the time of the tender and refusal, the vessel was engaged in the prosecution of a voyage which would carry her through the Gate. Until such a voyage has begun, the master is not called on to meet the question of the employment of a pilot; but, when he has entered upon such a voyage, and is bound from the port of New York through the Gate, then the law presumes him to be in need of a pilot, and compels him to take the first pilot who offers or pay him half pilotage. The present libel is defective, therefore, in that it fails to show that at the time of the tender the vessel had entered upon her voyage. If the vessel in question, when boarded, was lying at anchor off Hoboken, preparatory to commencing a voyage, and the statement in the libel is consistent with such a state of facts, in my opinion, the libellant cannot recover. The libel must be reformed in this particular before a recovery can be had.

The exception is, therefore, allowed, with liberty to amend the libel, the costs of the claimant upon the present hearing to abide the event.

TRAVELERS' INS. CO. (BAYLESS v.). See Case No. 1,138.

TRAVELERS' INS. CO. (McCARTHY v.). See Case No. 8,682.

Case No. 14,148.

TRAVERS v. APPLER.

[2 Cranch, C. C. 234.] [1]

Circuit Court, District of Columbia. April Term, 1821.

EVIDENCE—TALLIES—NOTICE TO PRODUCE.

A baker, using tallies with his customers for the purpose of keeping an account of the number of loaves of bread delivered, may call upon the defendant to produce his counterpart, if a proper foundation be laid for such a call, by affidavit of the plaintiff that such tallies were kept with the defendant, and that he had a counterpart; and if the defendant will not produce it, and will not make oath that he had it not, the plaintiff may produce his counterpart in evidence to the jury.

Assumpsit for bread sold and delivered. The plaintiff had given notice to the defendant to produce the counterpart of his tallies.

THE COURT was of opinion that if the plaintiff would lay a foundation for his call upon the defendant, by affidavit that such tallies were kept by the defendant, and if the defendant would not produce them, nor make oath that he had not such tallies, the plaintiff might produce them in evidence.

TRAVERS (BANK OF DANVILLE v.). See Case No. 886.

Case No. 14,149.

TRAVERS v. BELL et al.

[2 Cranch, C. C. 160.] [1]

Circuit Court, District of Columbia. Dec. Term, 1818.

DEPOSITION—NOTICE OF TAKING—CERTIFICATE—OMISSION—PROOF.

If the magistrate who takes a deposition under the act of congress omits to state whether notice

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

was given to the defendants, it is competent for the party who offers it in evidence to prove that the other party lived more than 100 miles from the place of caption, and had no agent or attorney within 100 miles, etc.

The plaintiff offered to read in evidence, at the trial, a deposition taken under the act of congress.

Mr. Jones, for defendants, objected that the judge who took the deposition had not stated whether any notice had been given to the defendants, although he had stated that the place of caption was more than 100 miles from the place of trial.

THE COURT (THRUSTON, Circuit Judge, absent), overruled the objection, and said that the plaintiff might prove that the defendants lived more than 100 miles from the place of caption, and had no agent or attorney within 100 miles, etc.

Case No. 14,150.

TRAVERS v. DYER.

[16 Blatchf. 178.] [1]

Circuit Court, D. Vermont. April 15, 1879.

ACCOUNT—NECESSARY AVERMENTS—ACCOUNTING—BALANCE DUE.

1. On a general demurrer to a count in an action of account, the question is, whether the count is sufficient in substance, without regard to form, but sufficient must be alleged in some form to constitute a cause of action.

2. In the action of account there are two judgments—one, that the defendant account with the plaintiff; the other, after the accounting, for the balance found due.

3. The declaration must show the privity by which the plaintiff is entitled to an account, and, also, proceedings under or pursuant to it, raising a balance in his favor, to be recovered.

4. Counts *held* bad, for want of such averments.

[This was an action by William R. Travers against John M. Dyer. Heard on demurrer.]

Edward J. Phelps and Noble & Smith, for plaintiff.

E. R. Hard and Stewart & Eldridge, for defendant.

WHEELER, District Judge. This is an action of account, in six counts. The first count is against the defendant as bailiff to the plaintiff of six thousand cords of wood; the second, as receiver of moneys of the plaintiff, to merchandise with, for their common profit; the third, as receiver of the moneys of the plaintiff as partner in hotel keeping; the fourth, as bailiff of the plaintiff's moiety of land held by them as tenants in common; the fifth, as bailiff of a moiety of other premises; the sixth, as bailiff of a moiety of other premises. The defendant has demurred generally to each of all the counts but the fourth, and tendered several issues upon that to the country. The cause has now been heard upon the demurrer. As the demurrer is general only, the questions are, whether the several counts demurred to are sufficient in substance, without regard to form; still, sufficient must be alleged, in some form, to constitute a cause of action. A general demurrer supplies nothing toward that.

The action of account is somewhat peculiar in its proceedings, but the peculiarities will supply no lack of statement of a cause of action, as those in the action of book account, in the states of Vermont and Connecticut, do, to some extent. The action is for an account by the defendant to the plaintiff for money of the plaintiff received by the defendant by some privity of authority or appointment, or of estate, or of law; and for the recovery of the balance due. There are two judgments in the action—one, that the defendant do account with the plaintiff; the other, after the accounting, for the balance found due. The plaintiff, in his declaration, must set forth enough to entitle him to both judgments. The privity, by which he is entitled to an account, and proceedings under or pursuant to it, raising a balance in his favor to be recovered, must both appear. If a plaintiff has not these he is not entitled to maintain the action. If he has them but does not set them forth, he does not show himself entitled to maintain it. These are simple and just rules, by which these counts must be tested.

The first count sets forth the relation between the parties clearly enough, by alleging that the defendant, from one day to another named, was bailiff to the plaintiff, and during that time had the care and administration of the wood to be sold and made profit of, for the plaintiff; but that is as far as it goes, except that it states that the defendant has not rendered any account, though requested. There is no allegation that any wood has been sold or profit made, nor anything to show there has been anything of the plaintiff's in the hands of the defendant, but the wood, and that may all be there yet, ready for the plaintiff. This count seems to be clearly bad.

The second count sets forth, that the defendant was the receiver of moneys of the plaintiff from a day to a day named, however and by whatever contract accruing for the common use, benefit and profit of both, and during that time received ten thousand dollars, to merchandise with and make profits for both, to render a reasonable account thereof, but states no relation or privity under which the plaintiff so became the receiver, nor that he did merchandise with the money received, or did make any profit. In Co. Litt. 172, it is said, that, "if two joynt merchants occupy their stocke, goods and merchandizes in common, to their common profit, one of them naming himselfe a merchant shall have an account against the other naming him a merchant," &c.; but here that is

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

not done, nor is it alleged that they were in fact joint merchants or partners. This is quite important and material. The defendant has a right to traverse the relation alleged, and the extent of the right of the plaintiff claimed, and to have the issues tried and settled before judgment to account, and those matters should be alleged in, at least, traversable form, that the defendant may avail himself of the right, which is not here done. Wood v. Merrow, 25 Vt. 340. This count is defective in substance.

The third count, after alleging the partnership of the plaintiff and defendant, charges that they received ten thousand dollars over and above the defendant's just share, but not that the defendant himself had received any more than his share. This may be a mere slip of the pen, in alleging that they received, intending to allege that he received; but, if so, there is nothing to correct it by. As the count stands, there is a plain lack of any allegation that the defendant is in arrear. This count is not good.

The fifth count alleges, that the defendant was bailiff to the plaintiff of an "undivided moiety or share," of certain lands. It is of importance that the right of the plaintiff should be definitely ascertained by the admissions of the pleadings or by trial. It must be definitely alleged before it can be definitely tried. If this allegation had stopped with "moiety" it would have been clear and exact. But the pleader added "or share," so the allegation stands that the defendant was bailiff of an undivided moiety or an undivided share, without stating of which; and, if of the latter, the share may be a moiety, or one of any number of parts into which an estate can be divided. This becomes too indefinite. The words, or share, cannot be rejected as surplusage, for they may be the ones on which reliance is placed, and as definite an allegation as could be made. This count is also bad.

In the sixth count, it is set up that the plaintiff was seized in fee of an undivided moiety of the premises, with the defendant, which the defendant held, as tenants in common. Perhaps the pleader intended to allege that the plaintiff and defendant were tenants in common, each owning a moiety, but if so he has not done so. As the count stands, they are alleged to be tenants in common of a moiety, which does not at all show what the share of either is. And it does not show who owns the other moiety, whether it is either of them or some other person or persons. If some other person, the action could not be maintained at common law, for it only lies between two and not more. Perhaps, however, the statute of the state would remove that difficulty. Gen. St. Vt. p. 344, § 17. But, however that may be, the defect of not stating the shares of these parties remains, and is not of form merely. This count is, likewise, not good.

The action of account proceeds upon the ground that the defendant rightfully had the money for some purpose. The defendant cannot, therefore, be in default until he has refused or neglected to account and deliver, after being called upon by demand or an equivalent. In each of these counts the allegation in that direction is very faint. It is merely, that, although requested, and particularly on a certain day, he refused to account. This may be sufficient, although it hardly seems to be. The counts are judged of upon the other grounds mentioned and not upon this.

The demurrer is sustained, and the first, second, third, fifth and sixth counts are adjudged insufficient.

Case No. 14,151.

TRAVERS v. HIGHT.

[2 Cranch, C. C. 41.] [1]

Circuit Court, District of Columbia. June Term, 1812.

AFFIDAVIT—TO HOLD TO BAIL—SUFFICIENCY.

The account was headed "George W. Hight to Esias Travers, Dr., for articles furnished by his direction, and he to be answerable for the payment thereof." Among other items was a charge for rations for the officers, &c., (George W. Hight being a recruiting officer.) An affidavit of the plaintiff was indorsed on the paper, "that the within account is just and true as stated."

Mr. Jones, for plaintiff.

Mr. Caldwell, for defendant.

THE COURT (FITZHUGH, Circuit Judge, absent,) said it was not sufficient. It was neither a positive affidavit that the defendant was indebted to the plaintiff in a certain sum; nor was it such an affidavit as made the account evidence per se, under the act of assembly of Maryland, 1729 (chapter 20, § 9), according to the rule in the case of Smith v. Watson [Case No. 13,124], at June term, 1806, in Washington.

Case No. 14,152.

TRAVERS v. RAMSAY.

[3 Cranch, C. C. 354.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

FRAUDULENT CONVEYANCE—POSSESSION—BILL OF SALE.

1. If the vendor and vendee of chattels live together in the same house, the possession will be presumed to be and remain in the vendor until the contrary is shown.

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

2. An absolute bill of sale of chattels is void as to creditors if the possession does not accompany and follow the deed.

Replevin [by John Travers against R. T. Ramsay]. Defence under an execution upon a judgment against George Travers, the plaintiff's father; and that the bill of sale from the father was void as to creditors, because the possession remained with the father. The evidence was that the son, the plaintiff, lived in the same house with the father, and that no change of possession took place in consequence of the bill of sale.

R. S. Coxe, for plaintiff.

THE COURT (THRUSTON, Circuit Judge, absent), instructed the jury that if the possession remained with the grantor, the deed was void as to creditors; and that if the title was in the father, the possession should be presumed to be in him also, at the time of the deed, unless the contrary should appear.

Verdict for the defendant.

TRAVERS (UNITED STATES v.). See Case No. 16,537.

Case No. 14,153.

TRAVERSE v. BEALL.

[2 Cranch, C. C. 113.] [1]

Circuit Court, District of Columbia. June Term, 1815.

ARBITRATION — WHEN UMPIRE TO BE CALLED IN.

An umpire is not to be called in until the original arbitrators have differed, and is then only to decide the points on which they differ.

Exceptions to an award.

Mr. Jones, for defendant, objected that the umpire (Collet) decided upon the whole case, and not merely upon the points on which the other two (E. Law and I. D. Barry) differed, and that he was appointed by them, and called in before they had disagreed.

J. Law, contra, cited Kyd, Awards, 53, 138, 156, 159.

THE COURT (nem. con.) was of opinion that the award was bad, because it did not appear that the original arbitrators had differed before they called in the umpire, but that he decided upon the whole case ab initio.

TRAVERSE (STILLE v.). See Case No. 13,444.

TRAVIS (GAINES v.). See Cases Nos. 5,179 and 5,180.

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

Case No. 14,154.

TREADWELL et al. v. BLADEN.

[4 Wash. C. C. 703; [1] 1 Robb, Pat. Cas. 531.]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1827.

WITNESS — COMPETENCY — INTEREST — PATENTS — NOVELTY—ABANDONMENT—MULTIPLICITY OF PATENTS—DISCLAIMER.

1. Action for the infringement of a patent right. To prove that the plaintiff was not the original inventor, the defendant gave in evidence a prior patent to A, for a machine alleged to have been the same in principle with the plaintiff's, and his assignment of the same to the defendant, and offered A as a witness to prove the priority of the invention. A is a competent witness, having no interest in the event of the suit.

2. If the defendant's notice of special matter states that the thing patented was known and used by A, B, C, and others, prior to the plaintiff's discovery, the defendant must prove its use by others than those named.

[Cited in Brooks v. Bicknell, Case No. 1,944.]

3. Proof by a witness that he had seen an article which might have been made by a machine similar to that for which the plaintiff afterwards obtained his patent, or in some other way, is not sufficient to deprive the plaintiff of his claim to be the original inventor; unless the jury should be satisfied from the evidence that the article was made by a machine similar to it in principle.

[Cited in Yearsley v. Brookfield, Case No. 18,131.]

4. What constitutes the form, and what the principle of a machine?

[Cited in Smith v. Pearce, Case No. 13,089.]

5. It is the use, and not the intention, of an inventor to use an improvement, to be found in the plaintiff's machine, that can invalidate the plaintiff's patent under the sixth section of the patent act.

[Cited in Singer v. Walmsley, Case No. 12,900.]

6. To invalidate the plaintiff's patent, it is not sufficient to show that the thing patented was used prior to the plaintiff's application for his patent; but it should be shown that it was prior to his discovery.

[Cited in Whitney v. Emmett, Case No. 17,585.]

7. What amounts to an abandonment of his invention, by an inventor, so as to invalidate his patent.

8. A person cannot have two subsisting valid patents for the same thing at the same time. But if he has obtained a patent, which he afterwards finds to be too broad, by having included in it the discovery of another, he may obtain a second valid patent for such parts of the machine as were discovered by him, and not by another.

[Cited in Shaw v. Cooper, 7 Pet. (32 U. S.) 318.]

9. Quære, whether a disclaimer in the specification annexed to the grand patent of those parts, which were not the invention of the patentee, is sufficient to remove the objection to the patent?

[Cited in Whitney v. Emmett, Case No. 17,585.]

This was an action on the case for an infringement of a patent granted to Edward Treadwell on the 18th of May, 1826, for an improvement in the art of manufacturing biscuit and sugar bread. The schedule describes the whole instrument, viz. the cir-

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

cular knives, dotters, cleavers, the holes and the niches for connecting the cakes and clearing away the loose dough, as in the former patent. But it disclaims the piercers or dotters, as used in the well known dotter used by hand, and declares that the patentee does not claim as his improvement either the circular knives, the dischargers, or clearers, or the use of the knives to cut, the piercers to prick, nor the clearers to discharge the biscuit, these having been long known and occasionally used by many persons. "What he claims is, his improvement in this machine for saving labour are, the contrivance specified for attaching and keeping the biscuit in clusters, particularly the small cuts, niches, or places filed away for attaching the biscuits, and the holes for the passage of the dough through the plate, and the circular connexion of the cluster of seven knives in this new combination to save labour." On the 23d of May, 1826, Edward Treadwell, in consideration of $700, assigned to Elizabeth Watson the patent right, so far as the same applies to the city and county of Philadelphia, and all other towns and villages bordering on the river Delaware from Easton to Newcastle inclusive. The plaintiff gave evidence to prove that the defendant used a machine for making biscuit and sugar bread, with the improvement mentioned in the specification to Treadwell's patent, and claimed by him, and that the improvement was new and useful. He also gave some evidence of the value of the use of this improvement. The defendant having pleaded the general issue, gave notice of special matter of defence, that Edward Treadwell was not the original inventor; but that the improvement claimed by the plaintiff had been in use, prior to the application of Treadwell, by J. Siddons, Peter Christian, and Daniel Poole; and, generally, it had been used before the application of Treadwell. The defendant having given in evidence a patent to Daniel Poole for the machine used by the defendant, dated the 24th of December, 1824, and his assignment of the same for a valuable consideration to the defendant on the 25th of February, 1825, offered Poole as a witness to prove the priority of his invention. An objection to his competency was made, but overruled by the court.

Charles J. Ingersoll, for plaintiffs.
M'Ilvaine & Dallas, for defendant.

WASHINGTON, Circuit Justice. The witness can have no interest in the event of this suit, as the verdict could not be given in evidence should the plaintiffs obtain it, in any action which the defendant might bring against him, for the purchase money, or for damages. What interest he has, is in the question merely, and even that is remote. Whatever objection can be raised can go only to his credit. The witness was asked generally, if he knew that this improvement had been in use by any person prior to the application of Treadwell? This was objected to by the plaintiff's counsel, the notice having designated three persons by name who had so used it.

WASHINGTON, Circuit Justice. This objection was taken in the case of Evans v. Eaton [Case No. 4,559], was overruled by this court; and that decision was approved by the supreme court on a writ of error [3 Wheat. (16 U. S.) 454]. The present objection must meet the same fate. Poole proved that his invention was made about the 1st of January, 1824. That he had seen gingerbread at Boston before the year 1819, connected together; but he knew not by what machine they were made, never having seen any, nor did he know that they were formed by a machine. Christian gave the same evidence as he did at the former trial. Siddons stated, that in July, 1820, he had a machine made with cutters, cleavers and dotters, holes and niches, but he never used it. That he got his first idea of the machine from Edward Treadwell, whose machine was then in operation. The plaintiff then gave evidence to prove that Edward Treadwell invented his machine prior to 1819, and that, in the latter part of that year it was made, and in use in this city. Some contradictory evidence was given as to the use of the plaintiff's improvement, and as to its difference from Christian's machine both in principle and in form.

The following objections were made by the defendant's counsel to the validity of the plaintiff's patent: 1. That the first patent of Treadwell, as well as the evidence in the cause, show that this improvement was known, and in use, before the application for the present patent. 2. That a party cannot have, at the same time, two valid patents for the same thing. The first patent is yet in existence, which invalidates the second. Morris v. Huntington [Case No. 9,831]; 2 Mass. 30. 3. That the alleged improvement of Treadwell upon Christian's invention is not in principle, but in form only; as Christian stated in his evidence that he had provided in his machine for the use of a wire which was to operate as a clearer of the loose cut dough; which, if it had been used, would have produced the same effect as the holes in Treadwell's machine. 4. Treadwell was not the first inventor of the improvement which he has patented. The plaintiff's counsel cited on the first point made by the defendant's counsel, Evans v. Weiss [Case No. 4,572]; Woodcock v. Parker [Id. 17,971]; Goodyear v. Mathews [Id. 5,576]; Morris v. Huntington [supra].

WASHINGTON, Circuit Justice (charging jury). The plaintiffs have laid before you a patent, for the improvements of which they

claim Edward Treadwell to be the original inventor, and have given evidence to prove the improvement to be useful, and that Treadwell was the original inventor of it. If they have succeeded in satisfying you of these facts, they are entitled to a verdict; unless the objections relied upon by the defendant's counsel, or some one of them, should be well founded. As to the fact of original inventions, it must depend upon the evidence, of which you are exclusively the judges. The only evidence relied upon by the defendant to disprove the claim of Treadwell to this discovery, is that given by Poole; who states, that, in the year 1819, he saw ginger cakes in clusters and connected together to the number of six or seven; but he admits that he had no knowledge how they were made, whether with a machine or by hand. The legal ground of this defence is that the improvement claimed and patented by Treadwell, was not originally discovered by him, but had been in use prior to the alleged discovery by him. This improvement, as you perceive by the machine before you, consists in what is termed in the specification, niches, or contrivances for attaching the biscuits in clusters, and the holes for the passage of the surplus dough through the plate. Now if the ginger cakes spoken of by the witness were made by hand, with a cup, or in a way different in principle from that stated in Treadwell's specification, it cannot be legally affirmed that the improvement claimed by the plaintiffs had been in use prior to the alleged discovery of Treadwell. It is for you to say, whether from the appearance of those ginger cakes, you can safely conclude that they were made by an instrument, having the improvement for which this patent was granted? As to the machines discovered by Christian, Poole, and Siddons, they most obviously do not interfere with the improvement of Treadwell. The contrivance to connect the biscuit, and the holes to vent the surplus dough are not in Christian's machine; and those made by Poole and Siddons were not earlier than 1824, about five years posterior to the discovery and use by Treadwell.

The next objection raised against the discovery of Treadwell is, that what he calls an improvement upon Christian's machine, is in form only, and not in principle. What constitutes form, and what principle, is often a nice question to decide; and upon none, are the witnesses who are examined in patent causes, even those who are skilled in the particular art, more apt to disagree. It seems to me that the safest guide to accuracy in making the distinction is, first to ascertain what is the result to be obtained by the discovery; and whatever is essential to that object, independent of the mere form and proportions of the thing used for the purpose, may generally, if not universally, be considered as the principles of the invention. What, for example, is the object of Treadwell's improvement upon Christian's machine? The answer is, to render the operation of that machine more expeditious in the making of biscuit, by uniting the cakes, so that seven of them may be removed from the place where they are, and with the same labour which would be required to remove a single one; and by enabling the operator, with greater facility, to extricate the machine from the loose dough. These results are produced by two contrivances not to be found in Christian's machine, and which constitute the principles of Treadwell's improvement. But it is contended that, as Christian contemplated using wires in his machine, the operation of which would be to clear away the loose dough, the holes in Treadwell's machine differ in form only from the wires before spoken of. The answer to this is, that the wires were never attached to Christian's machine, and were never used with it; and consequently, the objection has no foundation in the sixth section of the patent law.

It is in the third place objected to the validity of Treadwell's patent, that his improvement was known, and in use, prior to his application for a patent; it was used by Watson, and by the defendant for some years prior to May, 1826. If there be any solidity in this argument, the patent law would very nearly become a dead letter; as every inventor uses the machine he invents before he applies for a patent, with a view to satisfying himself whether it answers the purpose for which it was intended. But it is probable that the counsel did not intend to direct their objection to this kind of use; but to a general use of it, for some length of time, by the inventor, or by others.

In this view of the question, it is certainly not without difficulty, and it was felt by this court when the case of Evans v. Weiss [supra], was decided. The difficulty is created by the first section of the act of 1793 [1 Stat. 318], which authorises the issuing of a patent to any citizen of the United States who shall allege himself to be the inventor of any new and useful art, machine, &c. not known or used before the application, &c. To construe those expressions, uninfluenced by other parts of the patent law, to mean the knowledge of, or use by the inventor himself, would, for the reason before mentioned, render the act a felo de se; and even to extend those expressions to the knowledge of a third person, surreptitiously obtained, and his consequent use of the invention, without the consent of the inventors, would be unreasonable and manifestly repugnant to the whole spirit and design of the patent system. But whatever difficulty may arise out of the first section of the act, it is, I think, cleared away by other parts of the act of 1793; particularly by that clause of the sixth section which authorises the defendant to give in

evidence, under the general issue, that the thing patented was not originally discovered by the patentee, but had been in use or described in some public work anterior to the supposed discovery of the patentee. Here we find the expression "supposed discovery" substituted for "application" in the first section, and the word "known," in that section, is altogether omitted in the sixth; and upon the whole, I take the true construction of the act to be, that to invalidate the patent, the thing patented must have been used prior to the alleged discovery, and that it is not sufficient to show, that it was so prior to the application. That was the opinion of this court in the case of Evans v. Weiss [supra], and the same opinion has been held in Goodyear v. Mathews [Case No. 5,576]; Morris v. Huntington [Id. 9,831]; and by Mr. Justice Story, in Goodyear v. Mathews [Id. 5,576]. I admit that great public and private inconvenience may result from this construction, (although not so great as that which the other circumstances would produce,) where an inventor postpones unreasonably the exercise of his privilege of taking out a patent; thus keeping all the world at arm's length, so that no person can, in the mean time, safely construct, or use the thing invented, nor for fourteen years after the issuing of the patent, in case one should be taken out. But this is an inconvenience which it is competent for congress alone to remove. If, before the patent is taken out, the inventor looks on, and sees his invention going into general use without objection on his part; the courts will treat his conduct as equivalent to an abandonment or transfer of his exclusive right to the public. And it is possible that, without such use by others, an unreasonable and causeless, or faulty delay, in taking out his patent, might be justly and upon legal principles, considered as amounting to an abandonment; as to which, however, I avoid giving an opinion in this case, because it is unnecessary. For I hold it to be perfectly clear, that Treadwell is not chargeable with a causeless or faulty delay in securing the exclusive right to what he supposed to be his invention. He made the discovery some time in the year 1819, and during the latter part of that year, he put it into practical use, and on the 10th of January following, he obtained his patent, not only for the improvement secured by the last patent, but for those other parts of the machine of which he alleged, and so far as the evidence has gone to warrant a contrary conclusion, we are bound to say, he supposed himself to be the original inventor. The appearance of Christian's machine, which, from the place where it had for many years been reposing, was brought to the bar of this court upon a former trial between these parties, satisfied the patentee, as it did the court and jury on that occasion, that Treadwell was not the original inventor of the cutters, the dotters, or the cleavers. This was the misfortune of the patentee, as well as of the plaintiff in that cause; but it surely would be very harsh to conclude that it was the fault of Treadwell to include in his patent the invention of another person, so as to invalidate a patent.

Lastly. It is objected that the existence of the patent of January, 1820, at the time the patent of May, 1826, was obtained, invalidated the latter.

I entirely concur in the decisions in the cases cited (Morris v. Huntington [supra], and 2 Mass. 30). The principle there decided is, that a person cannot have two subsisting valid patents at the same time, for the same invention. The question in this case then is, are the two patents to Treadwell for the same invention? I think most clearly that they are not. The first patent was for an improvement in the art of making crackers and sugar biscuit by the combined operation of a cutter, a cleaver, a dotter, and contrivances, (as they are called,) for connecting the cakes, and freeing the board from the loose dough. The second patent is for an improvement on Christian's machine by adding to it the contrivances for connecting the cakes or biscuit, and for relieving the board or machine from the loose dough.

But it is insisted that the first patent, which was for the combined operation of those five parts, was necessarily a patent for all and each of the parts, and consequently for those two for which the last patent was granted. This argument was urged in the case of Evans v. Eaton [Case No. 4,560], and was rejected by this court, and that refutation was approved by the supreme court on a writ of error, so far as it was rested on the general patent law. The difference between that case and this is, that there the court was confined to a private act for the relief of O. Evans, and upon that point, I freely acknowledge that this court was mistaken. These two patents can no more be said to be for the same invention, than the patent to O. Evans for the combined operation of the five instruments for which his patent was issued, and a patent for the hopper boy, had one been granted, could be said to be for the same invention, had the private act been out of the question. But even if these patents were substantially for the same invention, I should strongly incline to the opinion (without meaning, however, to give a positive decision on the point), that the disclaimer of all title under the first patent to the three material parts of the invention for which it was granted, would operate as an estoppel to any remedy which might be prosecuted for a violation of that patent; and if all remedy for a breach of that patent be defeated, can any right under it remain?

If, upon the whole, the jury be satisfied that the defendant has used the improvement for which the plaintiff has a patent,

between the date of the patent and the institution of this suit; that the improvement is useful, and that Treadwell was the original inventor of it, the plaintiffs are entitled to a verdict. The amount of the damages is for the jury to assess. Verdict for $25 damages.

[For another case involving this patent, see Case No. 17,277.]

TREADWELL (CARTER v.). See Case No. 2,480.

Case No. 14,155.

TREADWELL v. CLEAVELAND.

[3 McLean, 283.] [1]

Circuit Court, D. Michigan. Oct. Term, 1843.

PRACTICE IN EQUITY—PROCESS—APPEARANCE—IRREGULAR DECREE—PLEADING—SPECIAL INTERROGATORIES—RULES.

1. The process on the defendant in chancery must be served twenty days before the defendant is bound to appear. And a rule for answer, where the process has not been so served, is irregular.

2. A decree pro confesso, for want of an answer, under such a rule, is also irregular. And if a final decree be entered, in virtue of the above proceedings, the court, on motion, will set the whole aside.

3. Under the 40th rule, the defendant is not bound to answer, unless special interrogatories be put in the bill. Such a bill is clearly demurrable.

In equity.

Baker, Harris & Milliard, for complainants.
Douglass & Walker, for defendants.

OPINION OF THE COURT. This is a motion to set aside the following proceedings for irregularity. The bill of complaint was filed the 11th of July, 1842. On the 1st Monday of September, a rule for answer was taken, and on the first Monday of October following, a decree pro confesso was entered, which, being referred to a master on the 21st of the same month, and the master's report being made on the same day, a final decree was entered by the court. These proceedings were wholly irregular, and must be set aside. By the 12th rule in chancery, on filing the bill, the clerk is required to issue the process of subpœna, returnable into the office on the next rule day, or the next but one, at the election of the plaintiff, "occurring twenty days from the issuing thereof," to the return. As the month of August came in on Monday, the subpœna was necessarily returnable on the first Monday of September. And the 17th rule declares that the appearance day of the defendant shall be the rule day to which the subpœna is made returnable, "provided he has been served with process twenty days before that day," otherwise his appearance day shall be the next rule day when the process is returnable.

The process in this case has not been returned, but it could not have been served so as to make it returnable before the first Monday in October, and the defendant could have been under no default for want of an answer before the first Monday in November. But the decree pro confesso was entered, and also the final decree, in October. On this ground the proceedings must be set aside.

It may not be improper to remark, that independently of the above, the bill in its form is radically defective. By the 40th rule, it is declared, "that a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto." The above bill contains no such interrogatory. And it is very questionable whether the defendant can be in default for not answering a bill which, under the above rule, he is not bound to answer. The bill is clearly demurrable on this ground.

Case No. 14,156.

TREADWELL et al. v. FOX.

[3 App. Com'r Pat. 201.]

Circuit Court, District of Columbia. Sept. 14, 1859.

PATENTS—INVENTION—MECHANICAL EQUIVALENTS.

[1. A result or effect of a process is not patentable; but where a result consists in the greatly improved manufacture, or the development of some new and useful principle, it may become the test of invention, so that invention may be inferred from the existence of such results.]

[2. The production of a machine which, for the first time, achieved the result of making a cylinder of dough (to be used in the manufacture of crackers) with a continuous, seamless pellicle, *held* to be a patentable invention.]

[3. The use of rollers having transverse grooves, for the purpose of making cylinders of rolled dough, is the equivalent of rollers effecting the same purpose by means of longitudinal grooves, notwithstanding that additional machinery is connected with the latter device for the purpose of cutting the dough into the form of crackers after it passes through the rolls.]

Appeal [by F. C. Treadwell, Jr., and Henry McCollum] from the decision of the commissioner of patents refusing to grant them a patent for their invention of improvements in preparing dough for crackers, and awarding priority of invention to Joseph Fox.

MORSELL, Circuit Judge. The specification of claim on the part of Treadwell & McCollum is as follows: "We claim as new, and desire to secure by letters patent of the United States, the above-described improved method of forming skin-covered strips of dough from a sheet of previously smoothed, rolled dough by the use of a pair of matched grooved rollers, constructed and arranged with the grooves separated by portions of the plain surface in which they are cut, the plain surfaces in each roller impinging on each other, and acting, as they roll together with equal surface motion, to gradually press

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

down the skin on each side of the sheet of dough passing between them, so that both skins gradually inclose the strip forming in the groove, and are finally firmly united together, at the sides thereof, by the impingement of the opposite plain surfaces against each other, and the strips separated, substantially as hereinbefore described." Or thus, as to the method, they say: "Our improvement in the method of forming cylindrical strips suitable to be thereafter divided and moulded into crackers consists in a peculiar way of operating upon a sheet of smooth rolled or 'skin-covered' dough, by which we form it into cylindrical strips that are skin-covered, and the skin pressed down and firmly united at the sides of the strips. We effect this by passing the sheet of smoothly and evenly rolled dough between a pair of matched, grooved rollers constructed with portions of the plain surface between each groove," etc. Again, they say: "We do not intend to confine ourselves to any fixed proportion of plain and grooved surface in the rollers we use, but will vary it as circumstances require; soft dough requiring much less pressure than hard, and therefore correspondingly less separation between the grooves. Neither shall we limit ourselves to the use of longitudinally grooved rollers, but will use transversely grooved rollers, if convenience require."

Joseph Fox, in his specification, states: "I do not claim forming a sheet of rolled, skin-covered dough into skin-covered cylindrical strips, by passing the sheet through grooved rollers which have the grooves parallel to the axis of the rollers. Nor do I claim forming a sheet of dough into cylindrical strips by running the sheet through grooved rollers which have the grooves at right angles to the rollers and close together. What I claim as my invention, and desire to secure by letters patent is —First, the passing a sheet of solid, skin-covered dough through rollers which are grooved at right angles to the axis of the rollers. and so constructed and arranged as to bring the two opposite skins of the sheet of dough together, and firmly unite them around the cylindrical strips made by the rollers, substantially as herein described, for the purchase specified." Also: "Thus it is that the cylindrical pieces of dough, E, cut from rolls made by the improved grooved rollers of my machine, require only about half as much labor and time to form them into crackers as is required to form into crackers the pieces, J, cut from strips made by the grooved rollers which were used prior to the first use of the said improved grooved rollers by myself."

The decision of the commissioner rejecting the claim of the appellants is dated 10th January, 1859, immediately following the report of the examiner in these words: "The aforegoing report is confirmed. A patent is allowed to the applicant on his claim, as restricted to the last amendment offered by him (Joseph Fox); and a patent is also granted to Treadwell & McCollum on their specification and claim, having been amended as suggested in the report." That is, the granting of a patent to Fox in the restricted manner which he proposes to accept it in his last amendment, to wit: "The passing of a sheet of rolled skin-covered dough through rollers which are grooved at right angles to the axis of the rollers,"—disclaiming at the same time the use of the longitudinally grooved rollers; and to Treadwell & McCollum, also, a patent on the amendment of the specification by striking out the paragraph immediately preceding the claim, to wit: "Neither shall we limit ourselves to the use of longitudinally grooved rollers, but will use transversely grooved rolls if circumstances require," and amending the claim by inserting the word "longitudinally" between the words "pair of" and "grooves."

The report is long, and such parts will be recited as shall be thought necessary in considering the issue between the parties. It states: "The point at issue between parties to be the use of grooved rollers, having a flat interval between the grooves, in the manufacture of cylindrical strips of skin-covered dough. That is, having been found highly advantageous, in the manufacture of crackers, that the pellicle which forms on the outside of dough, when worked by hand, should be also formed by machinery, each of the parties claim to have accomplished this, at least to a certain extent, by the use of grooved rollers as a part of their machinery." "They each claim that they were the first to use rollers thus constructed in the manufacture of crackers, and a part of the machinery necessary therefor." Again, in the connection of stating what was old in the machinery, and the claims of the parties rejected, as to that, he says: "To make a cylindrical strip of dough, therefore, is not new,—is not an invention of the present day: but it might be new to make it by machinery, and not by hand. On investigating the subject, this was found to be the case," etc. Again: "It appears that no one, before the parties in this case, had succeeded in making these cylinders of dough with a continuous seamless pellicle." Clearly, then, it is the machinery that is new and patentable, as applied to the art of cracker making, and not the broad right to make cylinder strips of "skin-covered dough" by rollers of any form or position of grooves.

It appears, from the testimony submitted in this case, that both the parties, about the same time, began to experiment on the use of grooved rollers in the manufacture of crackers. Samuel Kirkpatrick testifies that he saw rollers with sharp edges between the grooves used by Fox in August, 1852; but they were found not to answer the purpose desired, were taken to a machine shop, where the edges of the grooves were turned

down, and again tried, but not successful. In July, 1853, this witness saw them in successful operation; and in the fall or succeeding winter of that year this mode of making was introduced into his baking establishment. The testimony of Ira Yager, Joseph Field, William Bunnell, Cornelius McCister and others, introduced on the part of Fox, all sustain the testimony of Kirkpatrick in all its material parts, and show, clearly, that Fox commenced his experiments in the latter part of 1852, and brought them to successful issue, so far, at least, as this point under consideration is concerned in 1853.

On the part of Treadwell & McCollum, the testimony of both Shuyler and Birtwhistle shows that they were experimenting with the grooves and rollers for the same purpose in September, 1852, and the continuation of these experiments is proven not only by the other witnesses, Ford, Rockwell, McGray, and Robertson, but by the caveats filed in this office. The testimony shows, therefore, that each party in the case commenced his or their experiments near the same time. There does not appear, in this, that either knew or had any intimation of the doings of the other. Both appear to be practical bakers, and it is alike creditable to both that, seeing the importance of bringing machinery to bear upon and accomplish what had only been previously accomplished by manual labor, they both devoted their time and genius to its accomplishment. But, although both were engaged in the same laudable purpose, and exhibited the same zeal in carrying it out, it does not appear that they both resorted to the same means. Such a thing might, however, have been possible, and if the testimony had shown it to be so, the question of priority would have been one whose decision would have involved much anxiety, from the importance of the case, and the evident approximation of the time in which the parties were engaged in the experiments. At this point we are to look at the means they made use of, or, in other words, the machinery which they severally devised for the accomplishment of their purpose.

At the onset we find Fox using rollers grooved transversely to the axis of the rolls. At first he made these grooves with a sharp cutting edge between them, but he immediately, in the same month,—August, 1852,—found they would not do, and had them sent to the machine shop, where these sharp edges were turned down, and a plain surface made between each groove of the rollers. Although this alteration did not accomplish the purpose, he still seems sanguine of success, and told one of the witnesses he would attain it by having the space between the grooves wider. In the summer of the following year he accomplishes his object, and in the fall or winter succeeding, introduced it, and, it appears, has ever since been using it successfully in his bakery. It is well to note here that, after finding the transversely grooved rollers with cutting edges unsuccessful, he adopted the idea of interposing a flat surface between the grooves, and made no change in the idea until he finally rendered it practically successful. Treadwell, on the contrary, commenced his experiments by making the grooves of his rollers longitudinal, or parallel with the line of the axis; and, somewhat like Fox, he made the intervals between the grooves nearly sharp, or with cutting edge (see his caveat). This latter feature he seems also to have found objectionable, and, abandoning it, interposed a flatter space, or, rather, left a large portion of the periphery of the rollers between the grooves.

Neither Treadwell nor Fox appear at first to have appreciated the importance of having the broad, flat surface between the grooves which they subsequently found necessary. Treadwell & McCollum, the latter having become the partner of Treadwell in the manufacturing of these machines, appear to have adhered to the longitudinal grooves in their rollers until about 1855 or 1856, when they made them, or some of them, with transverse grooves, like those of Fox. It appears, then, that Fox was the first to make the rollers with transverse grooves having a flat surface interposed, and that Treadwell & McCollum were the first to make the rollers with longitudinal grooves and intervening flat spaces; that Fox has adhered without material change to the form which he originally found successful; and that Treadwell & McCollum have adopted both forms, the longitudinal and the transverse with the intervening space, but that they did not make or adopt the latter until long after—two or three years—Fox had reduced his to practical and successful operation. Treadwell & McCollum claim the above-described improved method of forming skin-covered strips from a sheet of previously smoothed, rolled dough by passing it between a pair of rollers arranged and constructed substantially as hereinbefore described, with the grooves separated by portions of the plane surface of the rollers, and in the specification they describe and in the drawings show these grooves to be longitudinal or in a line parallel to the axis of the rollers, and if they had confined themselves to this form it would not have been necessary to declare this interference. But, just before setting forth their claim, and after having given a description of their device, they say: "We do not intend to confine ourselves to any fixed proportion of plane and grooved surfaces in the rollers we use, but will vary it as circumstances require. Neither shall we limit ourselves to the use of longitudinally grooved rollers, but will use transversely grooved rolls if convenience require." This indicates that they consider the two forms of grooves, longitudinal and transverse, as equivalents. If we admit this, then the question is reduced simply to the priority of invention; and we are thrown back to decide it upon very uncertain data but, such as it is, it gives

the advantage to the claim of Fox. He further proceeds:

"But we cannot concede that the two devices are the same, substantially. There are circumstances under which devices of a certain kind, generally considered as equivalents of each other, cease to be so. In all the ordinary mechanical arrangements, a spring is considered as the equivalent of a lever, and properly so where the one can be substituted for the other, without altering materially the other parts of the machine. A common pocket watch is always moved by a mainspring. If a lever could be substituted for it, it would doubtless require other modifications in the general arrangement of the instrument, and, if new, would be entitled to a patent. Now, in the case before us, the patent asked for is not for this or that kind of grooves in a roller, but for an improved cracker machine, one of the essential elements of which improvement is this or that form of rollers. Treadwell & McCollum's application shows a machine beginning and ending with the conversion of a sheet of dough into cylindrical strips. To do this it is evident they might use either longitudinal or transverse grooves. In their machine, therefore, they are equivalent, and if they had shown in the testimony that they had invented the particular form of rollers, that they now claim, before Fox, then upon the strength of that equivalency they might have made a strong case against him. But, if we look at Fox's machine, we see at once that the equivalency does not exist in it. He does not begin and end with merely converting the sheet of dough into cylindrical strips. By additional machinery he cuts these strips, as they pass through the rolls, into disks, afterwards to be flattened out into the cracker form. The arrangement of his cutting apparatus, which, it must not be forgotten, constitutes a part of the improved machine for which he asks a patent, is such that he must use transversely grooved rollers. He could not use longitudinal grooves at all without an entire change in the other arrangements of the machine; in fact, without making a new machine. It is evident, therefore, that the equivalency of the two forms of grooves which exists in the machines of Treadwell & McCollum does not exist in that of Fox. Therefore, admitting Fox's priority of invention of the transverse rolls, they are not the equivalents, in his machine, of the longitudinal rolls as seen in Treadwell & McCollum's machine, and, therefore, cannot be set up against them for the use of the longitudinal grooves, etc."

To this decision the appellants filed twenty-seven reasons of appeal. As they cover the whole grounds on which the objections are raised, they will be substantially noticed, as far as deemed material, in the opinion which will be given. The report, in answer to the reasons of appeal, is, in principle, substantially the same as contained in the report of the examiner, with a reference to the evidence in the case. This was the case laid before me by the commissioner, together with all the original papers and evidence therein. After due notice having been given to all the parties concerned, in interest, of the time and place appointed for the hearing of said appeal, the parties appeared accordingly, and filed their respective arguments in writing, and the case was submitted.

The first question to be considered is as to the novelty of the invention, or, in other words, whether the thing claimed as an invention in this case is anything more than a double use, and not a substantive invention. The matter in issue between the parties, as before stated, as appearing by their specifications, is an improved method of forming skin-covered strips of dough from a sheet of previously smoothed dough, constructed and arranged with the grooves separated by portions of the plain surface in which they are cut, etc. In the argument, to support the position of double use, it is contended, as to the result: "That it is a admitted by the appellee, in his specification, that formerly, in making sponge and butter crackers, strips of dough were rolled by hand or machinery until a smooth skin was produced on every part, so that when such cylindrical slips were cut into pieces of suitable length, and flattened endwise, or rubbed down into the form of crackers, an unbroken skin was formed around the whole periphery of the crackers which it is essential that they should have." With respect to the machine: That it appears by the report of the examiner thus: "Nor was it new to construct rollers having a portion of the face or periphery of the rollers left between the grooves." Also, by Fox's amended specification, January 9, 1858: "In the rolling of sheets of clay and other elastic plastic substances into cylindrical strips, there is no such advantage to be gained by using rollers with broad bearings between the grooves as that to which I achieve by employing such rollers in forming smooth, skin-covered, elastic cracker dough into cylindrical strips with perfect skins." Besides, neither party claims to have invented the rollers. I submit, therefore, that the alleged invention or novelty does not exist in the machine. That the substance acted on, cracker dough, was old, needs no authority to support it. As to the specific form and condition of this substance operated on, as described by Fox on the second page of his specification in this language: "Now, by running broken cracker dough between smooth rollers, a beautiful, smooth skin or surface is produced on each side of the sheet," it was old and well known to cracker bakers prior to the alleged invention in controversy. To prove which the depositions of McGray and John Robertson were referred to. Various authorities are referred to as supporting the aforegoing doctrine. I have examined the authorities pro and con, on this subject, and find that there is in them so much refine-

ment as to make it difficult to know what are the settled distinctions between what is and what is not an "analogous use." It is true that it is a settled principle of patent law that a result or effect of a process is not patentable, but it is equally true that, where a result is in the greatly improved manufacture, or development of some new and useful principle, it may become the test of invention, and from which invention may be inferred, or where the result is substantially different from what had been effected before. In this case an important improvement in the manufacture of crackers by machinery has been attained by the operation of a peculiar arrangement of the parts of an old machine. In the language of the commissioner: "No one, before the parties in this case, had succeeded in making the cylinder of dough with a continuous, seamless pellicle." This improvement, I think, must be considered a new invention, and patentable as a new method or device in the improvement of an old manufacture, and the objection is therefore overruled and the commissioner's report upon this point affirmed.

The next part of the case to be considered is as to priority. It is apparent that each of the parties had this improvement in view,—the one in April, 1852, and the other in August, 1852. Fox was experimenting with rollers with sharp edges between the grooves, which were found not to answer, and which were taken to the machine shop, where the edges of the grooves were turned down, and again tried, but not successfully; but in July, 1853, the witness saw them in successful operation, and in the fall or succeeding winter of that year this mode of making was introduced into his baking establishment. Other witnesses, corroborating him, show that Fox commenced his experiments in the latter part of 1852, and brought them to successful issue, so far, at least, as the point now under consideration is concerned, in 1853. This is according to the statement of the evidence by the commissioner. The commissioner has stated, also, what he conceived the proof on the part of Treadwell & McCollum; but as they have objected to the accuracy thereof, I will endeavor to state it as it appears from the papers in the cause. They both state, alike, that the caveat filed by them was the commencement of their discoveries, and that, according to what is shown thereby, their plan was by making the grooves of their rollers longitudinal or parallel with the line of the axis. But it is contended by them that Treadwell & McCollum never tried or used rollers with sharp cutting edges between the grooves for the purpose as stated by the commissioner. And so, with respect to the surfaces between the grooves, they suppose the fact misstated, and that the fact is proved to be that rollers made and used by Treadwell & McCollum had intervening surfaces or bearings of an eighth of an inch wide in 1852; so proved to be in the months of September or October and November,—one of them producing a diagram, Exhibit A, which represented a pair of smooth rollers to roll the dough and a pair of longitudinally grooved rollers to from the strips, as a representation of the machine, and swearing that it represents the grooves and bearings, and that they were one-eighth of an inch bearing. I have compared the original depositions with the above statement, and find that it is substantially correct. Thus it appears that the thing claimed by the appellants, and forming the issue between the parties in this case, was both begun and consummated before the appellee's; and the commissioner, in his report, says that they might have had a patent accordingly, by striking out, as part of their claim, the paragraph immediately preceding the claim, to wit, "Neither shall we limit ourselves to the use of longitudinally grooved rollers, but will use transversely grooved rollers of convenience require," and amending the claim by inserting the word "longitudinally" between the words "pair of" and "grooved." The commissioner also says: "This indicates that they consider the two forms of grooves, longitudinal and transverse, as equivalent;" but that he could not concede this. He further says: "In the machine they are equivalent, and if they had shown in the testimony that they had invented the particular form of rollers that they now claim before Fox, then upon the strength of that equivalency they might have made a strong case against him, and also because the arrangement of Fox's cutting apparatus which, it must not be forgotten, constitutes a part of the improved machine for which he asks a patent, is such that he must use transversely grooved rollers, he could not use longitudinal grooves at all without an entire change in the other arrangements of the machine; in fact, without making a new machine." With all due respect, it appears to me that this cutting apparatus of Fox's forms no part of the issue in this case, but if it did, as the transverse roller is used for the same purpose, performs the same duty or is applicable to the same object, the change introduced by Fox will not be sufficient to render it less a mechanical equivalent as to the appellants. See Curt. Pat. § 224. If the change introduced by the defendant constitutes an equivalent in reference to the device of the patentee, and besides being such an equivalent it accomplishes some other advantage beyond the effect or purpose accomplished by the patentee, it will still be an infringement as it respects what is covered by a patent, although the further advantage may be a patentable subject as an improvement upon the former invention. Over and above all, it is old.

Upon the whole, I think that the appellants must be considered the prior inventors, and entitled to a patent for their invention, as prayed.

I, James S. Morsell, an assistant judge of the circuit court of the District of Columbia, do certify the honorable commissioner of patents that, according to previous notice given to the parties in this case of the day and place of trial of the aforesaid appeal, they respectively appeared before me by their attorneys; and the decision and report by the commissioner, with the reasons of appeal, and all the original papers, with the evidence, having been laid before me by said commissioner, said attorneys filed their respective arguments in writing thereon; and upon full consideration thereof, I am of opinion, and do so adjudge and determine, that the said decision so far as it respects the ground of analogous use, is correct, and is hereby affirmed, and so far as it respects the priority of invention between the parties, and the refusal to grant a patent to the appellants, it is erroneous, and the same is hereby reversed and annulled, and a patent is hereby directed to be issued to said appellants for their invention as prayed.

Case No. 14,157.

TREADWELL v. JOSEPH.

[1 Sumn. 390.] [1]

Circuit Court, D. Massachusetts. May Term, 1833.

PLEADING IN ADMIRALTY—FORM OF LIBEL—DEFENCES—JUSTIFICATION—BURDEN OF PROOF—MARITIME TORT.

1. In admiralty causes of damage, the libel should state each distinct act of injury in a distinct article, with reasonable certainty of time and place.

[Cited in Pettingill v. Dinsmore, Case No. 11,045.]

2. Where a defence is put in, by way of justification, it must admit the facts.

3. Where the act is relied on as a punishment, it must be so pleaded.

4. In cases where a justification is set up, the onus probandi is on the respondent.

[Cited in The Rhode Island, Case No. 11,745.]

5. Decree for damages for wrongful assault and imprisonment.

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

[This was a libel for damages for personal injury by Charles Treadwell against Harry Joseph. From a decree of the district court in favor of defendant (case unreported), libellant appealed.]

STORY, Circuit Justice. This is a suit brought in the admiralty by the original libellant, now appellee, against the appellant, who was the original respondent, in personam, in what is technically called a cause of damage. The charges in the libel are of gross maltreatment, and wrongful assault, and imprisonment of the libellant, who was a seaman on board the ship Forum, by the respondent, who was commander thereof, on the high seas, and within the jurisdiction of the court. The matter in the libel resolves itself into two distinct charges, each of which ought to have been propounded in a distinct article. with reasonable certainty of time and place, instead of being mixed together in one general statement; for they were not contemporaneous, nor in any exact sense a continuation of the same injurious proceeding. I cannot but express my regret at finding this anomalous and loose course of practice so long pursued; and I trust it will soon be reformed by more exact pleadings.

The first charge is, that the respondent did with force and violence, without rightful cause of justification, order the libellant to scrape down the masts of the ship for a long space of time, to wit, for fourteen hours, the wind then blowing heavily. The answer of the respondent to this charge is, "that the scraping of the masts of a ship is a necessary duty, and proper to be performed by the mariners thereof; and that, if the libellant was employed in that manner, it was a part of the ship's duty, which the libellant was bound by his enlistment on board the vessel to perform." Now, this answer is insufficient, both in matter and form. It neither admits nor denies the act complained of; but states conditionally, that, "if the libellant was employed, &c., it was a part of the ship's duty," &c. It is clear, upon the first principles of all responsive pleadings, that the party, who sets up a justification or excuse of any act, must admit the existence of that act; and if he denies it, his denial must be in positive terms. A defensive allegation in the admiralty equally as much requires this certainty, as a plea at the common law. A party cannot put forth a sort of middle and speculative answer, neither admitting nor denying any thing. He should meet the charge of the libel with direct allegations. Besides, the answer does not reach the gravamen of the charge. Admitting it to be a part of the duty of the crew to scrape the masts, it is to be done at proper times and seasons, and in a reasonable manner. If it is required under circumstances of oppression, or wantonness, out of mere resentment, the order is not justifiable, nor the duty demandable. A seaman is not a slave; he is entitled to fair treatment; and is not to be overcharged with duty from caprice or dissatisfaction. Hence, whenever the act is charged as oppressive, it should be specially shown, that it was proper on the particular occasion, and was not oppressive. On the other hand, if it be inflicted as a punishment, the cause should be specially set up, and shown to be a justification. In the present case, giving the utmost effect to the averments of the answer, it does not show, that such a prolonged duty for such a period of time was either proper or necessary for the occasion. And it is impossible to sustain the answer, as insisting upon it as a mode of

[1] [Reported by Charles Sumner, Esq.]

punishment. And yet the whole scope of the evidence leads the mind almost irresistibly to the conclusion, that it was required, as a mode of punishment for some incorrect conduct towards the master. I am compelled, therefore, to say, that not being justified in the pleadings, as a punishment, and yet being in fact such, it stands in the actual presentation unexcused. Indeed, if the testimony introduced into the cause by the master for another purpose, be true, the proceeding would deserve no small reprehension; for it would then appear, that the libellant was at the time known to be seriously indisposed, and in some sort wandering in his mind.

The other charge is of a more serious character, though in its frame it is quite too loose and inartificial. It is, that afterwards the master illegally and unjustifiably deprived the libellant of his food, keeping him upon rice-water and physic; and without cause imprisoned him in the hold of the vessel; and blistered him, and shaved his head, and lashed his hands behind him, and bound him to a stanchion below, whereby from the steam of the cargo (coffee) he was nearly suffocated, and he was deprived of sleep. The answer to this charge asserts in substance, that the libellant complained of pains in his head and back, and medicine was accordingly administered to him; that on the next morning he appeared more ill, and exhibited marks of derangement of mind, and the respondent thought it necessary to bleed him; and afterwards, the libellant still continuing in the same delirious state, the respondent caused his head to be shaved and blistered, and blisters also to be applied to his neck; that he caused the libellant to be placed in the steerage between decks, near the after hatch, where he could enjoy fresh air, and at the same time be protected from the weather and from disturbance from the crew; and in order to prevent him from wandering about the ship in the state of delirium, in which he was, the respondent confined him to a stanchion for about two days, until he recovered his mind, and became sufficiently rational to be trusted.

If this statement be true, it certainly amounts to a justification. But I am of opinion, that nothing short of substantial proof of the facts can sustain it, as a defence. Even if the respondent acted with entire good faith, but the libellant was not in a state of derangement or delirium, the defence must fail, although a mere mistake of judgment would certainly go very far in mitigation of damages. The onus probandi is here on the respondent; and unless he clears away every reasonable doubt, he must take upon him the consequences of his rashness, or want of skill. Now, I must say, that the evidence has, in my judgment, wholly failed to establish any clear, unequivocal case of derangement or delirium. And the conduct of the master seems to me to show an undue precipitancy, and a good deal of harshness and severity, uncalled for by the occasion. Nor am I able, upon examining the evidence, wholly to escape from the suspicion, that there were mixed up in these medicinal administrations some ingredients of resentment and punishment. The prescriptions were not so mild in their nature, nor the nursing so gentle or cautious in its quality, as to remove all doubt, that some wholesome correction for past faults mingled its share in the discipline.

If I were to reverse the decree of the district judge, it would be to act upon a mere private opinion, which disregarded the weight of evidence. My opinion is, that it ought to be affirmed, with costs. Decree accordingly.

Case No. 14,158.

TREADWELL v. PARROTT.

[5 Blatchf. 369; [1] 3 Fish. Pat. Cas. 124; 23 Leg. Int. 404; Merw. Pat. Inv. 319.]

Circuit Court, S. D. New York. Dec. 7, 1866.

PATENTS—STATE OF ART—INVENTION—NOVELTY.

1. The invention described and claimed in letters patent granted to Daniel Treadwell, December 11th, 1855, and reissued February 4th, 1862, for an "improvement in the manufacture of cannon," explained.

2. The prior application to a wrought iron gun, or to a barrel composed of a combination of wrought and cast iron, of wrought iron hoops, in a given way, to strengthen the barrel, will not defeat a subsequent patent for the application of such hoops, in the same way, to a cast iron gun.

3. An intelligent mechanic is chargeable with a knowledge of the state of the art in relation to a subject on which he is called to exercise his skill.

4. What is the business of a mechanic, as distinguished from that of an inventor, defined.

5. The said patent to Treadwell is void for want of novelty.

[This was a bill in equity by Daniel Treadwell against Robert P. Parrott, filed to restrain the defendant from infringing letters patent [No. 13,927] for "improvement in the manufacture of cannon," granted to complainant December 11, 1855, and reissued February 4, 1862 [No. 1,272]. The claims of the original and reissued patents, together with a description of the invention of the patentee, and of the prior devices, will be found in the opinion of the court.] [2]

Benjamin R. Curtis and Charles M. Keller, for plaintiff.

George Gifford and Samuel D. Cozzens, for defendant.

NELSON, Circuit Justice. The specification of the original patent describes very par-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 5 Blatchf. 369, and the statement is from 3 Fish. Pat. Cas. 124. Merw. Pat. Inv. 319, contains only a partial report.]

[2] [From 3 Fish. Pat. Cas. 124.]

ticularly the mode of construction of the cannon. The patentee first casts the cannon, having at its largest part a diameter about twice as great as the calibre. It is then bored, and the outside is turned. A screw is cut on the body. Hoops or rings are then formed of wrought iron, and a female screw is cut on the inside, to fit the threads cut on the body, and the hoops are finished with their interior diameters about $^1/_{1000}$ part less than the diameter of the male screw to be encircled. The hoop is then heated, to expand it sufficiently to turn it on to its place. An indefinite number of hoops or rings may be thus put on the body of the gun, and also other hoops formed in the same way over the first series. The claim in the original patent is as follows: "I do not claim a patent for using hoops generally in making cannon, as the earliest cannon known were formed in part by hoops brazed upon them. But my invention consists in constructing cannon with hoops screwed and shrunk upon a body in which the calibre is formed in the manner herein described."

The description of the mode of constructing the cannon, in the specification of the reissued patent, is the same, in hæc verba, as in the original, the difference consisting only in the explanation given of the principles which led to the construction. In the reissued patent, the invention is claimed as follows: "First. In making a cannon consisting of a body, (in which the calibre is formed,) the walls of which are of one piece, surrounded by rings, hoops, or tubes, in one or more layers, placed upon said body under great strain, by which said body is compressed and the natural equilibrium of the molecules, or particles, of which it is composed, disturbed by their being brought nearer together; and this is accomplished in the manner herein set forth, namely, by making the hoops smaller than the part which they are to surround, and then expanding them by heat and suffering them to shrink or contract after having been put in their places. Second. I also claim the method of securing the hoops to the body of the gun, and the several layers of hoops to each other, by screw threads, when they shrink to their places, as above described."

In explanation of the principles that led to the invention, the patentee refers to the Barlow law, as it is called, in which Barlow showed, that hollow cylinders of the same materials do not increase in strength in the ratio of increase in thickness, but that the ratio of increase in strength is such, that, when they become of considerable thickness, the strength falls enormously below that given by the ratio of thickness. The cause of the diminution in the power of resistance, it is observed by Barlow, may be stated as follows: "Suppose such a cylinder to be made up of a great number of thin rings or hoops, placed one within the other and exactly fitting, so that the particles of each hoop shall be in equilibrium with each other, then, the resistance of these rings, compared one with the other, to any distending force, will be inversely as the squares of their diameters." "Now, to obviate," the patentee observes, "the great causes of weakness arising from the conditions before stated, and to obtain, as far as may be, the strength of wrought iron instead of that of cast iron, for cannon, I have invented the following mode of construction." He then repeats the mode of construction already stated, and adds: "This compression (the compression of the body of the gun by the hoops) must be made such, that when the gun is subjected to the greatest force, the body of the gun and the several layers of rings will be distended to the fracturing point at the same time, and thus all take a portion of the strain up to its bearing capacity." He observes: "There may, at first view, seem to be a great practical difficulty in making the hoops of the exact size required to produce the necessary compression; but wrought iron and all malleable bodies are capable of being extended, without fracture, much beyond their power of elasticity. They may, therefore, be greatly elongated without being weakened. Hence we have only to form the hoops small in excess, and they will accommodate themselves under the strain without the least injury. It will be found best, in practice, therefore, to make the difference between the diameters of the hoops and the parts they surround considerably more than one-thousandth part of a diameter." The result he arrives at is, that "a gun thus made will be nearly four times as strong as a cast iron gun of the same weight, wrought iron being taken at only twice the strength of cast iron." Whether this result, to the extent claimed, is well founded or not, is a fact which it is not important either to admit or deny; but I entertain no doubt that the improvement thus made on the cast iron gun is very considerable, and entitles the inventor, whoever he may be, to the protection of the fruits of his invention.

Some question has been made as to the practicability of the contrivance for securing the benefit of the rings or hoops on the gun by means of screws, but I do not deem it material to examine it. If the case turned on it, I should incline, on the proofs, to uphold the patent notwithstanding the objection. Nor do I entertain any serious doubt, that, upon a fair and liberal construction of the specification and claims, which construction I am always disposed to give to these instruments, in behalf of a very useful and meritorious class of citizens, the improvement of the patentee was intended to be confined to cast iron guns. A gun of this material is mentioned in the specifications of the original and reissued patents, and no other.

In my view of the case, the only material and difficult question is, whether or not the

patentee is the original and first inventor of the improvement. I have paused upon this question some time, and given to it all the attention and examination consistent with other cases; and, after the best consideration, have been compelled to the conclusion that he is not. I shall, as briefly as practicable, state the grounds of this conclusion.

The improvement of a cast iron gun, by combining with it a wrought iron envelope, was discussed by a French officer (Thiery) as early as 1834, and is found in a publication of that date. After speaking of the liability of cast iron guns to burst, and the evils attendant, he observes: "We have thought that the combination of wrought iron and cast iron, which has contributed so much to the powers of steam-engines, would also present happy effects in the construction of cannon. It is in this view that we have proposed the trial of a cannon of cast iron with an envelope of wrought iron, adding to the resistance of the piece of ordnance, and preserving, in explosions, from the danger of fragments." Again, after speaking of the importance of using cast iron for the body of the gun, he observes: "This metal, having but very little elasticity, resists the explosion of the powder principally by virtue of its resistance to extension. This resistance once overcome, the cast iron would not evidently find any assistance against rupture from a surrounding body more elastic, and which yields beyond the limit at which its cohesion is destroyed. All that one can hope for, from an elastic envelope compressing the cast iron, is, that it augments, by the compression, the resistance to extension of this hard, rigid, brittle metal; but, not that it should cause it to participate in elastic properties which are not in its nature." He further states: "The means which naturally first offer for hooping a cannon of cast iron with wrought iron, would be to cover it with a series of hoops placed upon it while hot, side by side, and which would thus adhere to this piece of ordnance with the whole force of the contraction—a force which might become excessive by carrying the temperature of the hoop of wrought iron to a very high degree." This officer recurred to the subject again in 1840, and constructed a gun according to his suggestions in the previous paper. "Before placing the hoops," he observes, "nicks are made from distance to distance upon the exterior surface of the cannon, to cause the hoops, which are placed afterwards, after having heated them to the temperature found necessary to obtain a suitable dilation, to adhere strongly to it. The hoops, in cooling, exert, by contraction, upon the cannon a powerful compression, which cannot fail to add to the strength of the cast iron, and guarantees the connection of the system of the envelope of wrought iron." Thiery constructed a gun in 1834, as well as in 1840, according to his principles and theory. The body, however, of both was not purely of cast iron, longitudinal strips of wrought iron being immersed in the metal, in the casting of the cast iron body.

I have referred to these publications, not as evidence that a gun had been constructed like the plaintiff's, prior to his invention, but mainly as evidence of the manner and effect of hooping cast iron cannon with wrought iron bands, and of the state of the art, in the manufacture of cast iron cannon with wrought iron hoops. And it will be seen, that it was well known, as early as 1834 and 1840, that the hooping of the body of cast iron guns with wrought iron bands, very much after the manner of the patentee, had the effect to add to the resistance of the cylinders of cast iron against the explosion of powder; that the compression of the cast iron metal by the contraction of the heated hoops or bands, increased very much the strength of this resistance; and that the smallness of the diameter of the hoop, compared with the exterior diameters of the barrel, was governed by the principle of the law of expansion of wrought iron. I agree that, although the use of wrought iron hoops in the way stated, for strengthening the barrel of a gun, had been known as early as 1834 or 1840, yet, if the patentee was the first to apply the device to a cast iron gun, he must be regarded as the original inventor, and entitled to a patent; and that the application of it to a wrought iron gun, or to a barrel composed of a combination of cast and wrought iron, prior in point of time, would not, of itself, be any objection. Hence I lay out of the case the Thiery gun, as a defence to this patent; but the state of the art, as found in this publication, is important in another branch of the case. The same may be said of the Chambers gun, of wrought iron.

We come now to the Frith gun, the patent of which was granted in England, in 1843. This was a cast iron barrel. It is stated in the specification: "That portion of the cannon called the first reinforce, (except the part forming breech A,) the second reinforce, the trunnions, the chase and the muzzle, marked F F F F, is cast in one piece. The first reinforce, from F to G, is hooped with strong wrought iron or steel bands, driven on while hot, so that the contraction thereof in cooling will produce firm adhesion. Thus that part of the cannon most acted upon by explosion and heat is materially strengthened." It will be seen that the device described in hooping the first reinforce is like that of the plaintiff's, except in giving the proportion of difference between the interior diameter of the hoop and the exterior diameter of the barrel—the former to be $^1/_{1000}$ part of the diameter less than the latter. Frith gives no minimum or maximum difference. I, of course, lay out of the device the plaintiff's screws, as I have not been inclined to hold him to form.

One question, in this branch of the case, is, whether, in the existing state of the art, the

information given in the description would enable an intelligent mechanic to make the proper difference. We have seen, that the difference must be such, or so great, that, when the hoop is driven on while hot, the contraction, by cooling, will produce firm adhesion, and so as materially to strengthen that part of the cannon against explosion and heat. An intelligent mechanic is, I think, chargeable with a knowledge of the state of the art in relation to the subject upon which he is called to exercise his skill; and, hence, we may assume that he would know the extent to which wrought iron bands may be distended by heat without weakening their power of elasticity; and, with this knowledge, it is apparent, he would be qualified to carry into effect, in a scientific way, the purpose and object of the patentee. This, to me, obvious proposition, is confirmed by the answer of the plaintiff's very intelligent expert to the eightieth cross-interrogatory: "Judging from my knowledge of the state of the art," he observes, "as it has been previously practised, a machanic, if directed to shrink hoops upon a body, would probably forge the hoops with a greater difference of diameter than $1/1000$ part. He would then heat it hot, put it upon its place, probably by driving, and while hot hammer it up to the body, to make it fit." This is also affirmed more in detail by all the experts on the part of the defendant, whose attention was called to the subject.

The state of the art was familiar to Chambers in 1849. He observes, that he determines "the diameters of the interior of the rings as compared with that of the exterior of the tube, on the principle of the law of expansion of wrought iron." In another place he observes: "The edge f of the ring a is of such interior diameter that it will not, when cold, pass over the ridge o on the band a; but, when heated to the proper temperature, it will come into place, and then the contraction of the metal brings f into firm contact with 1, and g into contact with o, leaving the barrel at all parts firmly griped by the rings, but not so straining the latter as to diminish essentially the tenacity of the ring when cold."

In this connection, we may refer to the evidence of the plaintiff on this subject. He says, that he "was led to this quantity ($1/1000$ part of its diameter,) as iron strained $1/1000$ part of its length may be considered as having reached about the limits of its elasticity. If strained more than that, it produces merely a permanent elongation."

Another question in this branch of the case should be noticed. It is stated by the experts for the defendant, and not denied, that the thickness of the walls of the Frith gun, as shown in the drawings, corresponds very nearly with the thickness of the plaintiff's, and the same as to the thickness of the hoops. Now, assuming that these rings are placed on the barrel of the Frith gun in the way I have described, and, according to the then state of the art, it would seem necessarily to follow, that there would be a corresponding compression of the metal of the barrel, and distension of the hoop, with those of the plaintiff. The improvement, in each gun, as to the additional strength given, would seem to be identical. Indeed, the plaintiff's expert, already referred to, in his answer to the twenty-second interrogatory, if I understand him, admits that "hoops of the size shown, (as Frith's,) placed upon a body of the thickness represented in the drawing, would, if properly applied, produce the effect of compression and distension contemplated in the complainant's patent"—that is, he observes, if the surfaces were accurately fitted and placed upon the body after it was bored. The witness had before stated that he did not consider the boring before the placing of the hoops vital. Now, whether Frith had a knowledge of the Barlow law or not, if his construction of the gun met the difficulties there described and overcame them in the same way as the plaintiff's, it is manifest that the absence of this knowledge cannot affect the question.

In this connection, I may refer to another opinion expressed by this expert, in his answer to the sixty-sixth cross-interrogatory. The question is: "Do you understand the complainant's structure to be limited, as respects the difference of diameters of cast iron body and hoop, to a difference of $1/1000$ of the diameter of the body, or more, or less?" Answer: "I do not understand it to be limited to the difference in diameter of body and hoop, of $1/1000$. Any difference of diameter that would produce the beneficial result contemplated, would, I think, be within the description given, whether more or less." It seems to me that this is a sound view of the patent, and that the invention cannot be allowed to turn on the precise amount of difference stated; otherwise, an invasion of the patent would be easy and unavoidable. This view, however, shows, that the statement of the difference in the patent is not necessary or material, and will not bind the patentee, if made. All that is essential or useful is a reference to the principle or law of the expansibility of wrought iron, and the extent to which it may be carried by heat, without weakening its tenacity or elasticity. This would be sufficient to enable the intelligent mechanic to construct the improvement and protect the invention from invasion or infringement.

A good deal has been said by the experts in the proofs, and by counsel in the argument, in respect to the absence of any direction, in the specification of the Frith patent, as to the finish of the work to be done, such as turning or polishing the outer surface of the barrel, and the inner surface of the rings or hoops. I do not think this criticism entitled to much consideration. It is the business of the mechanic, not of the inventor. If it be

necessary that this work should be done, in order to make a proper fit of the hoops to the barrel, it may well be left to the intelligent mechanic, and to the duty that devolves on him to execute his job in a workmanlike manner, and so as to produce the effect intended by the inventor, if within his skill. The inventor is not necessarily a mechanic, and is oftentimes very much dependent upon the skill of the latter, to adapt his invention to practical use.

Upon the whole, without pursuing the case further, I am compelled to the conclusion, that, in view of the state of the art at the time, the improvement in the construction of the cast iron gun with wrought iron hoops or rings, claimed by the plaintiff, will be found in the description given in the Frith patent; and, upon this ground, a decree must be entered for the defendant, dismissing the bill.

Case No. 14,159.

The TREASURER.

[1 Spr. 473.] [1]

District Court, D. Massachusetts. April, 1859.

AFFREIGHTMENT — DELIVERY — DISCHARGE — WEIGHER—BILL OF LADING—ASSIGNMENT—RESCISSION.

1. The assignee of a bill of lading has no right to require a delivery of the cargo, without paying freight.

2. But he has a right to have it discharged, so that it can be examined, to ascertain whether it corresponds with the bill of lading in quantity and quality.

3. Where the quantity is to be ascertained by weighing, the holder of the bill of lading has no right to insist that the certificate of a particular weigher, selected by himself, shall be conclusive.

[Cited in Nine Thousand Six Hundred and Eighty- One Dry Ox Hides, Case No. 10,273.]

4. If he so insist, it is equivalent to a refusal to receive the cargo.

5. If the consignee named in the bill of lading make a contract for the sale of the cargo, for cash or notes, and assign the bill of lading to the purchaser, and the latter refuse to receive the cargo, and make payment except upon conditions which he has no right to prescribe, the consignee may rescind the contract of sale.

In this case, the libel, filed on the 18th day of April, in substance alleged that the master of the schooner, on the 24th of March last, signed a bill of lading for 250 tons of coal, shipped by E. A. Packer & Co., at Philadelphia, to be delivered to J. E. Howard, or his assigns, at Boston, on payment of freight; and that on the arrival of the vessel here, Howard sold the cargo, and indorsed the bill of lading thereof, to the libellant, who thereupon notified the master where to deliver the coal, and requested him to deliver it accordingly; but that the master, after having hauled his vessel to the libellant's wharf, refused to deliver the coal, and hauled the vessel to E. C. Prescott's wharf, and was, at the time of filing the libel, discharging her cargo there. The libel treated this as a conversion of the cargo to the use of the owners of the vessel, and the damages demanded were the value of the cargo, and the amount of inconvenience occasioned to the libellant by its non-delivery. The claimant's answer substantially admitted the facts alleged in the libel, except as to the refusal to deliver, and alleged a tender by the master, and a refusal to receive the coal by the libellant. The witnesses being all present, Judge Sprague consented, at the request of the parties, to hear and decide the case before the return-day of the warrant.

F. W. Sawyer, for libellant.
Charles W. Storey, for claimant.

SPRAGUE, District Judge. It is proved that a contract of sale was made last week, for an agreed price in cash, or a promissory note, and the bill of lading indorsed and delivered to the libellant. And further, that the master had hauled his vessel to the libellant's wharf, and made a tender of the cargo, and that the delivery had been prevented by a controversy which arose as to the weighing of the cargo. The libellant insisted that it should be weighed by a weigher whom he named, who was to be employed and paid by him. To this the master and consignee objected, declaring that they had not confidence in the weigher who had been designated. They proposed that there should be two weighers, the one insisted upon by the libellant, and another to be selected and paid by themselves; the latter also to weigh the cargo on the wharf. But this the libellant refused, insisting that the weighing should be done only by his own weigher, according to whose certificate of quantity payment should be made; and finally refused to discuss the subject further, and told the master that he had nothing more to say to him. The libellant did not pay, nor tender payment, for the coal. Howard, the consignee, demanded the return of the bill of lading, but the libellant refused to give it up. The vessel was then removed to another wharf, and the cargo was sold by the consignee, and delivered to another person. The libellant now claims for its non-delivery. As assignee of a bill of lading, under the contract of sale, he had no right to require the delivery of the cargo to him, without paying the freight; but he had a right to require that it should be discharged from the vessel, so as to give him an opportunity to examine it, and ascertain whether it corresponded with the bill of lading in quantity and quality; and for this purpose, he had a right to weigh it. But the master had the same right, of which he could not be deprived by the libellant's having selected

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

his own wharf as the place of discharge. He should have permitted the master to have the means of examining the cargo, and ascertaining its weight, and had no right himself to select the weigher, and insist that his certificate should be taken as conclusive.

The conduct of the libellant in prescribing conditions which were sanctioned neither by law nor reason, and to which the master was not bound to submit, was equivalent to an absolute refusal to receive the cargo. And even if the libellant were the owner of it, the master would have been authorized, as an agent from necessity, to dispose of the cargo, and would have been responsible for the net proceeds, after deducting freight, and his expenses and compensation as such agent. But the libellant cannot be deemed the owner, so as to recover even the net proceeds. By the contract of sale, he was to receive the cargo, and pay therefor, either by cash or note. He refused to receive the cargo, and made no payment, or offer of payment, in any form, and must be deemed to have refused payment according to the terms of sale. Howard, the consignee, therefore, had a right to rescind the contract of sale. This he has done, and sold the goods to a third party. It is true, the bill of lading was assigned and delivered to the libellant, and this is generally considered a transfer of the property. But a delivery of the evidence of title, or delivery by symbol, can have no greater efficacy than a manual delivery of the property itself, which, it is well known, will not deprive the vendor of the right to rescind the sale, if the purchaser refuse to perform its conditions; as, for example, to pay cash on delivery. The libel must, therefore, be dismissed with costs.

TREASURER OF LEAVENWORTH COUNTY (JEWETT v.). See Case No. 7,312.

TREASURER OF MUSCATINE COUNTY (UNITED STATES v.). See Case No. 16,538.

TREASURER OF STATE OF WISCONSIN (MADISON & P. R. CO. v.). See Case No. 8,938.

Case No. 14,160.

In re TREAT.

[10 N. B. R. 310.] [1]

District Court, D. Maine. 1874.

BANKRUPTCY—COMMITTEE OF CREDITORS—COMPENSATION FOR SERVICES—HOW DETERMINED.

1. The committee of creditors provided for in the 43d section of the bankrupt act [of 1867 (14 Stat. 538)] are entitled to compensation for their services, although the statute is silent on the subject.

[Cited in Grey v. Thomas, Case No. 5,806. Questioned in Re Bonnett, Id. 1,634.]

2. It should be limited to such an amount as will afford a reasonable compensation for the services required and rendered, to a person of ordinary standing and ability, competent for such duties and services; and should not be based upon the usages or rates of profit which prevail in any branch of commercial or other business, nor upon the special qualifications or standing of the person who may happen to perform the services.

At the second general meeting of creditors objection was made to the allowance of compensation to the committee of creditors, and the decision of the question was adjourned into court for the decision of the judge. This objection was based mainly upon the ground that the bankrupt act is silent upon the question, and that provision is nowhere made for such a charge upon the estate; but upon a hearing the court held that the committee were entitled to compensation, and directed a reference to the register to ascertain the nature and circumstances of the services rendered, and report what sum should be allowed. The facts sufficiently appear in the following extract from the report of Mr. Register Hamlin: * * * Mr. Goodell, one of the committee of creditors, presented his statement of claim for services from August 8, 1868, to June 19, 1873, amounting to four thousand eight hundred dollars. In support of this claim he offered his own testimony and that of Mr. Walker, another member of the committee, James Treat, one of the bankrupts, and other witnesses. From their statements it appears that Mr. Goodell was the most active member of the committee. It does not appear that any specific agreement was made as to what his compensation should be, and the nature and circumstances under which he rendered service, do not fully appear. No note or order of the committee was shown. From the fact that the third member of the committee was not present at the committee meetings, and took no part in the business, the inference is drawn that Messrs. Goodell and Walker, being a majority, and living within a few miles of each other, found themselves compelled to act without his co-operation, and so far as Mr. Goodell is concerned no pains were taken to reduce to writing any directions under which he was to act. It seems to have been taken for granted that he was the general utility man of the committee. It is incumbent on Mr. Goodell, under the rulings of the court, to establish affirmatively what the services are which he rendered, as well as the circumstances. Taking his disbursement account in connection with his testimony, and that of Mr. Walker, I find he was employed three hundred and thirty-six days, twenty-nine of which were devoted to individual estates of James and William Treat. I do not consider the testimony of the witnesses produced in support of the claim of four thousand eight hundred dollars salary

[1] [Reprinted by permission.]

charged by Mr. Goodell, and which proves him to have been a business man of experience, capacity, and ability—as affording the true rule by which his compensation should be fixed. Perhaps, if his compensation was to be determined upon such considerations the charge made is not excessive; but, as is said by the court in Grant v. Bryant, 101 Mass. 567, which was a bill in equity, in which it became necessary to pass upon the question of compensation of a receiver of a partnership, and the principle there established is applicable here; * * * "the proper compensation of a receiver as an officer of the court, in absence of any agreement between the parties in relation thereto, should be limited to such an amount as would afford a reasonable compensation for the services required and rendered, to a person of ordinary standing and ability, competent for such duties and services, and should not be based upon the usages or rates of profit which prevail in any branch of commercial or other business, nor upon the special qualifications or standing of the person who may happen to perform the services." * * * The allowance of three dollars per day is therefore recommended as a fair compensation to Mr. Goodell. This would entitle him to receive ten hundred and ninety-eight dollars in place of the salary charged by him—eighty-seven dollars of which should be apportioned to the individual estates of James and William Treat, a moiety to each.

Exceptions to the report of the register were taken, and upon hearing of the same the following order was passed.

H. D. Hadlock, for Goodell.

Wilson & Woodard and Hon. T. C. Woodman, for creditors.

FOX, District Judge. The court having carefully reviewed the reports of the register, and the evidence relating to the claim of Daniel S. Goodell, one of the committee, for his compensation for services rendered by him in that capacity, and the arguments of the counsel for said Goodell, doth now order, adjudge, and decree that the exceptions taken by said Goodell to the amount allowed for his personal services in behalf of the firm creditors of Treat & Company by the said register in his report, be sustained; and doth further order and decree that instead of the sum so allowed, viz., nine hundred and eleven dollars, the said Goodell is entitled to receive for services rendered by him for the estate of Treat & Company, as one of the committee of creditors, the sum of thirteen hundred dollars; which amount it is ordered and decreed shall be paid by the trustees to said Goodell in full compensation for his personal services as aforesaid, and in addition to the amount allowed him for services to the individual estates of James and William Treat, and also for his expenses as charged in his account rendered, which two amounts he is also to receive from said trustees. In all other respects the findings and conclusions of the register, as set forth in his original report, are adopted and confirmed.

Case No. 14,161.

TREAT v. The RAINBOW.

[1 Ben. 40.] [1]

District Court, S. D. New York. March, 1866.

PRACTICE IN ADMIRALTY—POSSESSORY ACTION—MOTION TO BOND BEFORE ISSUE JOINED.

1. Where a possessory action was brought by the owner of seven-eighths of a vessel, and the master, in possession and owning one-eighth, applied for leave to bond the vessel before filing his answer, and while the court was sitting to dispose of the admiralty calendar, *held* that, without passing upon the merits, the court would deny the motion. A motion by the defendant to bond in a possessory action is not ordinarily entertained on affidavits, before issue joined.

2. Where no delay is likely to attend the disposal of such a case upon the merits, the reason for a delivery upon bail fails.

This was a motion on the part of the defendant [Jacob E. Dodge] in a possessory action to be allowed to take possession of the vessel upon a stipulation for value. The vessel was seized on the first day of March, by virtue of process issued upon the prayer of the libellant [Edwin P. Treat], who alleged in his libel that he was owner of seven-eighths of the vessel, and that the defendant, who had theretofore been master of her, refused to deliver her to him, although required so to do. No answer had been filed by the defendant, but this application was made upon his affidavit that he was owner of one-eighth of the vessel; that, by an agreement made between him and a former owner of the remaining seven-eighths, he was to be continued master for the period of a year; and that the present owner sought to remove him before the expiration of the year, and while he was in the prosecution of a voyage undertaken before notice of dismissal.

Scudder & Carter, for the motion, cited the following authorities: 1 Dunl. Adm. Prac. p. 175; The New Draper, 4 C. Rob. Adm. 287; The See Reuter, 1 Dod. 22; 32 Law J. Prob. Mat. & Adm. 105; 1 Pars. Marit. Law, 389, 390; Abb. Shipp. p. 167; The Kent, 1 Lush. 495; 7 Cow. 670; 5 Wend. 315.

Benedict, Burr & Benedict, in opposition, cited Montgomery v. Wharton [Case No. 9,737]; 1 Boul. P. Dr. Com. pp. 332, 334; The Johan and Siegmund, Edw. Adm. p. 242.

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

BENEDICT, District Judge. Without now passing upon the questions argued by the counsel for the defendant, and which relate in great measure to the merits of the action, I am of the opinion that the motion must be denied, and for two reasons:

In the first place, the motion is premature, no issue having been joined. In possessory actions, an application for delivery on bail by a party who has not yet answered is not ordinarily entertained. Such was the ruling in the strongly contested case of The St. Thomas [not reported], decided in 1851. Upon a like application in that case, Judge Betts says: "If the claimants have any equity to prevent the allowance of the decree prayed for by the libellant, it must be brought before the court by answer. It is not competent to them to meet the merits of the libel by motion founded upon affidavit." This, in effect, would lead to a decision of the gist of the case upon matters outside the pleading.

Another reason why the application here made should not prevail at this stage of the case is, that the court is now sitting, and has the admiralty calendar before it. The cause can, therefore, be put at issue and tried forthwith. When no delay is likely to attend the disposal of the case upon its merits, the reason for a delivery upon bail fails. Indeed, it has often been denied where the reason existed. Thus, in the case of The Onyx [not reported], decided by the same experienced judge, it was held "that, as there appears probable cause for maintaining the action upon the merits of the libel, the court will not intercept the appropriate remedy to that right by a preliminary order placing the property in the hands of the adverse claimant, and giving him the whole advantage of such possession. * * * The substitution of stipulation for the vessel would not place the libellant on the same footing of right as that of her custody by the court; for, if they are entitled to the possession in specie, that would not be secured to them by force of the stipulation, and, if there be an entire equality of interest between the parties, the claimant cannot be allowed to secure to himself the advantage of possession and use of the vessel by giving a stipulation for her value." The cases cited were cases of application for delivery on bail, by a claimant in possession, and owning one-half of the vessel. The reasons above given seem to me to be conclusive in a case like the present, where the claimant is a minority owner, and no delay need be experienced in disposing of the case upon the merits. The motion is therefore denied, without prejudice to a second application, in case of necessary delay in bringing the case to a hearing.

TREAT (SMITH v.). See Case No. 13,117.

Case No. 14,162.

TREAT v. STAPLES.

[Holmes, 1.] [1]

Circuit Court, D. Maine. July, 1870.

INTERNAL REVENUE—PROPERTY SEIZED—REPLEVIN—DAMAGES.

1. Under the act of July 13, 1866 (14 Stat. 172), replevin does not lie for property of the plaintiff seized under a warrant by a collector of internal revenue as the property of another.

2. Nominal damages only should be allowed on judgment for defendant in replevin, where he has failed to show right in himself to the property in controversy.

Action for replevin [by Jonathan F. Treat against Miles S. Staples] for a vessel, &c., seized by the defendant, a deputy-collector of internal revenue, as the property of one Kidley, for non-payment of taxes assessed upon her. The case was heard by the court upon an agreed statement of facts, the material parts of which are stated in the opinion.

J. S. Rowe, for plaintiff.

George F. Talbot, for defendant.

SHEPLEY, Circuit Judge. This is an action of replevin for the brigantine M. A. Herera, her boats, tackle, and apparel. The general issue was pleaded and joined, and the defendant also denied that property was in the plaintiff, and set up property and right of possession in himself as a deputy-collector of the internal revenue of the United States.

On the twenty-eighth day of July, A. D. 1863, the brigantine being then the property of Annie M. Kidley, and registered as a British vessel at St. Andrews, in the province of New Brunswick, was by her conveyed by mortgage duly executed and recorded to James Treat, of Frankfort, Me., to secure the payment of a note for twenty thousand dollars, payable in one year from that date.

James Treat being indebted to the plaintiff, Jonathan F. Treat, on the thirty-first day of March, A. D. 1864, assigned the mortgage to the plaintiff then and now a resident in California, and delivered the assignment to the plaintiff's agent at Frankfort, Me. The mortgage debt was not paid, and the plaintiff had the right to immediate and exclusive possession of the vessel. In the mortgage, Annie M. Kidley is described as of Bristol, England, then residing at St. Andrews, in the province of New Brunswick. Her parents were British subjects, residing at the time of her birth, and ever since, at Clifton, near Bristol, England. In 1854, being then in her twelfth year, she came from Clifton to Frankfort, Me. There she remained in the family of George Treat, a brother of the plaintiff, until the spring of 1863, with the exception of occasional voy-

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

ages to sea, as a companion of the wife of George Treat, who is a master mariner. In July, 1863, she went to St. Andrews, in the province of New Brunswick, where she had friends, and resided in the family of J. H. Whitlock, collector of that port, and attended school. In March or April, 1864, she made a short visit to Massachusetts. In June, 1865, she made a visit of three weeks' duration to Frankfort, then returned to St. Andrews, and in the fall of that year returned to her home in England, where she has since resided.

In June, 1865, the assistant-assessor of internal revenue for collection district number five, in the state of Maine, which embraced the town of Frankfort, returned to John West, collector of internal revenue for that district, a list of persons in Frankfort and Searsport subject to internal-revenue tax. In this list Annie M. Kidley is assessed on income $1,557.70, and penalty $389.42; and at the foot of the list the assessor certifies that "Miss Annie M. Kidley, of Frankfort, above named, upon being duly notified and required to return to me, Charles H. Pierce, assistant-assessor of the tenth division of the fifth collection district of the state of Maine, the amount of her income, gains, and profits during the year 1864; and, after reasonable time allowed her therefor, she having neglected to render me the return of said income, gains, and profits for the said year 1864, from the best information I can obtain I have valued the said income, gains, and profits for said year at $18,377, and upon that valuation have assessed upon her a tax or duty of $1,558.70: and have also assessed upon her a tax or duty of $389.67, it being twenty-five per cent. added thereto as a penalty for willfully neglecting to return and render in to me the income, gains, and profits accruing to her as aforesaid in the year 1864, the whole duty or tax being $1,948.37." July 25, 1865, John West, the collector, committed to the defendant, his deputy-collector, duly appointed, a list of unpaid taxes for collection, in which list is included an income tax against Annie M. Kidley of $1,557.70, and a penalty of $389.42. At some time between the 1st and 7th of August, defendant called at Jonathan Treat's where he understood Miss Kidley had previously lived, and left there a notice for her to pay her tax. Aug. 9 and Aug. 21, defendant also deposited in the post-office, addressed to Annie M. Kidley, Frankfort, Me., notices to pay the tax in the usual form. These notices were not taken from the office, and were by the postmaster returned to defendant in April, 1866. Sept. 22, 1867, West called upon James Treat, and told him his business was to collect Annie M. Kidley's tax, or distrain her property, and asked said Treat if he was her agent, or if she had an agent in this country. James Treat replied, that Miss Kidley lived in New Brunswick, and had no agent in this country. Sept. 23, 1867, defendant received from John West, the collector, a warrant of distraint, dated Sept. 21, 1865, and on the same day seized and distrained upon the brigantine M. A. Herera, and was proceeding to comply with the provisions of law in relation to a distraint and sale, when, on the twenty-sixth day of September, the brigantine was taken from his custody by the writ of replevin in this case.

Upon this state of facts it is difficult for the court to arrive at the conclusion that Annie M. Kidley was taxable upon annual gains, profit, or income for the year 1864. She does not appear to be embraced in either of the classes contemplated in the statute as a person residing in the United States, or a citizen of the United States residing abroad. 13 Stat. 281, 479. And even if she had been a person liable to pay a duty on income, and had neglected and refused, after legal demand, to pay the same, the amount due would have constituted a lien in favor of the United States from the time it was due until paid, only upon the property and rights of property belonging to her at that time. The warrant to distrain the goods of the delinquent would not authorize the collector to levy upon property mortgaged long before the tax was assessed or due, and to which, if the mortgagee had not acquired an absolute title, he had certainly the right of immediate and exclusive possession. If the United States had any lien, it could only have been on such "rights of property," if any, as Annie M. Kidley had in the brigantine when the tax was due. It is clear, upon the agreed statement of facts in this case, that she had at that time no such "rights of property" in the vessel as would justify a seizure of the vessel itself, and a sale of it either as her property or as property conveyed by her under a conveyance subject to a paramount lien in favor of the United States.

The question then arises, if Annie M. Kidley was not liable to be assessed for a duty or tax on income, and if the property seized by the deputy-collector is not fairly to be considered as liable to seizure as the property of Annie M. Kidley, even if she were legally taxable and delinquent, is the plaintiff entitled to maintain an action of replevin against the defendant, a deputy-collector of the internal revenue of the United States? The statute of the United States approved March 2, 1833 (4 Stat. 633), provides that all "property taken or detained by any officer or any other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." The fiftieth section of the act of June 30, 1864 (4 Stat. 241), extended the provisions of the act of March 2, 1833, to all cases arising under the laws for the collection of internal duties,

licenses, or taxes, which have been or may be hereafter enacted; "and all persons duly authorized to assess, receive, or collect such duties or taxes under such laws are hereby declared to be and to have been revenue officers within the true intent and meaning of the said act, and entitled to all exemptions, immunities, benefits, rights, and privileges therein enumerated or conferred." The act of July 13, 1866 (14 Stat. 172), repeals the fiftieth section of the act of June 30, 1864; but it also provides that all property taken or detained by any officer or other person under authority of any revenue law of the United States shall be irrepleviable, and shall be deemed in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. Where a statute is repealed, and one or more of its provisions is re-enacted in the repealing statute, so that there is no moment in which the repeal is in force without being replaced by the corresponding provisions of the new statute, in practical operation and legal effect this is to be considered rather as a continuance and modification of old laws than as an abrogation of the old and the re-enactment of new ones. Wright v. Oakley, 5 Metc. [Mass.] 406; Steamship Co. v. Joliffe, 2 Wall. [69 U. S.] 458. But it is contended that the provision of the statute, that property taken or detained by an officer or other person under authority of a revenue law of the United States, shall be irrepleviable, applies only to such property as he is authorized by his warrant to take, and does not extend to a case like the present, where it is claimed by the plaintiff that his property was seized under warrant to seize the goods of Annie M. Kidley, the supposed delinquent.

But the words of the statute are not susceptible of any such limitation, nor would such a construction of the statute accomplish the purposes or carry into effect the policy of the enactment. Mr. Justice Davis, in Nichols v. U. S., 7 Wall. [74 U. S.] 129, well observes: "The prompt collection of the revenue, and its faithful application, is one of the most vital duties of government. Depending as the government does on its revenue to meet not only its current expenses, but to pay the interest on its debt, it is of the utmost importance that it should be collected with dispatch, and that the officers of the treasury should be able to make a reliable estimate of means in order to meet liabilities." After pointing out the disastrous consequences to the finances of the country, of allowing parties to arrest the collection of the revenues of the country by suits prosecuted for alleged errors or mistakes, he shows most conclusively that the laws for the collection of the customs and the internal revenue each constitute a system, and provides suitable remedies for the benefit of those who complain of illegal assessment of taxes or illegal exactions of duties. In the case of People v. Albany Common Pleas, 7 Wend. 485, a warrant had been issued directing the collection of a military fine from one Hammond, a member of the society called "Shakers." The warrant was executed by a constable, by levying upon property belonging to the society, who caused the property to be replevied. The president of the court-martial who issued the warrant, and the constable who served it, being made defendants in the replevin, moved the court to set aside the plaint, which they refused, on the ground that it was not shown that the proceedings were regular before the court-martial which issued the warrant. The statute of New York provided "that no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment, or fine, in pursuance of any statute of this state." Upon a motion in the supreme court for mandamus to the common pleas, the court (Savage, C. J.) say: "The common pleas supposed they had a right upon the motion before them to inquire into the regularity of the proceedings of the court-martial, which, I apprehend, is a mistake. If it appears upon the face of the warrant in the possession of the officer that he is authorized to collect any tax, assessment, or fine, replevin is not the proper remedy to correct his mistakes or trespasses. The warrant upon the face of it authorized the officer to take the property of Hammond. It refers to and purports to be in pursuance of a statute of this state. The officer took property belonging to a society of which Hammond was a member. Whether he had a right to do so or not is not to be inquired into in this motion, nor in this action. The legislature have thought proper to say that replevin shall not be brought in such a case. Any other appropriate remedy may be resorted to." This reasoning is applicable to the facts in this case. We are satisfied the plaintiff is not entitled to maintain the present action of replevin. The statute left him a resort to any other appropriate remedy. When the government for revenue purposes takes possession of any property of the citizens, it is the policy of the government that its power to provide for its expenditures should not be crippled by any liability to have that property taken by replevin from the officers intrusted with the duty of collecting revenue. The law provides for the citizen other and appropriate remedies. If the remedy of replevin existed before in case of property taken by authority or under color of legal process, it is taken away by the express provisions of the statute.

Judgment must therefore be entered for the defendant. He is entitled to nominal damages, because his right has been infringed, and to nothing more. There is no rule which requires the court to award to the defendant damages to the value of the property to him when he shows no right to it. Sanborn v. Leavitt, 43 N. H. 474; Ingraham v. Martin, 15 Me. 373. Judgment for defendant.

Case No. 14,163.

TRECARTIN v. The ROCHAMBEAU.

[2 Cliff. 465.] [1]

Circuit Court, D. Maine. Sept. Term, 1865.[2]

PAYMENT—DEPRECIATED CURRENCY—CONTRACT—SEAMEN'S WAGES.

The plaintiff, in 1863, shipped at St. John, New Brunswick, on board an American vessel, for a specified voyage, at an agreed rate of wages per month, viz., "$25 per month," the said voyage to terminate in the United States. It was contended that the plaintiff was entitled to an amount, in the currency of the United States, equal to the value of the contract price in this country, if paid in the currency of St. John. *Held*, there was no question of the relation of one currency to another involved in the case; the contract for wages being expressed in dollars and cents, and the payment to be made in this country, the plaintiff could recover no more than the amount specified in the contract.

[See The Australia, Case No. 667.]

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

This was a libel [by Thomas Trecartin against the ship Rochambeau, John E. Donnell, claimant] in a cause of subtraction of wages, civil and maritime, and the case came before the court on appeal from a decree of the district court for this district. The libellant was the second mate of the ship Rochambeau, and the libel was in rem against the ship, to recover a balance of wages, claimed by the libellant, which the master and owner refused to pay. The libellant shipped at St. John on the 27th of April, 1863, and was discharged at the port of Portland on the 7th of July, 1864, having, therefore, served fourteen months and seven days. He alleged the contract to be that he should be paid $25 per month in St. John currency; and the balance claimed as due was $201.50. The terms of the shipping articles were for a voyage "from St. John to London, from thence where freight or charter may offer, or as the master may direct, for a period of time not exceeding nine months, voyage to end at a port in the United States." The shipping articles were signed at St. John, but the sum specified as the rate of wages was expressed in decimals, and not in St. John currency, as alleged in the libel; as there expressed, the rate of wages was "twenty-five dollars per month" with $25 advance; and there was no evidence that the libellant was entitled to or expected any higher rate. Under the shipping articles the libellant went to London and back to the port of departure; and the period of service for which he shipped not having elapsed, he went a second voyage to the same port, without signing any new articles or making any new agreement as to service or wages. Exhibits attached to the libel showed that the second voyage was by the way of Newport, in England, and that the ship went to the Mediterranean before she returned to Portland. It was agreed that the ship was an American vessel, and the libellant a citizen of the United States. The vessel returned to the port of Portland on the 7th of July, 1864, and delivered a cargo of salt. The libellant faithfully performed his duty as second mate from the time he shipped until his discharge; and it was conceded that he was entitled to his wages as specified in the shipping articles, deducting the several payments made, namely, at St. John, London, Newport, Malta, and Trapani. It was agreed that those several payments were made in the currency of those ports; that is, in bills at St. John, and in gold and silver at the other places, and that they amounted in all to $213.50. The wages of the libellant for the entire period of his service amounted to $356.25, leaving a balance due him of $142.75 at the time of the discharge. In the district court, a decree was entered that the libellant was entitled to recover, as the balance of his wages, $154, to be paid in specie, or its equivalent, or $308 in the United States currency, with costs, and that execution should issue for that sum with costs of suit. [Case No. 11,973.] From this decree the claimant appealed.

J. O'Donnell, for libellant.

Evans & Putnam, for respondent.

CLIFFORD, Circuit Justice. The principal objection to the decree, as urged by the claimant, is, that the alternative amount awarded to the libellant is double the amount found to be due him in specie, and that it authorizes execution to issue against the stipulators for the alternative amount. The right of the libellant to recover is not disputed, but it is insisted that he is bound by his contract, and that he is not entitled to any greater sum than is therein specified.

The terms of the contract for the first voyage are as plain as they can be expressed in our language. They are "twenty-five dollars per month"; and it was especially stipulated that the voyage was to end in a port of the United States. Such were the terms of the original contract; and I concur with the district judge that the circumstances show that the libellant continued in the ship throughout the period of service at the same rate of wages. When the ship returned from the first voyage, the period of service had not expired; and inasmuch as the libellant went the second voyage without any objection by either party, and without any new contract, it must be understood that the same rate of wages was to be continued. Undoubtedly both parties so understood the arrangement, as all the partial payments were adjusted on that basis. Owners of the vessel agreed to pay $25 per month, and they agreed to pay nothing more, and both parties are bound by the terms of the contract. Looking at the case in that point of view, the question presented is not in what currency the libellant is to be paid, but how

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Modifying Case No. 11,973.]

much he is entitled to recover. He contracted for $25 per month, and it is not possible for the court to give him any more without assuming to make a new contract. The theory of the libellant is, that he is entitled to a decree for double that amount, because the contract was made at St. John, and because the currency of that place was selling in the market here, at the time the libellant was discharged, at a corresponding advance in legal-tender notes of the currency of the United States. But the theory cannot be sustained for several reasons: 1. Because it assumes that the execution when issued will necessarily be satisfied in our paper currency, whereas the marshal may levy the same upon the gold or silver currency of the stipulators. 2. Because it assumes that a dollar here is worth less than a dollar where the contract was executed, of which there is no proof in the case, unless it be assumed that a dollar here necessarily means a dollar in paper currency, which cannot be admitted. 3. Because it is utterly inconsistent with the terms of the contract which alone furnish the rule of decision. The words of the contract are, "twenty-five dollars per month," and it is not possible to allow any greater sum without introducing a new provision, to which the parties have not assented. There is, therefore, no question of the relation of one currency to another involved in the case, and it is wholly immaterial whether the contract is governed by the law of the place where it was made or by the law of the place where it is to be performed, as in either view of the question the result must be the same. Where the contract for wages is expressed in dollars and cents, and the payment for the service is to be made here, it is clear that the party entitled to wages can recover no more than the amount specified in the contract; and in such a case it makes no difference where the contract was signed or what may be the state of exchange. Decree of the district court must, therefore, be modified in conformity to this opinion. Libellant is entitled to a decree for the sum of $142.75, with interest from the time of his discharge to the present time, with costs in the district court. Appellant to recover no costs, except the proper charges of the clerk.

TRECARTIN v. The ROCHAMBEAU. See Case No. 11,973.

Case No. 14,164.

TRECOTHICK v. AUSTIN et al.

[4 Mason, 16.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1825.

LIMITATION OF ACTIONS — AGAINST EXECUTORS — ASSETS—FOREIGN EXECUTOR—ACTION—PARTIES.

1. The statute of limitations, of actions against executors and administrators in Massachusetts, does not begin to run against persons who have a right to appeal from the decree granting administration, until their right of appeal is lost, or the decree becomes absolute.

[Cited in Robbins v. Coffing, 52 Conn. 131; Harlow v. Dehon, 111 Mass. 199.]

2. Trusts devolving on an executor, and trust property in the hands of the deceased, kept separate, are not assets in the hands of executors and administrators; and the statute of limitations does not run against them.

[Cited in Taylor v. Benham, 5 How. (46 U. S.) 276; Re Eldridge, Case No. 4,301; Illinois Trust & Sav. Bank v. First Nat. Bank, 15 Fed. 859.]

[Cited in First Nat. Bank v. Hammel (Colo. Sup.) 23 Pac. 988; Union Nat. Bank v. Goetz (Ill. Sup.) 27 N. E. 909. Cited in brief, Kirby v. Wilson, 98 Ill. 242. Cited in Fowler v. True, 76 Me. 46; Re Shaw, 81 Me. 226, 16 Atl. 662; Johnson v. Ames, 11 Pick. 180, 182; Andrews v. Bank of Cape Ann, 3 Allen, 314; White v. Chapin, 134 Mass. 231; Attorney General v. Brigham, 142 Mass. 251, 7 N. E. 852; Little v. Chadwick, 151 Mass. 111, 23 N. E. 1005. Cited in brief, Babb v. Ellis, 76 Mo. 462. Cited in Luce v. Manchester & L. R. R., 63 N. H. 590, 3 Atl. 618; Ferris v. Van Vechten, 73 N. Y. 121; Boone v. Citizens' Sav. Bank, 84 N. Y. 87. Cited in brief, Randall v. Peckham, 10 R. I. 545.]

3. The assignor of a chose in action is not, in equity, a necessary party, where the suit is by the assignee and the assignment is absolute.

[Cited in Henry v. Francestown Soapstone Stove Co., Case No. 6,382; Land Co. v. Elkins, 20 Fed. 546; Hickox v. Elliott, 22 Fed. 21.]

[Cited in Mackay v. St. Mary's Church, 15 R. I. 125, 23 Atl. 108; Vance v. Evans, 11 W. Va. 382.]

4. Although no suit can be maintained in our courts by a foreign executor and administrator, unless he has taken out administration here; yet this principle does not apply, except where the party sues in right of the deceased.

[Cited in Taylor v. Benahm, 5 How. (46 U. S.) 271; Wilkins v. Ellett, 9 Wall. (76 U. S.) 741, 743.]

[Cited in Davis v. Smith, 5 Ga. 274. Cited in brief in Martin v. Gage (Mass.) 17 N. E. 311. Cited in Reynolds v. M'Mullen, 55 Mich. 575, 22 N. W. 45. Cited in brief, Wilburn v. Hull, 16 Mo. 429; Morton v. Hatch, 54 Mo. 409; Taylor v. Barron, 35 N. H. 496. Cited in Vroom v. Van Horne, 10 Paige, 557; Pedan v. Robb, 8 Ohio, 227.]

5. If he sues in his own right, although the right be derived under a foreign will, no administration need be taken out here, if it does not affect real estate passed by the will here.

[Cited in Humphreys v. Hopkins (Cal.) 22 Pac. 895. Cited in brief in Jaynes v. Goepper (Mass.) 17 N. E. 835; Olney v. Angell, 5 R. I. 200, 202.]

6. A derivative title to personalty may be proved under a foreign will without probate here.

[Cited in Olney v. Angell, 5 R. I. 204.]

Bill in equity [by James Trecothick against Jonathan L. Austin and others], to which the defendant, Jonathan L. Austin, put in distinct demurrers to different parts of the bill. To understand the points made at the bar, it is necessary to state some of the leading facts of the bill. Barlow Trecothick of London, by his will in 1774, after devising certain annuities and legacies and ordering the payment of his debts, gave the residue af all his real

[1] [Reported by William P. Mason, Esq.]

estates to Lord Frederick Campbell, Frederick Vane, the Rev. Earl Apthorp, and Lawrence Holken, in trust for any children he might leave by his wife, &c. (and he left none), and "in default of such issue in trust for his nephew (the plaintiff) and the heirs of his body begotten." He gave the residue of his personal estate to the same gentlemen "to lay out and invest the same in real estates in England, upon the same trusts as were therein declared concerning the real estate;" and he appointed the trustees his executors. After his death, which was in 1775, his will was duly proved by the executors before the prerogative court of the archbishop of Canterbury. Large sums of money were due to the testator, by bonds, mortgages, &c. in the then British provinces, now United States of America. For the purpose of collecting these debts the executors and trustees appointed one James Ivers, of Boston, (the father of the plaintiff,) their agent, who undertook the trust, and the bill alleges, that he collected large sums of money under the agency. The bill farther states, that Barlow Trecothick and one John Tomlinson were partners in trade, and that Trecothick was the survivor. Large sums of money were due in the British provinces, by mortgage and otherwise, to the firm, at the death of Trecothick. Afterwards an agreement was entered into between the plaintiff and the trustees under the will, with the executor and heir at law of Tomlinson, by which the whole of the debts and securities for the money, so due to the firm, were assigned to the plaintiff for his own use. For the purpose of collecting these debts, &c. a letter of attorney (to which all proper persons were parties) was, in 1784, given to one Mark H. Wentworth and the said James Ivers, jointly and severally, to take possession of the mortgaged estates, and to collect the debts, &c. under which Ivers acted, collected debts, and took possession of the mortgaged estates, &c. Afterwards, in 1798, the Rev. Earl Apthorp, then being the only surviving executor and trustee of Barlow Trecothick, gave a joint and several letter of attorney to the said James Ivers, and the defendant Jonathan L. Austin, authorizing them to collect all debts, &c. due in America to Barlow Trecothick or to the firm of Trecothick & Tomlinson, and to take possession of all mortgaged estates, &c. and to sell and convey the same, &c. Afterwards, in 1800, one Edward B. Long and wife, who was sole heir of John Tomlinson, Jun. (the sole heir of John Tomlinson, Sen.) gave a letter of attorney (at the request of the plaintiff), to Ivers & Austin, to collect all the debts due to the firm of Trecothick & Tomlinson, &c. The bill further states, that all the executors of Barlow Trecothick are now dead; and that all his debts and all the legacies and annuities, given by his will, have been duly paid; that it was agreed, between the plaintiff and Ivers, that Ivers should, during his natural life, continue to possess and enjoy all the interest of all the monies, property, and effects of the testator, B. Trecothick, that belonged to the plaintiff, that he could collect and get in, &c.; and that his executors should account to the plaintiff for the principal after his decease. The bill farther charges, that Ivers, in his life time, under his agencies as above mentioned, collected large sums of money, took possession of mortgaged estates, and sold and disposed of the same, and held the proceeds in trust for the plaintiff; that he kept memorandums and books of accounts and papers respecting the same, and the execution of his agencies, of which a discovery is prayed; that Ivers is dead, and that the defendant (Jonathan L. Austin) is the surviving executor under his will; that the memorandums, books of accounts, and papers of Ivers, came into the possession of the executors of Ivers; that the executors received large sums of money belonging to the trust property of the plaintiff in virtue of their executorship; that the defendant (J. L. Austin) also has received property under his agency; that Ivers, in his life time, invested some of the proceeds of the money so received, in real estate, of which the bill seeks a discovery; and that Ivers and Austin sold certain specific estates; that at his death Ivers held a valuable real estate and securities in the public stock in trust for the plaintiff as aforesaid, of which his executors have become possessed, and have converted the same to their own use. The bill farther states, that the defendants set up various defences: 1. The statute of limitations of Massachusetts limiting suits against executors and administrators to four years. As to this, it states, that Ivers's will was proved, and administration taken in 1813; that the plaintiff, residing out of the country at the time of the probate, was entitled to appeal from the probate thereof by the law of Massachusetts, that he did appeal in 1815, that the will was not conclusively established as to him, until the affirmance thereof by the supreme court in 1816, and that the present suit was brought within four years from the affirmance: 2. That a probate of the will and administration is necessary to be taken in the state of Massachusetts on the estate of Barlow Trecothick and John Tomlinson, before the present suit can be maintained. The bill charges the contrary of this as being the law, asserting that the probate before the prerogative court is sufficient, and no administration here necessary on either estate, to enable the plaintiff to maintain his suit. The cause was set down for argument upon the demurrer.

Gorham and Blake, in support of the demurrer, advanced the following points: 1. That all the demands set forth in the bill, were, virtually, demands against the estate of J. Ivers, and therefore were barred by the statute of limitations of 1791. 2. That the complainant had shown no right, by his bill, to appear as a party in this court to call the defendant to account, as being the devisee or residuary legatee, under the will of B. Tre-

cothick. There was no probate of any such will in this country. 3. That the complainant could not claim any interest, legal or equitable, through the medium of B. Trecothick's will, as devisee, or otherwise, without joining, in his bill, the legal representatives of B. Trecothick. 4. That it did not appear by the bill, that the Tomlinsons, either the elder or younger, ever made wills, or, if they did, that there ever was probate thereof in England or America, which ought to appear by the bill.

Hubbard and Prescott, for plaintiff, in answer to the first ground, in support of the demurrer, taken by the defendant's counsel, contended: 1. That the statute of limitations ought not to, and did not bar the plaintiff in this case, because the plaintiff was out of the country, and had not any attorney in the country at the time when the statute began to operate, and that, within one month after he had an attorney in the country, he prosecuted his appeal, and instituted his suit within four years after its decision, and that the statute did not run against him during the appeal. 2. That the plaintiff was now claiming property belonging to himself, that was held in trust by Ivers, and that such claim was not within the statute; that the statute applied only to creditors of the estate of the deceased, and was made to protect executors.

As to the second ground of demurrer, they contended, that the will of B. Trecothick, having been duly proved by the executors in the prerogative court of the archbishop of Canterbury, before the separation of the then colonies from the mother country, the subsequent separation of the colonies did not make it necessary that it should be proved again in this country; that if it was necessary to file a will and take out letters of administration in this state, in cases arising before the separation of the two countries, as is now required since the separation, still, that this necessity only applied to cases where the plaintiff sued in his representative capacity, but that, in this case, the plaintiff prosecuted in his own name and behalf, and not as representative of B. Trecothick; that the defendant ought to be considered as estopped from denying the probate of the will and power of the executors, under which his testator acted.

As to the third ground of demurrer, they contended, that it being stated in the bill, that all the debts, legacies, and annuities had been paid, which, by the demurrer, is taken to be true, the plaintiff was, in consequence, entitled to the whole residue; that there was, therefore, no other person interested, nor was any person within the jurisdiction who could be made a party; that after the lapse of half a century, and the death of all the trustees, the court would not require new ones.

As to the fourth ground of demurrer, they contended, that neither the executor nor heir of Tomlinson being made parties to the bill, no profert of the will was necessary; that the plaintiff did not claim as executor or representative of Tomlinson, but as a purchaser from the representative, and under such circumstances it was not necessary for him to make a profert of the will; it would be sufficient if he produced it at the hearing to maintain his title.

STORY, Circuit Justice. This is a bill in equity, and it has come before the court upon distinct demurrers put into different parts of the bill, upon the most material causes of which it may be necessary for the court to express an opinion. Upon this posture of the case, the facts stated in the bill, so far as they are covered by the demurrers, are to be taken to be true. If the demurrers to the extent of their reach cannot be sustained, they must be overruled. The rule in equity is, that a demurrer cannot be good in part and bad in part; though it may be good as to one party and not as to another. If, therefore, it covers too much ground, it will be overruled as to the whole; and the court will not separate the sound from the unsound parts, but leave the party to state his general rights of defence in his answer. Cooper, Ch. Prac. 113; Mayor, etc., of London v. Levy, 8 Ves. 398.

The first point presented by the demurrer is, that upon the case made by the bill, all remedy against the defendant (Jonathan L. Austin), as executor of James Ivers, is barred by the Massachusetts statute of limitations. The act of 1788 (chapter 66), in the third section, provided, that "no executor or administrator that shall hereafter undertake that trust, shall be compelled or held to answer to the suit of any creditor of his testator or intestate, unless the same suit shall be commenced within the term of three years next following his giving bond for the faithful discharge of his trust, &c. provided such executor or administrator shall give public notice of his appointment to that office, in the manner this act directs." There is a further proviso, in the fifth section of the act, that it shall not extend to any action "for the recovery of a legacy, bequest, gift, or annuity, arising, accruing, or becoming due, by virtue of any last will and testament." The third section of this act was repealed by the act of 1791 (chapter 28), and in lieu thereof it was provided, that "no executor or administrator, who has been appointed since the passing of the foregoing act (Act 1788, c. 66), or who shall hereafter be appointed, shall be held to answer to any suit, that shall be commenced against him in that capacity, unless the same shall be commenced within the term of four years from the time of his accepting that trust, provided he give notice of the appointment in the manner prescribed in the act before recited" (Id.). It is observable that in this clause the restrictive words of the former act, limiting its operation to creditors, are dropped, the words in that act be-

ing "to answer to the suit of any creditor," and in the present act, "to answer to any suit." Yet the sole reason, assigned in the preamble for the repeal of the act, is, that "from the shortness of said limited term [three years], and from the want of a general knowledge thereof, many inconveniences may accrue to the citizens of this commonwealth." So that no inference can be drawn from the omission in the act, that there was any change of legislative intention, or that the act ought to be construed to apply to all suits whatsoever. I am not aware that the courts of this state have ever held the construction of the two statutes to be different; but so far as cases have occurred, they seem to have received the same construction, viz. that there is nothing more than a substitution of four years' limitation for the former limitation of three years. See Scott v. Hancock, 13 Mass. 162; Brown v. Anderson, 13 Mass. 201; Ex parte Allen, 15 Mass. 58; Emerson v. Thompson, 16 Mass. 429. It is also observable, that in the statute of 1791, there is no exception in favor of legatees and annuitants; yet it has never been supposed that they were barred after the lapse of the four years, by the act of 1791. But it is more material to observe, that there is in neither statute any exception of suits by heirs and distributees. They could not reasonably be deemed "creditors" within the purview of the act of 1788; and there is not the slightest reason to suppose, that the legislature intended, by the act of 1791, to bar their rights after four years. The object of both acts was to produce a speedy settlement of estates, and a distribution of the residue after the payment of debts and charges among the heirs. Creditors are allowed four years to bring in their claims; and until their claims are satisfied the heirs can have no fixed title. To bring them within the general words of the act, would therefore be to exclude them from the means of asserting their rights, until the moment they were barred. Such a construction has never yet been asserted. See Decouche v. Savetier, 3 Johns. Ch. 190. There are then some cases to which the words of the act do not apply; and it cannot be contended with success, that the words "any suit," are unlimited in their operation. There are manifestly other cases, which fall within the same principle. The executor is, in a strict sense, a trustee of the residue for the heirs; and by the terms of the will he may, as executor, be constituted a trustee for other purposes. He may, as executor, be directed to retain a distributive share, until an infant arrives at 21 years of age; he may be directed to hold certain property in his hands during the life of a feme covert, paying her the income. Many other cases may be easily put, of directions to him as executor, which operate by way of trust, and must, from their nature and objects, be excluded from the statute, although if the words were to be construed very largely, the suits brought to enforce them, might be properly deemed suits against him as executor.

There is another view of the statute of limitations very material to the present cause. I pass over the considerations, whether the executor can ever avail himself of the statute in bar to a bill in equity, without pleading it, and whether any court ought, of its own mere authority, to hold it a good bar, when the executor has not elected to put it in the shape of a bar, but it comes out incidentally on the other side in the allegations of the bill. These considerations deserve a very deliberate examination; but I pass them over, because there is a flat exception in the very substance of the statute, which goes to the overthrow of the limitation itself. It is the proviso, that it shall not be a bar unless the executor has given notice of his appointment in the manner prescribed by the law. It has been adjudged, that the omission is fatal, not only as against the administrator, but the heir and devisee. Bachelder v. Fiske, 17 Mass. 464; Emerson v. Thompson, 16 Mass. 429. Now the bill contains no allegation, that the executors of Ivers ever gave due notice of their appointment; and certainly the court cannot presume it. It cannot, by inference and argument, create a positive bar, where all the facts, constituting that bar, are not before it. If therefore the other considerations, already alluded to, were of no weight, there would be intrinsic difficulty in arriving at the conclusion upon the facts in the bill, that a strict and absolute bar was presented to the court. It is proper, however, as this matter may not go to the merits, and be a mere slip in the pleadings, to give the subject a more comprehensive discussion.

The argument of the plaintiff, drawn from the matter of the bill, is, that the statute of limitation does not apply to him, because, though the will of Ivers was proved in 1813, yet that probate was not, at that time, conclusive on him; and until it was conclusive, the bar did not begin to run against him. It is well known, that in this state the courts of probate have an exclusive and peculiar jurisdiction as to the probate of wills; and a probate once made therein is, in general, conclusive upon all parties, as well as to the real, as personal, estate bequeathed by the will. The statute of 1783 (chapter 46), which is incorporated into our present probate act of 1817 (chapter 190), after giving this jurisdiction, directs, "that any person aggrieved at any order, sentence, decree, or denial of any judge of probate, &c. may appeal to the supreme court of probate," within one month from the time of making such order, sentence, decree, or denial, in a manner prescribed by the act. Then comes this further proviso, "that any person beyond sea, or out of the United States, who shall have no sufficient attorney within this government, at the time of such order, sentence, decree, or

denial, shall have one month after his or her return or constitution of such attorney, to claim and prosecute their appeal as aforesaid." The plaintiff was precisely in the predicament stated in this proviso. He was beyond seas, and without a sufficient attorney, at the time of the probate of Ivers' will in 1813. He subsequently, in 1815, appealed from the decree approving that will, and granting administration to the executors; and upon that appeal, the supreme court of probate affirmed the decree, and thereby confirmed the former proceedings.

I do not think it necessary to give any opinion upon the point, suggested at the argument, whether, in case of an appeal from the decree of a court of probate, the sentence becomes a nullity, unless confirmed by some act of the court above. An appeal in ordinary cases in ecclesiastical courts is not supposed to have such effect, but merely to suspend the operation of the decree, until the superior court has acted upon it, or has pronounced the appeal deserted. See Toll. Ex'rs, bk. 1, c. 2, §§ 9, 10. And the fifth section of chapter 46 of the act of 1783 seems to point in the same direction. But it is unnecessary to discuss this point; because, be this as it may, until the appeal is actually made and perfected, the decree is in full force and vigour, and every act done under it is rightfully done. But when the appeal is made, it certainly, by the express terms of the fifth section, suspends any further proceedings under the decree, until a final determination of the appellate court. In the ordinary case of decrees, where all parties live within the state, a month is allowed, within which an appeal may be made. The executor or administrator may still go on, until it is made, and if not made until the last day of the month, his intermediate acts must have validity. But, surely, it cannot be maintained, that if the appeal were duly made within the month, the mere fact, that the decree had been in operation for ten or twenty days, would make the statute of limitations run, and that notwithstanding the appeal might not be determined, until after four years, it would continue to run and conclude all parties. Such a construction would be so inconvenient and unjust, that no court would resort to it, unless it were unavoidable. A creditor cannot sue an executor or administrator, when his appointment is in suspense; nor can the latter meddle with the assets, so as to discharge the debts. What then would be the consequence of such a doctrine? That the rights of all parties might, if one may use the expression, be in a state of suspended animation, and yet a bar be all the while running, which they could not avert. It appears to me, that the proper exposition of the statute is, that the bar, let in by the probate of the will and administration granted thereon, is suspended by the appeal; and it revives again, only when the administration is again put in motion by the determination of the appellate court. Suppose an executor or administrator should, after his appointment, die within a year, and no administration should be taken, or it should be in litigation, until after the lapse of four years, are all creditors to be barred, because the statute began to run in the time of the first administrator? If not, what is the difference between the case of an administration suspended by an appeal and suspended by death? In respect to the common statute of limitations, some equitable exceptions have been admitted; and where the statute has once begun to run, it has sometimes been intercepted by suspensions arising from the acts of Providence. The cases of Kinsey v. Heyward, 1 Ld. Raym. 432, and Wilcocks v. Huggins, 2 Strange, 907, may serve as examples. See, also, Willes, 257, note a. In the latter case, the court suggested that the time of one year, usually allowed to an executor to commence a new action, in lieu of one which was gone by the death of his testator, might be properly enlarged, where the executor had been retarded by suits contesting the will or administration.

It strikes me, that in the ordinary case of creditors, the limitation ought not to be held to run, except during the period in which there is a living, unsuspended administration, and of course a right to sue a party competent to be sued. But the doctrine of relation may be relied on. It may be suggested, that such ought to be the effect of an appeal, if the decree be overturned; but if affirmed, then the administration ought to be deemed always in operation from the beginning. The doctrine of relation ought not, in my judgment, to be applied in cases of this nature, so as to work a wrong. It is generally applied in support of rights. And the same evils will exist in relation to creditors, whether the decree be affirmed or reversed. In both cases, during the contestation, the administration is, by the provisions of the statute, stayed and suspended. But, if there were any doubts on this point, as to creditors generally, the case of the plaintiff is certainly entitled to be excepted. He was out of the country, and the probate of the will and the consequent administration had no manner of operation to bind him. The statute secured to him a right of appeal, and as to him, there was not a rightful probate or administration, until the affirming decree of the appellate court. While he was contesting the validity of the administration itself, under the statute, it surely cannot be said, that there was a rightful administrator, whom he might sue, and in whose favour the statute was running. That would be to hold, that the administration was suspended, and yet in activity, at the same time, in relation to the same persons. The statute ought not to be so construed as to involve absurdities. To be rational, it must be expounded in regard to non-residents, entitled to contest the will, to have no operation whatsoever,

until they can no longer contest it. Cases may easily be put, in which very serious inconveniences might otherwise arise. Suppose the case of two wills, disposing very differently of the whole estate, and different executors. If the first is admitted to probate, and afterwards the second is offered by a non-resident, who is, at the same time, a creditor and an executor of the second will, are we to understand, that the probate of the first will makes the statute run against the rights of the party under the second; so that, if the controversy lasts more than four years, the party loses all his rights as creditor? That cannot be pretended, if the second will is finally established: and if the first one is finally established, still, until that decree comes, every right of administration must be in suspense as to all persons whatsoever.

A case has been put at the argument (which indeed is said to be the very case at bar, but with that suggestion I meddle not), which illustrates the propriety of this doctrine. Suppose the testator, by his will, gives an estate to his non-resident son, upon condition that he releases all the debts due him from the testator, and the son appeals from the probate; shall he lose all his rights as creditor by a contestation of the will, if the litigation reaches beyond four years after the administration is first granted?

My judgment is, that, as to the plaintiff, the statute did not begin to run until after the affirmance of the decree in the appellate court; and that, as the present suit was brought within four years from that period, there is no bar growing out of the statute, which can prevent him from maintaining it.

There is yet a very important consideration connected with this subject, which ought not to be omitted. It is, that the statute of limitations never was intended to apply to any cases of trusts, or trust property in the hands of executors and administrators; but simply to property belonging to them, as assets of the testator. The law on this subject does not appear to me involved in any real difficulty. Executors are charged with no more in virtue of their office, than the administration of the assets of the testator. If, at the time of his death, there is any specific personal property in his hands, belonging to others, which he holds in trust, or otherwise, and it can be clearly traced and distinguished from the testator's own, such property, whether it be goods, securities, stock, or other things, is not assets to be applied in payment of his debts, or to be distributed among his heirs; but is to be held by the executors as the testator himself held it. But if the testator has money, or other property, in his hands, belonging to others, whether in trust or otherwise, and it has no earmark, and is not distinguishable from the mass of his own property, the party must come in as a general creditor; and it falls within the description of assets of the testator. This is the settled law in bankruptcy and in the administration of estates. See Dexter v. Stewart, 7 Johns. Ch. 52; Kip v. Bank of New York, 10 Johns. 63; Moses v. Murgatroyd, 1 Johns. Ch. 119; Decouche v. Savetier, 3 Johns. Ch. 190; Deering v. Torrington, 1 Salk. 79. Stock therefore, expressly held in trust for others by the testator, is not part of his assets to be administered by the executor, but coming into his hands, as the general representative of the personalty, he is by law clothed with the same character of trustee of the property, and succeeds to its obligation. If he holds it after four years from the grant of the administration, he is still responsible to the cestui que trust, as a trust superinduced upon his character as executor, and in virtue of his successorship. The cestui que trust is not, in such case, strictly and merely a creditor of the testator; and the statute bars only claims of a pecuniary nature against the testator, not such as become personal trusts in the hands of the executor. If an executor were, after the death of a testator, knowingly to convert stock held by the testator in trust, could he protect himself from a personal liability for such unlawful conversion, at the suit of the cestui que trust? The testator would have done no wrong, and, strictly speaking, no right of action would have accrued against him, whatever might be the responsibility devolved upon his estate. The distinction already alluded to in respect to money, held in trust by the testator, clears this subject of many of the difficulties which have been suggested at the bar. It is said, that the claim for such money constitutes a legal demand against the estate; and the cestui que trust is, as to it, just like any common creditor. This is true, if the money is mingled, without any distinction, in the mass of the testator's property, and even, if it remains in specie, separated from it, and held as the separate property of the cestui que trust, he may have a right to come in and claim as a general creditor; but whether he is bound to do so, may be a different question. In the former case, without doubt the statute of limitations will run against him; and a court of equity will, in such case, follow the rule of law. The general principle indeed is, that where there is a concurrent remedy at law and in equity, in whichever jurisdiction the suit is brought, the same bar may, if no other equity intervenes, be pleaded. The case of Heath v. Henly, 1 Ch. Cas. 20, seems to the contrary; but it is of doubtful authority, and I agree with Chief Justice Spencer (Murray v. Coster, 20 Johns. 576) in thinking it at war with the doctrine of Lord Hardwicke in Sturt v. Mellish, 2 Atk. 610. The true rule is laid down in Murray v. Coster, 20 Johns. 576. But, take the case, that the money has been invested in personal securities by the testator in trust, and kept separate from his general estate, and

these securities come into the hands of the executor, with the express trust on their face, are they not, to all intents and purposes, in the eye of a court of equity, the property of the cestui que trust? May he not maintain a suit in equity for specific delivery of them to him? Has he not a right to a discovery from the executor, whether the money has been so invested, and in what manner, and to what extent? If mortgages have been taken, has he not a right to a discovery of the fact? And, if there has been no breach of trust by the testator, but he has held the property by an express agreement with the cestui que trust, does the trust cease to have existence, and change its nature by his death? It appears to me, that the principles, by which trusts are excepted from the operation of the ordinary statutes of limitations, apply with full force to cases of this nature. See Decouche v. Savetier, 3 Johns. Ch. 190, 216, 222; Beckford v. Wade, 17 Ves. 87; 2 Madd. Ch. Prac. 244, 245. If the trust is still subsisting in the hands of the executor, as executor, the lapse of four years does not bar a remedy against him. If it has become a mere money transaction, although originating in a trust, then it assumes the character of a debt, and the cestui que trust is a creditor barred by the lapse of the four years. See Vernon v. Vawdry, 2 Atk. 119.

Now, in this view of the case, it is very difficult to support the demurrer. The bill, if I do not greatly misunderstand its purport, does substantially, though certainly not in so exact and pointed a manner as it ought, assert, that Ivers did keep the trust property separate and distinct from his own, and did invest some of it in real estate and securities, &c. and did keep accounts and memorandums of it; and that the trust property has come to the possession of his executors. Now, if this statement be true, and upon the demurrer it must be taken to be true, the plainest case is made out for a bill of discovery against them. It is the common case of trust property, asserted to be in their hands for the benefit of the cestui que trust, of which he claims a discovery and delivery to his use.

Upon the whole, my opinion is, that so far as the demurrer to the bill is founded upon the statute of limitations in favour of executors, it cannot be supported. The defendant (J. L. Austin), as executor of Ivers, cannot shelter himself from answering by the interposition of that statute, as to the asserted trust derived, either under the executors of Trecothick, or the assignment of the Tomlinsons' executor and heir. Lapse of time is sometimes applied in equity in bar of relief upon trusts; but that doctrine stands upon principles entirely distinct from those which regulate positive statute bars. Cholmondeley v. Clinton, 2 Jac. & W. 138; Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 152, 177, note.

The next objection, taken by the demurrer, applies to the defendant (J. L. Austin), as well in his individual, as his representative character. It is, that Trecothick's will has never been proved, or administration granted thereon by any of the probate courts of Massachusetts; which is asserted to be indispensable to maintain a suit in our courts for any assets belonging to his estate. The same objection is made as to the Tomlinsons.

The general position stated at the bar, that no executor or administrator, appointed under a foreign government, can, in virtue of such appointment, sue in our courts, is admitted. The cases cited at the bar are conclusive on this point. [U. S. v. Simms] 1 Cranch [5 U. S.] 258; [Fenwick v. Sears] 1 Cranch [5 U. S.] 282; [Hallet v. Jenks] 3 Cranch [7 U. S.] 219; [Doe v. M'Farland] 9 Cranch [13 U. S.] 151; 3 Mass. 314; 11 Mass. 257, 313; 9 Mass. 337; 1 Pick. 82; Toll. Ex'rs, bk. 1, c. 2, § 8, pp. 71, 72. If, therefore, this were a suit brought by the executors of Trecothick, as executors, to recover any assets of their testator in the hands of the defendant, the objection would be fatal, unless the probate and administration, in the prerogative court of Canterbury, were conclusive upon the colonies antecedently to the Revolution, and ought now to supersede our local regulations under the circumstances of the present case. What the practice was before the Revolution, it is not very easy now to trace. Without doubt, full faith and credit were given in the colonies to all administrations under the authority of the prerogative court of Canterbury. Voluntary payments of debts, and receipts under such administrations, were of unquestionable validity, and released the debtors from farther claim. But this might well be, without supposing that such administrations entitled the parties to maintain suits in our courts. Such payments, voluntarily made to a foreign administrator, would now be held effectual in our courts, upon principles of national amity. This doctrine is supported by Atkins v. Smith, 2 Atk. 63, and still more fully and forcibly illustrated by the very able opinion of Mr. Chancellor Kent in Doolittle v. Lewis, 7 Johns. Ch. 45. But, though in practice it is not improbable, that many suits were brought by English administrators in our courts, there is reason to doubt, whether, if the point had been judicially contested, their right would have been supported. Lord Hardwicke, in Atkins v. Smith, 2 Atk. 63, said, that an administration taken out in England would not extend to the colonies in America. Burn v. Cole, Amb. 415, is to the same effect. The cases there cited prove, that the practice was to take administrations in the colonies, founded on those in England; and the doctrine established in that decision was, not that such administrations were unnecessary, but that they ought to be granted to the English administrator, and that the judge of probate

in the colonies was bound by the probate and administration in England. Even in relation to Ireland and Scotland, the same rule has been applied. A new administration must be taken out there, in order to found a general authority to sue. Toll. Ex'rs, bk. 1, c. 2, § 8, pp. 71, 72. These considerations induce me to doubt, whether before the Revolution, in strict law, an English administration was of force in the colonies to the extent of authorizing suits in our courts in invitum. But assuming, for the sake of the argument, that it was so, it appears to me, that a suit in our courts, at the present time, must be commenced and prosecuted according to the regulations now in force. Now, at least since the statute of 1785 (chapter 12), which provides for the probate of foreign wills, and the granting administrations thereon, the general rule, at present definitively recognised and settled in our state courts, must have prevailed. and at all events ought to prevail in all suits in courts sitting within the jurisdiction. But it is by no means clear, that, if Trecothick's executors were now suing, they would be obliged, in the present case, to take out administration here before they could proceed. The demand against Ivers, or the defendant (J. L. Austin), is not a demand which accrued in Trecothick's life time, or out of any contract with him. But it is a demand which accrued under agencies created by them, in their character as executors, after the death of Trecothick. They might, under such circumstances, have maintained a suit, in their own names, for an account against their agent, and need not have sued in their representative capacity. See Cockerill v. Kynaston, 4 Term R. 280; Cowell v. Watts, 6 East, 405; Thompson v. Stent, 1 Taunt. 322; Toll. Ex'rs, bk. 3, c. 10, p. 439. The agent would be estopped to deny their right to receive, what he had collected in virtue of their authority. See Nickolson v. Knowles, 5 Madd. 47; 10 Vin. Abr. "Estoppel," M; 2 Comp. 11. The true answer, however, to be given to this objection, so far as it applies to the plaintiff, is, that he does not sue in any representative character whatsoever. The right, he claims, is a personal and private right, belonging to himself, and in no sense to another. He may not be able to establish such a right; he may not be able to trace a sufficient title to sustain him, but he claims nothing as the representative of Trecothick; he claims simply as a cestui que trust under his will, and as an assignee under that of the representatives of the Tomlinsons. It is certainly not necessary to prove a foreign will in our courts, where such will constitutes but one step in the title of a party. If Trecothick had bequeathed a coach, or other specific chattel, to the plaintiff, and the executor had assented to the bequest, and afterwards it became necessary to sue for the same, or to establish the right to the same in our courts, I do not understand, that a probate and administration here would be necessary to establish the title. If a bill were brought in this court, for the specific performance of a contract for the purchase of land, lying in another state, and sold by the devisee thereof, under a will there made and proved, I do not understand, that a probate of the will is necessary, before he can maintain such a suit. Whenever the title to a thing passes by the lex loci, that title may be, nay, must be, made out by such law; and that is all that is necessary. The reason, why an administrator cannot sue in his own name for property here, is, that the administration is local, and confers such right only as to property within the jurisdiction. It is a limited right of representation of the deceased. But, suppose a foreign administrator sells goods of the deceased in the foreign country, and they are brought here, and the right to them is here contested in a suit, may not the party assert his title to them under the foreign will and administration, without a probate here? A will, bequeathing personal estate, conveys that property, wherever it may be situated, if the will is made according to the law of the place of the testator's domicil. Desesbats v. Berquier, 1 Bin. 336; Sill v. Worswick, 1 H. Bl. 690; Bruce v. Bruce, 2 Bos. & P. 231; Somerville v. Somerville, 5 Ves. 750; Potter v. Brown, 5 East, 124; Holmes v. Remsen, 4 Johns. Ch. 460. And it has never been supposed, that it was indispensable to the assertion of a title, derived under such will, that there should be a probate in every place where such property was situate. It is only necessary where a party sues for it, not in his own right, but as the personal representative of the deceased. In respect to a cestui que trust, it is very true, that he cannot sue at law in his own name to get at the trust property; but he must institute his proceedings in the name of the trustee. But in equity it is otherwise. He may there directly enforce his rights, not only against his trustee, but against all others having the trust fund in their hands. Equity will not put the cestui que trust to a circuity of action, but will make the party responsible directly and immediately to him, who is ultimately entitled to the fund. If money, or other personal property, be in the hands of a party, payable to a trustee for the use of a third person, equity will enforce a payment directly to the latter. A cestui que trust, absolutely entitled to a fund, has a right to control and regulate it, and dispose of it, at his pleasure. Riddle v. Mandeville, 5 Cranch [9 U. S.] 322; Russell v. Clarke's Ex'rs, 7 Cranch [11 U. S.] 69, 97; Doran v. Simpson, 4 Ves. 651; Short v. Wood, 1 P. Wms. 470; Collet v. Collet, 1 Atk. 11.

The principles, thus far discussed in respect to Trecothick's estate, apply with more pointedness to that part of the case connected with the Tomlinsons. Tomlinson (the younger) was partner of Trecothick, and the latter, as survivor, was entitled to collect

all the effects of the firm, in trust, however, as to Tomlinson's moiety, for his representatives. Those representatives assigned their right to the plaintiff for his own use, and the executors assenting to it, a letter of attorney was made, authorizing Ivers and the defendant (J. L. Austin), to collect the partnership effects for the benefit of the plaintiff. This is the case made by the bill, and it is of course the case of an assignee, claiming from the agent, with a knowledge of the trust, a right to the property collected under the agency, which he asserts to be still held in trust. The right of an assignee to maintain such a suit in a court of equity in his own right, whatever may be the nature of his derivative title, through a will and administration, or by a mere grant, does not seem susceptible of any legal doubt.

The next ground of demurrer is the want of proper parties to the bill. The objection is, that the executors of Trecothick and Tomlinson are not before the court, nor the trustees under Trecothick's will; and that they are necessary parties to the bill. In a recent case, this court had occasion to go somewhat at large into the doctrine of parties. I allude to the case of West v. Randall [Case No. 17,424]; the principles of which decision have, in no small measure, been confirmed by the supreme court in Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 167. I shall content myself with a simple reference to these cases, as containing the true grounds, upon which courts of equity act on the subject of parties. See, also, Quintine v. Yard, 1 Eq. Cas. Abr. 74; Walley v. Walley, 1 Vern. 487; Fell v. Brown, 2 Brown, Ch. 278.

Let us consider the case, in the first place, so far as the objection applies to the title derived under Trecothick's will. By that will, four persons, who were also his executors, were constituted trustees of all his real and personal estate. The real estate was devised to them in fee in trust for the children of Trecothick in fee tail, if he left any (and in fact he left none), and in default thereof, in trust for the plaintiff in fee tail. The personal estate was bequeathed to them, after payment of debts and legacies, to be invested in real estates in England upon the same trusts. The bill alleges, that all the debts and legacies have been paid, except an annuity to Mrs. Hannah Ivers (the mother of the plaintiff), which her husband, James Ivers, was authorized to pay out of the funds collected by him under his agency, and the payment of which was made one of the conditions in the agreement between him and the plaintiff, by which he retained those funds during his life. The bill further states, that all the executors and trustees are now dead, the Rev. Earl Apthorp having been the last surviving executor and trustee. The question here does not respect the real estate under the will, but that portion only which was personal, or ultimately turned into personalty, by the sales and collections in America. The bill does not state, that there is no executor or heir of the Rev. Mr. Apthorp now in existence, nor that, if there is, he resides out of the jurisdiction, nor that he refuses to take administration, or to become a party to the bill, which certainly were very proper averments to have found their way into the bill, so far as the facts would warrant them. Now, in respect to the executors of Trecothick, as executors, I do not know that they are necessary parties to the bill. They can be so only, so far as funds might be wanting on their part to pay debts or legacies. But, supposing these all paid and extinguished, and the very lapse of time might create a presumption of this, even if the bill did not, as it does in fact, assert a payment and extinguishment of them, they do not seem to have any interest in the controversy; at least not such, as that the court might not get over the difficulty of want of parties, if they were without the jurisdiction, and refused to authorize or seek an administration here. But it is the less important to deal with this point, because being at the same time trustees under the will, they must be deemed by operation of law to take all the personal estate in their character of trustees, as soon as the debts and legacies were paid. The Rev. Mr. Apthorp then became, as surviving trustee, the sole possessor and owner of all the funds collected under the agency in America. In the hands of his agent, the funds are to be considered the same as in his own hands. If any person then is to be a party, it is the executor of the Rev. Mr. Apthorp. He is to be a party, as succeeding to the trust, and compellable to apply the funds to the original purposes of Trecothick's will.

This brings the court to a very material consideration, and that is, how far the plaintiff, as cestui que trust, has a right to control the application of the trust funds to the purposes of the will. Has he a right to a decree for the payment of the funds to himself? Has he a right to prevent them from being invested in real estate upon the trusts in the will? The general principle in chancery is, that where money is directed by articles or by will, to be laid out in land, the party, who would have the sole interest in the land, if purchased, may elect to have the money paid to him, and that it shall not be laid out in land. That doctrine was recognized in Benson v. Benson, 1 P. Wms. 130, and Short v. Wood, Id. 471. See, also, 2 Atk. 452; 1 Atk. 12; Saund. Uses, c. 3, § 7, art. 14; Chaplin v. Horner, 1 P. Wms. 485; Craig v. Leslie, 3 Wheat. [16 U. S.] 363, 578. But there is this distinction, that, if he is tenant in fee simple of the land, when purchased, he has a right to the money absolutely; but if he is tenant in fee tail, with remainders or reversion over, then the court will not interfere, and give him the money, because, though tenant in tail may bar the remainders, by a common recovery, yet, as a recovery can only be in term, the court will not deprive the re-

mainder men of their chance, that the tenant in tail may die in the vacation. But if the tenant in tail is also entitled to the ultimate remainder in fee, then, as he can levy a fine in vacation, as well as in term, and thereby bar the intermediate remainders, the court will give him the same benefit as if he were absolute owner. Benson v. Benson, 1 P. Wms. 130. See cases collected in note to Collet v. Collet, 1 Atk. 12, note 1; Seeley v. Jago, 1 P. Wms. 389. That point was first decided by Lord Cowper in Colwall v. Shadwell, cited 1 P. Wms. 471, 485, and has ever since been recognized as good law. It was acted upon in Short v. Wood, Id. 471, and fully adopted in Collet v. Collet, 1 Atk. 11. In this last case, the brothers and sisters of the plaintiff were entitled to remainders; but, they appearing in court, and consenting to the payment of the money to the plaintiff, the court, upon this consent, decreed it to be paid over to him. In the present case there is a resulting trust of the remainder, undisposed of by the will after the estate tail in the plaintiff, to the right heirs of the testator. The plaintiff is not, therefore, absolute owner, and entitled at all events to the money. Who the heirs of the testator are, entitled to such remainder, is not stated in the bill, and no inference, therefore, can be drawn by the court on this subject. In this posture of the cause, where no consent is given by the heirs entitled to the remainders, it is difficult for the court to say, that the rights of the surviving trustee to the money to fulfil the objects of the will, can be intercepted, at least without making him or his executors a party. If the bill had asserted, that he had absolutely assigned the funds to the plaintiff, or assented to their being paid over to him by the agent, and the agent had acted upon such agreement, and recognised, in an unequivocal manner, his title to them, that might vary the case. There is, indeed, an act of parliament (40 Geo. III., c. 36), by which the court of chancery is authorized to order money in trust to be laid out in land, to be paid to the person who, as tenant in tail of the land, could bar the remainders by a recovery. Lowton v. Lowton, 5 Ves. 12, note; Ex parte Bennet, 6 Ves. 116; Ex parte Sterne, Id. 156; Ex parte Hodges, Id. 576. That might possibly relieve the case from some difficulty, if it were placed, with other accompaniments in the bill; and if it were shown, that, according to the course of chancery, acting upon that act, the plaintiff would now be entitled, if the money were in England, to receive it; or, at all events, if it were shown, that there were no opposing interests in the trustee, and there were no means of bringing him before the court, or he had, by long acquiescence and agreement, admitted the plaintiff's right. For all these purposes the bill is far too equivocal and loose and general.

One circumstance, however, of considerable significance as to this point, is the allegation in the bill of an agreement between Ivers and the plaintiff, that Ivers should hold the funds in his hands during his life, and have the interest thereon, paying the annuity to the plaintiff's mother. But it is not said, that this agreement was with the consent of the trustees, or acquiesced in by them. It is only stated, that Ivers did agree, that his executors should account to the plaintiff for the principal after his, Ivers', decease. If this was with the assent of the trustees, it would present one aspect of the case strongly in favor of the plaintiff, though Moor v. Blagrove, 1 Ch. Cas. 277, looks the other way. See Russell v. Clarke's Ex'rs, 7 Cranch [11 U. S.] 69, 98. If without their consent, it would give rise to a question, how far the court would dispense with parties, where the plaintiff sought to claim the funds, if not in violation of the trust, at least without giving the trustees an opportunity of being heard. I advert to these considerations in order to show, that the texture of the bill is not exactly such as enables the court to see its way to any final and definitive result. The difficulties may not be such as to call upon the court to dismiss the bill; but they show, that some amendments are necessary. But the demurrer goes, not merely to the claim under Trecothick's will, but to the equity of the plaintiff, as assignee of the Tomlinsons. The sufficiency of the assignment is admitted by the demurrer. The only question is, whether, upon such admission, the assignors, that is, the executor of Trecothick and the executor of the Tomlinsons, are necessary parties. If they were without the jurisdiction, and it were so averred in the bill, I should upon the demurrer have great difficulties in deciding, that they were necessary parties. The rule in equity seems to be, that executors and administrators ought, in general, to be parties to suits affecting the estates of the deceased; but this rule may be dispensed with when there is no administration, or the party is without the jurisdiction. Cooper, Eq. Pl. 35; 2 Atk. 51, 510; 1 Vern. 95; Finch, Prec. 83; Milligan v. Milledge, 3 Cranch [7 U. S.] 220.

In respect to cases of assignments, it has been argued at the bar that the assignor is always a necessary party, and the cause cannot go on in the name of the assignee without him. For this purpose the case of Ray v. Fenwick, 3 Brown, Ch. 25, has been relied on. That was the case of an assignment of a bond by an obligee, since deceased, and nobody had administered to him. An application was made for a ne exeat against the obligor, at the suit of the assignee. The lord chancellor (Thurlow) refused it, "because the suit, without a representative of the original obligee of the note (bond), must be dismissed for want of parties." This is the whole of the report; and it is certainly very unsatisfac-

tory, containing no circumstances, which enable us to see, whether the assignment was absolute or conditional only. In Cathcart v. Lewis, 1 Ves., Jr., 463, the same doctrine was, by the same chancellor, applied to the case of an assigned judgment, though his opinion principally proceeded on another ground. Here also, there are no circumstances stated in the report, enabling us to ascertain the nature of the assignment. The case of Cooke v. Cooke, 2 Vern. 36, is to the same effect. But it is a very short and loose note. Respectable as these dicta are, they do not appear to me well founded in point of law, unless in cases where the assignor has some remaining interest. If his assignment be absolute and unconditional, he can have no such interest. It is a general rule, subject, however, to some exceptions, that no person need be made a party, who has no interest, and against whom, if the cause be brought to a hearing, there can be no decree. Fenton v. Hughes, 7 Ves. 287; Whitworth v. Davis, 1 Ves. & B. 545. A mere witness cannot be made a party. Now, in cases of absolute assignments, the assignor has no interest; no decree could be had against him at the hearing; and he certainly may be made a witness. Upon what ground then does the objection stand as to such person? But there are cases of assignments, in which a doctrine contrary to that of Lord Thurlow is maintained, and upon principles rational and convenient. In Kirk v. Clark, Finch, Prec. 275, it was admitted, that, though cestui que trust must always be a party; yet the trustee was not to be so, if he have no interest, especially, if cestui que trust would undertake that he should conform to the decree. In Brace v. Harrington, 2 Atk. 235, Lord Hardwicke said: "It is not necessary, in every case of assignments, where all the equitable interest is assigned over, to make a person, who has the legal interest, a party; but if an obligee has assigned over a bond, and a presumption of its being satisfied arises from the great length of time, &c. the cause must stand over to make the representative of the obligee a party, because it is possible the obligee himself may have been paid; and therefore necessary to have an answer, as to that particular, either from him or his representative." The exception, here suggested, must, if good at all, stand upon the ground, either, that there was a payment to the obligee before the assignment, and then it would be a fraud upon all parties; or afterwards, and then the obligee, as the party ultimately liable, ought to be brought before the court. However this may be, Lord Hardwicke lays down a general rule, inconsistent with that of Lord Thurlow. In Hill v. Adams, 2 Atk. 39, Lord Hardwicke acted upon his own doctrine, holding, that "where a mortgagee assigns, without the mortgagor's joining (in the deed of assignment), the heir of the mortgagor, in preferring a bill to redeem, has no occasion to bring the original mortgagee before the court, for the assignee, as standing in his place, will be decreed to convey." In Chambers v. Goldwin, 9 Ves. 254, 268, Lord Eldon recognised the same doctrine. The converse case was decided by Mr. Chancellor Kent in Whitney v. McKinney, 7 Johns. Ch. 144, that, upon a bill to foreclose a mortgage, the assignee of the mortgage may maintain the bill without making the mortgagee a party. On that occasion the learned judge took a survey of the authorities, and put the point, whether the assignor ought to be a party or not, upon its true ground, whether the assignment was absolute or not. The reasonings of the master of the rolls in Whitworth v. Davis, 1 Ves. & B. 545, goes on the same general ground. And in Davies v. Dodd, 4 Price, 176, in the exchequer, in a suit by an indorsee against the acceptor of a lost note, it was held, that the drawer was not a necessary party.

The true principles to be adduced from the cases seem to me to be, that the assignor need not be a party, where the assignment is absolute, and he has no interest, and is not, by the nature of the case, brought under any new liability. If this be true generally, a fortiori, the assignor, even if a proper party, might be dispensed with when out of the jurisdiction of the court. In the present case the executors of the Tomlinsons have not the legal property in them, for Trecothick was the surviving partner, and entitled at law to collect the effects and account to the executors of the Tomlinsons. The latter, therefore, had an equitable interest only in the property, and a legal right to an account. But, as the bill asserts, that the assignment was made with the consent of the trustees and executors of Trecothick, which, upon the demurrer, must be taken to be true, that consent appears to me at present sufficient to dispense with the necessity of making either the one or the other parties. The case of Moor v. Blagrave, 1 Ch. Cas. 277, does not satisfy my judgment, that a contrary doctrine is sound, if that case cannot be distinguished from the present.

Many other topics have been brought into discussion upon the assignment, with which it is not now necessary to meddle; and sufficient unto the day is the evil thereof.

My opinion upon the whole is, that the demurrers are too broad, and not well taken in their matter and extent, therefore they must be overruled. The bill also appears to me very defective in its structure and averments; and before it can be brought to a successful hearing, it ought to undergo many amendments, even if the merits were altogether in its favour, upon which at pres-

ent I have not the slightest opinion. It is proper to add, that every thing relied on by way of demurrer may, so far as it goes to bar the suit, be brought out as matter of defence upon the answer, and insisted upon therein with all its legal effects. Demurrer overruled.

NOTE. After the above decree, no further proceedings were had on the plaintiff's bill, and at a subsequent term it was discontinued by consent.

Case No. 14,165.

TREE et al. v. The INDIANA.

[Crabbe, 479] [1]

District Court, E. D. Pennsylvania. July 15, 1842.

MARITIME LIENS—BY GENERAL LAW—BY STATE STATUTE—FOREIGN AND DOMESTIC VESSELS—ENROLLING FOREIGN VESSEL.

1. Admiralty courts have jurisdiction to enforce the claims of mechanics and material-men for work and materials furnished in fitting vessels for maritime service; where such repairs have been made, or materials furnished, to a foreign ship, or to a ship in the ports of a state to which she does not belong; and in the case of a domestic ship, when by the local laws of the state where the repairs are made, or materials furnished, the creditor has a lien on the vessel.

2. A vessel was enrolled as belonging to a port in New Jersey, and a share in her subsequently sold to a person in Philadelphia, who thereupon became managing owner, and obtained a new enrolment for her as belonging to Philadelphia; a libel being filed in this court for work and materials furnished, both before and after the new enrolment, it was decided that as to the charges which accrued before the new enrolment the court had jurisdiction over her as a foreign vessel, but after that enrolment she became a domestic vessel, and as the lien which the local law of Pennsylvania gave, for work and materials furnished, had been, under that law, divested by her making subsequent voyages, this court had no jurisdiction as to the charges which accrued subsequently to the second enrolment.

[Cited in Dudley v. The Superior, Case No. 4,115; Hill v. The Golden Gate, Id. 6,492; The Rapid Transit, 11 Fed. 332; The Jennie B. Gilkey, 19 Fed. 128; The Ellen Holgate, 30 Fed. 126; The Samuel Marshall, 49 Fed. 757.]

This was a libel for work and materials furnished [by John Evans Tree and John Eastburn, trading as Tree & Eastburn, sail-makers, against the brig Indiana, Wells, master], the libellants being sail-makers in Philadelphia. It appeared that the Indiana was built at Egg Harbor, in New Jersey, and there enrolled in 1839, as belonging to citizens of that state. On the 21st March, 1840, a sixth part of her was sold to one Patton, of Philadelphia, who thereupon became the managing owner, and on the 27th of that month, caused her to be newly enrolled at Philadelphia. A part of the claim on which the libel was founded was for work and materials furnished before the 27th of March, 1840, and the residue accrued after that time. The Indiana had made a voyage subsequently to the date of the last charge libellants presented against her.

[1] [Reported by William H. Crabbe, Esq.]

G. M. Wharton, for respondents.

There is no lien now existent on this vessel. She is a domestic vessel in this port, and is shown to be so by the register and enrolment, which are conclusive; but by our law all lien upon her is gone, as she has made a voyage since the last charge made by libellants. Act of assembly of June 13, 1836 (Dunlop Laws, 3d. Ed., 681); Serg. Const. Law, 208, 209; Woodruff v. The Levi Dearborne [Case No. 17,988]; The General Smith, 4 Wheat. [17 U. S.] 438; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; The Jerusalem [Case No. 7,294]; Davis v. New Brig [Id. 3,643]; Harper v. New Brig [Id. 6,090].

O. Hopkinson, for libellants.

RANDALL, District Judge. The jurisdiction of courts of admiralty to enforce the claims of mechanics and material-men for work done or materials furnished in building, repairing, fitting, or furnishing ships and vessels for maritime service, has been so frequently the subject of examination and judicial decision that, if anything can be considered as settled, it must be admitted that the jurisdiction exists: (1) Where such repairs have been made, or materials furnished, to a foreign ship, or to a ship in the ports of a state to which she does not belong; and (2) in the case of a domestic ship, when, by the local laws of the state where the repairs are made or materials furnished, the creditor has a lien on the vessel. In Pennsylvania, by the act of June 13, 1836 [Laws Pa. 1835–36, p. 617], ships and vessels of all kinds are made subject to a lien for all such work or materials done or furnished at the request of the master or owner, in preference to any other debt due from the owner; but the lien continues only from the time of doing the work or furnishing the materials until the vessel proceeds on her voyage to sea. If she is permitted to leave the port, and proceed to sea, without payment, the debt becomes a personal charge on the owner or contractor, and, as the lien on the vessel is gone, a proceeding in rem cannot be had in the admiralty to enforce payment.

In this case it is proved, if not admitted, that the vessel has made several voyages since the claim of the libellants accrued. The charges bear date at different times, from November, 1839, to August, 1841. The vessel cleared on a voyage to Kingston, Jamaica, on the 15th March, 1842, and the libel was not filed until the 8th April, 1842. Unless, therefore, she can be considered as a foreign vessel during the whole or some part of this time, the libel must be dismissed. The Indiana was built at Great Egg Harbor, in the state of New Jersey, in 1839, was owned by residents of that state, and, on the 18th October, 1839, was enrolled there as belonging to that port. On the 21st March, 1840, W. B. Adams, one of the owners, sold a sixth part of the vessel to Armer Patton, of Phil-

adelphia, and, on the 27th of that month, she was enrolled as belonging to this port; but, as the other owners continued to reside in New Jersey, it has been contended that the vessel must be still considered as belonging to that state. The act of congress, however, prescribes to what port or place a vessel shall be considered to belong. All ships or vessels are required to be registered by the collector of "the district in which shall be comprehended the port to which such ship or vessel shall belong at the time of her registry." Which port, by the third section of the act of December 31, 1792, 1 Story, Laws, 268, 269 [1 Stat. 288], is "deemed to be that, at or nearest to which the owner, if there be but one, or if more than one, the husband, or acting and managing owner of such ship or vessel, usually resides." In this case Patton, after his purchase, became the acting or managing owner of the vessel; consequently, her register was changed, and after the 27th of March, 1840, she ceased to be a foreign vessel, and must be considered as belonging to the port of Philadelphia. For repairs prior to that time the libellants have a lien. The charge for work and materials before that date amounts to $1021 61, and payments are admitted amounting to $947 51; the respondents allege that the work and materials have been greatly overcharged, so that these payments are a full compensation for all that was fairly due, but the evidence has not satisfied me that the libellants claim more than they are entitled to recover. For the balance of that account they will be entitled to a decree; as to the remainder of their claim the libel must be dismissed for want of jurisdiction.

Decree for libellants for $70 10, and costs, and as to the balance for work, labor, and materials furnished since 27th March, 1840, libel dismissed for want of jurisdiction.

Case No. 14,166.

TREFZ v. KNICKERBOCKER LIFE INS. CO.

[6 Ins. Law J. 850.] [1]

Circuit Court, D. New Jersey, 1877.[2]

INSURANCE — LIFE — APPLICATION — REPRESENTATIONS — "SICKNESS."

1. The application for a policy on the life of the husband in favor of the wife was in the singular number, but was signed by both. *Held*, that it was a joint agreement by both parties.

2. The application, which was for the issue of a new, in exchange for the old, policy, covenanted that all the statements in the original application were true when made, and should be the basis of the contract. The policy provided that it was issued in consideration of the representations in the application, upon the faith of which it was issued; also, that it was issued and accepted upon the express condition and agreement that, if any of the statements in the application were in any respect untrue, the policy should be void. *Held*, that any false statement, whether material to the risk or not, avoids the policy. A jury has no right to say that it will not regard them because they are not material.

3. When the insured, who was a German, answered to one of the interrogatories in the application "never sick," which was written by the person who took the application, it was for the jury to decide, in view of conflicting testimony, and his important knowledge of English, whether the answer was false.

4. If the sickness alleged by the company had been subsequently explained to the medical examiner upon its demand for a re-examination, in order to secure a reinstatement of the policy, and was by him regarded as too trivial to mention, the jury has a right to infer that it was not so serious as to make the statement of the insured a fatal mistake.

5. A party may not, in general, contradict the evidence of his own witness, unless such evidence was a surprise.

6. It is not every affectation of the head from the sun that constitutes "sickness," within the proper significance of that term. The burden of proof is on the defendant alleging such sickness.

7. A jury may not consider the hardship of the case in determining the liability of the company.

At law.

Mr. Coult, for plaintiff.

Mr. Keasbey, for defendant.

NIXON, District Judge (charging jury). The case has been so ably summed up by the counsel of the parties that not much remains for me to say. You are to determine all questions of fact. The responsibility of the law rests with the court. This is an action brought by the widow of Christolph Trefz to recover the amount alleged to be due on two policies of life insurance, which she held in the defendant's company, upon the life of her husband. They were both dated September 6, 1873; one for $8,500, and the other for $2,500. An examination of the face of the papers shows that they were issued to the plaintiff by the company, in consideration of her paying an annual premium, in advance, of $461.64 on the policy for $8,500, and $125.78 on the policy for $2,500. It is acknowledged by the terms of the respective policies that these sums were paid for the first year, ending September 6, 1874. The company issued and delivered to the insured, yearly thereafter, what are called "renewal receipts," signed by the secretary and president, certifying that the policies had been continued in force for another year, and I regard the production of these receipts by the insured as prima facie evidence, at least, that the annual premiums have been since regularly paid.

The evidence is undisputed that Christolph Trefz died on the 24th of February, 1876, and that his widow filed with the company proofs of loss on the 10th day of March following. By the terms of the policies the company was obliged to pay the amounts due upon them three months after notice and satisfactory proofs of the death of the insured. As no objection appears to have been made to the form of the proof, the jury

[1] [Reprinted by permission.]

[2] [Affirmed in 104 U. S. 197.]

will assume that the notice was regular, and was accepted by the company; and hence, if any liability exists, the sums due to the plaintiff upon the policies should have been paid to her on the 10th day of June, 1876. The plaintiff states, in her testimony, that when she presented to the company the proofs of death and loss, one of the officers interposed some objections to payment, on the ground that the deceased had shortened his life by the excessive use of intoxicating liquors, and that it might be a proper case for compromise; but that no difficulty was stated in regard to the form or mode of proofs.

The policies on which the suit has been brought were not the only or the first policies that the company had issued to the plaintiff. It appears in evidence that on the 25th day of May, 1867, the policy was issued for $3,000, and on the 18th day of March, 1868, another was issued for $10,000, making the aggregate of $13,000, which the insured had in the company from 1867-68 to 1873, when the surrender took place, and the new policies were made out. The first policies were surrendered on the 30th day of August, 1873, and on that day it appears that a written agreement was entered into between the parties, setting forth the terms and conditions upon which the new policies were to be granted. These agreements are in evidence, and they seem to be a request from the insured and his wife to the company to issue new policies, and were in these words:

"The undersigned, owner of policy No. 16,772 on the life of Christolph Trefz, hereby requests the Knickerbocker Life Insurance Company of New York to issue a new policy for $2,500, with premiums payable annually; and, in consideration thereof, I do hereby covenant and agree that all the statements contained in the original application and declaration for the said policy were true and valid when made, and are hereby made the basis of the contract between myself and the said company for the new policy hereby solicited." The other agreement is the same in form, and asks for a new policy for $8,500. Although in the singular number, they are signed by both Christina Trefz and her husband, and therefore must be held to be a joint and several agreement on their part that all the statements in the applications for the first policy were true and valid when made, and these statements were considered by them as the basis of the contract between the parties for the new policies about to be issued. The jury will thus perceive the connection between the old and the new policies,—the written statement and applications for the former were made the basis of the contract between the parties for the latter.

Now, turning to the latter policies, we find that they both purport to be issued upon the life of Christolph Trefz for the benefit of his wife, Christina, "in consideration of the representations made to them in the application for this policy, and upon the faith of which the same is issued," etc. The reference here is not to representations made in any new applications, but to the representations and statements in the original application, which had been made, by the agreement of the parties, the basis of the contract on which the new policies were issued. Looking further into the terms of these policies, we find the following condition annexed to them, and its importance will be understood by the jury when I state that the whole case, in my judgment, turns upon its meaning: "This policy is issued, and is accepted by the assured, upon the following express conditions and agreements, to wit" (and here follows a long statement of conditions and agreements, to which it is not necessary to refer, as they have nothing to do with the present controversy, and concluding with the following): "That if any of the statements or declarations made in or accompanying the application for this policy, and upon the faith of which the same is issued, shall be found to be in any respect untrue, then in every such case this policy shall be null and void." Now, gentlemen, that seems to be a hard condition for the policy holder, but it is there, and courts and juries, in cases of this sort, are obliged to ascertain what the contract is, and enforce it, without reference to the parties concerned in the litigation; in other words, there is no place for sympathy. We are not to inquire whether one party or the other made a good or bad bargain, nor are we to set up our individual judgments upon the question whether it was wise or unwise for one or the other to conclude such a contract. We are simply to find out what the parties did agree to, and whether either has failed to perform his covenant. When the surrender of the old policies took place, the parties agreed in express terms to make the statements and declarations in the original application the basis of the contract for the new policies.

We have heard a good deal said, during the trial, on the question whether these statements and declarations should be treated as express warranties, or as mere representations; but under the decisions of the supreme court of the United States (Jeffries v. Life Ins. Co., 22 Wall. [89 U. S.] 47, and Aetna Ins. Co. v. France [91 U. S.] 510), which control this court in the interpretation of the law, it would not seem to make any practical difference in this suit whether they are regarded as warranties or representations. Whether the one or the other, if they are in any respect untrue, they avoid the contract, and prevent a recovery upon the policies. The jury will at once perceive the reason of this. It is because the parties themselves have agreed that such shall be the result of any untruth in the statements. Nor, let it be observed in this connection, does it matter whether the false statements

or the false representations, if any have been made, are in my judgment material to the risk or not. The company has determined the materiality of the matter by asking the question. This may seem harsh, but we are not considering that. It is the law of this court that, when a party goes to a life insurance company for the purpose of effecting a life insurance, and agrees that every statement which he makes to the company shall be true, or there shall be no contract between them, if it turns out afterward that the statements were false or untrue, the jury have no right to say that they will not regard them, because they were not material to the risk. The company, in propounding the inquiry, made themselves the judges of its materiality, and the individual, in answering falsely, agreed that he should have no benefit under the policy or the contract.

We have now reached the question on which the case turns. Has it been proved to your satisfaction, by the defendant corporation, that the insured, in his written application, made any statement or representation which was not in fact and in all respects true? The jury must determine this question from the evidence in the case. The counsel for the defendant insists that the application, when considered in connection with the testimony of the witnesses, shows upon its face that there was an untrue statement made; but the difficulty about it is that there is a conflict in regard to the evidence, and the jury must first ascertain what the evidence is, before the question of the falsity of the statement can be passed upon.

I hold in my hand one of the written applications of Christolph Trefz and wife for one of the policies of insurance. The other is substantially like it, although in the German language. These are the papers that the parties stipulated should be true, and the basis of the contract between them, when the policies were issued on which the suit was brought, and, if the statements and declarations therein contained are not true, there was no contract to be enforced.

The counsel of the defendant claims that the answer given to the fifth interrogatory is an untrue answer, and must be so regarded by the jury when they come to construe the testimony in regard to the physical condition of the insured before the application was made. The interrogatory was this: "Fifth. Whether, now or formerly, when, or how long, or to what degree, have you been subject to, or at all affected by, any of the following diseases?" And then comes a long enumeration of diseases, commencing with A (apoplexy), in the alphabet, and ending with Y (yellow fever). He was asked whether he had ever been afflicted with any of these diseases. He replied "No" in one of the applications, and in the other the answer was "Never sick"; not written, however, by himself, but by the person who took his application for the insurance.

The counsel for the defendant asked me to charge you that the individual before whom the application was taken was not shown to be the agent of the company. I will say, in reply, that Mrs. Trefz testified that he represented himself to be such agent, but that, standing alone, would not bind the company. I do not know whether he was their authorized agent or not, and I have no recollection of any testimony in the case which would tend to make them in any wise responsible for his acts.

The counsel for the defendant further says that the reply "never sick" was an untruth of such a character as to avoid the policy. In considering this you have the right, and you ought to remember that the applicant was not a native born citizen, and that he was not very familiar with the language in which the question was put. He did not speak it with any fluency, and it is fair to assume from the testimony that he did not understand it very fully when spoken to him. I make these observations because it seems to me that, in endeavoring to ascertain the truth or falsity of the answer, we ought to look at it in the light of the knowledge and understanding which the individual had in regard to the terms he uses. The question was stated in what to him was a foreign language: "Have you such and such diseases,"—beginning with apoplexy and ending with yellow fever. His reply is reported in the same language, "No; never sick." Was the answer false? This much certainly is true, in view of the testimony of Dr. Smith, Dr. O'Gorman, the plaintiff, and others, that throughout the insured's life he had been a uniformly healthy man. They said they had never known him to be sick. He was not subject to the ills to which people in ordinary life are subject, in the way of acute or bad sickness. But it is also true that, before the applications were filed,—about six months before, if you believe the inference of the witness Schempler, who inferred that it was in the summer of 1866, from the statements made by Trefz at the time of his re-examination,—he was exposed to the rays of the sun whilst at work in the field, and was overcome by the heat in such a manner, and to such an extent, that he left his work, and went to his house. The defendant insists that such a fact was sufficient to make void the policies, because it shows that a man could not truly say he was never sick who had suffered from such a sunstroke.

Now, gentlemen, you must decide this question fairly, carefully adverting to all the testimony on the subject. The first witness to whom you will turn (Schempler) was for several years the bookkeeper of the insured. He was offered by the defendant necessarily, I suppose, because it was difficult to get testimony in matters of this nature without calling on the persons who have been intimately associated or connected in business with people affected in this way. I think it is proper

for me to observe that Mr. Schempler produced upon the court the impression of desiring to speak the truth. He was not prejudiced in favor of the company, although they called him, and I did not see any disposition on his part—although you must be the judge of that—to make any statements merely to favor the plaintiff. He says that the first he ever heard anything about a sunstroke was about the year 1872. He is not sure of the year, however, but it was at the time when he had neglected to pay the premiums due upon the policies, and had gone to the company's office in New York, with Mr. Trefz, to apologize for his carelessness, and to pay the premiums. Dr. Derby, the medical examiner of the company, says that it was in March, 1871, and fixes the date by a memorandum made at the time. The officers refused to renew the policy without a new examination of the insured. They were sent to the medical examiner of the company, and the doctor asked the witness whether he had any knowledge of Mr. Trefz's ever having a sunstroke. He thinks the doctor was led to ask him such a question from seeing some peculiar movements about the arms of the insured, and that the inquiry was made of him because he was more familiar with the English language than Mr. Trefz. The witness had never heard that Mr. Trefz had ever been thus affected, but, on inquiring of him, he learned that he had had a sunstroke some time before. He fully described to the medical examiner the symptoms, explained how he had been affected; and when he had concluded, the doctor, who was doubtless the agent of the company in the examination, said: "Oh, that makes no difference, if that is all;" and passed him as a fit subject for insurance after the attack had been described and explained.

When this testimony was given, I presume every gentleman upon the jury at once came to the conclusion that if it was true, and if the agent of the company regarded the attack, when he was told of it, of too little consequence to hinder the renewal of the forfeited policies, it was now too late for them to come forward, and say that it was of so serious a character and nature that he ought never to have been insured at all; in other words, that the company ought not to be allowed to regard the indisposition of such a trivial character as to overlook it, and take the money of the insured for a renewal of the policies, and, after his death, to avoid the payment of the loss, on the ground that the attack was serious enough to bring it within the range of the diseases respecting which the insured gave the reply of "never sick." But is it true that this statement and explanation were made by Mr. Trefz to the examiner? I called the attention of the counsel, when he was summing up the case for the defendant, to the fact that, when the doctor was afterwards called as a witness, he did not, in direct terms, contradict the testimony of Schempler. His reply was that the law did not allow him to offer a contradiction to his own witness. This is undoubtedly the general principle, for the obvious reason that, where a party tenders a witness in a cause, he by that act assumes that he is worthy of belief; and it would not conduce to the ends of justice to allow such a party to select those portions of his evidence that are favorable to him, and ask the jury to rely upon its truth, and then prove that he should not be believed as to other portions that seem to make against his case. But where the testimony of the witness has surprised the party offering him, there are cases in which the law allows of his contradiction. Whether this was one of such cases it is not necessary for me to say; but I think the defendant should have called the attention of the examiner to the interview between himself and the insured, and should have been asked whether the witness had stated the whole truth in regard to the conversation between them, and left the counsel of the plaintiff to have made objections if he saw fit. But, although no attempt at direct contradiction was made, the witness was asked a number of questions, the drift of which was to create the impression that no such conversation took place. He stated, for instance, without qualification, that, if he had known about the sunstroke as he then understood it, he would not have recommended the renewal of the policies of insurance.

It is for the jury to decide, in this state of the proof, where the truth lies. In determining it, they must not lose sight of the fact that the defendant claims that the assured stated that he had received a sunstroke, and that his conduct in talking about it, and in putting cabbage leaves in his hat, etc., indicated his apprehension of a return of the trouble. They must also determine whether it is probable that the insured would have pursued this course of conduct if he had considered the attack of so alarming a character as to make his declaration that he was "never sick" an untruth, which would defeat his policies of insurance. You must also bear in mind the statement of the witness Schempler that the insured said to the doctor that he was rendered insensible by the sunstroke. Consider, in connection with this, the testimony of the plaintiff, Mrs. Trefz, who stated that her husband came home alone; that he did not seem to be seriously affected; that he said he had been affected; that his head had been hurt by the heat; that he had been compelled to stop work, and come home; that at first he declined to eat his dinner; and that he did eat afterwards, and returned to his business. All this is only material as conveying to you a knowledge of the extent of the injury received by him. It is not every affection of the head from the heat of the sun that con-

stitutes sickness. When a man says that he was never sick, he does not mean that he never had a headache, or that he was never affected by the heat of the sun, or that he never had any of the ills that flesh is heir to. It may have been meant, in the present case, that the insured had "never been sick" with any of the long list of diseases which had just been enumerated to him.

I think I may properly say to the jury that there are affections of the head, caused by the heat of the sun, that may be denominated sickness, and that there may be other affections of the head thus caused which are not sickness. It is for you to determine the extent of the injury received by Mr. Trefz; and whether it was of such a character or nature as to make his reply to the interrogatory a falsehood or not.

The question was put to Dr. O'Gorman by the defendant's counsel, as to what he considered a sunstroke, and his reply was that he regarded it rather an accident than a disease. What I suppose is true to the matter is that there are some affections of the head, brought on by exposure to the sun, which would make the reply of the insured an untruth; and that there are other affections, produced in the same way, of such a light character as to render his reply proper and fair. It is for the jury to say from the evidence, in regard to the extent, nature, and kind of sickness, whether the attack which the insured suffered was of the character to make his answer "never sick" a falsehood.

The burden of proof here is upon the defendant. The company sets up the defense, and the jury must be satisfied from the evidence that the untruth of the statement has been established; otherwise, their verdict should be for the plaintiff, for the amount due on the two policies, with interest commencing three months after filing the proof of death and loss. But if you believe from the testimony that the insured, whether willfully or otherwise, made a statement in his application which amounted to an untruth, it will not do to refuse to enforce the contract which the wife and husband entered into, on the ground that it would be a hardship to the widow. People must not make bad bargains outside of the court room, and then come here, expecting the court and jury will relieve them from the consequences; but you must be satisfied of the falsity of the statement made by the insured before you can find a verdict for the defendant.

I will now refer to the request of the counsel of the defendant to make certain charges in regard to the law of the case. I will read them, and then state what I charge in regard to them.

I am requested to charge:

(1) That the statements contained in the original application and declaration for the respective policies, in place of which the policies in suit were issued, enter into and form a part of the new policies; and, if any of the statements contained in either of the said applications are found in any respect untrue, the policy issued upon the application containing such untrue statement is void, and the plaintiff cannot recover thereon. That I have already charged in substance, and I repeat it.

(2) That, although the policies do not, in express terms, make the application a part of the policy, yet, inasmuch as they declare that they are issued in consideration of the representations made in such applications, and on the faith of the same, and upon the express condition that, if any of the statements made therein were in any respect untrue, the policies should be void, these stipulations make the truth of the facts a matter of contract, obligatory on the part of the insured, as if the statement had been embodied in the policy itself; and therefore the contract must be held to comprehend both the policies and the application which they refer to as their basis. I do not perceive that the second differs materially from the first, except in the phraseology, and I charge it to be the law of this case.

(3) That being so referred to in the policies, and made in the basis of the contract, the statements in the application were warranties; and, if any of them, whether material to the risk or not, were untrue in any respect, either from design, mistake, or ignorance, the plaintiff cannot recover. I will pass that for the present. I think there is a request further down that covers the ground.

(4) That where the policy and application are brought together by the distinct reference of the former to the latter, in the terms employed in this case, there is an express agreement, not only that the statements are true, but they are to form a part of the contract, and thereby the statements become warranties. It is only where there is no such distinct identification of, and reference to, the application, that the statements can be held representations, and not warranties. I will pass that, also, for the present, as I think there is something further on in reference to it.

(5) That whether the statements are to be regarded as representations or warranties, or even as neither, yet, being expressly made the basis of the contract, they must all be true, as the insured has agreed that they shall be; and further, that the faithful performance of this agreement is essential to the existence of liability on the part of the company. I decline to charge to third and fourth requests, because I am not prepared to say that these representations are warranties, nor do I think it material to this case whether they are regarded as one or the other. This fifth request covers the whole ground, and I charge it. Whether the statements are treated as representations or warranties, or as either, they have been made expressly the basis of the contract, and must all be true, for the insured has agreed that

they shall be, and the faithful performance of the agreement is essential to the existence of liability on the part of the company. I hold that, if they are not true, the plaintiff cannot recover.

(6) That where it is expressly covenanted as a condition of liability that the statements in the application are true, and their truth forms the basis of the contract, and false answers are made, it is of no consequence whether the statements are material to the risk, or influence the mind of insurers, and these questions are not for the determination for the jury. I have already so said in my charge, and I repeat it.

(7) That, under the provisions of these policies, and the undisputed facts of the case, the only question for the jury is the truth or falsity of the answers; and that if the answer "never sick" was in point of fact untrue, the plaintiff cannot recover, whether the injury was material to the risk or not. I charge that, gentlemen, to be the law in this case.

(8) That by the undisputed medical evidence of the plaintiff's witnesses, sunstroke is a disease of the brain, often fatal, though sometimes entirely cured and its effects obliterated. I do not charge that, because it was not the undisputed medical testimony, as I understand it. I believe the question was put to Dr. O'Gorman whether it was not a disease, and he replied that he would rather call it an accident. I decline to charge it, because I do not consider it undisputed medical testimony.

(9) That if, within two or three years, the insured had such disease, his answer "never sick" was untrue, although he had entirely recovered from it long before his death, or even at the time of his application. I decline to charge, because I do not think it is true, as I have endeavored to state in my charge.

(10) That it is proved by witnesses, unimpeached and uncontradicted, that the insured frequently stated that he had had sunstroke in 1866, and guarded carefully against its recurrence, long after the insurance was effected; and that, unless you can find something in the case which renders these statements incredible, the jury are bound to treat the fact as established in the case, and, on the principles above asserted, to find for the defendant. I decline to charge that, because I do not care to interfere with questions of fact before the jury.

(11) That there is no evidence that the application—

By the counsel of the defendant: That has been already charged; the request may be omitted.

(12) If the jury believe the testimony of the witness J. H. Schempler, the defendant is entitled to a verdict in its favor. I decline to charge that, as I rather think his testimony, taken altogether, made for the plaintiff, rather than the defendant.

(13) If the answer of Trefz to any question was untrue in the sense in which such question and answer are commonly understood, the policy is void, even though the answer may have been true in the sense in which he understood the question. That will hardly do, and I decline to charge it.

By the counsel of the defendant: I desire to except to the ruling of the court to charge the last but one request, and to the terms of the refusal, to the effect that the testimony of Schempler is, on the whole, in favor of the plaintiff.

BY THE COURT: I did not mean to influence the judgment of anyone. I only stated that as my reason for declining to make the charge.

By the counsel of the defendant: I am afraid that it has done so.

BY THE COURT (to the jury): Anything I have said with regard to any fact in the case should not be allowed to influence your judgment. The facts are for you to determine. Although it may be proper, at times, for the court to impart to the jury the impression made upon its mind by the testimony, they are not bound by it. I repeat that you must not be influenced by any expressions I have used in regard to any questions of fact whatever.

By defendant's counsel: We except, of course, to the refusal of the court to charge as we requested, and to those parts of the charge in which the court said that Dr. Smith and other witnesses had testified that Mr. Trefz was a very healthy man in 1872, and for a long time after, inasmuch as the question of his health after he became acquainted with Dr. Smith and the other witnesses referred to was not the question at issue at all, but the state of his health in 1867 and 1868, and long before the policy.

BY THE COURT (to the jury): That exception is well taken, if I have so charged, and I will now correct it. Whatever Dr. Smith or others may have said in regard to the condition of the insured's health after 1872 should not affect your judgment; but in this same connection you should also weigh the statement of Mrs. Trefz that her husband was always a healthy man.

By defendant's counsel: Another special point of exception concerns the charge of Dr. Derby, as agent of the company, and the effect of the fact, if it was true, that he had been informed by Schempler and Trefz in regard to the sunstroke, and said it was a matter of no consequence. By our taking exceptions in this way, I presume it will be sufficient to cover the whole charge when we shall have it written out. On that subject, our claim, of course, is that Mr. Derby, as the physician of the company, could not interrupt the effect of the statement made years before, or waive the right of the company arising out of it. And, not only that, but this statement in 1871 could not abrogate the effect of a subsequent contract made in

1873, based upon the truth of former statements in 1871.

BY THE COURT: I am afraid that counsel did not fully understand what I said to the jury on that point. What I attempted to say was this: that, if it was true, as Schempler stated, that the insured revealed to the company's examiner, in 1871 or 1872, the full extent of sunstroke in 1866, and the company then thought that it was of so little consequence that it ought not to hinder the renewal of the policies, the jury have the right to infer that it was not of such consequence as to make the statement of the insured a fatal mistake.

By defendant's counsel: We except, then, to the charge in these terms. I did understand it substantially as stated now. I think this point covers all the exceptions.

The jury, after an absence of about one hour, returned into court with a verdict in favor of plaintiff in the sum of $11,998.82.

[On writ of error, the judgment entered upon this verdict was affirmed. 104 U. S. 197.]

Case No. 14,167.

TREMAIN v. AMORY.

[Cited in First Nat. Bank of Hannibal v. Smith, 6 Fed. 216. Nowhere reported; opinion not now accisible.]

TREMAINE (HITCHCOCK v.). See Cases Nos. 6,538, 6,540.

TREMAINE, The KATE. See Case No. 7,622.

TREMLETT (NICHOLS v.). See Case. No. 10,247.

Case No. 14,168.

Ex parte TREMONT NAIL CO.

In re MIDDLEBORO SHOVEL CO.

[16 N. B. R. 448; 16 Alb. Law J. 417; 5 Cent. Law J. 482.] [1]

District Court, D. Massachusetts. Nov. 22, 1877.

BANKRUPTCY—LIEN—EQUITABLE ASSIGNMENT.

A mere promise to pay out of a particular fund, when received, the promisor retaining control of such fund, and no notice being given to the person who is to pay, creates no lien or charge upon such fund.

The bankrupts were a copartnership, carrying on business under the firm name of the Middleboro Shovel Company. On the 28th day of June, 1877, Mr. Richardson, one of the partners, happened to meet in the cars Mr. Tobey, the treasurer of the Tremont Nail Company, and told him that he wanted to borrow about a thousand dollars to save him a journey to New York, where he could obtain it; that if the Tremont Nail Company would lend him the money, it would be repaid out of the first money received from John Dunn, of New York, for whom they were filling a large order. The loan was made, and a note for thirty days was given for it. A few days after this Mr. Richardson went to New York, and found that the agents of his firm there were embarrassed, and about to fail, or had failed. He received an advance of one thousand seven hundred dollars from Mr. Dunn, and returned to Boston on the 4th day of July, and consulted with his partner about their affairs. On the 5th of July, he saw Mr. Tobey, and told him of the failure of his agents, and that he did not know how it would affect his firm, and whether he ought to pay Mr. Tobey or not; but the conclusion reached at that time was that the firm would go on for the present. Early on Friday morning, July 6th, the money was paid to Mr. Tobey, and on the same day the firm stopped payment. Negotiations were entered into for a settlement with their creditors, in the course of which complaint was made of the payment to the petitioners, and the money was then repaid to the Middleboro Shovel Company, with an express written agreement that the repayment should not prejudice the rights of the petitioners, but that they should "stand in precisely the same condition in which they would have remained if the said sum of nine hundred and ninety-four dollars and ninety-two cents had not been paid to the said Tremont Nail Company upon the said 6th of July, but had been laid aside, subject to the decision of a court of law in reference to its disposal." The shovel company afterwards went into bankruptcy, and the Tremont Nail Company proved a debt against their estate upon certain other notes, concerning which there was no dispute, and claimed that this note should be admitted as a privileged debt, to be paid in full. The case was heard by consent of parties upon oral evidence instead of a special case.

B. L. M. Tower, for petitioners.

(1) Security given, or payment made in pursuance of a valid and definite agreement entered into when the loan is made, is always valid, though the debtor may have become insolvent in the meantime. Burdick v. Jackson, 15 N. B. R. 318, and cases there cited; In re Jackson I. M. Co. [Case No. 7,153]; Cook v. Tullis, 18 Wall. [85 U. S.] 332; Ex parte Fisher, 7 Ch. App. 636.

(2) The agreement gave the petitioners an equitable assignment of the money to come from Dunn. Story, Eq. Jur. §§ 973, 1044, and cases; Smith, Manuel Eq. p. 245; 2 Spence, Eq. 860.

(3) Notice to the debtor is not essential to the valid assignment of a debt. U. S. v. Vaughan, 3 Bin. [Penn.] 394; Muir v. Schenck, 3 Hill, 228; Littlefield v. Smith, 17 Me. 327; Dix v. Cobb, 4 Mass. 508; Warren v. Copelin, 4 Metc. [Mass.] 594; Wood v. Partridge, 11 Mass. 488.

[1] [Reprinted from 16 N. B. R. 448, by permission. 16 Alb. Law J. 417, contains only a partial report.]

(4) Assignment of part of a debt is good in equity. Morton v. Naylor, 1 Hill, 583; Clemson v. Davidson, 5 Bin. 392; Burn v. Carvalho, 4 Mylne & C. 690; Crain v. Paine, 4 Cush. 483.

T. K. Lothrop and R. R. Bishop, for assignee, cited Row v. Dawson, 2 White & T. Lead. Cas. Eq. 1531; Christmas v. Russell, 14 Wall. [81 U. S.] 69; Hall v. Jackson, 20 Pick. 194; Field v. Megaw, L. R. 4 C. P. 660; Malcolm v. Scott, 3 Hare, 39, and notes to Am. Ed.

LOWELL, District Judge. The agreement of the parties seems to have interpreted the contingency which has arisen of the shovel company becoming bankrupts, and, I think, they intended to leave the case as it would have been if Dunn had paid his debt into court, leaving the parties to interplead upon the equitable title. In other words, that the payment should go for nothing. Virtually admitting that, considered as an ordinary payment, it would be a preference. In this I have no doubt they were wise, for the payment was made under circumstances which would warrant a jury to find accordingly, on the part of the petitioner, that they were obtaining an advantage over the other creditors, and that the debtors were probably insolvent.

The parties have acted throughout in the utmost good faith, and there is a strong moral equity, so to call it, for the petitioners; but the question is whether they had what, in equity as admitted in the courts, amounts to an assignment of part of the debt due from Dunn.

A learned judge has said that the law of equitable assignments is brought to such an exquisite degree of refinement that it is by no means easy to understand it. Field v. Megaw, L. R. 4 C. P. 660, per Brett, J. And another judge, in a case which, in one aspect, resembles the one at bar, said that the lien might depend on whether the word used was "will," or "shall," in an oral agreement collateral to a negotiable instrument. Thomson v. Simpson, 5 Ch. App. 659. In the case first above cited, the decision was that a promise to pay when a certain debt is received is not an equitable assignment of the debt. Two of the judges in that case intimate that a promise to pay out of a particular debt, or fund, would work a transfer. A like dictum was made by Lord Truro, in Rodick v. Gandell, 1 De Gex, M. & G. 763, and this was followed by a decision of a learned vice-chancellor, afterwards lord chancellor, founding himself solely on this dictum (Riccard v. Prichard, 1 Kay & J. 277); but he overruled the decision of a very eminent chancellor to the contrary (Bradley's Case, Ridg. t. Hard. 194). The refinement appears in this: that while an agreement to pay out of a fund is on the border line, it is held both in England and the United States, that any order or assignment, oral or written, to pay out of a particular fund, made upon the debtor or holder of the fund, or an agreement to give such an order, or a mere oral direction to go and receive the money and pay such and such debts with it, does operate as an equitable assignment. See Diplock v. Hammond, 2 Smale & G. 141, affirmed 5 De Gex, M. & G. 320; Gurnell v. Gardner, 4 Giff. 626; Hunt v. Mortimer, 10 Barn. & C. 44; Ex parte Carlon, 4 Deac. & C. 120; Bank of U. S. v. Huth, 4 B. Mon. 423; Newby v. Hill, 2 Metc. (Ky.) 530; Richardson v. Rust, 9 Paige, 243. In the United States, it was held many years ago that a mere promise to pay out of a particular fund, when received, the promisor retaining control over the fund, and no notice being given to the person who is to pay it, would not work an equitable assignment. Rogers v. Hosack, 18 Wend. 319. This case was remarked upon by the chancellor in Richardson v. Rust, 9 Paige, 243; but it has been followed in all the cases which I have seen, and appears to be the settled law of this country. See Hoyt v. Story, 3 Barb. 262; Christmas v. Russell, 14 Wall. [81 U. S.] 69; Trist v. Child, 21 Wall. [88 U. S.] 441, per Swayne, J.; Christmas v. Griswold, 8 Ohio St. 558; Connely v. Harrison, 16 La. Ann. 41; Eib v. Martin, 5 Leigh, 132; Ford v. Garner, 15 Ind. 298; Pearce v. Roberts, 27 Mo. 179.

With these cases before me, I cannot hold that the agreement between these parties gave any lien or charge on Dunn's debt in favor of these petitioners, and their petition to stand as privileged creditors is denied.

Case No. 14,169.

Ex parte TREMONT NAT. BANK.

In re GEORGE et al.

[2 Lowell, 409;[1] 16 N. B. R. 397; 25 Pittsb. Leg. J. 84.]

District Court, D. Massachusetts. July, 1875.

BANKRUPTCY—BANKRUPT INDORSER—WAIVER OF DEMAND AND NOTICE.

1. The bankrupt is the trustee of his estate until the assignee is appointed.

2. A bankrupt indorser may waive demand and notice upon a note maturing before the choice of an assignee.

[Cited in House v. Vinton Nat. Bank, 43 Ohio St. 354, 1 N. E. 129.]

3. Semble, that a bankrupt may sue for a claim before the appointment of an assignee, if immediate action is necessary; and a plea of the plaintiff's bankruptcy is not a bar to an action, if an assignee has not been appointed.

The Tremont National Bank held certain promissory notes of third persons, indorsed by the bankrupts [George & Battey], which fell due after the adjudication of bankruptcy and before the appointment of the assignee. During this period, and before the maturity of the several notes, the bankrupts, at the request of the bank through its attorney,

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

signed a waiver of demand and notice, which accordingly were not duly made. Upon an offer by the bank to prove against the assets for the amount of the notes, the assignee objected, and the case was submitted to the court upon a written agreement of the facts above stated.

F. V. Balch, for creditor.
W. A. Field, for assignee.

LOWELL, District Judge. It was decided by Lord Eldon in 1812, that when a bill is dishonored after the bankruptcy of the drawer, a notice to him is a sufficient and proper notice if his assignee has not been appointed. "The bankrupt," says the learned judge, "represents his estate until assignees are chosen." Ex parte Moline, 19 Ves. 216. This statement of the law has been copied into the text-books, and was the guide, most probably, of the action of the bank in this case. Story, Bills, § 305; Byles, Bills, 228. See Ex parte Johnson, 3 Deac. & C. 433. Mr. Robson says, notice should be given to the trustee (assignee), or if none has been appointed, it would seem the notice should be to the registrar as official trustee. Robs. Bankr. 178. By our law the register is not official assignee, but the bankrupt remains, as in Lord Eldon's time, the trustee of his estate until the assignee is appointed.

Granting that notice is necessary, which is certainly the better opinion upon authority, the bankrupt is the only person who can be notified. If immediate action is necessary against the promisor or acceptor to save a probable loss, the bankrupt, on application to the court, would be permitted to prosecute. Indeed, though the bankrupt's debtors cannot safely pay him their debts after the proceedings are begun, yet I have very little doubt that he may, even without leave of court, begin any suits that are necessary to save the statute of limitations, or are otherwise of immediate urgency. It has always been one of the anomalies of the bankrupt law [of 1867 (14 Stat. 517)], but probably a necessary one, that a plea of the plaintiff's bankruptcy is not a bar to an action unless an assignee has been appointed, and not always then, unless the assignee has forbidden the prosecution of the suit, though a plea of payment to the bankrupt might be bad if the assignee should intervene. In other words, a bankrupt may sue, though he cannot, without suit, receive payment.

The creditor in this case cited the statement of a text writer, that the person on whom a demand should be made may waive it. No case was cited, but I think one is hardly necessary. Taking the meaning to be that the person referred to is one to whom notice is to be given as a party interested, or a general agent of such an one, and not a mere messenger or conduit, the remark is undoubtedly sound.

It was argued that though the bankrupt is the person to be notified as indorser of the dishonor of a note by the maker, and as such may waive the notice, yet he cannot dispense with the demand on the maker. This argument runs counter, I think, to the usual commercial practice and understanding. A waiver of demand and notice is very common, but a mere waiver of notice much less so. The purpose and meaning of the waiver commonly is, that the parties are well aware of the standing and situation of the promisor, and consider a formal demand and notice unnecessary for some reason or other. If the bankrupt has power to protect his estate, he has power to waive forms, and to undertake whatever action may be necessary as if such forms had been complied with. The same argument which establishes his right to require notice proves that he may waive the demand and take notice at his peril.

I am not sure that one of these notes may not have matured after the assignee was appointed; nor, if it did, whether there was any reason to hold that the assignee should have been notified, or asked to waive notice. Reserving any question that may arise on such a note, I admit the debt to proof. Proof admitted.

TRENTON NAT. BANK, Ex parte. See Case No. 14,169.

TREVITT (BURKE v.). See Case No. 2,163.

Case No. 14,170.

The TRIAL.

[1 Blatchf. & H. 94] [1]

District Court, S. D. New York. May, 1830.

WITNESS — COMPETENCY — INTEREST — SEAMEN — WAGES—VESSEL ABOUT TO PROCEED TO SEA —SHIPPING ARTICLES—FEES.

1. In a suit in rem for seamen's wages, the master is a competent witness for the libellant, though he may have executed a bill of sale of the vessel to the claimant.

[Cited in Patten v. Darling, Case No. 10,812.]

2. The testimony of the master in such a case is, in the absence of the shipping articles, sufficient of itself to establish the time of each seaman's service, and the amount of wages due.

3. Under the 6th section of the act of July 20, 1790 (1 Stat. 133), in order that admiralty process may issue within ten days after the arrival of the vessel, it is sufficient to show a reasonable ground of belief that the vessel is about to proceed to sea within the ten days.

4. The clerk's report, in matters referred to him, should state facts and conclusions, and not detail the evidence at length.

5. A neglect, at the trial, to object to the competency of evidence, is a waiver of the right to object to the same evidence on a subsequent reference to the clerk.

6. The right of a seaman to his wages depends on the service, and not on the shipping articles, and he is not obliged to call for them in order to establish his claim to wages, though he may do so.

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

7. If the state court compensates services similar to those performed by a marshal, although not performed there by a like officer, the marshal is entitled to the same compensation.

[Cited in U. S. v. Three Hundred Barrels of Alcohol, Case No. 16,509. Re Lowenstein, Id. 8,572.]

8. The same fees are allowed to officers in this court, as in the supreme court of the state, without regard to the source of the power of the state court—whether customary or statutory.

9. This court allows a reasonable compensation to its officers for services not enumerated in the fee-bill.

This was a libel in rem for wages, by Green, mate, and Anderson, steward, of the schooner Trial. Green had shipped in March, and Anderson in June. The schooner arrived in New-York on the 6th of August, the libellants were discharged on the 10th, their wages being unpaid, and this libel was filed on the 15th.

The claim and answer of Moses Davis and Martin Wood alleged, that on the 10th of August they became bona fide purchasers of the schooner, from Thomas Mister, master and owner, for $850, without notice of the libellants' demands, and they produced a bill of sale from him, with covenants of warranty and against incumbrances. They also denied that the schooner was about to proceed to sea before the end of ten days next after the delivery of her cargo, and alleged that the libellants had not proceeded according to the form of the statute, to recover their wages. The statute referred to was the 6th section of the act of congress of July 20th, 1790 (1 Stat. 133), which provides, that if the seamen's wages are not paid within ten days after the voyage is ended and the cargo is discharged, the master may be summoned before the proper magistrate to show cause why process should not issue against the vessel, unless the vessel shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo, in which case the seamen shall be entitled to immediate process out of a court of admiralty.

The libellants put in as evidence the deposition of the master, Thomas Mister, and their own several depositions, each for the other. Objections were taken to the competency of all the witnesses. To prove that the vessel was about to proceed to sea before the end of the ten days mentioned in the statute, it was shown that on the day after the sale to the claimants she was removed from the East river some distance up the North river. Morris, a witness for the claimants, testified, on cross-examination, that the vessel was removed to keep her out of the way of her former captain and crew; that the claimant thought of taking her to Philadelphia; and that she might have been got ready for sea in twenty-four hours. There was also evidence going to show that the purchase by the claimants was fraudulent.

Edwin Burr, for libellants.

George Sullivan, for claimants.

BETTS, District Judge. The objections to the competency of the witnesses upon whose evidence the case rests, will be first considered. In relation to the master, the general position is first taken, that a master cannot be a witness in behalf of seamen in a libel for wages, because he is one of the parties ultimately responsible to the seamen for their wages, and is thus interested to throw upon the vessel or her owners a charge which he might otherwise have to bear himself, and will be enabled to discharge his liability by his own testimony. Cases are referred to, decided by Judge Peters, in which the master was considered to be an incompetent witness in suits in rem by mariners for their wages. Jones v. The Phœnix [Case No. 7,489]; Malone v. Bell [Id. 8,994]; Atkyns v. Burrows [Id. 618]. The reasoning of the court is certainly expressed with great latitude in those cases, and it would seem to have been the impression of that learned judge, that a master could not be received as a witness in behalf of a seaman. In the cases referred to, however, the master was produced on the part of the owner against the mariner; and there is no doubt force in the suggestion, that under such circumstances the master stands interested, if not in a pecuniary point of view, at least by strong bias of mind, to defeat the action; though I am persuaded the weight of authority is against the conclusion of the court, even upon that point (The Lady Ann, Edw. Adm. 235), unless where he is called on to justify an act on board, for which, if unjustified, he would himself be responsible (The Exeter, 2 C. Rob. Adm. 261). However that may be, the objection does not apply where the master is offered as a witness by the seaman. It is difficult to perceive how the interest of the master can be promoted by the recovery of the mariner against the ship. The freight is the fund which ought to discharge wages, and that appropriately comes to the hands of the master, who will be liable to account to the owner for the freight and earnings of the vessel; but, in point of interest, it must be immaterial to him whether he pays the freight to the owner or to the sailor. The proofs do not show that there were no such earnings in this case, out of which these demands could have been satisfied; and the court cannot intend that none existed. But, admitting that the master had no means of the owner with which he could have paid the wages, and that, accordingly, he may become responsible for them personally, if they cannot be obtained out of the vessel by this suit, that circumstance does not create the degree of interest which disqualifies him from being a witness. The interest is not direct and necessarily dependent upon the decree rendered in the cause, but consequential and contingent—that is, the master may be made ultimately liable for the wages, if they are not satisfied by this decree or by the owner, but the decree could not be en-

forced in personam against the master or the owner, nor would it furnish a foundation for an action against either. The only way, therefore, in which the master could be benefited, would be to have the claim certainly satisfied by the vessel. Should the wages yet remain unpaid, his responsibility pro tanto to the seamen would be neither discharged nor lessened by means of the decree. He may testify under a strong bias, which ought to be regarded in estimating his credit; but there is not that pecuniary and direct interest against the claimants which renders him an incompetent witness for the libellants. Indeed, his interest and bias would rather seem to be united in defeating the action, and in proving that the mariners had no existing claim against the vessel, the owners or himself.

The further objection to the competency of the master is, that he executed a bill of sale of the vessel to the claimants, with covenants of warranty and against incumbrances. It is accordingly insisted, that he cannot be permitted to impeach the title he conveyed, or to interrupt the peaceable enjoyment of the property in his vendees. It is supposed, that if his testimony subjects the vessel to a sale by force of this lien which existed at the time of the transfer, he will have violated his covenants, and indeed, have committed a direct fraud, and stand exposed to an action by his grantees for the consequences. It is a sufficient reply to this objection, and to the reasoning in support of it, to observe, that the witness is called to testify by those whom it would be his more immediate interest, under such a state of things, to defeat. The claimants cannot object that the witness called by the libellants is strongly bound to support the defence and defeat the action. These arguments might prevent the claimants from calling their grantor or vendor, without giving him a release; but a party may always incur the hazard of taking the evidence of one who stands opposed to him in interest, and enlisted on the side of his adversary. The objections to the competency of the master cannot, therefore, be sustained. His testimony being sufficient to support the libellants' action, without the aid of their personal evidence, the case does not require a decision of the objection raised to their competency to testify for each other.

The claimants, in addition to their answer and claim, interpose a plea that the suit was instituted within less than ten days after the arrival of the vessel in this port, that she was not about to proceed to sea within that time, and that the libellants did not, in pursuance of the statute, summon the master to show cause why process should not be issued against the vessel. A general replication is filed to this plea.

The evidence of the witness, Morris, is abundantly sufficient to establish, prima facie, the only material point at issue between these parties under the plea, namely, that the vessel was about to proceed to sea before the end of ten days after her voyage was ended at this port. Accordingly, the libellants were entitled to sue immediately in admiralty, as their case came within the express exception of the statute, which prescribes, in ordinary cases, a different mode of procedure. To avail themselves of the exception, sailors are not bound to prove positively that the vessel was about to proceed to sea, before they can be remitted to their right of action under the general maritime law. This degree of evidence it may never be in their power to produce. The fact is commonly known only to the owners or to the master, the parties directly interested in concealing it. All, then, that can be exacted of the seamen is, to show a reasonable ground of belief that the vessel is about to go to sea. This may be gathered from concomitant circumstances as well as direct proofs.

Under the general maritime law, sailors could enforce their claims by an action as soon as the voyage was ended. The act of congress was not designed to abridge the rights or remedies of sailors; but only, in cases free from all hazard to them, to have the owner and master notified that the wages must be paid, before the seamen can arrest the vessel, to afford a reasonable period to collect the freight and pay the wages without suit. The present case shows that there was reasonable cause to believe that a summons under the statute would have been nugatory and inefficacious towards obtaining the wages due, and that, on the contrary, it would have been the means of hastening the departure of the vessel out of the jurisdiction of the court before proceedings could have been perfected for her arrest.

The right of action being established, and it appearing, prima facie, that wages are due to the libellants, I shall decree preliminarily in their favor, and order a reference to the clerk to ascertain and report to the court the amounts due. On the reference, either party may produce further proofs in support or discharge of the demands.

At a subsequent day (February 16th, 1830) the clerk, at the request of the counsel for both parties, reported the evidence given before him, and the exceptions taken, on the part of the claimants, to the proofs, and referred the matters of those exceptions to the court for decision. The same objections were taken as before, and a further one, that the libellants had not produced the shipping articles, they being the best evidence of the contract of hiring.

BETTS, District Judge. This is not conformable to the regular course of practice. The duty of the clerk is not to report the evidence, but the facts, and his conclusions thereon. Either party may have relief

against errors in the report, by taking exceptions to it, and thus bring under review the whole ground of the clerk's decisions. But, as the present mode of presenting the question seems to have been adopted in pursuance of the wishes of the parties, and as the whole matter may be as fairly and with less expense considered in this form, I shall not send the report back to have it framed according to the course of practice, but shall consider the points in the shape in which they are submitted by the parties.

The claimants' first exception is, that the libellants cannot substantiate their claim to wages without producing the shipping articles. The first and sixth sections of the act of congress of July 20th, 1790 (1 Stat. 131, 133, 134), require a shipping agreement to be executed between the master and the seamen, before proceeding on a voyage, and provide, that in case of dispute, it shall be incumbent on the master to produce the agreement, if required, otherwise its contents may be stated, and proof of the contrary shall lie on the master. This prosecution is under the general maritime law, and not upon the provisions of any statute, and the practice of courts of admiralty is to govern the proceedings, when not regulated by positive law. The statute referred to, so far as it may be deemed to be declaratory of the general law, or to act upon the shipping contract, must be the rule of decision in the cause, whether invoked or not by either party. The master, under whom the libellants contracted, was called and examined by them as a witness. He stated the terms of the contract with the libellants, but was not required by either party to produce the shipping articles. On the hearing, no exception was taken to the competency of this evidence, and no offer to produce the articles, nor any demand that the libellants should do so, was made by the claimants. This would be deemed to be a waiver by the claimants of this species of proof, if they had a right to exact it from the libellants. If allowed to raise the objection, they should have done so at the trial, when the libellants might have been able to obtain the articles, or to show good reasons for not producing them. A party cannot be permitted to go to a final hearing without objecting to the competency of evidence, and to raise an objection to the proofs on a reference before the clerk. This would be a surprise upon his adversary, and would enable the party making the objection, to secure inequitable advantages thereby.

But no authority has been produced on the part of the claimants, and I am not aware of any doctrine of the law, which requires from the libellants the production of the shipping articles. In general acceptation, the shipping articles and log-book accompany the vessel as a part of her muniments. A change of owners or of master would not divest the vessel of the possession of those documents. In judgment of law, they are in the custody of the claimants. The foundation of the suit for wages is the hiring and service, and not the written contract; and, therefore, it is not required by the course of the court, that the seaman should aver how the contract was made. That is matter of defence. So, also, if the articles show either that no right of action had accrued when the suit was instituted, or supply matter in bar of it, that must be made to appear by the claimants. And the rule seems to be clear, that in all cases where it is necessary that the written agreement with the seaman should be before the court, the obligation is cast upon the master or owners to produce it. The George, 1 Hagg. Adm. 168, note; Abb. Shipp. 464.

If the articles may be supposed to remain with the former master, it was the privilege, but not the duty, of the mariners to require their production before the clerk, and it was equally in the power of the claimants to call them into court. It appears, in fact, by the clerk's report, that when the objection was raised, the libellants required the production of the articles, and the claimants answered, that they should not have been asked of them, but of the master, who was the libellants' witness. The objection on this point is overruled. A decree must accordingly be entered, that after satisfying the costs out of the proceeds of the sale of the vessel, the libellants be paid their wages as reported due by the clerk.

A motion was subsequently (May 20th, 1830) made for the re-taxation of the marshal's bill of costs and disbursements. The following bill had been presented and taxed ex parte:

1.	Attachment, notices and proclamations	$ 17 90
2.	Marshal's custody fee (102 days)	153 00
3.	Keeper's fee (102 days)	102 00
4.	Serving vend. exp. and return	2 25
5.	Dr. and copy inventory	1 00
6.	Wharfage	40 31
7.	Storage of sails	5 00
8.	Padlocks and fenders	2 00
9.	For transporting schooner from North Moore-st. to Whitehall	10 00
10.	Labor unbending sails, pumps, &c.	3 00
11.	Storage of sails at Whitehall	3 00
12.	Dr. and copy costs and att'g on taxation	1 25
	Commissions on $420	10 50
		$351 21

BETTS, District Judge. The legality of most of the items taxed is now formally questioned, and it becomes necessary to decide upon the propriety of the charges, as well for the disposal of this particular case, as to settle the rate of allowance as a guide in future practice. The items objected to will be most conveniently considered under two heads—for services and for disbursements—Nos. 1, 2, 4, 5 and 12 falling under

the former, and Nos. 3, 6, 7, 8, 9, 10 and 11 under the latter.

1. It is urged by counsel, that a marshal can receive no emolument for the execution of the duties of his office, unless it is given specifically by act of congress. And it is further contended, that if, in the absence of all legislation upon the subject, a right to a reasonable compensation for services might be implied and be awarded by the court; yet, inasmuch as the act of February 28th, 1799 (1 Stat. 624), has established fees to the marshal for various descriptions of service, it clearly imports that congress intended that he should receive pay in the way of fees alone, and then only in the particulars designated in the act. There would be force in this reasoning, if the provisions of the act went no further than to arrange a tariff of fees. But, after designating the specific fees the marshal shall be entitled to, a broader provision is added to the section, to this effect: "For all other services not herein enumerated, except as shall be hereafter provided, such fees and compensations as are allowed in the supreme court of the state where such services are rendered."

The intention of congress to conform the proceedings in the courts of the United States to those of the courts in the particular state in which their functions were to be exercised, is most manifest throughout the organization of the judiciary system. It was obvious that the diversities of practice in the state courts would call for the performance of duties by the marshals in execution of process of the United States, which could not be appropriately compensated by any specific rate of fees. Congress, therefore, in this general manner, incorporated the customs of the supreme court of each state into the fee bill of the courts of the United States. It was supposed that in this mode the varying services made necessary by the course of proceedings in different states could be adequately provided for, without leaving the matter of compensation wholly at the discretion of the court. In most instances this will be found to be the case; yet, in others, as will appear from the bill of costs now under consideration, the court will find no fixed rules to guide its allowances, but must determine them by analogy to the modes of compensation authorized in the state. Bearing in view these general considerations, I shall proceed to discuss the particular items objected to.

Item No. 1 embraces $15 of disputed charges, $2 90 only being allowed by statute for the service of an attachment and for three proclamations. The charge should have specified in detail the particulars of which it was composed, that the parties might be prepared to investigate their propriety. If the charge of "notices" in this item means the draft and copy of the notice of monition prepared for the printer, it cannot be allowed. This service, under our practice, is performed by the clerk, and not by the marshal, and is included in the taxation of the clerk's costs. The marshal is not furnished with the means of doing it with accuracy and precision. The notice rehearses the substance of the libel, and, as this must be on file before the warrant of attachment is made out, it is the most convenient course of practice, to require the clerk to prepare, at the time the writ issues, the proper notices, founded upon the libel and process, and corresponding with them.

If, however, it is made to appear that the marshal has necessarily furnished any further written copies of the notice, he may, in my opinion, be compensated therefor, under the clause of the act referred to, at the rate paid attorneys, &c., for copies. The statute directs the compensation of the marshal for certain services to be governed by the allowance made by the supreme court of the state. But it does not require that the like services shall be performed in the state by a sheriff or other officer corresponding to the marshal. He will be entitled to the allowance, though, according to the state practice, the services are rendered by an attorney or clerk. In my opinion, the fee for serving the attachment does not cover this service or disbursement. The attachment is served when the property is seized. The fee is then earned, and, strictly speaking, the duty of the marshal in regard to the subject is all performed. When the proceedings are in rem, the arrest of the property and the citation of those in possession are simultaneous acts. 2 Browne, Civ. & Adm. Law, 178, 179. Our practice, however, requires ulterior steps to be taken, and notice to be given by publication. This is not a part of the duty of the marshal in perfecting the arrest, and might, with equal fitness, have been assigned to the proctor, of the propriety of the allowance of the fee to whom no doubt could exist.

Item No. 2 is wholly objected to. No such item is inserted in the act of congress fixing the marshal's compensation, and, as a previous statute had made provision for the service when the vessel had been seized by any officer of the revenue, it is argued that congress did not mean to give any other fees for it in private suits, than those for the arrest, and for poundage in case of sale under execution. There would seem to be a manifest incongruity in such a regulation, as the hazard and responsibility upon the marshal are the same in both cases; and it would be strange if he could, in addition to fees for serving the attachment, be compensated for the custody of a vessel pending a public prosecution for a violation of the revenue laws, and yet be obliged to bear all the risk himself when the action against her is in behalf of individuals. This is not the usual policy of the law. The government rarely imposes upon itself a heavier burthen of costs than is to be borne by private suit-

ors; and it would require some unequivocal indication of such an intent, to induce the court to conclude that congress designed a discrimination of that kind in these cases.

The safe keeping of the vessel is wholly extrinsic and independent of the service of the attachment. The execution of the process transfers the possession to the marshal. But, whether the vessel is to remain, during the litigation, at his risk, or at that of the parties in interest, must depend upon the law of the court in which the proceedings are had. If the arrest of the vessel were regarded merely as a citation of the parties in interest, there could be no foundation for a claim to custody fees, because the responsibility of the officer would cease on the due execution of the summons. That, however, is not the course of admiralty courts in this country. They continue the liability of the marshal for the safe keeping of the vessel until she is bonded, or to final decree. There is, accordingly, the most manifest propriety in awarding compensation on this account, if the service can be considered as embraced within the provision adverted to. To give application to that provision, however, it is not only necessary that the service should in itself be of a character meriting compensation, but also that it should be one that would, if rendered by a sheriff, have a compensation allowed for it by the supreme court of the state.

On examining the laws of the state in force when the act of congress was passed, or when this vessel was seized, it does not appear that fees were provided for services of this description. It is not consonant to the usual course of practice of the state courts to arrest property in the first instance; and, where it was allowed in special cases, the law was either silent as to the compensation of the sheriff, or referred the matter to the discretion of the judge who authorized the proceedings. This was so with regard to attachments against the property of absent or absconding debtors. 2 Rev. Laws N. Y. p. 20. But the act empowering material men, &c., to arrest vessels, made no provision on the subject. The recent Revised Statutes have supplied the omission; but the services in this case were performed before those statutes went into operation, even if they could properly affect the case, and our inquiries must be guided by the rule provided by the act of congress of 1799. That act ought not, perhaps, to be understood as referring to the statutes of the state, except in so far as they furnish rules to the respective supreme courts. The fees allowed in the supreme court of a state, without regard to the source of its power, supply the rule of allowance in the courts of the United States.

The remarks heretofore offered upon item No. 1, show that, in the estimation of the court, if the services performed by a marshal are compensated by the state court, though not performed there by a sheriff, the marshal is entitled to that compensation in this court. The court would award him the compensation for duties imposed upon him by its own system of procedure, though in the state courts a constable might be charged with the like service, and might receive the fees. Neither, in my opinion, is the act to be limited in its provisions to the case of services identically the same in the two courts. The plain principle of the act is, to adopt the state mode of compensation, in certain instances, and apply it to services rendered by the marshal. If the state court employs no other means for compensating its officers than by applying to the case the table of fees for enumerated services, and leaves those cases unrewarded which do not fall within the tariff, this court would undoubtedly be compelled also to deny to the marshal compensation in cases not expressly provided for by the legislation of congress or of the state. But, when the supreme court of the state grants an appropriate compensation to all its officers for services imposed on them by its mandate, or by the course of its practice, though no provision in that behalf is made by statute, the act of congress of 1799 ought to be construed to embrace the same principle, and to afford this court a like means of compensating its officers. It would thus follow, that for duties necessarily devolved upon a marshal, the court might secure him a compensation, though no services precisely like them were performed by state officers. The principle is indisputably established in the state court, that when the law is silent as to charges for particular services, the court will allow the officer what is deemed a reasonable compensation (Smith v. Birdsall, 9 Johns. 328; Bryan v. Seely, 13 Johns. 123); and this is done under the incidental powers of the court, in cases where no discretion is conferred by statute. This court feels itself supported by the act of congress, in exercising that power in cases like the present. A reasonable allowance will accordingly be made to the marshal as a custody fee in this cause.

After the recognition of this rule, the next consideration is, the manner in which it is to be carried into execution. It is supposed that the court ought to institute an inquiry into the circumstances of each case, and determine judicially the compensation, upon the proofs before it. The tendency of leaving the subject thus indeterminate, would be to lead parties into discussions and tedious investigations in the adjustment of every charge, and, in the end, the most satisfactory mode of disposing of the controversies would be to conform to some common rate of allowance. This rate should be a moderate but fair average, neither giving the marshal the ample emolument which some cases might justify, nor stinting him to the limited allowance which it might be convenient for all to pay.

The 4th section of the act of May 8, 1792

(1 Stat. 277), provides, that the marshal shall have the custody of all vessels and goods seized by any officer of the revenue, and shall be allowed such compensation therefor as the court may judge reasonable. The practice under this law, from the earliest organization of this court, is understood to have been to allow the marshal, on the seizure of a vessel, a custody fee of $1 50 per day. I have adopted that as a reasonable allowance, since I have presided in the court; and, as it appeared to me manifestly proper that one rule of compensation should be observed in cases alike in all respects, I have applied that rule in private suits also. This, in some instances, may afford a large compensation, but in others it will be exceedingly trivial, compared with the hazard and responsibility incurred by the marshal. I shall not depart from the general rate in this instance, and shall tax the custody fee at $1 50 per day. There can rarely be occasion for complaint because of this charge. The claimant can always relieve his property by bonding it, and the libellant can prevent the accumulating costs from destroying his remedy upon the property, by speeding his prosecution. The procedure upon the admiralty side of the court may be so accelerated that a diligent suitor need never suffer by delays. A very few days will be sufficient for him to obtain his final decree, if he chooses to urge it.

Item No. 5 cannot be allowed. An inventory for the sale of property under execution is not necessarily prepared by the marshal. If any of the parties consider it advantageous to have one, it must be provided at the expense of those who desire it.

Item No. 12 will be allowed. The marshal is compelled to have his costs taxed, and he must accordingly draw out a bill and attend on taxation. He may also charge for a copy, when the proceedings in the cause have rendered it necessary that he should serve a copy on either party. This will hereafter always be so. A general rule will be promulgated, that the marshal, in all cases, serve a copy of his costs on the proctors of the parties, with notice of taxation.

2. The decision of the supreme court of this state, in Smith v. Birdsall, 9 Johns. 328, shows that an officer will be reimbursed his expenditures incurred in performing duties imposed on him by authority of law, when no general compensation is provided which must be held to be intended to cover all charges. It is, however, contended, that if these views are correct in general, and would justify the payment of the charges of material men, wharfage, &c., they ought not to cover a claim for publishing notice of the monition and for a keeper's fee.

Item No. 1 embraces the printer's bill, and, as it has already been shown that this publication was not the service of the attachment, nor a duty necessarily to be performed before the process could be said to be executed, but was outside of that duty, and a matter regulated by the practice of the court, it follows that the charge is not embraced in the enumerated fees, and should now be allowed as a disbursement. The bill, however, ought to specify how much was paid, and the proper vouchers should be produced to support the charge.

Item No. 3 falls properly under the head of disbursements. The $1 50 per day allowed the marshal will not be a reasonable compensation for his risk and responsibility, and be also sufficient to provide a keeper, when the safety of the property requires that one should be actually in charge of it. A moderate compensation will therefore be allowed, where a keeper is necessarily employed, but great caution will be observed that this charge shall not lead to abuses. It is in no way to be a masked fee to the marshal or his officers. It is passed as an expenditure, and, before it is allowed, it must be made to appear satisfactorily to the court that a prudent precaution in regard to the interests of all concerned in the property justified the marshal in placing a keeper over it, that the keeper actually continued in charge of it for the time specified, and that the price paid was no more than reasonable for the services rendered.

The other charges for expenditures and disbursements will be allowed on proof, if required by the parties in interest, that the services or supplies charged were authorized by the marshal, that in his judgment they were necessary for the safety of the vessel, and that the charges are reasonable and have been actually paid as charged. The proof may be upon the affidavit of the marshal or other deposition, at his option.

A re-taxation of the bill of costs is ordered in conformity to these principles.

TRIBLECOCK (WAITE v.). See Case No. 17,046.

TRIBOU, The MARCIA. See Case No. 9,062.

Case No. 14,171.

The TRIBUNE.

[3 Sumn. 144.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1837.

ADMIRALTY — MARITIME CONTRACTS — CHARTER PARTY—MEASURE OF DAMAGES—MASTER.

1. The admiralty has no jurisdiction over preliminary contracts leading to maritime contracts.

[Cited in Cox v. Murray, Case No. 3,304; Peck v. Laughlin, Id. 10,890; Maury v. Culliford, 10 Fed. 390.]

2. The jurisdiction of the admiralty does not depend upon the particular name or character of the instrument, but whether it imports to be a maritime contract.

[Cited in Gloucester Ins. Co. v. Younger, Id. 5,487.]

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[1] [Reported by Charles Sumner, Esq.]

3. An agreement for a charter-party to be made at a later period, *held*, under the circumstances, to amount to a present charter-party, notwithstanding a more formal instrument was contemplated.

[Cited in Scott v. The Ira Chaffee, 2 Fed. 402; Maury v. Culliford, 10 Fed. 390.]

4. Where the voyage, commenced under this agreement, was broken up by the ship-owners before its completion, *held*, that the measure of damages, for which they were liable to the other party, was what would be a compensation for the actual loss and expense incurred about the voyage, the labor and services in procuring another vessel, and the reasonable disbursements in the present suit, beyond the taxed costs.

[Cited in The Flash, Case No. 4,857; Stone v. The Relampago, Id. 13,486; Oakes v. Richardson, Id. 10,390; The Baracoa, 44 Fed. 103; Wheelwright v. Walsh, Id. 382.]

5. A person, once master of a vessel, will be deemed to continue in that character, until displaced by some overt act or declaration of the owners.

[Cited in Thomas v. Osborn, 19 How. (60 U. S.) 45; Fox v. Holt, Case No. 5,012.]

6. The power of the master to make contracts about his vessel in the home port of the owners, is limited.

[Cited in The Flash, Case No. 4,857; The Director, 26 Fed. 709.]

[Cited in Botsford v. Plummer, 67 Mich. 271, 34 N. W. 569.]

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

Libel on a memorandum of charter-party.

Ames & Atwell, for libellant.

Rivers, Jr., & Whipple, for claimants.

STORY, Circuit Justice. This is the case of an appeal from a pro formâ decree of the district court, in a cause civil and maritime. The libel is founded on a memorandum of contract, entered into at Bangor, in the state of Maine, on the 23d of November, 1836, by Samuel Dennett, the asserted master of the schooner Tribune, as follows. "I hereby agree, within three days, to be ready at Hampden, with a new suit of sails on the Tribune, to load for T. W. Letson, (the libellant), and proceed without delay to Lubec, to take in what may be wanted to constitute her cargo, and proceed to Havana, and back to any port of the United States; also that the charter-party shall not commence until she is loaded at Lubec, provided I am not detained over seven days in loading said vessel." Then follows the date and the signature of Dennett. On the same paper, immediately below the foregoing memorandum, is the following, signed by T. W. Letson. "I agree to allow said vessel, on said charter-party, five hundred Spanish dollars per month. The charter to be made at Lubec. Bangor, Nov. 23, 1836." It appears, from the evidence, that at the time when this contract was entered into, the libellant had also contracted with the government of the island of Cuba, to supply it with a large amount of lumber of various descriptions, and among other things, with a large number of cedar posts, by the 1st of January, 1837; and the object of the contemplated voyage of the Tribune was, to take a cargo of cedar posts to Havana in fulfilment of this last contract. The Tribune was, at the time of making this contract, owned by the claimants, and belonged to Frankfort, in the district of Belfast, in Maine. She had been employed in the year 1835 in the coasting trade, during what is technically called the coasting season; and afterwards surrendered her coasting license and enrolment, and performed a voyage to the West Indies and back again. In the year 1836, she was again employed in the coasting trade, and at the time of the contract had just terminated her coasting season, and her license and enrolment had been deposited in the custom-house at Frankfort, for the purpose of being surrendered, in order to have the schooner registered for a foreign voyage. During all these periods she was under the command of Dennett, as master, he taking her upon shares, according to the custom of the country, that is, he paying for her victualling, and manning, and other expenses of navigation, and dividing the gross proceeds of her employment equally with the owners; so that each was entitled to a moiety of the gross earnings. Under such circumstances, according to the doctrine maintained by the supreme court of Maine, the master would be entitled to be deemed owner for the voyage, or season of hiring, and, of course, he would be entitled, as such, to let or charter, or otherwise to employ, the vessel. See Thompson v. Snow, 4 Greenl. 264; Emery v. Hersey, Id. 407; Winsor v. Cutts, 7 Greenl. 261. After this memorandum of charter-party was made, a large number of cedar posts, destined on the voyage, were put on board of her at Frankfort by the libellant, under the superintendence of Dennett. But before the schooner sailed on her intended voyage to Lubec, the owners ordered the cargo so laden to be put on shore, and attached it under process, for an asserted debt, due to them on a former voyage by a company, of which they insisted he was either a partner, or an agent; and in either event liable to them. The whole voyage was thereupon voluntarily broken up by the owners; and the libellant was frustrated in his intended enterprise to Lubec and Havana with the schooner. She was subsequently employed in another voyage to the West Indies under the command of Dennett, and on her return was found at Providence; and the present proceedings were there instituted, in the district of Rhode Island, against her.

The first point, which has been made at the bar, and which, indeed, is preliminary in its nature to all other inquiries is, whether the court has jurisdiction sitting in admiralty over this contract. It is not disputed, that courts of admiralty have jurisdiction in cases of charter-parties generally. But the argument

is, that the present contract is not a charter-party for the contemplated voyage; but is a mere preliminary agreement to execute such a charter-party; and, that over preliminary agreements of such a nature, the admiralty court has not, and does not pretend to exert jurisdiction. In support of this objection, the case of Andrews v. Essex Fire & Marine Ins. Co. [Case No. 374], is relied on. I agree to the doctrine contained in that case on this subject. I think, that the admiralty has jurisdiction over maritime contracts generally, but not over preliminary contracts leading to such maritime contracts. And the only remaining point of inquiry is, whether the contract now in controversy is such a preliminary agreement. On the one side it is contended, that the terms of the original instrument signed by Dennett, do not import, that another charter-party is to be executed for the voyage, but only, that the right to the charter compensation is to commence on the loading at Lubec; and, that the words in the other part of the instrument signed by the libellant, "the charter to be made at Lubec," are to be construed as having the same meaning; and that "made" is to be read "commence." On the other side, the claimants contend, that the natural meaning of the latter words is, that the charter-party was to be made or executed at Lubec, and that the commencement of the chartered voyage was to take place upon the loading at that port. In loose instruments of this sort, it is not very easy to say, what precise meaning ought to be attached to words standing in such a connection. The whole of both papers is to be construed together as constituting one contract, and I incline to think, that the better construction on the whole is that for which the claimants contend; and that there was an intention to have a formal charter-party executed at Lubec.

But, admitting this to be the true construction of the two instruments taken together, still it does not follow, that this agreement is to be treated as a mere preliminary contract. It may still be treated as a charter-party, loose and informal, indeed, but as containing in itself the substantial provisions of such an instrument, a definite voyage to be performed on one side, and a definite compensation to be paid therefor by the other side. The making of a mere formal instrument under such circumstances may be treated rather as a farther assurance, than as the inception of a maritime charter-party. Nor is this doctrine at all new, even at the common law. It is not uncommon for agreements to be made for a lease for years, with suitable covenants for the due execution of a future formal lease; and in many cases of this sort, notwithstanding such covenants for a formal lease, the agreement has been held to amount to a present demise, where it seemed better adapted to carry into full effect the intention of the parties. Without going at large into the cases, it is sufficient to cite on this very point the case of Warman v. Faithfull, 5 Barn. & Adol. 1042; where it was established, that an agreement for a lease for a definite period, for a fixed rent, amounted to a present demise, notwithstanding a more formal instrument was to be executed, upon the intelligible ground, that it best carried into effect the apparent intention of the parties. Upon a similar ground, I think the present instrument might well be construed to amount to a charter-party for the voyage, loose indeed, and informal, notwithstanding a more formal instrument of the same nature was contemplated But I do not rest my opinion upon this point; because there is another view of the matter, which is conclusive. It is manifest, that, so far as the voyage from Frankfort to Lubec was concerned. (a voyage necessarily maritime and for no inconsiderable distance on the high seas) no farther or more formal paper was within the contemplation of the parties. The cargo for this part of the voyage was actually taken on board, and the voyage was voluntarily broken up at Frankfort by the claimants. Under these circumstances, it seems to me, that the jurisdiction already attached, as the voyage was maritime, and the contract was maritime. The question of jurisdiction in cases of this sort does not depend upon the particular name or character of the instrument, but whether it imports to be a maritime contract or not.

The next objection is, that Dennett was not master of the vessel at the time; and if he was, that he had no authority to make the contract. I am of opinion, that he was master. He had been master for a whole year before; and his name stood on the ship's papers as master. Being once master, he must be deemed still to continue to hold that character, until some overt act or declaration of the owners displaced him from the station. There is no proof of that. As far as the evidence goes, it is directly the other way. He took on board this very cargo at Frankfort, as master. He made the very contract in question, as master. Nay, he has continued ever since in the vessel as master, to the commencement of the present suit. His own testimony does not deny this; though I must say, that I am sorry to say, that it contains some pitiful evasions, and some statements, which, looking to the other facts in evidence, I cannot entirely credit. As to his right to make such a contract in the home port of the owners, I agree, that it cannot be ordinarily presumed from his character as master. It is not an incident to his general authority; nor can it be presumed, under such circumstances, as an ordinary superadded agency. But there are peculiar circumstances, however, in the present case, which do create some presumption of such a superadded agency. In the first place, such had been his authority in the former voyages of the vessel; and such seems also to have been his authority

under her subsequent employment. And I think it might fairly be presumed, that in the home port he would scarcely have had the rashness to make so important and definitive a contract without some authority. I am aware that he has sworn that the contract was made by him conditionally, if his owners approved of it. But no such condition appears on the instrument itself; and I cannot but think, that the attendant circumstances discredit it. How are we to account for the fact, that the cargo was taken on board by him under the contract, in the course of some two or three weeks; and yet, that all this time he acted without authority; nay, that the owners disapproved of it? But I go farther, and am of opinion, that there was an adoption of the contract by Mr Parker, one of the owners, and the ship's husband and managing owner, upon a full knowledge of the proceedings of the master. He lived in the neighborhood; he must have seen the cargo taken on board; for he had the immediate superintendence of the vessel in the home port. He suffered the cargo to be loaded without objection, or giving any notice of objection to the libellant. He was present, when conversations were had between the libellant's agent and the master on the subject of the voyage; and yet he made no objection. The testimony of Mr. Lord appears to me directly to establish the full knowledge of Mr. Parker of the voyage, and his full assent to it. It is true, that the master has sworn, that the owners never did assent to the contract. But his testimony is completely outweighed on this very point by that of Mr. Ames and Mr. Cheesborough. Without going into a particular commentary upon all the testimony, I cannot doubt, that the contract of the master was fully adopted by the owners; and that it was broken off afterwards upon other considerations, wholly aside from the objections now insisted on.

The only remaining question is as to the damages. I have no doubt. that the expected profits to be made on the voyage, and the supposed injury to the libellant, from his inability to comply punctiliously with his contract with the government of Cuba, are not proper items of damage. The due performance of the voyage was subject to many future contingencies; and the item of profits is too uncertain in its nature to form any basis of damages, even if, in a case like the present, there were not other objections to it. I think, too, that in the present action no allowance can be made in the damages for the alleged loss of the cedar posts, which were attached. If rightly attached, then the libellant has sustained no damage. If wrongly attached, his proper remedy is in a court of common law, in an action of trover for an illegal conversion. Certainly the loss of these posts is not in any view a legitimate consequence of the refusal of the owners to proceed on the voyage. All that the libellant seems fairly entitled to is a compensation for his actual losses and expenses incurred in and about the voyage, and for his labor and services in procuring another vessel, and his reasonable disbursements, in vindicating his rights in the present suit, beyond what he will receive an indemnity for in the regular taxed costs. Upon a full consideration of all the circumstances in evidence, it seems to me that the libellant ought to recover the sum of two hundred and fifty dollars, and his costs of suit.

TRIBUNE ASS'N (COOK v.). See Case No. 3,165.

TRIBUNE CO. (SMITH v.). See Case No. 13,118.

TRIGG, Ex Parte. See Case No. 2,348.

Case No. 14,172.

TRIGG v. CONWAY.

[Hempst. 538.] [1]

Circuit Court, D. Arkansas. May, 1847.

RECORDS—ATTESTATION—CERTIFICATE—NEW TRIAL.

1. A record of another state is not admissible, if the certificate of the presiding magistrate omits to state, that the attestation of the clerk is in due form.

2. Courts cannot officially know the forms of the courts of another state, and such forms should be proved in the manner directed by the act of congress of May 26, 1790 [1 Stat. 122], and the certificate of the presiding justice is the only evidence that can be received for that purpose.

3. A new trial will be granted where improper evidence has been admitted, against the objection of the adverse party.

Detinue [by Francis B. Trigg against James S. Conway].

Daniel Ringo and F. W. Trapnall, for plaintiff.

S. H. Hempstead, for defendant, contended on the motion for a new trial:

(1) That the damages were excessive. There had been no demand for the negro boy before the institution of the suit, and the suit was the only demand which he admitted to be sufficient to maintain the action, and a sufficient demand to entitle the plaintiff to damages after the suit. But an actual demand was necessary to entitle the plaintiff to recover damages for the detention before the commencement of the suit, and cited Tunstall v. McClelland, 1 Bibb, 186; Cole v. Cole's Adm'r, 4 Bibb, 340; Jones v. Henry, 3 Litt. [Ky.] 49; Carroll v. Pathkiller, 3 Port. [Ala.] 279; Vaughan v. Wood, 5 Ala. 304; Carraway v. McNeice, Walk. [Miss.] 538; Gentry v. McKehen, 5 Dana, 34. The jury had evidently found a large amount, as damages for the detention before the suit, and without any actual demand having been made. Walk. [Miss.] 538.

[1] [Reported by Samuel H. Hempstead, Esq.]

(2) The lapse of time was sufficient to bar the action. The statute of limitations may avail a defendant in detinue under the general issue. The plea of non detinet is in the present tense, and under this issue any thing (except a pledge) which will show a better right in the defendant than in the plaintiff, may be admitted as competent evidence. Five years' uninterrupted adverse possession confers a right, which may be relied on as a perfect defence. 1 Saund. Pl. & Ev. 434; Smart v. Baugh, 3 J. J. Marsh. 365, 366; Smart v. Johnson, Id. 373.

(3) The plaintiff did not show any right to the slave demanded. This, among other slaves, devised by the father of the plaintiff to her, vested in Elias Rector, her husband, on the death of the father, and Rector had the power of disposing thereof, which he appears to have exercised by his will. Merewether v. Booker, 5 Litt. [Ky.] 258; Banks v. Marksberry, 3 Litt. [Ky.] 280, 281. Where a legacy is given to a wife during coverture, it is in effect and by law a gift to the husband himself. 1 Swift, Dig. 28; Fitch v. Ayer, 2 Conn. 143. If a husband dies without reducing it to possession, it survives to the wife, but if she dies before him, it goes to the husband. Beresford v. Hobson, 1 Madd. 362. But what is more pointed, a share of personal estate accruing in right of the wife during coverture vests even before distribution in the husband absolutely, and does not, in the event of her prior death, survive to him. Griswold v. Penniman, 2 Conn. 564; Toll. Ex'rs, 225; Swann v. Gauge, 1 Hayw. [N. C.] 3. This was no chose in action. They are debts due by bond, simple contract, and the like,—something existing in promise. 3 Litt. [Ky.] 281. The case of Gallego v. Chevalle [Case No. 5,200], relied on by the counsel of the plaintiff, is not applicable.

(4) The record of the Jefferson county court of Kentucky was improperly admitted. It was essential to the recovery of the plaintiff, and if there was an error here, a new trial must be granted. The record of the proceedings of a court of another state cannot be admitted as evidence, unless it is under the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, that the attestation is in due form. 1 Stat. 122. This is the requisition of the act of congress. The omission to certify that the attestation or certificate is in due form is fatal, as has been frequently decided. Ferguson v. Harwood, 7 Cranch [11 U. S.] 408; 2 Pet. Cond. R. 548; Green v. Sarimento [Case No. 5,760]; Drummond's Adm'r v. Magruder, 9 Cranch [13 U. S.] 122; 3 Pet. Cond. R. 304; Craig v. Brown [Case No. 3,328]; Smith v. Blagge, 1 Johns. Cas. 238; Stephenson v. Bannister, 3 Bibb, 369.

In this record the judge merely states that the person attesting the record as clerk was such at the time, and that full faith and credit are due to his official acts, but wholly omits to state that the certificate or attestation is in due form.

OPINION OF THE COURT. On the trial of this cause, the counsel for the defendant made two objections to the admissibility of the record from the Jefferson county court of Kentucky: First, that it was not properly authenticated; and second, that it purported on its face to be a partial record. This record is conceded on all hands to have been indispensable to a recovery on the part of the plaintiff; and, as the jury have found for her, it follows, as a necessary consequence, that a new trial must be granted on this ground alone, if that record was not admissible, irrespective of the other points urged by the defendant's counsel, and on which no opinion is intended to be expressed. The counsel of the defendant has produced a number of adjudged cases of controlling authority, and which are conclusive, to show, that the first objection made by him to the admissibility of the record, was tenable, and should have been sustained. The specific objection to it is, that the presiding magistrate has omitted the statement in his certificate, that the attestation of the clerk is in due form. This is a fatal defect, as the cases cited by him demonstrate. And other cases to the same effect will be found industriously collected, in note 771, by Cowen and Hill, in 3 Phil. Ev. 1120, 1132. The act of congress of May 26, 1790 (1 Stat. 122), expressly declares that "the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form." And when so authenticated, they are entitled to the same faith and credit as in the courts of the state from whence the same are taken.

In Smith v. Blagge, 1 Johns. Cas. 238, it was said by the court: "We cannot officially know the forms of another state, and therefore they ought to be proved. The act of congress directs the mode of proof, and requires that the presiding judge of the court from which the copy is obtained, shall certify that the attestation is in due form." Hence a mere certificate verifying the handwriting of the clerk is not enough. Craig v. Brown [supra].

The intention of the act of congress was, not that the attestation should be according to the form used in the state where offered, or to any other form generally observed, but according to the forms of the court where the proceeding was had; and the certificate of the presiding judge is the only evidence that can be received that such form has been observed. The record not being admissible,

it follows, that a new trial must be granted, the costs to abide the event of the suit. Ordered accordingly.

[NOTE. The plaintiff subsequently removed to and became a citizen of Arkansas, and after her death John T. Trigg, also of Arkansas, became administrator, and moved to be substituted as plaintiff, and for a sci. fa. to bring in the representatives of James S. Conway, deceased. The motions were granted. Case No. 14,173.]

Case No. 14,173.

TRIGG v. CONWAY et al.

[Hempst. 711.] [1]

Circuit Court, D. Arkansas. April, 1855.

REVIVAL—DETINUE—COURTS—JURISDICTION—CITIZENSHIP—PRACTICE.

1. In an action of detinue the cause of action on the death of the plaintiff survives.

2. Where the jurisdiction has once attached, it is not divested by subsequent changes or events.

3. Representatives of deceased parties may be substituted although citizens of the same state.

4. Such substitution is no new proceeding, but to enable the original suit to progress.

5. The 31st section of act of 1789 [1 Stat. 90] cited—construction thereof—death and substitution of parties—jurisdiction of the court—explained in note, and divers cases there cited.

Detinue in the circuit court, before the Hon. PETER V. DANIEL, associate justice of the supreme court, the Hon. DANIEL RINGO, district judge, not sitting, having been of counsel in the case.

This was an action of detinue brought by Francis B. Trigg against James S. Conway [Case No. 14,172], subsequent to which time both parties died, and their deaths respectively were suggested and proved. After the institution of the suit, the plaintiff removed to, and became a citizen of Arkansas, and after her death John T. Trigg, also a citizen of Arkansas, took out letters of administration therein, and became her administrator; and, producing the letters, by his counsel moved to be substituted as plaintiff, and for leave to prosecute the suit, and for a sci. fa. to bring in [Elias N. Conway, executor and Mary Jane Conway, executrix] the representatives of James S. Conway, deceased, at the next term, to which motion the counsel of the defendants objected.

P. Trapnall and George A. Gallagher, for plaintiff.

S. H. Hempstead and A. Fowler, for defendants.

DANIEL, Circuit Justice. This is a case in which the cause of action survives. Dig. 98; Hatfield v. Bushnell [Case No. 6,211]. It appears that administration has been granted to John T. Trigg on the estate of Frances B. Trigg by the proper authority, and he is entitled to be substituted as plaintiff, and to prosecute the suit to final judgment. This is expressly authorized by the judiciary act of 1789 (1 Stat. 90).

It is objected by the counsel of the defendant, that after the commencement of the suit, the deceased plaintiff ceased to be a citizen of Missouri, and became a citizen of Arkansas, and of which last-named state her administrator is a citizen, and here took out letters of administration, and that as the suit is now between citizens of the same state, it should be dismissed for want of jurisdiction. This objection is not maintainable, for it is undeniable that where jurisdiction has once vested, a change of residence of either of the parties will not divest it. That has frequently been decided by the supreme court of the United States. [Morgan v. Morgan] 2 Wheat. [15 U. S.] 297; [Conolly v. Taylor] 2 Pet. [27 U. S.] 564; [Mollan v. Torrance] 9 Wheat. [22 U. S.] 537; [Dunn v. Clarke] 8 Pet. [33 U. S.] 1. The death of either party, pending the suit, does not, where the cause of action survives, amount to a determination of it. The substitution of the representative of the deceased is not the commencement of a new suit, but a mere continuation of the original suit, and whether the representative belongs to the same state where the suit is pending or not, is quite immaterial. If the jurisdiction attached, as between the original parties, it still subsists. Clarke v. Mathewson, 12 Pet. [37 U. S.] 164. It is proper to substitute the administrator, and to direct a scire facias to bring in the representatives of the deceased defendant, returnable to the next term. Ordered accordingly.

NOTE. The 31st section of the judiciary act of 1789 is as follows (1 Stat. 90; Gord. Dig. 687), namely. "Where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment; and the defendant or defendants are hereby obliged to answer thereto accordingly; and the court before whom such cause may be depending is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where such suit is depending, twenty days beforehand, shall neglect or refuse to become a party to the suit, the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party to the suit. And the executor or administrator who shall become a party as aforesaid, shall, upon motion to the court where the suit is depending, be entitled to a continuance of the same until the next term of said court. And if there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such

[1] [Reported by Samuel H. Hempstead, Esq.]

death being suggested upon record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants."

As to construction of the section.—This statute embraces all cases of death before final judgment, and is more extensive than the 17 Car. II., 8 & 9 Wm. III. The death may happen before or after plea pleaded, before or after issue joined, before or after verdict, or before or after interlocutory judgment; and in all these cases the proceedings are to be exactly as if the executor or administrator were a voluntary party to the suit. Hatch v. Eustis [Case No. 6,207]; Green v. Watkins, 6 Wheat. [19 U. S.] 260. In real actions, the death of the ancestor without having appeared to the suit, abates the suit, and it cannot be revived and prosecuted against the heirs of the original defendant. The 31st section of the act of 1789 is clearly confined to personal actions, as the power to prosecute or defend is given to the executor or administrator of the deceased party, and not to the heir or devisee. Macker's Heirs v. Thomas, 7 Wheat. [20 U. S.] 530.

As to substitution of parties.—Unless the fact be admitted by the parties, the person applying to be substituted as representative must show himself to be such, by the production of his letters testamentary or of administration, before he can be permitted to prosecute; but if the order for his admission as a party be made, it is too late to contest the fact of his being such representative. Wilson v. Codman's Ex'r, 3 Cranch [7 U. S.] 193.

Upon the death of the plaintiff, and appearance of his executor, the defendant is not entitled to a continuance. Nothing in the act induces the opinion that any delay is to be occasioned where the executor is substituted and is ready to go to trial. But an executor made defendant is entitled to one continuance to allow him to inform himself of the proper defence. 3 Cranch [7 U. S.] 207.

As to jurisdiction.—If the jurisdiction of the court has attached, it cannot be divested by any subsequent events. If, after the commencement of the suit, the original plaintiff removes into and becomes a citizen of the same state with the adverse party, the jurisdiction over the cause is not divested by such change of domicil. Morgan's Heirs v. Morgan, 2 Wheat. [15 U. S.] 290, 297; Mollan v. Torrance, 9 Wheat. [22 U. S.] 537; Dunn v. Clarke, 8 Pet. [33 U. S.] 1; Clarke v. Mathewson, 12 Pet. [37 U. S.] 170; Hatch v. Dorr [Case No. 6,206]; Hatfield v. Bushnell [Id. 6,211].

In the section above alluded to, congress manifestly treat the revivor of the suit by or against the representative of the deceased, as a matter of right, and as a mere continuation of the original suit, without any distinction as to the citizenship of the representative, whether he belongs to the same state where the cause is depending, or to another state. Clarke v. Mathewson, 12 Pet. [37 U. S.] 172. And accordingly in the last case, a bill of revivor, being treated as the continuance of the old suit, brought by the representative, who was a citizen of the same state with the defendants, was allowed, and the jurisdiction of the court sustained, and the decree of dismissal [Case No. 2,857] reversed. As an original suit, it could not be maintained ([Chappedelaine v. Dechenaux] 4 Cranch [8 U. S.] 306; [Childress v. Emory] 8 Wheat. [21 U. S.] 642; Dodge v. Perkins [Case No. 3,954]; [Clarke v. Mathewson] 12 Pet. [37 U. S.] 170), because the parties to the record would be citizens of the same state. The court has jurisdiction, because it had it originally, and because the substituted party comes in to represent the deceased, and to prosecute a pending suit, and not to begin a new one. In Dunn v. Clarke, 8 Pet. [33 U. S.] 1, an injunction bill was sustained, although the parties were citizens of the same state, because the original judgment under which the defendant in the injunction bill made title, as the representative in the realty of the deceased, had been obtained by a citizen of another state in the same circuit court. And so in Hatch v. Dorr [Case No. 6,206], it is held, that as a creditors' bill is merely the continuation of the suit at law, and intended to realize the fruits of the judgment, and cannot be considered as an original proceeding, the jurisdiction may be maintained, although the complainant has become a citizen of the same state with the defendant, where the judgment was rendered. It was said, in Green v. Watkins, 6 Wheat. [19 U. S.] 260, that the death of the party neither raises any new right or cause of action, nor produces any change in the condition of the cause or in the rights of the parties. If these remain unaffected, it would seem to follow that the jurisdiction is likewise unaffected, irrespective of the citizenship of the personal representative.

The administrator, if admitted, is not to be considered in the light of an original party. The action was commenced and regularly pending in the lifetime of his intestate, who was the original party; and he comes in, not in his own right, but merely as the representative of such original party. It is in this special character, and under these special circumstances, that he appears and prosecutes. Hatfield v. Bushnell [Case No. 6,211].

An executor or administrator may bring a scire facias in the circuit court to revive a judgment recovered therein in a suit brought by the testator or intestate, or to have execution against the bail in the suit, or if no judgment be recovered in the suit so brought, but it be still pending, may become a party to and prosecute the same, although he may be a citizen of the same state with the adverse party, and for that cause incompetent to bring in such court an original suit against him.

Case No. 14,174.

In re TRIM. Ex parte MARSHALL. In re PURCELL. Ex parte WAGNER. BOWMAN v. WAGNER et al.

[2 Hughes, 355;[1] 5 N. B. R. 23.]

District Court, D. South Carolina. 1871.

LANDLORD AND TENANT—LIEN FOR RENT—MILITARY ORDER—BANKRUPTCY.

1. A landlord has a lien in the state of South Carolina on the personal property of the tenant, which is good for one year as against execution and other creditors.

[Cited in Bailey v. Loeb, Case No. 739.]

2. Under the statute of Anne, a landlord has a secured lien for his rent in the state of South Carolina, and that law is still in force, not having been repealed by the military order of General Sickles.

3. An assignee in bankruptcy is bound to respect the landlord's lien for rent.

[These were several proceedings in bankruptcy, entitled respectively: In re W. J. Trim; Ex parte E. W. Marshall, Agent; In re Purcell; Ex parte T. D. Wagner; and E. M. Bowman against T. D. Wagner and others.]

BRYAN, District Judge. The same question in all these cases was submitted to and reported upon by the register in bankruptcy and a special referee. Exceptions were filed to the reports, and the cases are before me

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

on these exceptions. I shall, for convenience, confine the discussion to one case, that of Ex parte Wagner, the decision of which will apply to the others.

After protracted deliberation and a thorough examination of all the authorities bearing on this issue, English and American cases, with the benefit of exhaustive arguments by counsel of the first ability and learning in this case and others, I have come to the conclusion opposed to that of the referee in this case, himself so greatly distinguished for learning, experience, and ability, and feel compelled to overrule his judgment. My mind is satisfied with the reasoning of the chief justice in the analogous Case of Wynne [Case No. 18,117]. I accept his ruling as ascertaining the meaning of the word "lien." "Whenever the law gives a creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of it gives a lien on such property to secure the payment of this debt." And in the language of the chief justice, in the same case, "I think a lien of this sort" is given by the statute of 8 Anne, c. 14 (Pub. Laws, p. 97), of force in this state. This lien is not dependent on a distress warrant or an execution. The charge on the property or the proceeds of the property is a charge because by the statute, where there is an execution, the charge is paramount to the levy itself. It ranks the levy. The very fact that it is paramount to the levy proves that it is a lien. It is not necessary that in point of fact there should be an execution. But if there were, in the language of the chief justice, "would it not be trifling with the plain sense of words" to say that "the claim which by law is made superior to the lien, is itself not a lien?" The statute creates a lien, not the execution. It creates a charge upon the property which excludes even an execution. The lien, so far from being credited by the execution, ousts it. If it had not a previous existence, how could this be? The property then in the hands of an assignee is in the hands of the law, as much so as if in the possession of the sheriff, and to be disposed of subject to this charge, and against all other liens, the highest possible lien being a levy which is the consummation or execution of an execution.

The parties to this contract entered into it with remedy of distress at common law, and the lien upon the proceeds of personal property upon the premises, upon sale by execution by the sheriff, for the payment of the rent, as an essential part of the contract. The landlord put his property in possession of the tenant, with an anticipative execution in his hands, as security for his rent when due, and the protection against any other levy by the statute of Anne, to the extent of one year's rent. He might neglect or waive his rights at common law, or under the statute, but on the conditions and under the circumstances prescribed by the common law and the statute, the protection was prompt, in his own power, and so sufficient and prevailing as to be paramount to an execution upon a hostile process. Let it be remembered that the landlord begins as to his debt where other creditors end; he has the consummation of a judgment put into his hands, an execution for the security and payment of his debt before suit. In other words he has a right to do before suit, as to all personal property (unless specially employed) upon the premises of his tenant, what any other creditor can only do at the end of the law.

We hold with the chief justice, and resting upon the authorities he cites, and on his own great authority, that "by the bankrupt act all the rights and all the duties of the bankrupt in respect to whatever property not expressly excluded from the operation of the act he may hold, under whatever title, whether legal or equitable, and however incumbered, pass to and devolve upon the assignee at the date of the filing the petition in bankruptcy, and all rights thus acquired are to be enforced by process, and all duties thus imposed are to be performed under the superintendence of the national courts. No lien can be acquired or enforced by any proceeding in a state court after petition is filed, though in cases where jurisdiction has been previously acquired by state courts of a suit brought in good faith to enforce a valid lien upon property, such jurisdiction will not be divested."

Under our act, differing in this respect from the operation of the English bankrupt act, all process is stayed by the assignment of the bankrupt, and among others the process of a distress warrant. It must be in effect executed by the assignee. He takes the property subject to the duty of executing it. It cannot, as under the English system, be executed by the landlord himself, and it is because he cannot that the assignee is bound to do it. And it is only because under the English law the landlord has a right to levy his distress warrant after the assignment, that the duty is not imposed upon the assignee to pay the claim of the landlord and satisfy what the text-books and the most renowned judges of England style, his "lien." The assignment would be regarded as an execution under the statute of Anne, if the landlord had not the right to make his levy and collect his debt in spite of it. In other words the assignment, there, as in this country, would be accepted as a statutory execution, and the right of the landlord, whether based upon the common law or the statute of Anne, would be protected and enforced by the assignee. See In re Appold [Case No. 499].

Our own local reports furnish a case in which the right of the landlord under the statute of Anne is most strikingly illustrated and enforced. It is the case of Lambert v. De Saussure, 4 Rich. Law, 248. The case

and the point ruled is sufficiently stated in the rubric. It is this: "A tenant against whom there was a fi. fa. under stay, made an assignment for the benefit of creditors, of furniture in the house which he occupied as tenant. The execution creditor agreed that the assignee might sell the furniture and hold the proceeds subject to all legal liens. After the assignment, but before the removal and sale of the furniture, the rent fell due. Held, that the assignee was bound to pay the rent in preference to the debt under the fi. fa."

Mr. Justice Whitner, speaking for the supreme court of the state, remarks: "When the assignment was first heard of and examined into, the plaintiffs (in execution) early expressed their willingness, by their attorney, to abide a sale by the assignee in lieu of the sheriff, subject to liens according to law. But without compromising the plaintiffs by any particular form of expression, in point of fact, the sale was made by the assignee. Suppose it had been by the sheriff, in virtue of the execution at the earliest day, according to the indorsement on the record, to wit, the 1st January, 1849. The rent was due to the landlord before that day, and hence the sheriff must have paid the sum claimed on notice, before the removal of the goods under the provisions of the statute of Anne." See, also, 1 Tread. Const. 119; 3 McCord, 38.

There is another view based upon our state legislation, which serves to ascertain the value and rank of the landlord's claim for rent, and to establish the justice of the allowance of it as a preference over general creditors. It will be seen in reference to the act regulating the order in which debts due by testators' or intestates' estates are paid (5 St. S. C. 111, § 21) that rent must be paid before bonds or other obligations. Rent is paid to their total exclusion, if there be not funds to pay both. The analogy is the stronger from the fact that this order of payment is as to an estate and an insolvent estate. In both cases the debts must be paid out of the estate. There is no other fund to look to. In either case each party, so far as his creditors are concerned, is, in legal contemplation, equally dead. Neither has any future upon which the creditors can proceed. He who is dead is done with earth, and can work no more for his creditors. And he who is discharged in bankruptcy is no longer legally bound to work for them; his release from his creditors is as perfect under his certificate of discharge as he who is released by death; and whatever property he may subsequently make is his, and not legally liable for his debts. Death in the one case and the certificate in the other is an equally valid discharge from all obligations. The creditor can alone in either case, therefore, look to the estate, and if not paid out of it, he must go unpaid so far as the law can help him to payment.

The case of a general creditor whose claims rest on a specialty, or note, or open account, in the case of a deceased person's estate, and who is postponed and excluded by the claim for rent, is certainly equally hard as that of a like creditor under the bankrupt law. And let it be observed that this satisfaction of the claim for rent is without limitation as to time, so far as the general creditor is concerned. It is paid in full for whatever time as respects him. It is a charge upon the whole estate, which must be satisfied before any unsecured obligation can be paid, and to the extent of a year's rent is a paramount lien upon any personal property upon the premises of the deceased, being "one of those cases where a creditor may have a lien on any particular part of the estate." 5 St. S. C. p. 111, § 26. And here let it be remarked, so far as the hardship of excluding the general creditor and preferring the landlord under the law is concerned, that they both contract under the law and in reference to it. For illustration, when this contract between the bankrupt, Purcell, and the claimant, Mr. Wagner, was entered into, and Mr. Wagner parted with the Mills House, it was upon the security which the law gave him for his rent. He confided in that security. He knew he had the right of distress generally; he knew that to the extent of one year's rent he had a lien under the statute of Anne, paramount to a hostile execution; he knew that in the event of his tenant's death, he had a lien or preference protected by law extending to all his estate, as against the general creditors of the estate. And it is, in my esteem, legitimate to say—I am not advised to the contrary by any decision—that to the extent of one year's rent in such contingency he had also a lien upon the furniture of his tenant, paramount to all other liens, as in the category of "those who have a lien on every particular of the estate," under the act heretofore referred to. And all the other creditors of Mr. Purcell contracted with him with reference to those rights of the landlord. When they trusted their money or other property to him it was with the knowledge of these rights. They were at liberty to protect themselves by demanding adequate security. If they trusted to his sufficiency to pay in any event, it is their misfortune. They knew they were dealing with one who had special claims upon him, qualifying their claims and putting them at hazard. It is a hardship that they suffer, but it is a legal hardship, and one they risked, when, without security, they trusted their property or loaned their money to the bankrupt. It is certainly a usual and a prudent thing, and a just thing as well, that when a man parts with his property he should have security for its return. The banks exact it. Money loaned on land by individuals, almost as a matter of course, is secured by bond and mortgage or confession of judgment. It is not objected to the banks or individuals in these cases that security is demanded and exacted. Yet rent is in substance so much money, and the claim that it should be made secure is certainly equally reasonable. In a mere business point

of view is it not equally fair and just that I should demand security for the loan of my house as the loan of my money? The landlord, in this case, trusted to the security of his legal preference and protection. If the law did not afford him protection, is it not true, in the nature of things, that as the banks and other capitalists, the landlord would require in advance security for his rent, the loan of his property? A lien in some shape, or security equivalent to it in each doubtful case, would be exacted. Generosity and gratuities do not belong to money transactions or the exchanges of property in any form. When a man gives a certain property he wants a certain equivalent in return, and to get back what he gives. When he gives so much value as in the shape of the loan of a house, he wants so much value in the shape of rent, and to be as secure in getting it as the other party is secure of getting its equivalent; all else is gratuity and kindness, and strict business-like commerce and exchanges of values with mutual security.

It is my judgment, therefore, on the whole, under the statute of Anne, unrepealed by the military order of General Sickles, and still in force and operation, as much so as the lien under the intestate's act, that to the extent of one year's rent and interest on the amount, due notice having been given to the assignee, the lien of the claimant, Mr. Wagner, is valid, and it is made the duty of the assignee, as the representative of the rights and the duty of the bankrupts under the act, to satisfy it out of the proceeds of the personal property on the premises. It is therefore ordered and decreed, that the assignee in each of the above cases do pay into the registry of this court the amount reported to be due for one year's rent, with interest, from the bankrupts respectively to their respective landlords.

Case No. 14,175.

The TRIMOUNTAIN.

[5 Ben. 246.] [1]

District Court, E. D. New York. June, 1871.

ADMIRALTY—SURPLUS AND REMNANTS—STEVEDORE—COOPERING CARGO—MASTER'S WAGES AND DISBURSEMENTS—MORTGAGEE—BANKRUPTCY—GOLD CONTRACT.

1. Surplus and remnants of a ship, were claimed by an assignee in bankruptcy. Petitions were also filed on behalf of a stevedore, who had discharged the cargo of the ship on her last voyage, and on previous voyages; of a cooper who had put the last cargo in landing order previous to its delivery; also by the master of the vessel for his wages and for disbursements; and by a watchman for watching the vessel in port, both before and after her seizure by the marshal under the process. *Held*, that the claims of the stevedore and cooper for services rendered, in reference to the cargo on the last voyage only, and of the master for wages and disbursements during the last voyage only, should be paid out of the surplus.

[Cited in Porter v. The Sea Witch, Case No. 11,289; The Wexford, 7 Fed. 684; The Lillie Laurie, 50 Fed. 221; The Seguranca, 58 Fed. 909.]

2. The expenses of watching the vessel in port, previous to her seizure by the marshal, might also be paid out of it, but not the expenses of watching her after such seizure.

[Cited in The Champion, Case No. 2,584; The Erinagh, 7 Fed. 234; The Seguranca, 58 Fed. 909.]

3. A mortgagee of the ship under a mortgage given to secure "one thousand pounds sterling, lawful money of Great Britain," petitioned also to be paid out of the surplus, the amount due him "in gold coin of the United States." The assignee in bankruptcy claimed, that the amount should be paid in currency. *Held*, that inasmuch as the questions of law involved had been decided by the district court for the Southern district of New York, arising between the same parties, on similar mortgages on two other ships, from which decision no appeal had been taken by the assignee, this court, without passing on the questions of law involved, would consider that that decision was acquiesced in by the assignee, unless it was appealed from, and would make a similar order. But if an appeal was taken from that decision, a decision in this matter would be withheld, until the determination of the questions of law by the appellate court.

In admiralty.

BENEDICT, District Judge. This is a motion for an order of distribution of the proceeds of the ship Trimountain, a vessel which has been condemned and sold to pay certain liens attaching to her. The proceeds in the registry are more than sufficient to discharge all the decrees which have been rendered against the vessel, and the only controversy is in respect to the distribution of the surplus remaining after payment of the decrees. No owner has appeared to make any demand for this surplus, but several parties, who have performed certain services in connection with the vessel, have presented petitions, asking that their demands may be directed to be paid out of the surplus in the registry.

A petitioner holding an unsatisfied mortgage, has filed a like application for payment of his mortgage, and there is also the petition of John Sedgwick, Esq., assignee in bankruptcy of the owner of the vessel, who has appeared by petition, and asks that the surplus proceeds may be paid over to him, for distribution among all the creditors of the owner, in accordance with the provisions of the bankruptcy act [of 1867 (14 Stat. 517)], and who opposes the payment of the demands of the petitioners. Proofs have been taken in support of the various petitions, and they are now to be disposed of by the court.

I am of the opinion, that the demands arising out of labor of coopers performed on board the vessel, at the termination of the last voyage, in order to put the cargo in landing order, and enable the ship to deliver her cargo, and earn her freight, may be paid out of the surplus proceeds of the vessel, and that the demand of the stevedore for labor per-

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

formed in landing the same cargo may also be in like manner paid.

I do not rest this determination upon the grounds of the decision in the case of The Stephen Allen [Case No. 13,361], where the owner of the ship, who was admitted to be liable in personam, for the demand, was the only opposing party making claim to the fund; because here the opposing party who makes claim to the fund is the assignee in bankruptcy of the owner. The assignee in bankruptcy represents all the creditors of the owner, and against him no demand can be paid out of the fund, unless upon the ground that the fund is, in equity, subject to a charge, an equitable lien for such demand. But this fund is surplus proceeds of a ship sold shortly after her arrival in port. When she arrived, she was loaded with a cargo which she was bound to deliver. If not enabled to deliver her cargo, she would have been subjected to a maritime lien for damages, and she would have been unable to collect her freight. The usual and ordinary expenditures, made to enable her to free herself from liability on her existing contract of affreightment, and to enable her to collect her freight, should in equity be paid out of a fund, which, if such expenditures had not been made, would have been thereby largely diminished. It cannot be doubted, that if the assignee in bankruptcy had come into possession of the vessel with this cargo on board, he would have been directed by the court to make this very expenditure out of the general proceeds of the bankrupt's estate, in order to bring into that estate the ship, free from any liability for the cargo. If these bills would properly be paid by the assignee under such circumstances, I see no reason why he should now be permitted to object to them.

Again, I think, it might be fairly inferred from the evidence, that the freight of this cargo, which the ship was enabled to earn partly by means of the labor which these demands represent, came into the hands of the assignee in bankruptcy with the rest of the estate, and this freight money would, I think, be clearly subject in equity to a charge for money expended to secure it. If the assignee in bankruptcy, who has received the freight so chargeable, declines to pay charges upon it of this nature, a court of admiralty may well refuse to grant his petition to be paid a surplus in its registry, until he shall do equity in respect to such demands.

The reasons I have assigned for charging this fund with demands for labor performed in and about the completion of the last voyage of this ship, fail in respect to demands of a similar character incurred on former voyages. Time relieved the ship from any possibility of liability by reason of those voyages, and no freight of those voyages has come into the hands of the assignee. The order will therefore be that the petitioner James H. Yeaton, be paid the sum of $154.93, out of the fund in court, and that the petitioners Johnson & Giles, be paid in like manner the sum of $115.25.

The demand of Charles Manent, for services as watchman on board the vessel, after she was taken in actual custody by the marshal, cannot be allowed out of the fund. The necessary watchman's fees for that period, disbursed by the marshal, form part of the marshal's bill of costs. But wages earned in watching the vessel in port, up to the time of her seizure by the marshal, may be paid out of the fund. Such services, being rendered for the benefit of all interested in the ship, create a lien upon the ship. They constituted one of the privileged demands of the maritime law as administered under the ordinance, and are so ranked in the Code de Commerce.

The demand of the master for wages and disbursements is not sufficiently proved to enable me to pass upon it. He is entitled upon the principles above stated, to be paid any wages earned, or necessary ship's disbursements made during the last voyage, but not for services and disbursements made during any former voyage, and he has liberty to present any further evidence he may desire, to show that he has any demand which will come within the rule above laid down.

There remains, undisposed of, a question arising upon the petition of the mortgagee. This petition prays, that, out of the moneys in court, which consist of certain legal tender notes received upon the sale of the vessel, under a decree in rem, rendered in a former case, he be paid one thousand pounds sterling, with interest from June, 1870, in satisfaction of a mortgage upon this vessel, which was given to secure the payment in New York of "one thousand pounds sterling, lawful money of Great Britain," the lien of the mortgage having been transferred to this fund. Upon this petition, the petitioner now asks for an order, directing the payment of the amount due him "in gold coin of the United States." I have examined, to a certain extent, the questions of law which this petition raises, and cannot consider them free from difficulty. It does not appear to me clear that the contract of the parties can be considered to be a contract to pay in the gold coin of the United States.

I also think that it may well be doubted whether, in a case where the only fund in court is currency of the United States, a party petitioning for payment out of that fund can demand gold coin of the United States, a currency different from that of which the fund consists. But I do not think, that I can be called on at the present time to decide these and the other questions which have been argued before me upon this petition, for the following reason.

Precisely the same questions, arising between the same parties, upon exactly similar mortgages made upon two other ships of the same line, have just been decided by Judge Blatchford, in the Southern district of New York, where the other vessels were proceeded

against. These questions were there raised by the same assignee in bankruptcy, and it does not yet appear, whether he does or does not intend to seek a review of that decision in the circuit court. If that decision be acquiesced in, and no appeal be taken, I shall feel justified in making an order in this case similar to the one made by Judge Blatchford. The omission to take an appeal, by the assignee, should be held by this court to be an acquiescence, on his part, in the law declared in that case. If an appeal be taken, I shall withhold my decision here until the questions at issue by these parties shall be determined by the proper appellate tribunal upon that appeal. I therefore make no order at present, in respect to the mortgage, but as the fund is sufficient to pay all the other demands, and still sufficient to satisfy the mortgage, even if the same is finally declared payable in gold coin of the United States, the other demands which I have above examined, may be now paid.

TRINITY M. E. CHURCH (CAPELLE v.). See Case No. 2,392.

Case No. 14,176.

TRIPLET et al. v. VAN NAME et al.

[2 Cranch, C. C. 332.] [1]

Circuit Court, District of Columbia. May Term, 1822.

AVERAGE—DECK LOAD.

The vessel, and the cargo in the hold, are not liable to contribution for the deck load thrown overboard for the general safety.

Bill in equity [by Triplet & Neale] for contribution from the vessel, and remaining part of the cargo, for a part of the deck load thrown overboard for the general safety of vessel and cargo, in a voyage from New York to Alexandria, D. C.

Mr. Mason, for defendant, contended that the cargo under deck is not liable for average of deck load thrown overboard for the preservation of the whole. Smith v. Wright, 1 Caines, 43; Judah v. Randal, 2 Caines, Cas. 324; Lenox v. United Ins. Co., 3 Johns. Cas. 178; Stev. Av. 14, 18, 50; Code Nap.

Mr. Taylor, contra.

This is a coasting voyage, and the question depends upon the usage of the trade. The general principle is, that the vessel and remaining goods shall contribute for any part of the cargo thrown overboard for the safety of the residue. There is no reason for excepting the deck load, unless the vessel is thereby overladen; in which case the master only is liable. The error has arisen from applying the law of insurance to a mere question of contribution. But the law of insurance is founded on the fact that a deck load is liable to greater risk than a cargo under deck. Beaw. Lex. Merc. tit. "Salvage." The Code Napoleon is the municipal law of France, and is no evidence of the general maritime law upon this particular case.

Mr. Taylor also cited a MS. note of the case of the sloop Matilda from New York to Alexandria, D. C., which was submitted to arbitrators, James Bruce Nichols, an insurance broker, and George Coleman, a master of a vessel, who decided it to be a proper case for average, it not appearing that the vessel was overloaded.

THE COURT, having taken time to consider, in the vacation, was of opinion that it was not a case of average, and dismissed the bill.

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

Case No. 14,177.

TRIPLET v. WARFIELD.

[2 Cranch, C. C. 237.] [1]

Circuit Court, District of Columbia. April Term, 1821.

PLEADING AT LAW—VARIANCE.

The defendant cannot take advantage of a variance between the writ and declaration, by demurrer, without praying oyer of the writ.

The capias issued in trespass on the case. The declaration was in trespass vi et armis for breaking the plaintiff's lamp. The defendant demurred generally to the declaration, without praying oyer of the writ.

THE COURT, after taking time to consider, rendered judgment upon the demurrer, for the plaintiff. See 1 Chit. Pl. 438, 439; Hole v. Finch, 2 Wils. 394; Oakley v. Giles, 3 East, 167; Gray v. Sidneff, 3 Bos. & P. 399; Murray v. Hubbart, 1 Bos. & P. 645; 1 Chit. Pl. 209, 249, 254; Spalding v. Mure, 6 Term R. 363.

Case No. 14,178.

TRIPLETT et al. v. BANK OF WASHINGTON.

[3 Cranch, C. C. 646.] [1]

Circuit Court, District of Columbia. Nov. Term, 1829.

EVIDENCE—BANK BOOKS.

A call for all the letter-books of the bank from its institution to the time when the cause of action arose, was held to be too general. The court will compel the production of such only as they are satisfied contain evidence pertinent to the issue. The party calling for books has no right to examine them before the trial, to see whether there be not something in them pertinent to the issue.

Upon the venire de novo issued under the mandate of the supreme court, in this case (see 1 Pet. [26 U. S.] 25), the plaintiffs had given notice to the bank (the defendant,) to produce at the trial the letter-books of the bank, from its institution down to the year 1825, to be used in evidence.

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

THE COURT (MORSELL, Circuit Judge, absent, on account of the death of his brother), said that the call was too general, and that the bank ought not to be compelled to produce them unless the plaintiffs should first satisfy the court that they contained evidence pertinent to the issue; and then they could be compelled to produce only such as they show to be pertinent.

Mr. Neale contended that he had a right to examine them before the trial, to see whether there were not something in them pertinent to the issue.

But THE COURT said he had no such right. The plaintiffs then gave notice to the defendants to produce, at the trial, the letter-books of the bank which contain their letters to their dealers, notifying them of the acceptance or non-acceptance of such drafts, payable after date, as have been sent to the bank for collection; and also such letter-books as contain their letters notifying their dealers that individuals had not been found by the officers of the bank on whom drafts had been drawn payable after date, and sent to the bank for collection; and moved the court to order the defendants to produce those books.

Mr. Key, for the defendants, objected that the notice was still too general. It does not show that there are any such letters. It is merely to enable the plaintiffs to find possible evidence.

THE COURT refused to make the order; not being satisfied that the books contained any matter pertinent to the issue, (no particular letter being designated,) and not being of opinion that the plaintiff has a right to inspect the books for the purpose of ascertaining whether they contained any such matter. The cause was tried. Verdict for defendant. Exceptions taken to the rejection of evidence, but no important point of law decided by the court.

[See Case No. 951.]

Case No. 14,179.

TRIPLETT v. HANLEY et al.

[1 Dill. 217.] [1]

Circuit Court. E. D. Arkansas. 1871.

BANKRUPTCY—ATTORNEY'S FEES.

1. The assignee in bankruptcy cannot recover from an attorney the amount of a fee fairly paid to him by an insolvent person for necessary services rendered at the time, there being no fraud in fact or upon the bankrupt act intended or effected.

2. Payments made to an attorney by the bankrupt in contemplation of bankruptcy, for services in opposing the petition of creditors under the 39th section, will be allowed to stand only so far as consistent with a due regard for the interests of the general creditors.

In bankruptcy.

Watkins & Rose, for assignee.

English & Hanley, for defendants.

Before DILLON, Circuit Judge, and CALDWELL, District Judge.

DILLON, Circuit Judge, delivering orally the opinion of the court, in substance as follows:

This is an action by an assignee in bankruptcy against the defendants, attorneys at law, to recover moneys paid to them by the bankrupts, as fees, or for services, in violation or fraud, as alleged, of the bankrupt act.

The defendants rendered services of two kinds:

1. While the debtors were embarrassed and insolvent and known to be so by defendants, but before the filing of the petition in bankruptcy against them, one of them was arrested under a requisition from another state, and employed the defendants to procure his release by a habeas corpus proceeding, which was successful, and he paid him therefor property alleged to be of the value of $700, but there was no proof or claim that the value of the property exceeded the fair value of the services rendered, and the payment was made before the filing of the petition in bankruptcy. We hold, that being a payment for services rendered at the time, and not being shown to be fraudulent or excessive, or intended to withdraw property from the operation of the bankrupt act, or to evade or defeat it, the assignee has not established his right to recover the sum thus paid to the defendants.

2. The other services were these: On the petition in bankruptcy being filed against the bankrupts, who were merchants, they consulted the defendants as attorneys, and agreed to pay or did pay them in cash, merchandize, and notes, over $1,500 for advice and services in opposing the petition. The bankrupts were known to the attorneys to be hopelessly insolvent, and to have committed acts of bankruptcy, and they knew or must be taken to have known that it was useless to oppose the proceeding, or to incur expense in doing so. We hold that the assignee is entitled to judgment against the defendants for the amount thus paid to them, less the sum of $200, that being shown to be a fair compensation for all necessary advice, and expenditure, and services; the court regards the allowance of that amount, under the circumstances, just and equitable, but disclaims to lay down any rule on the subject, observing that such allowances must be made with great caution, and a due regard for the interests of the general creditors. See Bump, Bankr. (3d Ed.) 195, 368, and cases cited.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

TRIPLETT (SHIRLEY v.). See Case No. 12,797.

TRIPLETT (UNITED STATES v.). See Case No. 16,539.

TRIPP (FLANDERS v.). See Case No. 4,854.

TRIPP (HARTSHORN v.). See Case No. 6,168.

Case No. 14,180.

TRIPP v. SPRING.

[5 Sawy. 209.] [1]

Circuit Court, D. California. July 29, 1878.

LAND GRANTS—BOUNDARY OF CITY OF SAN FRANCISCO—PUEBLO LANDS—TIDE LANDS—TREATY OBLIGATIONS.

1. According to the decree in the Pueblo Case, the Bay of San Francisco is the eastern boundary of the land confirmed to the city of San Francisco, the line being that of ordinary high-water mark as it existed on the seventh of July, 1846.

2. Mission creek constitutes no portion of the Bay of San Francisco. The boundary line of the tract confirmed crosses the mouth of all creeks running into the bay.

[Cited in Knight v. United Land Ass'n, 12 Sup. Ct. 274.]

3. The laws of Mexico, relating to lands to be assigned to pueblos, required that such lands should be laid out in a square or prolonged form, according to the nature of the country, and, so far as practicable, have regular lines for boundaries. The decree of the United States circuit court in confirming the claim of the city followed this requirement, and gave boundaries which could be easily ascertained, and which formed as compact a body as the situation of the country would permit.

4. The general doctrine that the state of California holds the title to soils under tide waters within her limits is asserted; but such title could only devolve upon her where it had not been previously granted to other parties by the sovereignty from which the United States acquired the country, or been subjected to trusts which require its disposition in some other way. If it were acquired by the United States charged with any trust, the disposition of it, in the execution of that trust, will override any claim of the state.

5. The obligation which the United States assumed by the treaty with Mexico, was to protect, all rights of property acquired under the laws of that country. The property rights of pueblos, equally with those of individuals, were entitled to protection, and in the legislation of congress provision was made for their investigation and confirmation. The right and power of the government in the execution of its treaty obligations to protect the claim of the city of San Francisco, as successor of the pueblo, were superior to any subsequently acquired rights or claims of the state, or of individuals.

6. The decree confirming the claim of the city having fixed the Bay of San Francisco at ordinary high-water mark as its eastern boundary, this line cannot be changed by the surveyor-general or any department of government. The act of congress of March 8, 1866 [14 Stat. 4], confirmed the claim as described in the decree, and also relinquished all interest of the United States to the lands embraced by it, subject to certain exceptions and reservations. Any patent of the United States which may hereafter be issued to the city from the land department at Washington, cannot affect the title already vested in the city and those claiming under it. The confirmation approved and affirmed by the act of congress will control any patent which the department may issue.

[Cited in Whitney v. Morrow, 112 U. S. 695, 5 Sup. Ct. 334; Knight v. United Land Ass'n, 12 Sup. Ct. 264.]

[Cited in Ohm v. City and County of San Francisco (Cal.) 28 Pac. 585.]

This was an action [by C. C. Tripp against F. S. Spring] for the possession of a parcel of land within the city of San Francisco. The case was tried at the July term of the court, before Mr. Justice Field, without a jury, by stipulation of the parties.

Philip G. Galpin, for plaintiff.

E. J. Pringle and A. Campbell, Sr., for defendant.

FIELD, Circuit Justice. This is an action for the possession of a parcel of land within the city of San Francisco, constituting a portion of the block bounded by Mission, Howard, Seventeenth and Eighteenth streets, and designated on the map of the city as block sixty (60). The plaintiff is a citizen of Illinois, and asserts title to the premises under a conveyance executed by the state board of tide land commissioners, in November, 1875, to one Geo. W. Ellis, through whom he derives whatever interest he possesses. The defendant is a citizen of California, and claims the ownership of the premises by conveyance from parties who acquired the interest of the city of San Francisco under the ordinance known as the "Van Ness Ordinance," and the confirmatory legislation of the state and of the United States. The case is believed to be a test one, and it is stated that upon its disposition numerous other cases, depending upon the efficacy of the deed of the tide land commissioners, will be determined. It is tried by the court without the intervention of a jury by stipulation of the parties.

The contention of the plaintiff is, that the premises in controversy were, on the admission of California into the Union, either lands covered by the tide waters of the Bay of San Francisco, and that their title then vested in the state, by virtue of her sovereignty; or that they were, upon such admission, salt-marsh lands, which at once passed to the state under the act of congress of September 28, 1850 [9 Stat. 519], known as the swamp land act; and that in either case, the title of the state was conveyed to Ellis by the deed of the tide land commissioners. The statute providing for the appointment of these commissioners makes their deed prima facie evidence of the regularity of their preliminary proceedings, and of their sale, and of title and right of possession in the grantee (Laws 1867–68, p. 720); and the plaintiff also contends that this prima facie evidence cannot be controverted in an action at law until the defendant has connected himself with the original source of title.

The premises are situated where formerly

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

was a stream called Mission creek, running into the waters of a bend in the Bay of San Francisco, known as Mission Bay. They are distant about a mile from the mouth of the creek. All of that stream which covered any portion of block sixty (60) is now filled in, and upon the land thus formed, and adjoining lands, several buildings have been erected, which are occupied as private residences. Whether the waters of the bay were ever carried by the tide over the lands is a matter upon which the evidence is conflicting. The creek was often swollen by water from the adjacent hills so as to overflow its banks, and the tide sometimes, though not regularly, forced back the waters of the creek, so as to cause a similar overflow. But from the view we take of the case, it is immaterial whether the lands could ever properly be termed tide lands or marsh lands, whether they were at any period covered by the daily tides, or lay beyond their reach at their highest flood. The record of the proceedings and the final decree in the Pueblo Case have been given in evidence, and from them it appears that the premises are situated within the limits of the tract confirmed to the city of San Francisco. This tract embraces so much of the upper portion of the peninsula, upon which the city is situated, above the ordinary high-water mark of 1846, as will contain an area of four square leagues, being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line, drawn so as to include the area designated, subject to certain deductions which it is not material to mention in this connection. Mission creek never constituted any portion of the Bay of San Francisco, any more than the Sacramento river constitutes a portion of the Bay of Suisun, or the Hudson river a portion of the Bay of New York. As the demanded premises lie where Mission creek formerly existed, or where its banks were, they necessarily fall within the tract confirmed to the city. The boundary of that tract runs along the bay on the line of ordinary high-water mark, as that existed in 1846, crossing the mouth of all creeks running into the bay, and that of Mission creek among others.[2] The boundary would have been a very singular one had it followed the windings of that creek and its branches, wherever the tide waters of the bay may have flowed. The laws of Mexico relating to lands to be assigned to pueblos, required that such lands should be laid out in a square or prolonged form, according to the nature of the country, and so far as practicable, have regular lines for boundaries. The decree of the United States circuit court in confirming the claim of the city followed this requirement, and gave boundaries which could be easily ascertained, and which formed as compact a body as the situation of the country would permit.

The general doctrine that the state holds the title to soils under tide waters within her limits is not questioned. Her proprietary right to such soils has been asserted in numerous instances, both by the state and federal courts. It was expressly recognized by the supreme court of the United States in the recent case of Weber v. Harbor Commissioners, which originated in this city (18 Wall. [85 U. S.] 65). Though the United States acquired the title to the lands under tide waters from Mexico equally with the title to the uplands, they held it in trust for the future state. The ownership and consequent right of disposition passed to her upon her admission into the Union. But this ownership could, of course, only devolve upon her where it had not been previously granted to other parties by the former sovereign, or subjected to trusts which would require its disposition in some other way. If it were acquired by the United States charged with any trust, the disposition of it, in the execution of that trust, will override any claim of the state.

That a pueblo of some kind existed at the site of the present city of San Francisco upon the cession of the country from Mexico; that such pueblo possessed proprietary rights in certain lands, and that the city succeeded to such rights, are no longer open questions for discussion or judicial examination. They have been determined by repeated decisions of the federal courts; and however much counsel may be disposed to question the original soundness of those decisions, the conclusions reached must be re-

[2] This line of ordinary high-water mark was established by the municipal authorities of the city of San Francisco, in 1851, under what is known as the first "Water Lot Bill" (St. 1851, p. 307). The state, by that act, granted to the city of San Francisco, for ninety-nine years, the use and occupation of certain lands bounded on one side by the lines of certain streets, and on the other by "natural high-water mark;" and the statute provided that a "correct map of said boundary line, distinctly and properly delineated by a red line," should be deposited within thirty days after the passage of the act in the offices of the secretary of state, of the surveyor-general, and of the surveyor of the city of San Francisco. The outside red line was made by the act the water-front of the city, while the inside red line indicated the line of ordinary high-water mark. Between the two lines were the so-called beach and water lots, the use and occupation of which were granted to the city. It is matter of history that the survey was made as provided in the statute, the maps platted and red-lined, and deposited with the proper custodians, where they have ever since remained. By this well-known "red line map" all parties, since 1851, have been governed in the matter of determining the line of ordinary high-water mark. And this line, as shown by the above-mentioned map, crosses Mission creek and all the creeks and sloughs that in 1851 emptied into the Bay of San Francisco; but all of which, with the exception of a portion of Mission creek, have long since been filled up, and built over.

ceived as established, and all the legal consequences flowing from them accepted. The obligation which the United States assumed by the treaty with Mexico was to protect all rights of property acquired under the laws of that country. The property rights of pueblos, equally with those of individuals, were entitled to protection, and in the legislation of congress provision was made for their investigation and confirmation. The right and power of the government in the execution of its treaty obligations to protect the claim of the city of San Francisco, as successor to the pueblo, were superior to any subsequently acquired rights or claims of the state or of individuals. See Teschemacher v. Thompson, 18 Cal. 28.

It is undoubtedly true that, until the confirmation of the city's claim, the government retained the right to control the use and disposition of the pueblo lands, where, by action of the officers of the pueblo, or of the city, its successor, they had not been previously vested in private proprietorship; and, perhaps, had congress in terms so declared, the swamp lands within the limits of the pueblo may have been alienated to other parties. There is no occasion, however, to express any opinion on this point, as the only act of congress to which reference is made (that of September 28, 1850), was clearly not intended to apply to any lands then held by the United States, charged with the equitable claim of others, which they were by treaty bound to protect.

Our conclusion is, that the premises in controversy constitute a part of the tract confirmed to the city by the decree of the United States circuit court, entered on the eighteenth of May, 1865. That decree became final by the act of congress, passed on the eighth of March, 1866, which was followed by a dismissal of the appeal taken to the supreme court. The defendant has shown that the parties, through whom he claims, were in peaceable, actual possession of the lands in controversy at the time the Van Ness ordinance took effect, and on the passage of the confirmatory act of the legislature of the state, and had made valuable improvements upon it, and thus acquired the title of the city. He has thus brought himself in connection with a title superior to that of the plaintiff. It follows that judgment must be entered in his favor.

The suggestion that the survey of the peublo claim forwarded to the land department at Washington, follows the banks of Mission creek, cannot have any weight in the case. The decree confirming the claim of the city fixes the Bay of San Francisco at ordinary high-water mark as its eastern boundary, and this line cannot be changed by the surveyor-general, or any department of government. The act of congress confirms the claim as described in the decree, and also relinquishes all interest of the United States to the lands embraced by it, subject to certain exceptions and reservations not material to be now considered. Any patent of the United States which may hereafter be issued to the city from the land department at Washington can neither add to nor take from the title already vested in the city and those claiming under it. The confirmation approved and affirmed by the act of congress will control any patent which the department may issue. A patent of the United States operates, as was held by the supreme court in a recent case, in two ways: "It is a conveyance by the government," said the court, "when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence having the dignity of a record of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights, because it also embodies words of release or transfer from the government." Langdeau v. Hanes, 21 Wall. [88 U. S.] 521. It was a legislative confirmation of which the court was here speaking, and in the case of San Francisco, we have both a judicial and a legislative confirmation, the latter sanctioning and affirming the former. By them the title of the city and her alienees became perfect, and no patent can ever disturb or strengthen it. And yet a patent will be of great value, as it will enable parties to maintain their titles in the tribunals of the country without other proof of the claim of the city and its confirmation, and will also remove doubts as to the boundaries of the tract where their establishment rests in the uncertain recollection of witnesses as to places which are fast becoming obliterated by the improvements of a constantly increasing population. But it cannot by any possibility make a creek running into the bay a part of the bay itself, and it is not to be supposed that any suggestion of the kind will be heard with favor by those to whom the duty of issuing a patent is entrusted.

NOTE. The decision in the above case was given orally, the presiding justice stating at length his views, and observing that he would at a subsequent day file an opinion embodying their substance. A day was then fixed for counsel to prepare the findings, but soon afterwards the case was settled, and the suit dismissed by stipulation of parties.

TRISTRAM SHANDY, The (HAINEY v.). See Case No. 5,906.

TRITCH (HALLACK v.). See Case No. 5,956.

Case No. 14,181.

The TRITON.

[1 Blatchr. & H. 282.] [1]

District Court, S. D. New York. Jan. 14, 1832.

SEAMEN—WAGES—SHIPPING ARTICLES.

Parol proof offered by a ship-owner to vary the voyage described in the shipping articles, is not admissible in an action in rem by the seamen for their wages.

This was a libel in rem for seamen's wages. The libellants alleged that they shipped at Havana, on a voyage "to Cronstadt, in Russia, and thence to a port of discharge in the United States," at stipulated wages. The claimants (the owners of the ship) alleged, that the agreement was only for a voyage to Cronstadt, and had been altered without their knowledge or consent, on the home voyage of the ship. The shipping articles, as produced, corresponded with the allegations of the libellants; and the claimants offered to prove, by parol, that the words following "Russia" were inserted after the articles were signed, and whilst the vessel was on her return voyage, and that the agreement with the libellants was to terminate at Russia. The libellants objected to the proof as incompetent, but the court ordered it to be read de bene esse, reserving, till the final hearing, the question of its admissibility.

Erastus C. Benedict, for libellants.
John B. Staples, for claimants.

BETTS, District Judge. There is a disaccordance in the statements of the claimants' witnesses, which weakens the force of their testimony. It is also contradicted, in some important particulars, by the evidence on the part of the libellants; and, upon the proofs before me, supposing the claimants' depositions to be admissible, I cannot say that the articles, if altered at all, were altered on the return voyage of the ship, and not before she left Havana. But, if the articles have been altered, is it competent for the owners to impugn them as against the seamen? The statute enjoins upon the master the duty of having written articles subscribed by his seamen, fixing the voyage and wages. The English act, from which ours is borrowed, declares the contract to be "conclusive and binding;" but those terms are not introduced into our statute, though the provision that the contract and log-book shall be produced, to ascertain the wages due, is tantamount to them in effect. The interpretation of the contract, accordingly, has been, in this country, that a seaman is concluded by the written agreement as to the amount of wages, and cannot recover more than is stipulated in the contract (Bartlett v. Wyman, 14 Johns. 260; Johnson v. Dalton, 1 Cow. 543); and it is believed that no case can be produced in which a seaman has been permitted to disregard the written contract, unless he has satisfied the court it was executed through fraud or imposition practised upon him. Though it is out of his custody, and in that of those opposed in interest to him, the courts will listen to no proof, however clear and full, setting up an agreement different from the written one, until that is shown to be void as against the seaman. The objection to such testimony, when offered by the owner or master against a seaman, would be of still greater force. They are the parties who propose, prepare and hold the contract. Alterations can, therefore, be rarely made in it, without their knowledge or to their prejudice. On the contrary, the men cannot be presumed to have access to it after their signature, nor to have capacity to change its terms, or annex new agreements to it, even if disposed to do so; and it would be subversive of every precaution and safeguard designed for the protection of the crew, to permit the owner to curtail or vary, by parol proof, the engagements of the written articles, or substitute different stipulations in their place. This would, in effect, nullify the act of congress; for, the obligation upon the master and owner to enter into a written contract with their crew, would be useless, if they might afterwards efface it by parol evidence. When, therefore, the owner produces the written contract in court, it must have the effect "to ascertain the matter in dispute," unless he is enabled to prove that it has been fraudulently changed by the seamen.

In the present case, the agreement was deliberately entered into, and the owners now insist upon all the provisions that are binding on the seamen, as in full force against them, and have also excepted to, and procured the exclusion of evidence offered by the seamen to show that the real contract for wages was different from that inserted in the articles. They furthermore claim a forfeiture of wages because of a breach of the articles by the seamen. There would be something revoltingly incongruous in adjudging, for the benefit of the owners, the contract to be conclusive against the mariners, as to wages or other privileges, and yet in exonerating the owners from one of its most important provisions in favor of the seamen, upon loose oral proofs that that provision was not originally part of the agreement. The rules of the common law in regard to parol proof in contradiction of a written contract, ought not to be relaxed, in behalf of an owner or master, with respect to shipping articles. When proceeded upon in courts of law, they are construed with all the strictness of other agreements, even as against sailors. Webb v. Duckingfield, 13 Johns. 390. Applying the like principle in favor of the seamen, the ship-owner cannot substitute an oral agreement in place of one required by law to be in writing (Starkie, Ev. pt. 4, p. 999), nor vary the written contract by any species of

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

parol evidence (Id. p. 1,001), except in cases of fraud or duress.

I shall, accordingly, decree wages to the libellants for the home voyage, according to the shipping articles as presented in court, with costs.

TRITONE, The (LLADO v.). See Case No. 8,427.

Case No. 14,182.

The TRIUMPH.

[2 Blatchf. 433, note;[1] 15 Law Rep. 427, note.]

District Court, N. D. New York. July 27, 1841.

MARITIME LIENS—HOW LIEN AFFECTED—PRACTICE IN ADMIRALTY—PRIORITIES.

[1. In admiralty the first libelant seizing the property is entitled to a preference over all other claims of no higher character than his.]

[Cited in brief in The Pathfinder, Case No. 10,797. Cited in The Minnie R. Childs, Case No. 9,640; The J. W. Tucker, 20 Fed. 130; The Battler, 67 Fed. 253.]

[2. A maritime lien renders the property liable to the claim without a previous judgment or decree of court, as is necessary at common law. The action in rem merely carries this lien into effect.]

[Followed in The Globe, Case No. 5,483. Cited in The Young Mechanic, Id. 18,180; The Frank G. Fowler, 8 Fed. 332.]

The vessel having been sold under a decree and the proceeds paid into court, a question arose as to the proper distribution of the proceeds, they being insufficient to satisfy all the demands preferred against them. Various libels had been filed against the vessel, and thirteen attachments had been issued and served upon her or her proceeds, and petitions were also brought in by other parties setting up claims to the fund in court. Suits were brought by different seamen on the same voyage, by seamen on different voyages, by the assignees of wages of seamen, and by material men for labor, supplies, materials, &c. [For a libel by James Hill and others against the vessel to recover a balance of wages due them on a voyage from New Orleans to New York, see Case No. 6,500.] The actions by the material men were not brought in the order of time in which their debts accrued.

After passing upon the rights of the respective suitors to a remedy in the court, and in the form of procedure adopted by them, BETTS, District Judge, proceeded as follows:

"The remaining inquiry relates to the order in which the different demands are to be satisfied when of like rank. Are they to be paid pro rata, or does the prosecuting creditor who first obtains service of process upon the property, acquire a right to the first satisfaction? And, if any of the demands stand in a common rank, are the costs attending their prosecution entitled to preference in payment? An action in rem stands on a distinct footing from a suit at common law or in chancery. The thing arrested is in sequestration to satisfy the specific demand thus fastened upon it. Whether the res, in kind, remains in court, in the custody of the law, to the termination of the suit, or is delivered up on stipulation, itself or its substitute remains subject to the particular claim, and is detained on that alone. The moment the attaching demand is satisfied, the thing attached is surrendered by the court, and nothing short of another attaching process will justify its longer detention. If other suits are instituted after the property is delivered on bail, (that bail, according to our practice, responding only to the particular suit,) most manifestly the after-demands could not be attached to the fund so raised. And, if the property is not yet delivered out of court, subsequent arrests of it, while there in custody, would no more enure to place the subsequent actions on an equality with the one holding it under seizure, than they would when it stood released on bond or stipulation.

"The meaning and efficacy of a maritime lien is, that it renders the property liable to the claim without a previous judgment or decree of the court, sequestering or condemning it, or establishing the demand, as at common law, and the action in rem carries it into effect. Ingraham v. Phillips, 1 Day, 117; Barber v. Minturn, Id. 136. Thus, the appropriation of the res to that end becomes absolute and exclusive on suit brought, unless superseded by some pledge or lien of paramount order; and, it accordingly results, from the nature of the right and the proceedings to enforce it, that the first action which seizes the property is entitled to hold it, as against all other claims of no higher character. Clerke, Praxis, Adm. tit. 44; Hall, Adm. 89; People v. Judges of New-York, 1 Wend. 39. The lien, so termed, is, in reality, only a privilege to arrest the vessel for the debt, which, of itself, constitutes no incumbrance on the vessel, and becomes such only by virtue of an actual attachment. Hall, Adm. tit. 44; Abb. Shipp. pt. 2, c. 3, 142; 3 Kent, Comm. 169, 170; People v. Judges of New-York, 1 Wend. 39.

"[Applying these principles to the case before the court, the prosecuting creditors, except seamen suing for wages, are to be satisfied in the order in which the warrants of arrest were served upon the property, whether the vessel in kind, or her proceeds in court. Each action, with its appropriate costs, comes upon the fund according to the period of its commencement.]" [2]

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

[2] [From 15 Law Rep. 427, note.]

Case No. 14,183.

The TRIUMPH.

[1 Spr. 428;[1] 21 Law Rep. 612.]

District Court, D. Massachusetts. July, 1858.

SALVAGE—WHO MAY BE SALVORS—SEAMAN.

1. A seaman may be a salvor of his own vessel, after his contract of service shall have been dissolved. He may be absolved from his allegiance to the ship, by being deserted by the master and the rest of the ship's company.

[Cited in The Olive Branch, Case No. 10,490; The C. P. Minch, 61 Fed. 512.]

2. The case of Mason v. The Blaireau [2 Cranch (6 U. S.) 240].

3. Amount of salvage compensation.

[This was a suit brought against the vessel Triumph, Artis, claimant, for an alleged salvage service.]

H. A. Scudder, for libellant.

A. H. Fiske, for claimant.

SPRAGUE, District Judge. This is a libel for salvage by Knowlton, one of the crew. The facts proved are as follows: The libellant shipped, as cook, on board of this vessel, for a voyage from Philadelphia to Boston and back. On the 24th of June last she sailed for Boston, laden with coal. On the 30th, being off Cape Cod, at about eleven o'clock at night, she came in collision with another vessel, called the Elisha T. Smith, which struck her starboard quarter, broke off some of her stanchions, injured the main boom and the house on deck, and tore the mainsail so as to render it useless. The wind was northeast, and so strong that the topsails and flying jib had been taken in, and she was under her mainsail, foresail and jib only. Highland light was in sight; at what distance, is variously stated from six to fifteen miles. The crew consisted of the master, one mate, three foremast hands, and the libellant. At the time of the collision, the libellant was in his berth, asleep; one other seaman also was below. The master, mate, and two seamen were on deck, all of whom immediately deserted the schooner, and got on board the colliding vessel. The seaman who was below also got on board of her, by jumping overboard and swimming to her. The libellant, being roused by the crash, ran on deck, found no one there excepting one seaman, whom he soon afterwards saw getting up the side of the other vessel. Finding himself alone, he hailed the other vessel, and begged that he might not be deserted. The master of the Triumph says that, before he left his vessel, he called the libellant, and, after getting on board of the Elisha T. Smith, he besought her master not to leave the libellant, but he refused to comply, lest by delay he should vacate his insurance, and proceeded on his voyage. The libellant states that, after being thus deserted, he first rigged the pump, and worked it for some time; he then secured the main boom, the rope which held it to the mast having been broken, and the block for the main sheet being out of the strop. He next pumped for awhile, and then searched for a leak, and believing that the water came in between the skin of the vessel and the timbers below, took cotton wool from some of the bedding, and with a case-knife, calked, as well as he could, around and near the stanchions that had been broken. He also stuffed a mattress and pillows into a hole in the house, through which, it was apprehended, water might be dashed by the waves into the cabin. About this time another vessel came near, which he hailed, stating his condition and begging for assistance, which she refused, and kept on her course. Up to this time the starboard, that is the wounded side of the vessel, was to leeward and the water came on to her deck. The libellant then took the helm and wore round, so as to bring the starboard side to windward, and more out of water. The mainsail having been destroyed, the only sails set were the foresail and jib. He put a signal of distress into the main rigging, and steered toward Highland light, and by daybreak was not far from the land. The wind and sea had abated. He ran along parallel to the shore for some time, when another vessel came within speaking distance; from her, also, he begged for aid. She declined rendering any, but told him that, if he ran down off Harwich, boats would come to his relief. He did so, and at about half-past eight o'clock in the morning, a boat from that place, with seven men, came to his assistance. They anchored the vessel off Harwich, got a new mainsail, nailed boards over the stanchions that had been broken off, and over the hole in the house, and then got under way for Provincetown, which they reached the next morning.

It is contended by the claimant, first, that the libellant rendered no service; and, second, that if he did, being one of the crew, he was bound by his contract to use his utmost exertions for the preservation of the vessel, and could not, therefore, be a salvor. I do not think that the statement of the libellant is to be wholly disregarded; and although the vessel leaked very little, if any, yet I am satisfied that his exertions contributed to her safety.

As to the second objection, the claim of the seaman, Toole, in the case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, is, in all circumstances which affect the right to assume the character of salvor, like the present. It is true that Toole alleged that his remaining on board of The Blaireau was, in some degree, voluntary,. But the opinion of the court states that he was deserted, and the decree is placed on that ground. Some differences between the two cases have been suggested,

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

but they are too minute to be worthy of remark. It is contended, however, that the case of Mason v. The Blaireau is antiquated; that it was decided when the law was not well understood, and that it is now settled that a seaman cannot be a salvor of his own vessel. If this were so, I should regret it, for instead of being an advance in sound jurisprudence, it would be the reverse. But it is not so. The case of Mason v. The Blaireau is not shaken, but strengthened and confirmed by subsequent opinions. Chancellor Kent sustains it by the authority of his name, laying down the same doctrine in the third volume of his commentaries (page 197). In Hobart v. Drogan, 10 Pet. [35 U. S.] 122, Judge Story, in delivering the opinion of the court, after stating that cases might exist in which seamen might be salvors, says "such was the case of the seaman left on board, in the case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 268." And as late as the year 1853, Dr. Lushington, in the case of The Florence, 20 Law & Eq. Rep. 607, cites the case of Mason v. The Blaireau with approbation, and judicially adopts its doctrines. The case of The John Perkins, decided by Mr. Justice Curtis in this circuit [Case No. 7,360], is relied upon, as maintaining the position that a seaman cannot be a salvor of his own vessel. But that case was essentially different from the present. The vital question is, had the contract with the seaman been dissolved?—that is, was he bound to render the service for which he claims salvage compensation, or had he been previously discharged from all obligation under his contract? Now in Mason v. The Blaireau it is held, that the absolute desertion of a ship with a seaman on board, by the master and rest of the crew, sine spe revertendi, was a dissolution of his contract, and absolved him from his allegiance to her. In the case of The John Perkins [supra] there was no such desertion of the vessel. The master, and all the crew but one, left her by reason of danger from the ice, with the intention of watching her from the shore, to contribute to her preservation as far as might be in their power, and to return to her, if practicable, and they actually did return to her. None of the seamen were discharged; they were allowed by the master the option of going ashore for the time being, or of remaining on board. One chose to remain, but all continued under his authority, and subject to his command. As to the amount of salvage that should be awarded, little aid can be derived from the case of Mason v. The Blaireau. There the property saved exceeded $60,000, and the damage and peril of the ship were very much greater, and the salvors were for a long time in great danger, and subjected to severe labor. Here the property was only $5,000, and the time it was in jeopardy was short. In a day or two after the Triumph was brought into Provincetown, her master, who was also part owner and ship's husband, reached that place. He settled with the seven men from Harwich by paying them $900, a liberal salvage compensation. Some negotiation was had with the libellant. One witness, a general agent of underwriters, testified that the highest sum claimed by the libellant was $200. The libellant himself stated that it was $300. Upon consideration I shall decree to the libellant the latter sum. There is a part of the history of this case which invites some general remarks. It is true policy to offer such pecuniary inducements, by salvage compensation, to those who happen to be in a situation to aid in rescuing property from extraordinary peril from the sea, as will induce them to render that aid promptly and efficiently. I am aware that underwriters have generally deemed the rate of salvage compensation allowed by the courts to be far too liberal. But we here see not only property, but life, in peril on the ocean, and yet three vessels in a situation to render aid, and implored by the man whose life was at stake, to do so, all refuse his request. The first, the colliding vessel herself, would not lie by, or delay, a moment, from fear of pecuniary loss; the second follows her example, without assigning any reason. Both, in the darkness of the night, keep on their course, without pause, leaving this solitary mariner and his crippled vessel to any fate to which the wind and the waves might devote them. The third vessel, in broad daylight, was so little influenced by any prospect of reward, that she chose rather to leave the libellant and his vessel to the chance of being seen and succored from the shore, than to render any assistance herself. Now if the policy of the law, and of the courts who administer it, had accomplished their purpose, the master of each of these vessels, from the mere hope of gain, independent of motives of humanity, would at once have arrested her course, and given all needful assistance with promptitude and energy. Decree for $300 and costs.

See The Holder Borden [Case No. 6,600], and note.

TRIUMPH, The (HILL v.). See Case No. 6,500.

TROAX (UNITED STATES v.). See Case No. 16,540.

TROBE (UNITED STATES v.). See Case No. 16,541.

Case No. 14,184.

The TROJAN.

[8 Ben. 498.] [1]

District Court, E. D New York. July, 1876.

TOWAGE—DAMAGES—SPEED.

Where a lighter loaded was towed by a tug from the North into the East river without slack-

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

ing speed upon coming round against the ebb tide, and capsized and sunk, *held*, that the tug was in fault for not observing the effect of her speed upon coming up against the tide, and slacking when necessary to save the lighter.

The lighter Alert, with a full cargo of salt in bags, was towed by the tug Trojan from Jersey City, on the North river, to go to a pier on the East river. The tide in the East river was strong ebb, and very soon after rounding the Battery the lighter began to sheer and be unmanageable; and the tug not slacking speed, in a few minutes she rolled off her deck-load abreast of pier 6, in the East river, and capsized and sank. The owner of the lighter sued to recover the damage to the lighter.

Beebe, Wilcox & Hobbs, for libellant.

R. D. Benedict and W. W. Goodrich, for claimant.

BENEDICT, District Judge. This action is brought to recover the damages caused by the sinking of the lighter Alert while in tow of the steamtug Trojan, on the 17th day of April, 1874. The lighter, fully loaded with salt, was taken in tow at the White Star dock in Jersey City, to be towed to the pier at the foot of Thirteenth street, East river. The accident happened after the lighter had passed into the East river and was being towed against the tide.

A mass of evidence has been taken on both sides; but, upon a careful consideration of it, the case is narrowed to the question whether the speed at which the lighter was being towed when she sank, was the cause of the collision. I find the fact to be, that the lighter was properly loaded and that with proper care on the part of the tug and proper steering on her part she could have been transported in safety. The proofs fail to establish that the sinking was the result of any want of care in the steering of the lighter; and the weight of evidence affirmatively proves to my satisfaction negligence on the part of the tug in towing at the speed she did. It was the duty of the tug to watch the effect produced on the lighter by the rate of speed when she began to meet the ebb tide; and I doubt not, had this been done, the speed would have been slacked and the disaster avoided.

The theory has been put forth in behalf of the tug, that the sheering of the lighter was caused by her taking in water through some leak, and so becoming water-logged; but, while such a circumstance, if it existed, would doubtless account for the action of the lighter, the difficulty is that the theory lacks the support of proof. I find no evidence in the cause sufficient to justify finding that the lighter took in water through a leak and so became full of water and unmanageable. The evidence tends to show the contrary. There is conflicting evidence in the case and some vigorous swearing, but when the whole mass of testimony is considered the weight of it is in support of the allegation of the libel, that the lighter was towed at a higher rate of speed than was necessary or consistent with her safety.

There must, therefore, be a decree for the libellant, with an order of reference.

Case No. 14,185.

TROOST et al. v. BARNEY.

[5 Blatchf. 196.] [1]

Circuit Court, S. D. New York. Nov. 23, 1863.

CUSTOMS DUTIES—GUNNY CLOTH—MANUFACTURE OF JUTE.

Gunny cloth, known in commerce by that name, and being a manufacture of jute, is, under the tariff act of July 14, 1862 (12 Stat. 554) liable to duty, under the fifth subdivision of the tenth section, as a manufacture of jute, and is not liable to duty under the eleventh section, as cotton bagging, or as a manufacture not otherwise provided for, "suitable for the uses to which cotton bagging is applied," although used for rebaling cotton.

[Cited in Lane v Russell, Case No. 8,053.]

This was an action [by Abraham Troost] against [Hiram Barney] the collector of the port of New York, to recover back an alleged excess of duties paid, under protest, on an importation of gunny cloth from Calcutta, in September, 1862.

Sidney Webster, for plaintiffs.

E. Delafield Smith, Dist. Atty., for defendant.

NELSON, Circuit Justice. The duty charged in this case was a specific duty, under the eleventh section of the act of July 14, 1862 (12 Stat. 554), the appraisers having added to the words, "gunny cloth," the words, "suitable for the uses to which cotton bagging is applied." The plaintiffs claim that the duty should have been charged at thirty per cent. ad valorem. The fifth subdivision of the tenth section of the act of July 14, 1862, provides for an additional duty of five per cent. ad valorem "on all brown or bleached linens, ducks, canvas paddings," &c., "or other manufactures of flax, jute, or hemp," &c., which five per cent., when added to the previous duty to which this is an addition, makes the duty thirty per cent. ad valorem. Gunny cloth is a manufacture of jute, and, therefore, comes directly within the terms of this clause of the section. The eleventh section provides for an additional duty "on cotton bagging, or other manufactures not otherwise provided for, suitable for the uses to which cotton bagging is applied, whether composed in whole or in part of hemp, jute, or flax, or any other material valued at less than ten cents per square yard, three-fourths of one cent per pound; over ten cents per square yard, one cent per pound." The insuperable difficulty of bringing gunny cloth within the eleventh section is, that the article of gunny cloth is expressly provided for,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

as we have seen, in a clause of the previous section. In this eleventh section, the words are, "or other manufactures not otherwise provided for," suitable, &c. The argument on behalf of the government ignores this phrase, and treats it as having no meaning, as it respects manufactures of jute, before provided for. But this will not do. The principle, if established and acted upon, would derange the whole system of the tariff, as the phrase, "not otherwise provided for," is common, and excludes from the given enactment a multitude of articles. It appeared, on the trial, that gunny cloth had always been known in commercial dealings by that name, and was purely a manufacture of jute; and that latterly, since the price of cotton had risen, it had been used for rebaling cotton, as any other heavy article of goods would be used. In the bale of cotton, the weight of the covering per pound would be of equal value to a pound of cotton. So, since the high price of wool, gunny cloth is used for baling wool, for the same reason. It was suggested, that the articles might be brought under the head of cotton bagging; but the difficulty is, it is not known in the market by that commercial designation, but by the designation of gunny cloth, a manufacture of jute. I am satisfied, upon a full consideration of the statute and of the facts, that the plaintiffs are entitled to recover.

Case No. 14,186.

The TROPIC WIND.

[Blatchf. Pr. Cas. 64.] [1]

District Court, S. D. New York. Nov. 1861.

PRIZE—WHO MAY SEIZE—PRACTICE—COMMUNICATING WITH ENEMY — UNREASONABLE REGULATIONS—COSTS.

1. It is competent for any person to take possession of property seizable as prize when found within the jurisdiction of the court.

2. The vessel and cargo were seized in Hampton Roads, near Fortress Monroe, by Major General Butler, of the army, and sent to New York, and there libelled as prize. *Held*, that the arrest was legal, and the suit regularly instituted.

3. Claimants of property seized as prize, who complain of irregularities, delay, and acts of negligence on the part of the captors, must proceed according to rule 23 of the standing prize rules—that is, by libel and monition, and not by special motion—to discharge the arrest.

4. Vessel and cargo, libelled for having been fraudulently employed by the master in unlawfully communicating with the enemy, released.

5. There is no public or municipal law which inhibits a neutral vessel, on a lawful voyage from Washington city to Halifax, from sailing at night on the Potomac river.

6. The questions as to what are considered, in prize law, contraband letters or dispatches, when carried to an enemy, and as to what personal intercourse with the enemy is allowed by the prize law, discussed.

7. The seizure having been made on probable grounds of suspicion, the vessel and cargo were restored without costs or damages against the captors.

BETTS, District Judge. This vessel, her equipments, and lading, were seized in Hampton Roads, near Fortress Monroe, on the 25th of July last, by order of Major General Butler, of the United States army, commanding at Fortress Monroe, the schooner then lying near that fortress. The vessel was sent to this port upon that seizure, and was here libelled, August 5, as prize, in the above-entitled suit. The British consul, resident at this port, intervened, and filed a claim and answer, in his official character, "for the interests of the owners of the whole cargo of the above schooner as the property of British subjects," August 27; and on the 8th of October James T. Farrington and Theodore Farrington filed their claim and answer and exceptions, as owners of the vessel, to the libel. The test oath appended thereto supported the allegations of the pleadings that they are British subjects and owners of the vessel and carriers of the cargo, both of which are the property of British subjects. These facts were not controverted on the trial by the United States attorney.

The pleadings took direct issue upon the allegations of the libel that cause of capture of the vessel and cargo as prize of war existed in the facts or law of the case, and also averred that the vessel had been improperly ordered to this port for trial. That branch of the case was also made the foundation of special motions to the court to discharge the arrest of the vessel and cargo, because of irregularities in their seizure, in their not being transmitted to the District of Columbia for prosecution, and in other acts of omission or negligence on the part of the captors, in relation to the papers found on board of her when seized, and other proceedings consequent thereupon. These collateral subjects were, on the hearing, blended with the main case, and all discussed together. The decision of the court upon the merits of the case will render it unnecessary to notice more particularly these subordinate points.

In my opinion the arrest of the property seized was legal, and the suit was regularly instituted. It was of no importance to the right of action that the capture should be made by a marine force and officers of the revenue service, or other authority particularly charged with the enforcement of prize law at sea. It is competent for any person to take possession of property seizable as prize when found within the jurisdiction of the court. The Johanna Emilie, 29 Eng. Law & Eq. 562; The Rebeckah, 1 C. Rob. Adm. 227; La Rosine, 2 C. Rob. Adm. 372. The case of The Amiable Isabella, 6 Wheat. [19 U. S.] 1, captured at sea under Spanish colors by an American privateer commissioned to capture English vessels, or to recapture American vessels which had been seized by British cruisers, heard on appeal in the supreme court, in February term, 1821, presented the

[1] [Reported by Samuel Blatchford, Esq.]

question, directly, whether, in a prize suit, the action could be maintained without proof that the captors had lawful authority to make the capture in question. The point was carefully argued by distinguished counsel. The opinion of the court, delivered by Story, J., disposed of the principle, and settled definitely the practice. The court say (page 66): "A preliminary question was raised that the libel ought to be dismissed because the capture was made without public authority, and by a noncommissioned vessel. Whether this be so or not, we do not think it material now to inquire. It is a question between the government and the captors, with which the claimant had nothing to do. If the captors made the capture without any legal commission, and it is decreed good prize, the condemnation must, under such circumstances, be to the government itself. But in any view the question is matter of subsequent inquiry, after the principal question of prize is disposed of; and the government may, if it chooses, contest the right of the captors, by an interlocutory application, after a decree of condemnation has passed, and before distribution is decreed. The claimant can have no just interest in that question, and cannot be permitted to moot it before this court."

This doctrine disposes as well of the particular exception included in the answer of the owner claimants, as of the special motions made to avoid the proceedings because of alleged irregularities and want of authority in army officers to arrest the vessel, or of the sending her into this district for trial without transmitting with her the papers found on board. All these questions cease to be personal with the seizing general, and affect the United States only as vested with the whole interest in suit upon the capture, as a droit of admiralty, to their exclusive use. The relief to claimants of property seized and brought into port as prize, when any unwarrantable delay is made by the captors in bringing it to adjudication, is provided for in rule 23 of the standing prize rules. 1 Wheat. [14 U. S.] Append 500. This established course of proceeding supplants the use of special motions resting on ex parte affidavits, as in courts of law and equity, and puts the claimants to the employment of precise allegations by libel, enforced by process of monition. Accordingly, the special motions addressed to the court in this behalf must be disregarded.

The merits in this suit rest upon the issue whether the vessel and cargo had been fraudulently employed by the master, prior to her capture, in sending dispatches to, or in other unlawful communication with, the enemy. The vessel and cargo are British property. On the 19th of April she came into the port of Richmond, from the port of Nassau, N. P., and had there laden or board a cargo of tobacco, bound for the port of Halifax, Nova Scotia, and sailed, with such cargo, from Richmond for her port of destination, on the 14th of May last, with a crew of twelve men, including a mate. She was captured by a vessel of war of the United States, in Hampton Roads, for an alleged violation of the blockade then existing, by wrongfully coming out of the port of Richmond, and was sent to Washington, and there libelled, tried, and convicted for the offence before the United States district court, in the term of June last. The sentence was remitted by the government, and on the 21st of June the vessel and cargo were delivered up to the master, on such remission, by order of the court which had condemned her, and on the 23d and 24th she proceeded, under the charge of the master and four colored men, shipped at Washington, on her voyage thence for Halifax. It seems that none of the ship's company, on board at the time she sailed from Richmond, remained with her on her release at Washington, except the master. On coming down the Potomac river, on the 24th, the schooner was brought to by the United States ship of war Pawnee, before she reached Acquia creek, and a notice was indorsed upon the certificate of release granted her by the court, "not to enter any port in Virginia, or south of it, nor to sail at night in the Potomac river." Of course, the prohibition could not be observed literally, because the vessel must necessarily continue within a port of Virginia during the period of her transit to sea. She was authorized to pursue that track by force of her discharge from arrest, and the right could not be taken away by any subsequent restriction or construction of the discharge at the arbitrary discretion of a naval officer. The palpable meaning of the warning must have been that she should afterwards avoid seeking any port in Virginia for the purpose of commercial intercourse with it, she being entitled to an undisturbed passage through and out of the waters of the state. Nor is there any legal force in the other qualification attempted to be imposed on the freedom of the vessel, "not to sail in the night on the Potomac river," because there is no public or municipal law which inhibits the vessel of a neutral power, lawfully navigating that arm of the sea, to continue on her passage at discretion. Had the evidence shown a violation by the vessel of this prohibition, she or her owners would not have incurred forfeiture thereby, or liability to arrest or detention. But, as she came off shorthanded, with only three colored seamen and no mate, the daily entries in the log, showing that the vessel anchored each night on her passage down the river, would be as satisfactory evidence of the true manner of her being sailed as the rough recollection of the sailors; and, when no probable motive for misrepresentation is established, the log would prevail, as of more reliable probability of accuracy as to those facts.

The main accusation upon which the capture was made, and that relied on by the

prosecution for condemnation of the vessel, is, that she, in fraud of her privilege as a neutral, communicated with the enemy, furnishing dispatches and other unlawful aid and comfort in furtherance of the hostilities carrying on against the United States. Sir William Scott declares that the fraudulent carrying of dispatches of the enemy by a neutral is a criminal act, which will lead to the condemnation of the neutral vessel. The Atalanta, 6 C. Rob. Adm. 458, 459. In the extended statements, in that case, of the principle on which the offence is founded, and the penalty of confiscation imposed on the vessel as the guilty instrument, Sir William Scott carefully forbears pronouncing what might be the consequence of a simple transmission of dispatches (Id. 454), i. e. (it is presumable), when no other purpose is fastened upon the agent than his being bearer or forwarder of written communications to or from an enemy, without regard to their contents, or the promotion of injurious objects thereby. Mr. Wheaton, in his adoption of the doctrine laid down in the case of The Atalanta, seems to limit its force to acts fraudulent and hostile in their nature. Wheat. Mar. Capt. c. 6, § 10. Sir William Scott interprets "dispatches," treated of in the decisions as warlike or contraband communications, to be "official communications of official persons, on the public affairs of the government." The Caroline, 6 C. Rob. Adm. 465. The cases to which he refers, and from which that definition was deduced, were essentially of that character, and, moreover, generally contained some marked element of fraud, culpable concealment, or duplicity, or evasive subterfuge. Id. 461, note. The Madison, Edw. Adm. 225, indicates clearly that the court only regards as criminal in a neutral vessel the carrying of letters or dispatches of a public nature from or to a belligerent port. The Rapid, Edw. Adm. 228. The like tone of sentiment prevails in like cases with the same eminent judge, and he manifests a strong disposition to exonerate a vessel from responsibility for transporting private letters between individuals, and to presume they were of an innocent kind, in the absence of all proof to the contrary. The Acteon, 2 Dods. 53, 54.

In the present case the libellants give no further proof respecting the transmission of dispatches on board the Tropic Wind, to persons in Virginia, than that a small box was put ashore by the master, containing some newspapers and a letter directed to his wife, who resided at Richmond. Upon that proof the court would not presume the letter was of a contraband nature, or conduced to compromise the neutral character of the vessel; but evidence given by the master, in his sworn protest, admitted with the proofs in the cause, shows that the box contained only a present of a few seashore shells, some newspapers, and a letter from the master to his wife. The stopping of the vessel at the mouth of the Rappahannock, anchoring there, or communicating with the shore by means of its boats, were none of them acts in culpable violation of her obligations of neutrality towards the United States. She was still navigating within the limits of our ports, and not proceeding inwards from the high seas towards a blockaded port. In her position there was no inhibition to her holding personal intercourse with the enemy for innocent purposes and objects. She might obtain necessary sea stores, material supplies, and those other aids in her equipment, indispensable to making the lawful voyage she was pursuing; and a sufficient complement of men to complete her voyage, would be fairly included. She was released at Washington, free to prosecute her voyage, but destitute of an adequate crew (having been carried to that port with twelve hands, and departing with four only, including a cook). The proofs do not show that she did more than to make appropriate inquiries and exertions to obtain these supplies, and, accordingly, nothing is fastened upon her doings which constituted a breach of her duty towards the United States, as a neutral and friendly vessel within their waters.

The evidence of the colored informers, upon whose charge the vessel was seized, gave probable grounds of suspicion that she harbored the intention to go up the Rappahannock to Fredericksburg, and there make sale of the colored men, or commit other acts, in intercourse with the enemy, prejudicial to the rights of the government, and in violation of her obligations as a neutral. The whole evidence, when disclosed, dissipates that suspicion, and a decree must be entered dismissing the suit, and ordering restitution of the vessel and cargo to the claimants, without costs or damages against the captors. Decree accordingly.

Case No. 14,187.

The TROPIC WIND.

[The case reported under above title in 24 Law Rep. 144, is the same as Case No. 16,541a.]

TROS, The (BAKER v.). See Case No. 783.

Case No. 14,188.

In re TROTH.

[19 N. B. R. 253; [1] 2 N. J. Law J. 147; 36 Leg. Int. 158.]

District Court, D. New Jersey. April 8, 1879.

BANKRUPTCY—COMPOSITION.

The court may give effect to composition proceedings in cases of voluntary bankruptcy, although the bankrupt has by his own acts and conduct deprived himself of the right to obtain a discharge.

[1] [Reprinted from 19 N. B. R. 253, by permission.]

[In the matter of Henry Troth, a bankrupt.]

P. B. Voorhees, for bankrupt.
S. B. Huey, for opposing creditors.

NIXON, District Judge. [I have given a careful attention to the testimony taken to sustain the specifications against the resolution for composition, and find no satisfactory proof that the court ought not to confirm the resolution and order it to be recorded.] [2] The most serious question arises from the fact that the petition was voluntary and was filed after the bankrupt had made an assignment under state law. A fair construction of the act in reference to a composition does not seem to preclude the court from giving effect to the proceedings in such cases, although the bankrupt has by his own acts and conduct deprived himself of obtaining a discharge in bankruptcy. So held in Re Haskell [Case No. 6,192], and I can see no controlling reason why his conclusion should not be adopted as a proper interpretation of the law. Judge Blatchford went a step farther in Re Odell [Id. 10,427], and decided that the refusal of the court to grant a discharge for a cause set forth in section 5110 was not a bar to a composition subsequently agreed to by the requisite number of creditors. They are presumed to be familiar with all the facts, and if they assent to the composition with such knowledge, the court should assume that they understand their interests and that it will be best for all concerned, under the circumstances, that the resolution should be recorded, and it is so ordered.

Case No. 14,189.

TROTT v. CITY INS. CO.

[1 Cliff. 439] [1]

Circuit Court, D. Maine. April Term, 1860.

LIFE INSURANCE—AGREEMENT FOR REFERENCE—EFFECT OF—OUSTING JURISDICTION OF COURT.

1. A by-law which provides that any difference or dispute which may arise in relation to any loss sustained or alleged to be sustained by any person insured under a policy issued by an insurance company, shall be referred to and determined by certain referees; and in case any suit shall be commenced without such offer of reference, the claim of the party so commencing the suit shall be released and discharged, includes within the agreement for reference, not only the liquidation of the amount to be recovered, but also the question as to whether there has or not been any loss at all.

[Cited in Nurney v. Fireman's Fund Ins. Co., 63 Mich. 637, 30 N. W. 352.]

2. The effect of such a by-law, if it be valid, is to oust the courts of their jurisdiction.

[Cited in Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co., 139 U. S. 143, 11 Sup. Ct. 514.]

[Cited in German-American Ins. Co. v. Etherton, 25 Neb. 508, 41 N. W. 406.]

3. Such a by-law is void.

[Cited in White v. Middlesex R. R., 135 Mass. 219; Whitney v. National Masonic Acc. Ass'n, 52 Minn. 385, 54 N. W. 185; Wood v. Humphrey, 114 Mass. 186.]

4. Where the effect of such a by-law is to prevent the insured party from coming into a court of law, even though made a part of the policy by express agreement, it cannot be supported.

Action of assumpsit on a policy of insurance. Insurance was effected on three-sixteenths of the bark Hellespont, in the City Insurance Company, for the sum of forty-one hundred and twenty-five dollars, for the period of one year from the 23d of December, 1857. The claim is for a total loss on the 3d of April following. Plea in abatement to the writ, setting forth that the writ was sued out upon a policy of insurance, to recover the amount of a loss alleged to have been sustained by the plaintiff [James H. Trott], within the terms of the policy, and that within the terms of the policy the by-laws passed by the company were made a part of the contract, to which the plaintiff had agreed to conform, and especially to the twentieth by-law, which was as follows: "In case any difference or dispute shall arise in relation to any loss sustained or alleged to be sustained, by any person insured under a policy issued by this company, the same shall be referred to and determined by referees, to be chosen mutually by the assured and the board of directors; and no holder of a policy shall be entitled to maintain any action thereon against the company until he shall have offered to submit his claim to such reference. In case any suit shall be commenced without such offer of reference having been made, the claim of the party so commencing shall be released and discharged, and the company released from any liability under it." Under this by-law, the defendants alleged in their plea, it was the duty of the plaintiff, mutually with the defendants, to have agreed upon and chosen referees to determine upon the difference and dispute; and having failed so to do, the defendants were released from any liability to answer to the suit, and moved that the writ be quashed. To the plea the plaintiff demurred. Defendants joined in the demurrer.

Anderson & Webb, for plaintiff, and in support of the demurrer.

Agreements to submit all disputes to arbitration cannot oust the courts of their jurisdiction. Kill v. Hollister, 1 Wils. 129; Thompson v. Charnock, 8 Term R. 139; Robinson v. George's Ins. Co., 17 Me. 131; Mitchell v. Harris, 2 Ves. Jr. 129; Tobey v. County of Bristol [Case No. 14,065]; 2 Story, Eq. Jur. § 1457; Street v. Rigby, 6 Ves. 815; 1 Story, Eq. Jur. § 670; Gray v. Wilson, 4 Watts, 39; Hill v. More, 40 Me. 515; 2 Pars. Mar. Law, 483; Nute v. Hamilton Ins. Co., 6 Gray, 174; Amesbury v. Bowditch Ins. Co., Id. 596; 2 Arn. Ins. 1245.

[2] [From 36 Leg. Int. 158.]

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

Shepley & Dana, for defendants, and in behalf of the plea.

The only question that arises under the pleadings is this: Can a suit be maintained for a loss under the policy, without a prior offer to submit the matter in dispute to arbitration? This is a mutual company, and plaintiff, as a member thereof, is bound by its by-laws. The current of modern decisions sets in favor of upholding agreements not to bring suit until an offer to refer has been first made. This is discussed in 2 Pars. Mar. Law, 484. See, in Russel v. Pellegrini, 38 Eng. Law & Eq. 101, remarks of Campbell, C. J.; Avery v. Scott, 8 Welsb., H. & G. 497. There is a distinction between a case where it is agreed no suit shall be brought and one where it is provided that before suit an offer to refer must be made. The offer to refer was, by the twentieth section of the by-laws, made a condition precedent to a suit. That part of the by-law discharging the company from all claim of loss where suit is brought without the previous offer to refer, is an independent contract, and does not affect the previous clause.

CLIFFORD, Circuit Justice. Both parties agree that the only question which arises in the case of any considerable importance is, whether a suit can be maintained by the plaintiff under the policy, without a prior offer on his part to submit his claim to arbitration. It is insisted by the defendants that the terms of the by-laws bar the right to sue in a case like the present, until the insured has offered to submit his claim to referees. That construction of the by-law is virtually conceded by the plaintiff, but he insists that the by-law, if such be its true construction, is invalid, because its effect is to oust the jurisdiction of the courts. Looking at the language of the provision, I am of the opinion that it is sufficiently comprehensive to sustain the views of the defendants. Omitting certain unimportant words, it provides, in effect, that any difference or dispute in relation to any loss sustained, or alleged to be sustained, shall be referred to and be determined by referees, to be chosen mutually by the assured and the board of directors, and that no holder of a policy shall be entitled to maintain any action thereon against the company until he shall have made the offer so to refer. Loss alleged is as much within the provision as a loss sustained, and if the provision be valid, it is indispensable that the plaintiff should both allege and prove the prior offer to submit his claim to referees. He must offer to refer as a condition precedent, no matter what the question in dispute is, else he cannot maintain any action on the policy. Obviously, therefore, it is a mistake to suppose that the by-law admits the loss, and looks only to the liquidation of the amount to be recovered. On the contrary, it is clear, I think, that the words, "or loss alleged to be sustained," were intended to exclude that construction, and make it certain that no action should be maintained against the company until such prior offer had been made. Confirmation of this view, if any is needed, is derived from the subsequent clause of the same by-law, which provides that, in case any suit shall be commenced without such offer of reference having been made, the claim of the party so commencing such suit shall be released and discharged, and the company be released from any liability under it. Reference is made by the defendants to certain expressions and stipulations in the policy as tending to support a contrary construction; but I am of the opinion that they have no such tendency. Losses are to be paid in sixty days after proof and adjustment; and the policy provides, that if any dispute shall arise relating to a loss, it shall be submitted to the judgment and determination of arbitrators, mutually chosen, whose award in writing shall be conclusive and binding on all parties. Standing alone, that provision might give some countenance to the views of the defendants. Such, however, is not the fact, for the same instrument, in the next sentence but one, provides that, in case of loss, the same shall be adjusted and settled according to the twentieth section of the by-laws; and after declaring the by-laws to be a part of the contract of insurance, reads, "and these presents shall themselves be a sufficient bar against any suit commenced against the company, contrary to the true intent and meaning of the twentieth section of the by-laws." It is plain, therefore, that the twentieth section of the by-laws is adopted without restriction or modification, and consequently that it embraces any and every difference or dispute in relation to any loss sustained or alleged to be sustained by any person. Nothing, therefore, can be more certain than that the effect of the by-law, if it be valid, is to oust the jurisdiction of the courts. Every difference or dispute must be referred to and determined by referees; and the policy expressly provides that their award in writing shall be conclusive and binding on all the parties. To say that a suit may afterwards be brought upon the award is not a satisfactory answer to this objection. Having come to this conclusion, the only remaining inquiry is, whether the by-law is valid, and I am of the opinion that it is not. Judge Story, in the case of Tobey v. County of Bristol [Case No. 14,065], divided the cases upon this subject into two classes: one where an agreement to refer to arbitration was set up as a defence to a suit, either at law or in equity, and the other, where the party as plaintiff, sought to enforce such an agreement by a bill in equity, for a specific performance. Both classes, says the learned judge, have shared the same fate. Courts of justice have refused to allow the former as a bar or defence against the suit, and

have declined to enforce the latter as ill-founded in point of jurisdiction. Mr. Chitty adopts the rule laid down in Kill v. Hollister, 1 Wils. 129, that a clause in an agreement, that, if any dispute should arise, the matter in difference should be referred to arbitration, is no defence to an action. Chit. Cont. 792. Lord Kenyon said, in Thompson v. Charnock, 8 Term R. 140, it is not necessary now to say how this point ought to be determined if it were res integra, it having been decided again and again that an agreement to refer all matters in difference to arbitration is not sufficient to oust the courts of law or equity of their jurisdiction, and with the qualification admitted in Goldstone v. Osborn, 2 Car. & P. 550, the decisions in the English courts have been uniform to the same effect until within a very recent period. Tattersall v. Groote, 2 Bos. & P. 131; Mitchell v. Harris, 2 Ves. Jr. 129; Street v. Rigby, 6 Ves. 815; Wellington v. Mackintosh, 2 Atk. 569; Gourlay v. The Duke of Somerset, 19 Ves. 430; Milne v. Gratrix, 7 East, 608; Clapham v. Higham, 1 Bing. 87; King v. Joseph, 5 Taunt. 452. Similar views have also been held by the state courts in this country, in repeated instances. Robinson v. George's Ins. Co., 17 Me. 131; Gray v. Wilson, 4 Watts, 39; Hill v. More, 40 Me. 515; Allegre v. Maryland Ins. Co., 6 Har. & J. 408; Contee v. Dawson, 2 Bland, 264; Haggart v. Morgan, 4 Sandf. 198, 5 N. Y. 422; Nute v. Hamilton Ins. Co., 6 Gray, 174; Hall v. People's Ins. Co., Id. 185; Cobb v. New England Ins. Co., Id. 193. Amesbury v. Bowditch Ins. Co., Id. 596. Text-writers, both English and American, have long regarded it as a settled principle of law, that the parties to a contract cannot oust the jurisdiction of the courts by any agreement to submit the matters in difference to arbitration. 2 Arn. Ins. 1245; 2 Story, Eq. Jur. § 1457; 2 Pars. Mar. Law, 483. Many additional decisions and authorities might be added to this list, where the same unqualified doctrine is laid down and enforced, and I am not aware that the soundness of the rule established in the leading case has ever been questioned by an American court. No such case has been cited by the defendants, and it is believed that none such can be found. But it is insisted by the counsel for the defendants, that certain recent decisions in England have adopted a different rule upon the subject. Russel v. Pellegrini, 38 Eng. Law & Eq. 101; Avery v. Scott, 8 Welsb., H. & G. 497; Livingston v. Ralli, 5 El. & Bl. 132. Speaking of these cases, Thomas, J., says, in Cobb v. New England Ins. Co., 6 Gray, 193, they may possibly lead to some revision and qualification of the doctrine as heretofore understood. Nothing was decided in the case of Russel v. Pellegrini which warrants any such inference as is attempted to be drawn from it. Suit was brought in that case by a ship-owner upon a charter-party, which contained a clause that all matters in difference should be referred to arbitration. Damages for the unseaworthiness of the ship were claimed by the charterer, but the ship-owner refused to refer that claim, and brought an action for the agreed freight. After the suit was entered in court, the defendant obtained a rule under the common-law procedure act, calling upon the plaintiff to show cause why all further proceedings in the action should not be stayed, and the rule was made absolute; the court holding that the respective claims were in the nature of cross-demands, which it was intended should be referred within the eleventh section of that act. Lord Campbell admitted that, when a cause of action has arisen, the courts cannot be ousted of their jurisdiction, but added, that parties may come to an agreement that there shall be no cause of action until their differences have been referred to arbitration. Suppose that to be so, still the principle cannot affect the decision in this case, because no such agreement was made by the parties, as has already sufficiently appeared. Reference is also made to the case of Livingston v. Ralli, but it decides nothing which is immediately applicable to this case. It was an action to recover damages for a breach of an agreement to refer, alleging readiness on the part of the plaintiff, and a refusal on the part of the defendant; and the court, contrary to the case of Tattersall v. Groote, 2 Bos. & P. 131, held that the action lay. On that occasion, the court took a distinction between the case where the defendant relies on such an agreement as a defence, and a case where the plaintiff seeks damages for not fulfilling the agreement. There is not a word in the case, however, inconsistent with the established doctrine, that no such agreement can oust the jurisdiction of the courts in a case where the loss is not admitted. All things considered, I am of the opinion that the true rule is stated by Coleridge, J., in Avery v. Scott, 8 Welsb., H. & G. 497, overruling Scott v. Avery, Id. 487, in the same volume. He says there is no dispute as to the principle. Both sides admit that it is not unlawful for parties to agree to impose a condition precedent, with respect to the mode of settling the amount of damage, or the time for payment, or any matters of that kind which do not go to the root of the action. On the other hand, it is conceded that any agreement which is to prevent the suffering party from coming into a court of law, or, in other words, which ousts the courts of their jurisdiction, cannot be supported. That qualification to the general doctrine, as stated in the earlier cases, was admitted in Hill v. Moore, 40 Me. 515; and I am inclined to think it is one that ought to be sustained. But the present case is not within that qualification, and consequently the demurrer is sustained, and the plea adjudged bad.

Case No. 14,190.

TROTT et al. v. WOOD.

[1 Gall. 443.] [1]

Circuit Court, D. Rhode Island. June Term, 1813.

SHIPPING — CARRIAGE OF GOODS — RESHIPMENT — USAGE.

1. The owner of a ship has no right, without necessity, to change the vehicle of conveyance of goods shipped for the voyage on freight.

[Cited in Marx v. National Steamship Co., 22 Fed. 682; Calderon v. Atlas Steamship Co., 64 Fed. 878.]

[Cited in Green & B. R. Nav. Co. v. Marshall, 48 Ind. 598; Schroeder v. Schweizer Lloyd Transport Versicherung's Gesellschaft, 66 Cal. 297, 5 Pac. 480.]

2. A usage to control this general principle should be very clear and uniform, otherwise it ought not to affect the rights of the parties.

[Cited in Baxter v. Leland, Case No. 1,124; Bulkley v. Protection Ins. Co., Id. 2,118.]

[Cited in Bank of U. S. v. Beirne, 1 Grat. 254; Crosby v. Fitch, 12 Conn. 417, 422; Desha v. Holland, 12 Ala. 513; Farnsworth v. Chase, 19 N. H. 541; Janney v. Boyd, 30 Minn. 320, 15 N. W. 308. Cited in brief in Laussatt v. Lippincott, 6 Serg. & R. 388; Meldrum v. Snow, 9 Pick. 443. Cited in Natchez Ins. Co. v. Stanton, 2 Smedes & M. 340. Cited in brief in Pawson's Adm'rs v. Donnell, 1 Gill & J. 44. Cited in Power v. Kane, 5 Wis. 269.]

Assumpsit for not transporting certain merchandize from Providence to New York, in a packet sloop belonging to the defendant [John Wood]. It appeared from the evidence, that the merchandize was shipped at Providence, in the defendant's packet, for New York; that the packet sailed as far as Newport, where the owner lived, and the merchandize was there unshipped and sent on in another packet, which was captured in her passage down the sound, by the British squadron, and thereby the merchandize was finally lost. The defense at the trial was (1) that the packet wanted some repairs, and therefore the trans-shipment was necessary; and (2) that by the custom of the trade, it was lawful to trans-ship the goods in another packet, without any special authority for that purpose. As to the first point, the evidence was, that some slight repairs were necessary; but that the packet might have been, and actually was, repaired in a short time, so as to have been fit to perform the voyage. As to the second point, there was considerable testimony on each side.

Mr. Bridgham, for plaintiffs.

Searle & Burrill, for defendant.

STORY, Circuit Justice, directed the jury, that when goods were shipped on board of a vessel, to be sent to another port, the owner of the vessel had no right to change the vehicle of conveyance without necessity.[2] That great inconvenience might arise from a contrary decision to the commercial world, as every merchant might well be presumed to ship his property in a particular vessel, not only from his knowledge or information of her character as to sailing and seaworthiness, but also from his confidence in the master and owner of the ship. If, in the course of the voyage, the ship were disabled or wanted repairs, the master was bound to have the ship refitted, if it could be done within a reasonable time. But if the ship were incapable of repairs within a reasonable time, then he might transport the goods in another ship to the place of destination, and thereby earn his whole freight. In every such case the master was justified in the change of the ship, by necessity only; and if done without necessity, the owner was responsible for all losses consequent thereon. And this was founded in good reason; for the shipper would, by the change of the ship without necessity, lose the security, which he might otherwise derive from any insurance made on the voyage.[3] That in the present case, if the jury believed the evidence, there was no such necessity as authorized the trans-shipment. As to the question of usage, in order to support that defence, it was not sufficient that a few instances could be produced, in which masters in the trade had trans-shipped goods, and no objection had been made. The course of the trade must be uniform and general, to entitle it to be considered as a legal defence. It should be so well settled, that persons engaged in the trade must be considered, as contracting with reference to the usage; and as the proof of such usage lay on the defendant, the jury ought not to change the general principles of the law, as to the rights of the parties, unless the usage were fully proved to be uniform, and independent of the consent of particular shippers.

The jury found a verdict for the plaintiffs.

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

[2] S. P., Consolato del Mare, c. 89.

[3] Roccus de Assec. N. 28; Santerna, p. 3, n. 35; Pelly v. Royal Exch. Assur. Co., 1 Burrows, 351; Plantamour v. Staples, 1 Term R. 611, note; 1 Emerig. Ins. 424, 425.

TROTTER (BUCHANAN v.). See Case No. 2,075.

TROTTER (NEW JERSEY ZINC CO. v.). See Case No. 10,167.

TROUT (HOLMES v.). See Case No. 6,645.

TROUT (UNITED STATES v.). See Case No. 16,542.

Case No. 14,191.

In re TROWBRIDGE.

[9 N. B. R. 274.] [1]

District Court, E. D. Michigan. 1874.

BANKRUPTCY—PROOF OF CLAIM—PETITION TO ADMIT CLAIM—PRACTICE.

1. The estate of a bankrupt was being wound up in pursuance of the provisions of section 43 of

[1] [Reprinted by permission.]

the bankrupt act [of 1867 (14 Stat. 538)]. After the resolution of creditors for the appointment of a trustee had gone into effect, a certain creditor made proof of his claim before a register in bankruptcy, in pursuance of the provisions of the twenty-second section of said act, procured the certificate of the register to that effect, and delivered it to the assignee. The trustee, however, under the direction of the committee of creditors, refused to admit the claim to a participation in the distribution of the bankrupt's estate. The said creditor then presented a petition in the United States district court praying for an order requiring the trustee to admit his claim, and obtain the usual order to show cause. On the return day of said order the trustee appeared by counsel, and interposed the following exceptions: First, that it appears that no notice was given said trustee of proving of the claim of said creditor before the register, and that said proceeding for that reason is void; second, that said register, having acted on the proof of the alleged claim without any order of this court, had no jurisdiction in the matter. *Held*, that it is the intention of said section 43 that, pending proceedings under it, all the ordinary processes and proceedings under the act, for the time being, are absolutely superseded and suspended, excepting so far as such processes and proceedings are retained by the express words or by the necessary implication of the provisions of that section, and that section being entirely silent in regard to proof of debt presented after institution of proceedings under it, there are none of its provisions that cannot be fully carried out and enforced without the proof required by section 22 in the case of debts so presented; that the trustee and committee have full power to arrange, and by mutual agreement to adjust everything relating to the settlement and winding up of the estate, but they cannot adjudicate or decide any disputed matter; that the petitioner in this case is the proper moving party, but that his petition is insufficient in this, that the prayer for relief is based alone upon the fact that his claim has been proven under section 22, whereas the right so to prove his debt had ceased to exist.

[Cited in Re Hicks, 2 Fed. 852.]

2. Exceptions sustained, and leave given to petitioner to amend his petition by omitting therefrom the allegation of proof of claim before the register and inserting in lieu thereof a statement of the fact, amount, nature and consideration of the claim, and so changing the prayer as to conform the same to such amendment, a copy of such amended petition to be served on the attorney for the trustee within thirty days.

The questions for decision arise upon exceptions by John I. Donaldson, trustee, to the petition of Luther S. Trowbridge, administrator of the estate of Hubbard Trowbridge, deceased, praying for an order requiring the trustee to admit a claim presented by the petitioner, to participation in the distribution of the proceeds of the estate.

L. S. Trowbridge, in pro. per.

G. V. N. Lothrop, for assignee.

LONGYEAR, District Judge. In this matter the estate of the bankrupts is being wound up by a trustee under the inspection and direction of a committee of the creditors, in pursuance of the provisions of section 43 of the bankrupt act (14 Stat. 538). The claim of the petitioner had not been proved when the resolution of creditors for appointment of trustee was adopted. Since then, and after the resolution had gone into full effect, the petitioner made proof of his claim before, and procured the same to be certified by, a register in bankruptcy, in the ordinary manner, in pursuance of the provisions of section 22 of the act (14 Stat. 527), and delivered the same to the trustee. The trustee, however, under the direction of the committee of creditors, refused to admit the claim to a participation in the distribution of assets, and the petitioner now prays for an order requiring the trustee to so admit his claim. The petition is based exclusively upon the fact that the claim was duly proven under section 22, as above stated. An order to show cause why the prayer of the petition should not be granted having been served on the trustee, he appeared on the return day of the order, and by his counsel interposed the following objections and exceptions: "(1) That it appears that no notice was given said trustee of proving of the claim of said administrator before the register, and that said proceeding for that reason is void; (2) that said register, having acted on the proof of the alleged claim without any order of this court, had no jurisdiction in the matter."

The point to be decided involves, therefore, a consideration of the question of the extent to which the ordinary processes and proceedings in bankruptcy under the act are superseded or suspended by the adoption of the mode of winding up the estate by "arrangement," as provided by section 43. It is clear to my mind that the intent and effect of section 43 is, that, pending proceedings under it, all the ordinary processes and proceedings under the act are, for the time being, absolutely superseded and suspended, excepting so far as such processes and proceedings are retained by the express words, or by the necessary implication of the provisions of that section. The section is entirely silent, however, in regard to proof of debts presented after the institution of proceedings under it, and in my opinion there are none of its provisions that cannot be fully carried out and enforced without the proof required by section 22 in the case of debts so presented. The proceeding contemplated by section 43 is evidently intended to be one by arrangement and not by judicial process or proceedings. The power and jurisdiction of the court are, however, retained over the matter, in order that it may interfere whenever it may become necessary for the preservation and enforcement of the rights of all parties concerned. The committee of creditors represents the entire body of the creditors, and its acts and doings are their acts and doings. All the details of the winding up and settlement of the estate are carried on, through and by the trustee and committee, by arrangement and amicable adjustment, and until some dispute or other exigency arises which cannot be settled and disposed of in that way, none of the processes, powers or jurisdiction of the

court are brought into requisition, and they can be set in motion only by a special application for that purpose. The trustee and committee have full power to arrange, and by mutual agreement to adjust everything relating to the settlement and winding up of the estate, but they cannot adjudicate or decide any disputed matter. They have no judicial powers. Those are all reserved to the court. A creditor who had proved his debt before proceedings under section 43 were instituted had thereby established his right, prima facie, to participate in the distribution of assets under those proceedings. If in such a case the claim is disputed, the only way the dispute can be adjudicated is by an application to the court to expunge or abate the claim, in which application the trustee must, of course, be the moving party. If a debt which had not been so proven is disputed, the remedy is, of course, the same; but in such a case the creditor must be the moving party, because not having proved his debt in the ordinary way while he had the right to do so, he has not the advantage of the prima facie right to participate which that step confers. In the case last mentioned, the creditor should proceed by petition directly to the court, in which he should set up the fact, nature and consideration of his claim, and pray for leave to prove the same, and for its allowance. If the facts stated in the petition make out a prima facie case, the court will make an order requiring the trustee to answer the same. Upon the coming in of the answer the court will proceed by reference to take proofs, or otherwise, to a final disposition or determination of the matter, as may be deemed expedient. The present case comes within this rule. The petitioner is the proper moving party, but his petition is insufficient in this, the prayer for relief is based alone upon the fact that his claim has been proven under section 22, whereas, as we have seen, the right to so prove his debt had ceased to exist. The exceptions must, therefore, be sustained. The court can see no good reason, however, why the petitioner may not be allowed to reform his petition so as to conform to the foregoing decision, and he will be accorded that privilege.

I have examined carefully the only two reported decisions upon the question discussed in this opinion, viz.: In re Darby [Case No. 3,570], and In re Bakewell [Id. 788]. These opinions are in direct conflict with each other. It will be seen that I agree in the main with the views of Treat, J., in the first-named case, and of course fail to concur in the views of McCandless, J., in his approval of the opinion of Register Harper, in the last-named case. An order must be made in this matter (1) sustaining the exceptions to the petition: (2) granting the petitioner leave to amend his petition by omitting therefrom the allegation of proof of his claim before the register, and inserting in lieu thereof a statement of the fact, amount, nature and consideration of the debt claimed, and so changing the prayer as to conform the same to such amendment; (3) that such amended petition be filed and a copy thereof served on Mr. G. V. N. Lothrop, of counsel for John I. Donaldson, trustee in this matter, within thirty days from this date; (4) that the said trustee answer the amended petition within thirty days after the copy of the same shall have been served as above required.

TROWBRIDGE (SCHMITT v.). See Case No. 12,468.

TROWBRIDGE, The HENRY. See Case No. 6,379.

Case No. 14,192.

The TROY.

[4 Blatchf. 355.] [1]

Circuit Court, S. D. New York. Sept. 20, 1859.

ADMIRALTY — JURISDICTION — SERVICE OF VESSEL WHOLLY WITHIN STATE.

The district court has no jurisdiction to enforce, in a suit in rem, in admiralty, a claim for materials and labor, for the repair of a steamboat engaged in running upon waters wholly within the limits of the state of New York.

[Appeal from the district court of the United States for the Southern district of New York.]

This was a libel in rem, filed in the district court, against the steamboat Troy, to recover for materials supplied to and work done upon that vessel, in July, 1857. The Troy was engaged in running upon the Hudson river, between the port of Troy and the port of New York, touching at intermediate places, exclusively within the state of New York.

Richard H. Huntley, for libelants.

Welcome R. Beebe, for claimants.

NELSON, Circuit Justice. The question involved in this case is, whether the court below had jurisdiction of the libel. In the case of Allen v. Newberry, 21 How. [62 U. S.] 244, the supreme court held, that the district court for Wisconsin had no jurisdiction over a contract of affreightment of goods between the port of Two Rivers and the port of Milwaukee, both being within the same state, because the contract related to the purely internal commerce of the state, which was not within the cognizance of the admiralty. And, again, at the same term, in the case of Maguire v. Card, Id. 248, it was held, that the district court for California had no jurisdiction over a contract for supplies furnished to the Goliah, a steamboat engaged in the business of navigation and trade on the Sacramento river, between ports exclusively with-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

in the state of California. The court regarded that case as governed by the principle decided in Allen v. Newberry. The case of Maguire v. Card comes fully up to the one in hand. The principle is, that a contract arising out of the trade and navigation of a vessel engaged in the purely internal commerce of a state, is governed by state laws, and belongs exclusively to state cognizance. In the case of The Goliah, the supplies furnished were coal. In the present case, they are materials and labor for the repair of the vessel.

I make no question under the local law giving a lien in the case, for the suit was commenced before the rule was made refusing any longer to recognize and enforce such a lien in the admiralty. That rule did not take effect till May 1, 1859. All suits commenced previous to that time were saved.

I must, therefore, for the reason given, reverse the decree of the court below, for want of jurisdiction in that court, and dismiss the libel.

Case No. 14,193.

The TROY.

[Blatchf. Pr. Cas. 246] [1]

District Court, S. D. New York. Oct., 1862.

PRIZE—ILLEGAL TRADE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned as enemy property, attempted to be used in trade by their owner for the benefit of the enemy, and arrested in the act of violating the blockade.

In admiralty.

BETTS, District Judge. This schooner and cargo were seized August 13, 1862, by the United States steamer Kensington, in the Gulf of Mexico, off Sabine Pass, as prize. The crew escaped from the vessel after capture, and could not be sent in as witnesses. The vessel was found to be unseaworthy, and was taken to the Southwest Pass of the Mississippi river, and there left by the captors in charge of the United States authorities. The cargo was shipped to this port for adjudication. On its arrival here, it being made to appear, by the deposition of Robert Barstow, an acting master's mate in the United States navy, that five persons had been found on board of the prize vessel at the time of her apprehension, that none of said persons were sent to this port with the prize property, nor was either of them then here, and that two of them were then in the state of Louisiana, and the other somewhere on the coast of Texas, the court, on motion of the United States attorney, ordered the testimony of Barstow to be taken before the prize commissioners in preparatorio, to be read on the trial, subject to all legal objections. On the 1st of October, 1862, a libel was filed against the captured property. On the 21st of the same month the monition issued thereon was returned to the court by the marshal, with notice of the attachment of the cargo, and, on due proclamation, an order for judgment by default was rendered against all parties in interest not appearing in the suit. No one appearing as claimant in the cause, the United States attorney submitted to the court the preparatory proofs and papers, and prayed judgment.

The vessel was enrolled and registered in the Confederate port of Sabine, Texas, July 3, 1862, to J. D. Kirkpatrick, on his oath that he was owner of her and a citizen of the Confederate States. A bill of sale, dated June 4, 1862, from Wiliam Nelson, of Beaumont, Texas, to the said J. D. Kirkpatrick, conveying to the latter the said vessel for the consideration of $900, accompanies the register. There are, also, a manifest of the lading of sixty-five bales of cotton, given at the port of Sabine, August 4, 1862, for Belize or Campeachy; a letter from the owner, Kirkpatrick, dated July 19, 1892, stating the crew and the lading of the vessel, and naming her place of destination as to some port in Honduras Bay or the West India Islands for the sale of her cargo, and her return back to Sabine Pass, or near there, with goods necessary "for our government"; a Rebel passport to the vessel, dated July 19, 1862, to leave Sabine Pass with her cargo; and a permission granted to Kirkpatrick and two others, June 13, 1862, by the provost marshal of Beaumont, Jefferson county, Texas, to visit Vermilion, but not to communicate any facts injurious to the Confederate States. The only witness examined in preparatorio was Mr. Barstow. He proves the capture at the time and place above mentioned, and the facts of the taking possession of the vessel and the transshipment of the cargo to this port, as before stated. Kirkpatrick claimed, on board of the vessel, at the time of her capture, that he owned the vessel and cargo. She was attempting to sail out of Sabine when captured. That port was then under blockade.

These facts are made to appear upon the vessel's papers: (1) She was endeavoring to evade a blockaded port; (2) both vessel and cargo were enemy property, water borne; (3) the cargo was destined to be traded off, in some foreign port, for goods necessary to the use of the Rebel government; and (4) the testimony proves that the avowed and registered owner of the vessel and cargo was on the vessel when the capture was made and the attempt to violate the blockade was in actual execution. This was an act in face of the actual blockade, which is sufficient to stamp the endeavor with culpability, independent of the knowledge of the existence of the blockade by the owner of the prize property, to be implied from its notoriety and from his residence at the place blockaded. A decree is accordingly rendered condemning the prize as enemy property, attempted to be used in trade by its owner for the benefit of the enemy, and arrested in the act of violating the blockade.

[1] [Reported by Samuel Blatchford, Esq.]

TROY v. The SPEEDWELL. See Case No. 10,252.

TROY & W. T. BRIDGE CO. (SILLIMAN v.). See Case No. 12,853.

Case No. 14,194.

TROY CITY BANK v. LAUMAN.[1]

Circuit Court, E. D. Pennsylvania. May 1, 1857.

SUIT ON FOREIGN JUDGMENT — PENDENCY OF APPEAL IN ORIGINAL SUIT—EFFECT.

1. The pendency of an appeal from a judgment in another forum, in a suit on which judgment has been obtained, will afford sufficient ground for a stay of proceedings when the appeal is a supersedeas in the case of the original judgment.

2. Execution on a judgment obtained in a suit on a judgment obtained in another forum will not be stayed, on account of an appeal proceeding, which is not a supersedeas, having been sued out thereto in the forum of the original judgment.

At law. On motion to stay execution and proceedings on fi. fa. until the determination of the appeal proceedings in New York. Suit by the president and directors of Troy City Bank, a corporation of the state of New York, against John C. Lauman, John O. Rockafellow, and James Moore, Jr., of state of Pennsylvania, on a judgment obtained in the superior court of Buffalo, N. Y., on which appeal proceedings had been taken to the court of appeals of that state.

Edward Ingersoll, for plaintiff.
Garrick Mallory, for defendants.

Before GRIER, Circuit Justice, and KANE, District Judge.

GRIER, Circuit Justice. The plaintiff in this case has recovered a judgment against defendant and issued his execution, and defendant now moves for a stay of execution on the following grounds: The suit in this case is brought on a judgment obtained in the superior court of Buffalo, N. Y. The defendant in this court, among other things, pleaded the pendency of a writ of error to the supreme court of New York. That plea was overruled by this court as insufficient, and the plaintiff had judgment at the present term. The original judgment in New York has been affirmed in the supreme court during the pendency of this suit here. But the defendant has taken an appeal to the court of appeals, the court of last resort in that state. If this writ of error to the supreme court had been a supersedeas, and no execution could have been issued on the original judgment in the superior court, this, though not a good plea to the action on the judgment here, would have afforded sufficient ground for a motion to stay proceedings on the judgment here during the pendency of such writ of error. But it is admitted that neither the writ of error to the supreme court nor the appeal to the court of appeals is a supersedeas to execution on the judgment in New York. Without referring to the constitution and act of congress as to the credit and effect to be given to the judgment of one state in another, we may say, in short, that the same rule will apply to an action on such a judgment as to an action on a domestic judgment. One who has a judgment in any of the courts of record in England may bring an action on his judgment, and the pendency of a writ of error, though not a good plea in bar, will be a sufficient reason for suspending execution on the last judgment, because the writ of error is a supersedeas of execution on the original judgment, and the court will not permit the plaintiff to have execution on the later judgment when he could not have it on the original. See Falkner v. Franklin Ins. Co., 1 Phila. 183; Christie v. Richardson, 3 Term R. 78; Benwell v. Black, Id. 643. I can find no authority for restraining process of execution on the last judgment, when the plaintiff has a right to it on the original. If the defendant had given the requisite security in New York in order to obtain a supersedeas or stay of execution, he would have been entitled to the same stay here. As the reason for granting the stay of execution on the last judgment does not exist in this case, the motion must necessarily fail.

It is contended that it would be a great hardship in case the judgment should be reversed in New York, and, consequently, restitution of the money levied here awarded to defendant, that he should be thus compelled to sue the plaintiff in another state on our judgment in order to obtain restitution; but, though the result is possible, it is the necessary consequence of a judgment of a court of law, which is, prima facie, presumed to be just and right, and if the defendant would avoid the hardship he should give the required security in order to make his writ of error or appeal a supersedeas. Otherwise, he might have it in his power to baffle a plaintiff's recovery for years. Suppose the plaintiff's original cause of action had been sued in this court, the first judgment obtained here, and defendants had taken out a writ of error to the supreme court of the United States, without giving security so as to make its writ of error a supersedeas; would not the plaintiff have a right to take out execution and collect his money, subject, only, to a decree of restitution in case his judgment should be reversed? Yet the hardship would be precisely the same to the defendants, and the remedy the same as in the present case. If the defendants will enter security for the debt, they will be entitled to execution by the laws of the forum. The courts of the United States, administering the laws of the state, conform their remedies to those granted by those laws to their own citizens. In states where judgments are a lien upon land in the state

[1] [Not previously reported.]

courts, the plaintiff in suits in the United States courts can have the same privilege. And so, where defendants have a privilege of a certain stay of execution by giving security for the debt, the same will be awarded to them in the courts of the United States, except in cases where the state legislation interferes so far with the remedy and the contract in the manner to destroy the obligation altogether. The motion of defendant's counsel for a stay of execution is therefore overruled.

TROY INS. CO. (FITZPATRICK v.). See Case No. 4,844.

Case No. 14,195.

TROY IRON & NAIL FACTORY v. ERASTUS CORNING et al.

[1 Blatchf. 467;[1] 1 Fish. Pat. Rep. 290.]

Circuit Court, N. D. New York. Oct. Term, 1849.[2]

PATENTS—ORIGINALITY—MACHINERY FOR MAKING SPIKES—AGREEMENT—LICENSE.

1. Evidence, as to the originality of an invention, examined by the court, on a hearing on pleadings and proofs, in a suit in equity brought for an injunction and account on the ground of an infringement of the patent, and decided in favor of the patentee, he having the first patent, and the evidence on the part of the defendant not being sufficiently specific and decisive on the question of originality, to overthrow it.

2. B., the patentee, in 1840, of "improvements in the machinery for making hook or brad-headed spikes," claimed that C. was infringing his patent, and brought a suit in equity in 1844, in his own name, against C., for its violation. B. also claimed the exclusive right to make patent horse-shoes, and C. too claimed the right to make them, B. and C. having each a patent for machinery for making horse-shoes. There had been much correspondence between them about their differences, particularly about the spike controversy. While these matters were still in dispute, and the suit was yet pending, a written agreement was made between B. and C., in 1845, which recited the pendency of the suit, and that both parties claimed the right to make the hook-headed spike, and then provided, that the suit should be discontinued, each party paying his own costs, "and that the said parties may each hereafter manufacture and vend spike of such kind and character as they see fit; notwithstanding their conflicting claims to this time." The agreement further recited, that C. claimed the right to make "the patent horse-shoe," and that B. claimed "such right exclusively," and then agreed that B. might make "said patent horse-shoes," and that C. would not make them, and each released to the other all claims and causes of action "by reason of any violation of the patent-rights claimed by them as aforesaid" to that date. *Held*, that the agreement contained a license to C. to make the hook-headed spike with the machinery so patented to them.

3. Oral evidence, in explanation of the agreement and of the intent of the parties in entering into it, is inadmissible. It must be interpreted by its language, in connection with the subject matters which led to the compromise contained in it.

4. At the time the agreement between B. and C. was made, B. had the legal title to his hook-headed spike patent, and exercised all the acts of ownership over it. In 1848, the plaintiffs, a corporation, acquired the legal title to B.'s patent, and sued C., in equity, for infringing it, claiming that they had the equitable title to it when the agreement was made. *Held*, that B., as holder of the legal interest in the patent, was competent to settle the disputed claims in respect to it, and that, as the suit between B. and C., which was settled by the agreement, was in B.'s name, and as he was, at the time, the agent of the plaintiffs, and the principal stockholder in their corporation, and as his acts of ownership over the patent were exercised with their knowledge and presumed assent, the settlement made by the agreement was, in judgment of law, with their privity and assent, even conceding that they had the equitable title to the patent at the time.

The plaintiffs were a corporation, created July 20th, 1835, under the act of the legislature of the state of New-York relative to incorporations for manufacturing purposes, passed March 22d, 1811, and the acts continuing and amending the same, for the purpose of manufacturing, at Troy, N. Y., nail-rods, cut-nails, hoop-iron, spikes, &c. On the 2d of December, 1836, they became, by assignment from one Henry Burden, the owners of letters patent granted to said Burden on the 2d of December, 1834, for an "improvement in the machinery for manufacturing wrought nails and spikes;" and, in the assignment, Burden agreed with them that if he should thereafter make any improvement upon his said invention, he would convey it to them. On the 2d of September, 1840, Burden obtained letters patent for "improvements in the machinery for making hook or brad-headed spikes." The bill claimed that the plaintiffs, by virtue of the agreement of December 2d, 1836, became entitled to the improvements for which the patent of September 2d, 1840, was granted. Burden assigned to the plaintiffs all his right, title and interest in and to that patent, on the 19th of June, 1848. The defendants [Erastus Corning and others] were the owners of "The Albany Iron and Nail Works" at Troy. The bill charged that on the 15th of October, 1845, the defendants erected at their works four or five machines for the manufacture of hook or brad-headed spikes, containing the improvements patented to Burden on the 2d of September, 1840, and had been since and were still engaged in making that description of spikes with those machines, in violation of the exclusive rights of the plaintiffs. The bill also set forth, that in 1842 Burden commenced an action at law in this court against the defendants, for the infringement of the patent of September 2d, 1840, which was defended and tried, and resulted in a verdict of $700 in favor of Burden, and in a judgment in his favor in 1843, by which the originality of the invention and the validity of the patent were established. The plaintiffs prayed for an account and an injunction.

The defendants, in their answer, denied that Burden was the inventor of the improvements covered by the patent of 1840,

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

[2] [Reversed in 14 How. (55 U. S.) 193.]

and set up that they were invented prior to Burden's application for the patent, by several persons from whom Burden obtained a knowledge of them. They also denied that, under the agreement of 1836, the plaintiffs became, either legally or equitably, entitled to the improvements for which the patent of 1840 was obtained, and insisted that the device of the bending lever for the manufacture of hook-headed spikes, (which was the gist of the patent of 1840,) was a distinct and independent invention, and no "improvement" upon the invention patented in 1834. The claim of the patent of 1840 was for the bending of the end of the spike-rod, from which the head of a hook or brad-headed spike was to be formed, by means of a bending lever, which bent down the end at an angle with the shank, so that it should be in a proper position to receive the blow of the heading die and be formed into a hook-head. The answer further insisted, that the rights of the plaintiffs to the patent of 1840 were subject to the rights of the defendants under the following agreement in writing, entered into between the defendants and Burden on the 14th of October, 1845: "Agreement made this fourteenth day of October, 1845, between Henry Burden of the one part, and Erastus Corning, James Horner, and John F. Winslow of the other part. Whereas a suit is now pending in the circuit court of the United States for the Northern district of New-York, in favor of the said Henry Burden against the said Corning, Horner, and Winslow, arising out of the alleged violation and infringement of a patent right claimed by said Burden for the making of spike, both parties claiming the right to make said spike: It is now agreed between the said parties, that the said suit shall be and is hereby discontinued, each party paying their own costs; and it is further agreed, that the said parties may each hereafter manufacture and vend spike of such kind and character as they see fit, notwithstanding their conflicting claims to this time; and the said John F. Winslow claiming as patentee to have the right, for the benefit of the said Corning, Horner, and himself, to manufacture the patent horse-shoe, and the said Henry Burden also claiming such right exclusively, it is severally agreed by said Corning, Horner, and Winslow, that said Burden may manufacture said patent horse-shoes, and that said Corning, Horner, and Winslow will not manufacture them; and each party, in consideration of the premises, hereby releases to the other or others all claim, demand, and cause of action, by reason of any violation of the patent rights claimed by them as aforesaid to the date hereof." The answer further averred, that this agreement was made as a full settlement and compromise of differences and claims then existing between Burden and the defendants, in regard to the manufacture of horse-shoes and of hook or brad-headed spikes, and as a discontinuance and settlement of a suit in equity then pending in this court, brought by Burden against the defendants, for the making of hook-headed spikes in violation of the patent of 1840. The use of the patented machinery, as alleged in the bill, was admitted in the answer, as also were the suit at law and the verdict and judgment in favor of Burden; but the defendants denied that thereby the originality of Burden's invention or the validity of his patent was established, and averred that the bill in the said suit in equity was filed in 1844, as well for the benefit of the plaintiffs as of Burden, that the suit was pending when the agreement of October, 1845, was made, and was compromised and settled thereby, and that all benefit from the judgment was thus waived as against the defendants. The plaintiffs put in a general replication, and the testimony was taken by a special commissioner, without written interrogatories, the parties having stipulated to waive them.

A large mass of evidence was given on both sides, upon the question of the originality of the invention covered by the patent of 1840; and as to transactions and communications between the parties after the agreement of October, 1845, was made, with a view to explain the agreement, and to show the intent of the parties in entering into it; and as to the matters in difference between the parties before and down to the time of the making of the agreement. A voluminous correspondence between the parties prior to the agreement was put in evidence, and the pendency, at the time the agreement was made, of the equity suit before referred to on the patent of 1840, was shown. It appeared, also, that on the 11th of August, 1843, a patent for an "improvement in machines for forming horse-shoes," &c., was granted to the defendant Winslow and one Osgood; and that Burden had two patents, each for an "improvement in the machine for making horse-shoes," one granted to him November 23d, 1835, and the other September 14th, 1843. All other facts necessary to an understanding of the case will be found stated in the opinion of the court. The cause was heard before NELSON, Circuit Justice, on pleadings and proofs.

Samuel Stevens, for plaintiffs.

William H. Seward, David L. Seymour, and Samuel Blatchford, for defendants.

NELSON, Circuit Justice. I. Upon a full consideration of the proofs concerning the originality of the improvement in the machinery for making hook-headed spikes, for which a patent was granted to Henry Burden on the 2d of September, 1840, I am of opinion, that the weight of it is in favor of the claim of Burden, as the first and original inventor; and that, if the case turned upon this question, the plaintiffs would be entitled to an injunction. The proof is conflicting, and some parts of it are irreconcilable, but the most satisfactory conclusion, in my judg-

ment, is the one above stated. Burden has the first patent, and the evidence on the part of the defendants is not sufficiently specific and decisive upon the question of originality, to overthrow it; on the contrary, independently of the patent, the preponderance of proof is in support of it.

II. In respect to the second ground of defence, I have not been able to bring my mind to doubt, that the agreement entered into by Burden and the defendants, on the 14th of October, 1845, in pursuance of a compromise of existing differences and disputes concerning patent rights, and, among others, the right now in question, contains a license to the defendants to manufacture the hook-headed spike upon the improved machine as patented to Burden on the 2d of September, 1840.

In coming to this conclusion, I lay out of the case entirely the oral evidence given in explanation of the agreement, and of the intent of the parties in entering into it, and confine myself to an examination of the language of the parties in the instrument itself, in connection with the subject matters that led to the compromise. The oral evidence of the intent and meaning of the parties, in explanation of the agreement, is wholly inadmissible, and ought not to have been received. The agreement, being in writing, must speak for itself.

There were at the time two principal matters of difference between the parties, namely, the right to manufacture the hook-headed spike with the bending lever, and the right to make the patent horse-shoe. A suit was pending between them in respect to the former right, which was deemed the most important of the two by Burden. Indeed, the correspondence between the parties shows that this was the chief matter in dispute, the one in which the parties felt the deepest interest, and in respect to which a settlement was deemed most desirable. Now, reading the agreement of the 14th of October, 1845, with these facts in view, it is impossible to hesitate as to its legal import and effect upon the matters in controversy. It recites the suit pending in favor of Burden against the defendants, for an infringement of the patent of 1840 by manufacturing the hook-headed spike, and that both parties claimed the right to manufacture the article; and it is then agreed, that the suit shall be discontinued, each party paying his own costs, and that each may thereafter manufacture and vend spikes of such kind and character as they see fit, notwithstanding their previous conflicting claims. It then recites, that each claimed the right to manufacture the patent horse-shoe, and that Burden claimed the exclusive right, and it is then agreed, that the defendants shall cease the manufacture, and that Burden may continue it; and then follow mutual releases of all claims and demands and causes of action, for alleged previous infringements of patent rights claimed by the respective parties, down to that time. Why stipulate that the defendants might thereafter manufacture and vend spikes of any character and description, without regard to previous claims to the contrary, if it was not intended to admit or concede the right to manufacture the hook-headed spike? And how can we say that this particular spike is not embraced in the stipulation? What is meant by the agreement, that the defendants may manufacture spikes "of such kind and character as they see fit, notwithstanding their" (the parties') "conflicting claims to this time," if it was intended to exclude the hook-headed? The argument is quite as strong and well-founded to exclude spikes of any other description—indeed stronger, if it were possible, as this particular spike was the principal item in controversy at the time of the compromise or settlement, and a suit was pending in respect to it. The language of the instrument is certainly most remarkable, if it was intended by the parties to exclude the defendants from the right to make this particular spike; as there are not only no words of exclusion or prohibition, but an express admission of the right, in terms so full and specific that no argument can make it clearer. We are asked to interpret a stipulation to make any kind of spikes the parties see fit, to mean any kind except the hook-headed; and that, too, in the case of a compromise of a disputed right to manufacture spikes of this character and description, among other matters, this being regarded as the principal one. I think it impossible to come to any such conclusion, without a disregard of the clear import of the agreement.

III. The compromise and agreement of Burden bind the plaintiffs. He was possessed, at the time, of the legal title to the patent of 1840, and exercised all the acts of ownership over it, with their knowledge and presumed assent. The suit for the infringement was in his name, and was one of the subjects of the settlement; and, besides, he was the agent of the plaintiffs at the time, and the principal stockholder in their company. Being the holder of the legal interest in the patent, he was competent to settle the disputed claims in respect to the improvement, and, conceding that the plaintiffs possessed the equitable title, the settlement, under the circumstances stated, was, in judgment of law, with their privity and assent.

The bill must be dismissed, with costs.[3]

[On appeal to the supreme court the above decree was reversed, and the case remanded to

[3] Decree. This cause having heretofore been brought to a hearing upon the pleadings and proofs, and counsel for the respective parties having been heard, and due deliberation thereupon had, and it appearing to the said court that the said Henry Burden was the first and original inventor of the improvement in the spike machine in the bill of complaint mentioned, and for which a patent was issued to the said Henry Burden, bearing date on the 2nd of September,

this court with directions that an account be taken by a master. 14 How. (55 U. S.) 193. For further proceedings in this litigation, see Cases Nos. 14,196–14,199.]

Case No. 14,196.

TROY IRON & NAIL FACTORY v. CORNING et al.

[6 Blatchf. 328; 3 Fish. Pat. Cas. 497.] [1]

Circuit Court, N. D. New York. March 25, 1869.

MASTER IN CHANCERY—EXCEPTIONS TO RULING—FINAL REPORT—PATENTS—INFRINGEMENT—DAMAGES.

1. An exception should always be taken on the spot to each ruling of a master which a party intends to contest. It need not then be drawn up in form, but it should be taken, by giving notice to the master, and it is his duty to note the fact in his minutes.

2. Where a master admits evidence that is objected to, and reserves the questions arising on the objection, and afterward omits to pass on the objection, or decides upon it in a manner claimed to be incorrect, the first opportunity should be taken to except to his omission or alleged error in such particular.

[Cited in The E. C. Scranton, Case No. 4,272; Celluloid Manuf'g Co. v. Cellonite Manuf'g Co., 40 Fed. 478.]

3. The serving of the draft report of the master, and the filing of objections thereto, is such opportunity, and, if such objections do not embrace such exceptions, it is too late to take such exceptions by way of exception to the final report of the master.

[Cited in Hatch v. Indianapolis & Springfield R. Co., 9 Fed. 857; Celluloid Manuf'g Co. v. Cellonite Manuf'g Co., 40 Fed. 477.]

4. If it is proper to except at all to the final report of a master, for rulings admitting or rejecting evidence, this can only be done where objections of the same kind have been made to the draft report.

[Cited in Memphis v. Brown, 20 Wall. (87 U. S.) 322.]

5. It is somewhat doubtful, whether, strictly, any exceptions to the master's rulings on the admission or rejection of evidence, can be properly embraced in exceptions to the master's final report.

6. Reasons for applying the rule strictly in this case, and for overruling exceptions taken to the final report of the master, in respect of rulings made by him as to the admission and rejection of evidence.

7. Effect of an admission made in an answer, that the defendants had made "large profits" by the use of machinery alleged to infringe the plaintiffs' patent, upon the question of the amount of nett profits derived from such infringement, on an accounting before a master under a decree.

8. Effect of letters written by the defendants to their customers, on the same question.

9. Consideration of the expenses and charges proper to be allowed to the defendants, in ascertaining such nett profits.

10. The true amount of the nett profit derived from using machinery, in infringement of a patent, to make articles which are sold, cannot be determined, without deducting from the value of the articles made and sold all the elements of cost in their production.

This was a bill in equity, praying for an injunction and an account. It was filed July 10, 1848. The answer was sworn to March 1, 1849. The object of the suit was to restrain the defendants [Erastus Corning, James Horner, and John F. Winslow] from using a certain improvement in machinery for making hook or brad-headed spikes, for which a patent was granted to Henry Burden, September 2, 1840, which he assigned to the plaintiffs; and to compel the defendants to account to them for the profits alleged to have been made by the defendants in the course of their unauthorized use of this patented improvement. The case was brought to hearing before this court, and, in March, 1850, a decree was rendered dismissing the bill. [Case No. 14,195.] On appeal to the supreme court, the decree below was reversed, at the December term, 1852 (14 How. [55 U. S.] 193), and the case was remanded to this court, "with instructions to enjoin the defendants perpetually from using the improved machinery with the bending lever for making hook and brad-headed spikes, patented to Henry Burden, the 2d of September, 1840, and assigned to the complainants, as set forth in the complainants' bill, and to enter a decree in favor of the complainants for the use and profits thereof, upon an account to be stated by a master, under the direction of the said circuit court," &c. The mandate of the supreme court having been filed in this court, the latter, on the 28th of June, 1853, entered a decree in conformity thereto, at the same time referring the case to Marcus T. Reynolds, Esq., as master pro hac vice, to take and state the account. Mr. Reynolds having declined to serve as such master, the court, on the 20th of October, 1853, appointed Reuben

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1840, as in said bill of complaint set forth, and that the said complainants have a full and perfect title to the said patent for said improvement, by assignment from the said Henry Burden, as is stated and set forth in the bill of complaint; but it also further appearing to the court, on the pleadings and proofs, that the instrument in writing bearing date the 14th of October, 1845, stated and set forth in said bill of complaint, and also in the answer of the said defendants thereto, entered into upon a settlement and compromise of certain conflicting claims, between the said parties, and, among others, of mutual conflicting claims to the improvements in the spike machine in said bill mentioned, and which said instrument was executed by the said Henry Burden of the one part, and the said defendants of the other, the said Henry Burden at the time being the patentee and legal owner of the said improvements, and fully authorized to settle and adjust the said conflicting claims, did, in legal effect and by just construction, impart and authorize and convey a right to the defendants to use the said improvements in the manufacture of the hook-headed spike, without limitation as to the number of machines so by them to be used, or as to the place or district in which to be used: Therefore, it is ordered, adjudged, and decreed that the said bill of complaint be and the same is hereby dismissed, with costs to be taxed, and that the defendants have execution therefor.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here reprinted by permission. 3 Fish. Pat. Cas. 497, contains only a partial report.]

H. Walworth, Esquire, in his stead. The latter, after some preliminary proceedings, commenced taking the proofs on the accounting, on the 5th of April, 1854. The hearing on this reference was continued till the 10th of June, 1864, when the evidence was closed. The master subsequently served a copy of a draft report on the counsel for the respective parties, to which, on the 4th of March, 1866, the defendants filed thirty-three objections, and, on the 7th of the same month, the plaintiffs filed forty objections. The master made his final report in May, 1866. To this report the plaintiffs filed forty exceptions to the main conclusions of the master, and about fifteen hundred exceptions to the rulings of the master made during the progress of the hearing before him. The defendants filed nineteen exceptions to the conclusions of the master.

Elisha Foote, for plaintiffs.
William A. Sackett, for defendants.

Before NELSON, Circuit Justice, and SHIPMAN, District Judge.

SHIPMAN, District Judge. This case was set down for hearing on the exceptions, before this court, at Cooperstown, in October, 1867, when and where the counsel for the respective parties appeared, and, after consultation, concluded to submit the case on the pleadings and the evidence before the master, together with briefs and arguments thereafter to be filed. These briefs and arguments have been filed, and the whole case is now before the court, the record of the proceedings, including the arguments and the evidence taken by the master, covering nearly seven thousand printed pages. In addition to this printed matter, there are large numbers of manuscript books and papers, many of which were referred to and consulted by the master and the counsel during the progress of the hearing before him. No important portions of these, however, are now before this court as evidence. Our attention has, therefore, been confined to the printed evidence submitted by the master, and, after devoting several months exclusively to its examination, and to the various questions raised by the exceptions and the arguments thereon, we proceed to state the conclusions at which we have arrived. In doing this, we shall be as brief as possible, in view of the unexampled length to which the proceedings in the case have already been carried.

The first questions to be considered are those which relate to the rulings of the master, on the hearing, on the admission or rejection of evidence, after objections of counsel. The plaintiffs have filed special exceptions to the master's report, on account of these rulings, to the number of nearly fifteen hundred. These exceptions are objected to, by the defendants, as irregularly taken, for two reasons: first, that no exceptions were taken, before the master, at the times the rulings were severally made; and, second, that these alleged errors of the master were not embraced in the objections filed by the plaintiffs with the master, to his draft report. In view of the condition of the master's minutes, this phase of the case would not be free from embarrassment, even if the plaintiffs had conformed to the rules of practice, as to the time of taking their exceptions. Many of the rulings in question were not absolute, but evidence was often received, and the questions arising on the objections of counsel were reserved. What precise disposition was ultimately made of the particular questions reserved, does not always appear. It is not easy for the court to deal with these, as it is almost or quite impossible to ascertain to what extent the evidence thus conditionally received was finally accepted or rejected by the master.

But let us take the rulings of the master that were formal and peremptory, overruling or sustaining objections to the admission of evidence at the time they were made. What are the rules of practice to be observed by the party who desires to revise such rulings? We think, that an exception should always be taken on the spot to each ruling of the master which a party intends to contest. It need not then be drawn up in form, but it should be taken, by giving notice to the master, and it is his duty to note the fact in his minutes. This is a familiar rule, constantly applied in other trials, and we see no reason why it should not be adhered to in hearings before masters. However loose the practice may, in fact, be, the rule is well settled, especially in trials at law. In Morris v. Buckley, 5 Serg. & R. 211, Tilghman, C. J., remarks: "Exceptions to evidence must be taken as soon as the court has decided to admit or reject the evidence." The same point is decided in Ligget v. Bank of Pennsylvania, 7 Serg. & R. 218, where the same judge explains the object and importance of the rule. In Poole v. Fleeger, 11 Pet. [36 U. S.] 185, 211, Mr. Justice Story remarks: "In the ordinary course of things, at the trial, if an objection is made, and overruled, as to the admission of evidence, and the party does not take any exception at the trial, he is understood to waive it. The exception need not, indeed, then be put in form, or written out at large and signed; but it is sufficient that it is taken, and the right reserved to put it in form within the time prescribed by the practice or rules of the court." The reason of this rule is founded in the interest of justice, as its observance tends to narrow the limits of controversy; for, if the party in whose favor a ruling is made is notified that an exception is taken and the question is to be revised, he can waive the point and admit or withdraw the evidence, as the case may be, and thus avoid future controversy and delay over it. This is very often done, to the advantage of one or both of the parties. The same reasons exist for the observance of the rule in hearings before masters, as in other trials.

It may be said, that this rule can have no application to the instances, on this hearing, where the master admitted evidence objected to, and reserved the questions arising on the objections. As we have already intimated, it is not always easy to determine what precise disposition was made by the master of many of these reserved questions. But, if he omitted to decide them, or ultimately decided them incorrectly, the first opportunity should have been taken to except to his omissions, or alleged errors, in this particular. This opportunity, if not presented before, occurred when the draft report was served and the parties filed their objections thereto. None of these errors are embraced in the objections then filed. Exceptions to these rulings appear, for the first time, among those presented to the master's final report, although some of them were made years before either the draft report or the final report was drawn up. It would seem, from the authorities, that, if it is proper to except at all to the master's final report, for rulings admitting or rejecting evidence, this can only be done where objections of the same kind have been made to the draft report. Lord Chief Baron Gilbert lays down the rule as follows: "The ancient rule was, that the party should never except, but where he has first objected to the draft of the report before the master, and, where there was no objection brought in, it was allowed good cause to discharge the exception; and it were to be wished that this good rule was strictly followed, since, if the party had objected, he might have shown the master his error, and the report would have been altered in that particular, and never have troubled the court." This is substantially the rule of the English court of chancery, at the present time. 2 Daniell, Ch. Prac. (3d Ed.) p. 1304. In Story v. Livingston, 13 Pet. [38 U. S.] 366, Mr. Justice Wayne, speaking for the court, says: "Strictly, in chancery practice, though it is different in some of our states, no exceptions to a master's report can be made, which were not taken before the master; the object being to save time, and to give him an opportunity to correct his errors, or reconsider his opinion." We think, therefore, that, as to any questions arising upon objections made during the hearing, and reserved by the master, they should have been embraced in the objections filed with him to his draft report; and, as to the rulings which were made final at the time the objections were taken, the exceptions should have been made and noted at once, as such rulings were made.

It is, indeed, somewhat doubtful, whether, strictly, any exceptions to the master's rulings on the admission or rejection of evidence can be properly embraced in exceptions to the master's final report. It is true that such a practice is recognized in 2 Daniell, Ch. Prac. (3d Ed.) p. 1323, but the author cites no authorities in support of it. On the contrary, in Schwarz v. Sears, Walk. Ch. 19, and in Ward v. Jewett, Id. 45, it was expressly held, that an improper rejection of testimony is to be at once corrected by a motion to the court for an order to compel the master to receive the evidence, and not by exception to his report. See, also, the case of Tyler v. Simmons, 6 Paige, 127. But it is unnecessary to pursue this branch of the inquiry. We are entirely satisfied that these exceptions in this case were taken too late. They were taken neither when the rulings were made, nor at the first opportunity thereafter.

However much looseness there may have been in practice, or however much we might be disposed to look with indulgence upon a departure from the rules in ordinary cases, we think it our duty to apply them strictly in the present case. Any other course would be attended with delay and embarrassment. It is true, that, so far as the evidence improperly admitted is concerned, we might strike it out, though this might leave the proofs in a confused and fragmentary state. But, where the evidence was improperly rejected, we are, in effect, asked to again refer this case to a master for further proofs on many points involved in the controversy between these parties. We should not be justified in such a step unless the rules strictly required it. Neither of the parties could be benefited by it. The enormous length and cost of this litigation have already rendered it barren of any substantial advantages to either party, in view of any possible result that might be reached, even at the end of another twenty years. Ten years, two months, and five days have already been consumed in taking the proofs on this reference, and nearly two years more in settling the report. From what we know of this controversy, after devoting months to a diligent and laborious examination of the evidence, we have no doubt that another reference would consume years. Such a result is almost certain, in view of the fact that the reference would have to be to a new master, who would, in order to discharge his duty intelligently, have to examine the whole case, and, perhaps, make a new report. Such a course might be practicable were human longevity equal to what it was in the antedeluvian ages. But, twenty years having been spent in this litigation, we think that the interests of all parties require that it should be brought to a close, if this can be done by a strict application of the rules of practice. This cannot be done, however, during the present generation, if the case is again to go to a master. We, therefore, apply the rule strictly, and dismiss the fourteen hundred and seventy-two exceptions to the rulings of the master in rejecting or receiving evidence, on the ground that they were not taken in time, and are irregularly before the court.

As already stated, the object of this reference was to ascertain the amount of profits, if any, which the defendants made, by the

use of the improvement secured to Burden by the patent of September 2, 1840, and by him assigned to the plaintiffs. The article made, for which the defendants are liable to account, was the hook-headed spike, used largely in the construction and repair of railroads. The master has found the period for which the defendants are liable to account to extend from October, 1845, to April, 1853, about seven years and a half. He found it necessary, or convenient, to divide this period covered by the infringement into separate business years, and give the results of the manufacture in each year. The first business year (during the last half of which the defendants are to account) ended April 4, 1846; the second, April 3, 1847; the third, April 1, 1848; the fourth, March 31, 1849; the fifth, March 30, 1850; the sixth, May 3, 1851; the seventh, May 1, 1852; the eighth, April 2, 1853.

The following table will show the number of pounds of hook-headed spikes manufactured by the defendants by the use of the infringing machine; the cost of manufacture; the nett proceeds of the sales; and the profit or loss, during each of the business years named, as found by the master. We have simply numbered the years in their order, for brevity, and to avoid the unnecessary repetition of dates:

	No. of pounds.	Cost.	Nett proceeds of sales.	Profit.	Loss.
1st (½) yr.	219,430	$ 10,056 93	$ 9,562 99		$ 493 34
2d "	540,947	24,750 10	24,226 05		524 05
3d "	1,389,826	60,763 16	60,531 71		231 45
4th "	2,134,573	88,810 93	92,022 83	$3,221 90	
5th "	1,811,030	74 391 87	72,963 26		1,428 61
6th "	4,167 373	158,917 46	151 267 89		7,649 57
7th "	4.422,426	158,940 81	149,939 06		9,001 75
8th "	4,131,766	151.521 53	133.906 22		17,615 31

In addition to the above, the master finds that 102,000 pounds were made, or rather sold, after the 2d of April, 1853, which, by stipulation, are to be estimated according to the scale of cost and sales of those made during the eighth business year. The nett result of the whole business, as found by the master, may be stated, in round numbers, as follows: The defendants manufactured and sold, in violation of the complainants' patent, 19,000,000 of pounds of spikes, which brought them $700,000. They made no profit, taking the whole time together. On the contrary, they sustained a loss of $34,000. We give merely proximate sums, in round numbers. They made nothing, except in the fourth business year, when their profits were a little over $3,000. During all the rest of the time, except the third business year, their losses steadily increased, reaching, in the last year, $17,615.31. This is a singular and surprising result, especially in view of the admission by the defendants in their answer, and of several important facts that are apparent on the evidence.

1. The admission in the answer. The answer was sworn to March 1, 1849, near the close of the fourth business year, by Mr. Winslow, who, as one of the parties in interest, and the active manager of this part of the business, was familiar with the whole subject of this controversy. This answer states, that the defendants admit that they "have, since the 15th of October, 1845, been engaged, and are still engaged, in manufacturing said brad or hook-headed spikes, whenever these defendants had or have a demand for the same, and that, in such manufacture, they have used, and still use, said improvement claimed by said complainants to be new and useful, and to be secured by the patent so as aforesaid granted to said Burden on the 2d day of September, 1840, and have thereby made large profits, but not to the amount of one hundred thousand dollars, as charged in said bill of complaint." This admission was deliberately made, after they had manufactured and sold over one hundred and eighty thousand dollars' worth of these spikes; and yet, according to the result arrived at by the master, they had then made but little over two thousand dollars profit. It is difficult to reconcile this with the admission of the answer, that they had made large profits. It is said, in the report, that there is nothing in the answer to show what the defendants considered large profits. This may be true; but it is correct to assume that they used those terms in their ordinary sense, and, although they are not words that give exact information, they certainly cannot be deemed to have no meaning at all, or one the reverse of what is ordinarily understood by them. Considering the time over which the business had been extended, the skill and care devoted to it, and the capital employed, the amount of profit found by the master to have accrued, at the time this answer was filed, was not only not large, but it was, on the other hand, extremely small—so small, that it hardly merited the term profit at all. It is difficult to resist the conclusion, in view of all the circumstances, that the defendants, at the time this answer was filed, looked upon this question of profit and loss in a different light from that in which it is presented in the report now before us.

2. The letters of the defendants, written to their customers, by the defendant Winslow, their business manager, touching the manufacture of these spikes, are significant evidence on this question of profit and loss. They are not the letters of an imperfectly informed clerk, or other subordinate, but of one of the partners, who shows throughout a perfect familiarity with the whole business. We give some extracts, which show their tenor. (Extracts are then given from nineteen letters, extending, in date, from September 27, 1845, to July 19, 1851, one being written in 1845, one in 1846, two in 1847, five in 1848, five in 1849, three in 1850, and two in 1851.) We have cited thus at length from these letters, because, as already intimated, we think they throw light upon the question of profit

and loss now under consideration. They were written, in the ordinary course of business, by one of the defendants, who was thoroughly conversant with all the details of the business and the state of the market, both in respect to the raw material and the manufactured article. These letters cover nearly the whole period embraced in this accounting, and were written with a full knowledge of the results of the business from year to year, as the master's report finds, "that accounts of the different departments of the defendants' manufacturing establishment or works, known as the 'Albany Iron Works,' have been closed or made up periodically, at the end of what are called business years." It is evident from these letters, that this business was conducted, from the very start, under the most favorable auspices, not as an untried experiment, but commencing after many years' experience, from which the means of making an accurate forecast must have been derived, and was carried on on a large scale, with the best machinery, and an abundance of the best material, with a conceded and growing reputation, with a large market, and wealthy corporations for customers, which the defendants were able to supply often at a day's notice, and with an increasing demand growing out of the widely acknowledged superiority of the article furnished, as compared with other kinds in the market. It is evident, too, from these letters, that, while the defendants furnished their customers with spikes manufactured from superior iron, they found their account in so doing, and charged the difference in the price between that supplied and poorer material; that they obtained a "living profit," at least, "a small profit," on the business, as they conducted it; that they found it for their interest, as well as the interest of their customers, to furnish the best article; and that, though they could have supplied one of poorer quality with "as much profit," yet it would have been at the expense of their acquired reputation, which they wisely chose not to forfeit. It is fairly inferable, also, from these letters, that they had no formidable, at least, no successful, rival in the business; for, these letters repeatedly assert, that the defendants manufactured the best article, that experience at once demonstrated that the best was the cheapest, and that all, or nearly all, their orders were for the best, those being the only ones their customers would buy or consent to use. It is true, indeed, that, in one letter, the defendants speak of being pressed by the rivalry of those who manufacture a cheaper and poorer article, yet, in the same letter, they assert emphatically, that they cannot use the best material in the manufacture of their spikes, unless consumers are willing to pay the difference between its cost and that of the poorer iron. Yet they continued the business, and used the best material, and were eager and successful in increasing the sale in the United States, down to the last. Throughout this correspondence, there is no hint by the defendants that they were losing money, or that they desired to abandon or curtail this branch of their business, or change its relative scale of prices, though, according to the report of the master, the more they made and sold, even during the last three years, after the trade was thoroughly established, the heavier were their losses, until they rose, the last year, to over $17,000, on a business of $133,000.

3. These continued and increasing losses are not charged to any extraordinary embarrassment or unforeseen calamity. It is true that the spike-factory was burned during this period, but that was during the fifth business year, in which their entire loss, according to the master, was only $1,428.61. There was, indeed, a reduction in the prices at which the spikes were sold, after the second, and down to and including the seventh business year, but this reduction bears none of the marks of a struggle to win customers or force the market on particular occasions, but a regular lowering of rates, to make them correspond with the decline in the iron market, marked by intelligent calculation and forecast, free from the pressure of any necessity, so far as we can see, and undisturbed by any sudden irregularities, or great fluctuations in the prices or demands of the trade.

But the result arrived at by the master we have stated, and the question of its correctness is raised before us by exceptions taken to his report by both parties. These exceptions, and the long and elaborate arguments thereon, refer to and open the immense mass of evidence from which the master deduced his results. This evidence relates, of course, almost wholly, to the cost of manufacturing these spikes, including the cost of the raw material. The sum at which they were sold was easily ascertained, but, to fix the exact amount of expense which entered into the cost of their production, was, upon the plan on which this reference was conducted, (and, perhaps, would have been upon any plan that could have been adopted,) a work of immense labor and difficulty. We may say, indeed, that it was impossible to fix the exact amount of that expense, as many of the elements which entered into it had no existence in precise figures, and were incapable of being reduced to certain quantities. They were entangled with other and different branches of the defendants' large business, carried on in the same establishment, and their details were mingled with details relating to the cost of manufacture of a variety of other articles. It was, therefore, impossible to arrive at certainty, and a result was reached only through estimates, comparisons, and apportionment. These remarks apply more particularly to most of the various items of cost which entered into the manufacture other than the value of the iron, though they apply, in a measure, to that also.

We have traced and examined the evidence

in this case in detail, and now proceed to state our conclusions. We cannot add to our already prolonged labor by discussing at any great length these details which we have examined, and shall dwell only, and that briefly, on those parts of the case wherein we think the conclusions of the master must be modified.

The largest item in the cost of manufacture is embraced in the value of the iron or spike-rods out of which the spikes were made. This item constituted over four-fifths of the whole expense, as will be seen from the following statement, derived from the results set forth by the master:

In the first half year, ending April 4, 1846, the defendants made or sold 109.71 tons of hook-headed spikes, which cost them, according to the report, $10,056.93. The value of the iron is estimated at $75.55 per ton, being, in the aggregate, for the 109.71 tons, $8,288.59. In the business year ending April 3, 1847, 270.47 tons, costing $24,750.10. The value of the iron is estimated at $75.55 per ton, amounting to $20,434. In the business year ending April 1, 1848, 694.91 tons, costing $60,763.16. Value of iron, $72.65 per ton, amounting to $50,485.20. In the business year ending March 31, 1849, 1,067.28 tons, costing $88,800.95. Value of iron, $70.08, amounting to $74,794.08. In the business year ending March 30, 1850, 905.51 tons, costing $74,391.87. Value of iron, $67.51 per ton, amounting to $61,130.98. In the business year ending May 3, 1851, 2,083.68 tons, costing $158,917.46. Value of iron, $64.36 per ton, amounting to $134,106.64. In the business year ending May 1, 1852, 2,211.21 tons, costing $158,940.81. Value of iron, $60.28 per ton, amounting to $133,291.17. In the business year ending April 2, 1853, 2,056.58 tons, costing $151,521.53. Value of iron $61.88 per ton, amounting to $127,261.17.

From this statement it will be seen that the value of the iron was the principal source of expense in the manufacture of the spikes. Fixing that value, therefore, was a very important consideration, and a variety of proof was gone into, to show at what prices it should enter into the expense account of the defendants. The propriety of this will at once appear, when we consider that this value was to be settled on 9,399.35 tons, besides the 51 tons sold after the 2d of April, 1853, and which was to be fixed by stipulation. A comparatively small variation in the price of this large amount of raw material would produce a decided effect on the general result, as shown in the balance-sheet. All, or nearly all, of the important evidence before us on this point, comes from the defendants' witnesses. In the early stages of the reference, the plaintiffs offered considerable evidence, which they claimed was pertinent to the question, which was received under objections reserved by the master, but subsequently the master rejected it, on the ground that it related to a different kind and quality of iron from that which the defendants actually used. That evidence is, therefore, not before us for consideration. The defendants did not buy this iron in the form of spike-rods, but manufactured the rods themselves, at the same place where they made the spikes. No purchase price could, therefore, be proved as the measure of their value. Resort was consequently had to the sales by others of like rods, and of other forms of iron of similar quality in New York, Pennsylvania, Massachusetts, and Connecticut, and to such sales of like iron as the defendants made at their works. Upon this evidence, which we will refer to at some length hereafter, the master made an estimate of the average market value of such iron as the defendants used at their works, during each of the years for which they are to account. On this point the report says: "I have, therefore, from the evidence in this case, made an estimate of the market values in each business year, of a ton of such spike-rods as the defendants did use in manufacturing their hook-headed spikes, except that the defendants' rods were not all cropped. And schedule I, hereto annexed, and forming a part of this, my report, contains what I conclude to have been the actual market values, per gross ton, of 2,240 pounds, of such spike-rods, after making a very liberal deduction from the values testified to by the witnesses, on account of the fag-ends which were on a part of the hook-headed spike-rods used by the defendants. In the same schedule, I, I have computed the amounts of those estimated average market values, in each business year, per ton of 2,000 pounds. Those estimated values, I conclude, are not more than the real market values, at the Albany Iron Works, of the spike-rods used there, per ton of 2,000 pounds of rods, in manufacturing hook-headed spikes, made with the use of the bending lever, in the same business years respectively. But, inasmuch as the plaintiffs' counsel claimed and insisted that a deduction ought to be made from the value, at the Albany Iron Works, of the spike-rods made there by the proprietors themselves, and not purchased by them, to cover the risk and expenses of marketing such rods if they had been sold by the defendants, I have, for greater caution, concluded to make a deduction of five per cent. from these values, per ton of 2,000 pounds, which diminished values are also computed and entered in said Schedule I." The report also finds, that, "to make a ton of 2,000 pounds of hook-headed spikes, of the sizes, on an average, which were made, would require about 2,150 pounds of such spike-rods as were used for that purpose, in the several business years, at the Albany Iron Works, and that, in making a ton of 2,000 pounds of such spikes, the scrap would be about 130 pounds, and the wastage, in addition to the scrap, about 20 pounds."

The master finds the values of the iron

used to make a ton of hook-headed spikes, of 2,000 pounds, during the respective years embraced in the accounting, as follows:

1st (½) year....	$75 55	5th year....	$67 51
2d "	75 55	6th "	64 36
3d "	72 65	7th "	60 28
4th "	70 08	8th "	61 88

The values were arrived at by estimating, from the evidence, the value of the iron, in gross tons of 2,240 pounds; then finding the value in nett tons of 2,000 pounds; from the last deducting five per cent.; then finding the value of 2,150 pounds, thus reduced; and from that, deducting the value of 130 pounds of scrap. The wastage, 20 pounds, of course, disappears. For example, the first (half) year, the iron is estimated:

Per gross ton, at.....	$85 00
Pet nett ton, at.....	75 89
After deducting 5 per cent.....	72 10
2,150 pounds of rods, at $72.10 per 2,000 pounds	77 50
Deduct for 130 pounds of scrap, at 1½ cent per pound.....	1 95
	$75 55

For the remaining years, the calculations were made in the same way, and the iron, per gross ton, was estimated as follows:

2d year	$85 00	6th year	$72 50
3d "	82 00	7th "	69 00
4th "	79 00	8th "	70 00
5th "	76 00		

We now proceed to examine the evidence upon which the estimated values of iron per pross ton were founded, confining ourselves to that offered by the defendants. The witnesses were manufacturers of iron, and were called to prove the prices at which they sold iron of a similar quality to that which the defendants put into the spikes in question. We will give the prices at which they sold from year to year, with the estimated prices allowed by the report to the defendants for the spike-rods of the latter, arranging the prices of each witness and the prices allowed by the master in parallel columns. These prices refer to gross tons of 2,240 pounds.

Philip Ripley was a manufacturer of iron at Windsor Locks, Connecticut, and made iron of a similar quality to that used by the defendants. He sold, during the period of this accounting, less than 500 nett tons, and his sales are given in parcels, about 200 in number. Whether this is the precise number of lots into which his sales were divided does not certainly appear, but, from his testimony, we infer that the quantities given were taken from his books, and were copies of the entries made from time to time. The quantities vary from a few hundred to several thousand pounds each, and were sold to various customers. There was a variety of sizes, some ten or a dozen, of various shapes, square, round, flat, &c. Some of it was in the form of spike-rods, and some in other shapes. There is a very considerable variation in prices, even in sales apparently made at about the same time. He gave his prices as follows:

			Allowed by Master.
1st (½) year,	$90 to $100.....	$85
2d "	80 to 100.....	85
3d "	77½ to 90.....	82
4th "	75 to 80.....	79
5th "	75 to 80.....	76
6th "	65 to 70.....	72½
7th "	65 to 70.....	69
8th "	no sales given.....	70

Philip D. Borden was a large manufacturer of iron at Fall River, Massachusetts. He does not, like Ripley, give the details of his sales. The iron was sold at Fall River, Providence, Boston, and New York, as well as to customers through correspondence. This witness does not give the prices for the precise years into which the time is divided by the master, but gives it according to the calendar years. He also gives average, instead of exact prices. His estimates appear to be confined to round and square rods of various sizes, ranging from ⅜ to ⅝ in diameter. In what quantities they were sold does not appear. His average prices are as follows:

		Allowed by Master.
From Oct. 1, 1845, to Jan. 1, 1846,	$90..	$85
From Jan. 1, 1846, to Jan. 1, 1847,	85..	85
From Jan. 1, 1847, to Jan. 1, 1848,	85..	82
From Jan. 1, 1848, to Jan. 1, 1849,	80..	79
From Jan. 1, 1849, to Jan. 1, 1850,	80..	76
From Jan 1. 1850, to July 1, 1850,	75..	72½
From July 1, 1850, to Jan. 1, 1851,	70..	72½
From Jan. 1, 1851, to Jan. 1, 1852,	70..	69
From Jan. 1, 1852, to Jan. 1, 1853,	65..	70

Of course, if the master had adjusted his division of time exactly as the witness did, he might have made some slight variations in his yearly price, though the general result would have been substantially the same.

Isaac Bortelot was an iron manufacturer in Reading, Pennsylvania. He appears to have sold his iron generally to the trade. In what quantities he sold at a single time, or to a single customer, does not appear. This firm manufactured from 1,500 to 2,000 tons annually, but this included the heavier kinds, which were made from pig iron puddled. The lighter kinds, such as spike-rods, were, as a general thing, made from wrought iron scraps, like the defendants'. The proportion of iron made from the puddled pig, and that from wrought iron scraps, does not appear. The prices given by this witness are estimates of about what the average would be, made "in his head," after looking at his books, and are as follows:

			Allowed by Master.
1st (½) year	$85.....	$85
2d "	82½.....	85
3d "	80.....	82
4th "	75.....	79
5th "	75.....	76
6th "	72½.....	72½
7th "	70.....	69
8th "	82½.....	70

Abram B. Kingsland, an iron manufacturer at Keeseville, New York, made and sold to the trade and customers generally, and manufactured nails. He gives the prices of round and square rods made of materials like the defendants', for a portion of the years in question, as follows:

		Allowed by Master.
1st year,		
2d "		
3d (½) year,	$90	$82
4th "	85	79
5th "	85	76
6th "	82	72½
7th "	80	69
8th "	80	70

It should be remarked that this witness gives "about" the average prices.

John Mitchell, an iron master at Norwich, Connecticut. He made iron of the same quality as the defendants', and sold to the trade and customers generally, and gives about the average prices as follows:

			Allowed by Master.
1st (½)	year	$85	$85
2d	"	85	85
3d	"	85	82
4th	"	82½	79
5th	"	72½	76
6th	"	70	72½
7th	"	68¾	69
8th	"	73	70

Nathan Rowland, an iron manufacturer in Philadelphia, made from 500 to 600 tons per annum, of the same quality as the defendants', of which 300 to 400 tons were made into round and square rods, of not more than ⅝ths of an inch in diameter. He sold generally in the market, and to ordinary customers, at the following prices:

		Allowed by Master.
1st year,		
2d "		
3d "	$75	$82
4th "	75	79
5th "	70	76
6th "	70	72½
7th "	75	69
8th "	70	70

The witness gives about the average prices, and not the details of his sales.

There is some other evidence of the same general character, but we have given the most important, and that which shows the state of the general market in various places, as evinced by the sales of iron manufacturers under the ordinary circumstances which characterized the trade. In addition to this, it should be stated, that the defendants proved their sales of iron of a similar quality to that which they put into these spikes. These sales cover the period of accounting. They represent the sales in spike-rods, horseshoe iron, hame iron, hoop iron, hoops, and beer hoops, and include, in round numbers, about 1,000 nett tons, about 200 of which were spike-rods. The figures apparently represent a variety of separate sales, amounting to several hundred in number. The prices range higher than the average of sales by other manufacturers. The quantities varied from 50 pounds to 6,000 pounds. During the first half business year, the prices ranged from $89.60 to $112, per gross ton of 2,240 pounds; the second, the price was $89.60; the third, from $89.60 to $134.40; the fourth, $89.60; the fifth, from $75 to $90; the sixth, from $89 to $89.60; the seventh, from $80 to $85; and the eighth, from $80 to $84. The evidence of Artemas Hammond, the spike-maker and the purchaser of spike-rods, we will refer to hereafter.

It is evident, from an inspection of the report in the light of this evidence, that the master struck a fair average of the prices of the sales of the manufacturers of iron of the same quality as that used by the defendants; and, after making an allowance for the fag-ends which were on a portion of the defendants' rods, in excess of those found on the rods of others, made this average the price at which the defendants' rods are charged in their expense account, in the first instance. This estimated price per gross ton of 2,240 pounds, forms the basis of the iron account, modified only by reducing the amount to nett tons, deducting from these five per cent., then taking 2,150 pounds to make 2,000 pounds of spikes, and allowing, of that, 130 pounds for scrap, and 20 pounds for wastage. The prices of the rods, per gross tons, and per nett tons, of spikes, will appear as follows:

		Per gross ton.	Per ton of spikes.
1st (½) year,		$85	$75 55
2d	"	85	75 55
3d	"	82	72 65
4th	"	79	70 08
5th	"	76	67 51
6th	"	72½	64 36
7th	"	69	60 28
8th	"	70	61 88

These were assumed as the market prices during the respective years, at the defendants' works, and they represent a pretty fair average of the prices in other places, as shown by the sales proved by the different manufacturers who testified on the reference. No reduction was made on the nine thousand four hundred tons of raw material manufactured by the defendants, and by them turned into hook-headed spikes, by the use of the plaintiffs' patented machine, except the item for fag-ends, and the item of five per cent. The propriety of allowing for the fag-ends which were on the defendants' rods, and not on those proved to have been sold by others, is obvious. How much was allowed does not appear, but the master states that it was liberal. The five per cent. allowed was "to cover the risk and expenses of marketing such rods, if they had been sold by the defendants." The propriety of this allowance is equally obvious, in view of the fact that the defendants are allowed, in their expense account, for the risk and expense of marketing the spikes. Thus, it will be seen that, under this theory, the defendants, as iron manufacturers, sell 9,-

400 tons of spike-rods, to themselves as spike-makers, under what is equivalent to a single contract, with a regular and continuous delivery, at the same prices at which the same article was sold to different purchasers, in different localities, in quantities varying from a few hundred pounds to thirty tons. This is said to be equitable, on the ground that they ought to be allowed the market prices for their rods, and that such prices, therefore, form proper charges in their expense account. Moreover, the defendants allege, that the prices from which the master has struck his averages, were the wholesale, and not the retail, prices, and therefore furnish the only true guide on this subject. These, and other considerations, have been urged by the defendants' counsel, in an elaborate and exhaustive argument, to which we have not been inattentive.

After a careful consideration of this question of the prices at which the rods should enter into the expense account of the defendants, we are satisfied, in view of the whole evidence bearing upon it, that the conclusions of the master thereon should be modified. As has been stated, the rods were made by the defendants, and by them wrought into spikes by the use of the plaintiffs' patented machine. A large and ready market was thus furnished to the defendants for their iron, within the very precincts of their rolling-mills, under circumstances which, as we have said, were equivalent to a single and continuous contract for 9,400 tons of spike-rods. These rods were manufactured under the most favorable auspices, were of very few sizes, of one shape, and dropped from the rolls into this ready market, and were at once absorbed by a single customer. For the purposes of this case, we may properly consider the defendants, in this position, as iron manufacturers, selling their rods to themselves as spike-makers, and inquire what would have been the price at which they would readily have sold these rods, in such quantity, to any other spike-maker, supposing that the defendants had not been in the latter business. Now, no such sale has been proved in the general market. None probably could have been proved, which would have embraced any thing like the same quantity, to a single purchaser. The sales that have been proved were in comparatively small quantities, to single purchasers, and, though stated to be at wholesale prices, yet, in view of the comparative smallness of the individual sales, and the number of customers, these transactions, as contrasted with the immense quantity of one kind of iron which the defendants transferred from one department of their business to another, were more of the character of a retail, than a wholesale business. The quantity of merchandise of a single size, form, and quality, to be delivered under a single contract, all other things being equal, inevitably affects the price, up to a certain point. No law of trade is more regular in its operation than this. The reasons upon which it is founded are obvious. The manufacturer who thus deals, on a large scale, with a single transaction and a single customer, can and does produce and sell cheaper than when his business is split up into a multitude of smaller transactions. He forecasts the future, and buys his raw material, and works it up under circumstances which he can control, and proceeds with greater certainty, uniformity, and economy.

We, therefore, think, that the circumstances under which the defendants transferred this large quantity of rods from their rolling-mills to these spike-machines, should be considered, in arriving at the prices at which they should be charged in the expense account. If it is still insisted that these circumstances cannot be properly allowed to influence our decision, and that the "market price" at the defendants' works is, after all, the only true guide, it may be replied, that the evidence does not justify us in assuming that there was a market price there, or any where else, for any such quantity of rods as the defendants consumed. There was no other such market as these spike-machines furnished to the defendants' rolling-mills. We are, therefore, satisfied, that we ought not to ignore the condition of things under which the defendants, as iron-makers, furnished themselves, as spike-makers, with these rods. On the contrary, we are constrained to think that it is a proper subject for our consideration, and that its natural and legitimate effect should be allowed to operate in the reduction of the prices at which these rods are charged by the master in the defendants' expense account. We have carefully considered the extent of that reduction, and, after weighing the whole matter, are satisfied that it should be at the rate of four dollars and a half per ton of rods used to make a ton of spikes of 2,000 pounds weight. This we regard, in view of the whole evidence germane to the point, as allowing a fair price for the rods. In coming to this result, we have not overlooked the testimony of the defendants' witness Hammond, so earnestly pressed upon our attention by the plaintiffs' counsel, but we have not attached any very great importance to it. It is true that he states that, for three of the years covered by the periods of accounting, the firm of Adams & Hammond, of which he was a member, made about 200 tons of spikes per annum. They received all their rods from the Plymouth Iron Company, and they were of the same quality of wrought iron scrap rods as those used by the defendants. They were received under a single contract, and at a price $5.60 per ton less, on the average, than the master has allowed the defendants for their rods during the same years. Still, this was comparatively a limited transaction, the whole circumstances connected with which may

not be before us, and the witness who testified to it did not seem to have a very clear idea of the iron market at the time to which his testimony referred. He thought that the market price of iron advanced some in the latter part of 1845, and continued to advance for two or three years afterward; but in this he was mistaken. As the whole evidence shows, iron did not rise, but continued steadily to decline, during nearly the entire period covered by the accounting, and down to the last year, when there appears to have been a slight reaction. Still, as we have already remarked, we do not attach any very great importance to the facts testified to by this witness, though, as far as they go, they tend to show that the prices allowed by the master for the defendants' rods for the first three years is too high, and that our reduction is none too much.

This question, touching the value or price at which the spike-rods are allowed by the master, and included in the expense account of the defendants, was raised and presented by the plaintiffs' sixth exception to the report of the master. This exception is, therefore, sustained to the extent and upon the principles we have set forth. All the other points raised by this exception are overruled.

The plaintiffs' twenty-third exception raises several questions, touching the allowance, made by the master, for the "use of water-power, buildings, lands, machinery, and tools, for spike-factory purposes." The only remarks we have to make upon this exception, which includes a variety of objections, stated in detail, will relate, first, to the principle of allowing any thing at all for the use of the property; and, second, to the amount actually allowed by the master. This property we may call, for convenience, the fixed capital used by the defendants in the business of manufacturing these spikes. We use this term, to distinguish it from what is called, in another part of the case, the floating capital. The material points involved in this aspect of the case, will appear more clearly, by citing the language of the report. The master says: "A part of the expenses of manufacturing the hook-headed spikes, made with the use of the bending lever, by the proprietors of the Albany Iron Works, was the value of the occupation and use of the real estate, buildings, water-power, dams, bulk-heads, water-wheels, and other fixtures and machinery, machines, and tools, exclusively employed by the spike-factory department, in the manufacture and storage of its productions, etc., and of the materials used by its mason, carpenter, blacksmith, etc., from time to time. Schedule O, hereto annexed, and forming a part of this, my report, contains an estimate, which I have made, from the testimony, of the average values, in the last half of the business year ending the 4th of April, 1846, and in each of the seven succeeding business years, of the water-power, the spike-factory building, the spike-factory store house, and of the dam, bulk-head, water-wheel, and propelling machinery, and of the machinery and tools in the spike-factory. From these estimated values, which I believe to have been about the true values of this part of the spike-factory property, from time to time, according to the weight of the testimony, I have, for greater caution, and because I believed it would not alter the result of this reference, deducted ten per cent." The report then proceeds to allow eight per cent. per annum on the estimated value of this part of the spike-factory property, and to allow such a proportion of the amount as was properly chargeable to the hook-headed spikes, leaving the balance out, as belonging to the other articles manufactured in the spike-factory. He allows for the

1st (½) year	.....	$ 171 14
2d "	.....	432 75
3d "	.....	672 67
4th "	.....	947 74
5th "	.....	1,116 04
6th "	.....	1,994 08
7th "	.....	2,074 11
8th "	.....	1,597 96

The total amount of these items is $9,006.49.

The plaintiffs contend, that this is in the nature of rent, for the use of premises which the defendants had already erected for their other business, and, that, therefore, it should not be allowed as an item in their expense account. But we do not see how the true amount of profit derived from the use of the machines is to be determined, without deducting, from the value of the articles made, all the elements of cost in their production. The use of shop room and tools is a necessary ingredient in the expense of manufacturing most articles, and we see no reason why it must not be estimated and allowed as part of the expense account. The case of Goodyear v. Providence Rubber Co. [Case No. 5,583] is cited by the plaintiffs, in support of their objection to this allowance. But, as that case is not reported, and the decision was oral, we are not in possession of the reasons by which it was supported. On the whole, we think, the allowance of the items embraced in this exception was correct, on principle. We have examined the evidence upon which the amount allowed by the master rests, and, although the final results at which he arrived were reached by estimates and apportionments, we cannot say that he has erred in these, or that the evidence fails to support them. As we have already stated, in another part of this opinion, certainty, in fixing many of the items of the defendants' expense account, was impossible; but we think the amount allowed by the master, under this head, was no more than reasonable. This exception is, therefore, overruled.

The plaintiffs, by their twenty-fourth ex-

ception, object to the allowance made by the master for the use of what is called floating capital. The total amount allowed by the master, under this head, was $7,692.-94. We regard the principle upon which this allowance was made as correct, and, after examining the evidence, we approve of the amount allowed.

There are over fifty remaining exceptions to the conclusions of the master, on the one side and on the other, which have been discussed at great length by counsel. Of these exceptions, the evidence bearing on them, and the arguments presented, we have made a prolonged and laborious examination. We have endeavored to sift, analyze, and classify the evidence bearing upon each point raised, and, on the whole, have concluded to overrule them all. But we cannot undertake to go into the reasons that have led us to this result, as we could not do so without extending this opinion over hundreds of pages. This evidence relates to innumerable details, the discussion of which could not be compressed into the compass of an ordinary volume. We, therefore, content ourselves by stating the result at which we have arrived, touching these remaining exceptions.

Reducing the price of the spike-rods, as we have already indicated, and leaving the rest of the report to stand, we find that the amount of profits made by the defendants, in the use of the plaintiffs' patent described in the bill, between the 15th of October, 1845, and the 31st of March, 1849, after deducting the losses that subsequently accrued, is $8,475.09. The plaintiffs are, therefore, entitled to recover this sum, with interest at the rate of seven per cent. per annum, from the last-named date to the entry of the final decree in this cause.

As, upon the facts reported by the master, and not excepted to by either party, Mr. Horner is to be deemed a member of the firm, and, therefore, a codefendant, down to March 31, 1849, after which no profits were made, his withdrawal from the firm does not require to be noticed in the decree.

The rule touching the time from which interest is to be computed, which we have adopted, is liberal toward the defendants, and we have, therefore, taken no account of the trifling loss on the fifty-one tons of spikes made by the defendants, the adjustment of which was provided for by stipulation. Subject to the modification in the price of the rods, which we have indicated, let the report of the master, in this case, be confirmed, and a decree be entered for the plaintiffs, for the sum of $8,475.09, with interest from March 31, 1849, to the date of the decree, together with costs to be taxed. The clerk of this court is directed to compute the interest, and include the same, on the entry of the decree.

[For subsequent proceedings, see Cases Nos. 14,197–14,199.]

Case No. 14,197.

TROY IRON & NAIL FACTORY v. ERASTUS CORNING et al.

[7 Blatchf. 16.] [1]

Circuit Court, N. D. New York. Sept. 15, 1869.

FEES—SOLICITOR—DOCKET FEE—FOR TAKING DEPOSITIONS.

1. Under the act of February 26th, 1853 (10 Stat. 161), a docket fee of twenty dollars is the highest compensation allowed to a solicitor in a cause; and it can be allowed but once.

[Cited in Goodyear v. Sawyer, 17 Fed. 13; Williams v. Morrison, 32 Fed. 683; Cleaver v. Traders' Ins. Co., 40 Fed. 864.]

2. The provision of that act, allowing to the solicitor $2.50 for each deposition taken and admitted as evidence in a cause, relates to testimony taken out of court, under authority which will entitle it to be read as evidence in court, and has no relation to oral testimony taken in court, or before a master. It applies, in cases at common law, where depositions are given in evidence on the trial; and, in suits in equity, where depositions are read at the hearing.

[Cited in Jerman v. Stewart, 12 Fed. 278; The Sallie P. Linderman, 22 Fed. 558; Wooster v. Handy, 23 Fed. 58; Spill v. Celluloid Manuf'g Co., 28 Fed. 870; James Dalzells' Son & Co. v. The Daniel Kaine, 31 Fed. 747; Strong v. U. S., 34 Fed. 19; McKinistry v. U. S., Id. 214; Ingham v. Pierce, 37 Fed. 647; Missouri Pac. Ry. Co. v. Texas & P. R. Co., 38 Fed. 776; McKinistry v. U. S., 40 Fed. 817; Hake v. Brown, 44 Fed. 734; Ferguson v. Dent, 46 Fed. 91; Indianapolis Water Co. v. American Straw-Board Co., 65 Fed. 535.]

3. No other compensation to a solicitor is taxable, but such docket fee and such fees for depositions.

4. The provisions of that act in regard to printer's fees, clerk's fees, and witnesses' fees, considered.

[Cited in Spaulding v. Tucker, Case No. 13,-221.]

5. Where witnesses are examined before a master, on an accounting in a suit in equity, and their testimony is afterwards abandoned or given up, or is stricken out or rejected by the master, and the striking out or rejection is sustained by the court, no per diem allowance is taxable for the attendance of such witnesses before the master.

This case, reported in [Cases Nos. 14,195 and 14,196], now came before the court on a motion by the defendants for instructions to the clerk as to the principles which should govern him in the taxation of the costs awarded to the plaintiffs. The question as to the solicitor's fees for depositions arose in regard to oral testimony taken by the master, on the accounting before him. The question in regard to printer's fees arose in respect to the expenditure for printing the testimony taken before the master.

Elisha Foote, for plaintiffs.

William A. Sackett, for defendants.

NELSON, Circuit Justice. The questions raised on this application are to be determined by a reference to the act of congress passed February 26, 1853 (10 Stat. 161).

The 1st section of that act provides, "that,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

in lieu of the compensation now allowed by law to attorneys, solicitors, and proctors," &c., "the following, and no other compensation, shall be taxed and allowed." The same language is used in respect to the compensation of the clerks, marshals, witnesses, commissioners, and printers. There is, also, a provision in the section, that the act shall not be construed to prohibit attorneys, solicitors, and proctors from receiving from their clients such reasonable compensation, in addition to the taxable costs, as may be in accordance with general usage, or may be agreed upon between the parties. The section goes on to say: "Fees of attorneys, solicitors and proctors. In a trial before a jury in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars." This is the highest compensation allowed to the solicitor in a cause; and it can be allowed but once. Dedekam v. Vose [Cases Nos. 3,730, 3,731].

The same section provides: "For each deposition taken and admitted as evidence in the cause, two dollars and fifty cents." This relates to testimony taken out of court, under authority which will entitle it to be read, as evidence, in court, and has no relation to oral testimony taken in court, or before a master. It applies, in cases at common law, where depositions are given in evidence on the trial; and in suits in equity, where depositions are read at the hearing. Stimpson v. Brooks [Case No. 13,454].

The above are the only items in the law relating to compensation to the solicitor; and the statute says that they are "in lieu of the compensation now allowed by law," and that "no other compensation shall be taxed and allowed," and (section 5) "that all laws and regulations heretofore made, which are incompatible with the provisions of this act, are hereby repealed and abrogated."

There is no provision in the act as it respects printers' fees, except in paragraph 5, page 168, which has no application to the present case. The fees of the clerk are so specifically stated in the act, under the head of "Clerk's Fees" (page 163), that no observations in regard to them are necessary.

The provision in regard to witnesses' fees is this (page 167): "Witnesses' fees. For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents per mile for travelling from his place of residence to said place of trial or hearing, and five cents per mile for returning." No per diem allowance should be taxed for the attendance before the master, of witnesses on the part of the plaintiffs, whose testimony was afterwards abandoned or given up, or was stricken out or rejected by the master, where the striking out or rejection has been sustained by the court. It would be unreasonable and against the established rule of taxation, to tax costs in favor of a party for acts or services which were useless or illegal, and which only led to increased expense, and to a waste of the time of the court and of all persons concerned. This refusal to tax, and a taxation in favor of the adverse party, are intended as a check against idle, frivolous, and illegal proceedings before courts and officers concerned in the administration of justice.

With these instructions, I think the clerk will have no difficulty in the taxation of the bill of costs.

[NOTE. The case then came before the court upon a motion for apportionment of costs. Case No. 14,198. A bill of revivor was subsequently filed by the complainant, and the cause brought to a hearing upon pleadings and proofs. The bill was dismissed, with costs. Id. 14,199.]

Case No. 14,198.

TROY IRON & NAIL FACTORY v. ERASTUS CORNING et al.

[10 Blatchf. 223; 6 Fish. Pat. Cas. 85.] [1]

Circuit Court, N. D. New York. Nov. 27, 1872.

COSTS—PATENT CASE.

In the taking of the account of profits in this case, a patent suit, in equity, before the master, the plaintiff greatly exaggerated his claim, and caused a great waste of time, and introduced a large amount of irrelevant evidence, and recovered, in the end, a comparatively small sum. *Held*, that neither party should recover, against the other, any costs or expenses that accrued before the master, embracing the fees of witnesses, the taking and printing of the evidence, and all disbursements before him, but each party should bear his own; and that the compensation of the master, as fixed by the court, should be paid equally by the parties.

[2] [Motion for apportionment of costs. The bill in this case was filed July 10, 1848. A motion was made, on the bill, for a preliminary injunction, and was resisted, on affidavits, and denied. An answer was filed in March, 1849, to which a general replication was put in. The proofs for final hearing were taken in June, 1849. The case was heard thereon, before NELSON, Circuit Justice, in August, 1849. In March, 1850, he rendered a decision dismissing the bill, with costs. [Case No. 14,195.] The plaintiffs appealed to the supreme court, and that court (14 How. [55 U. S.] 193) reversed the decree below, and directed an accounting by the defendants. A decree, in conformity, was made by this court, June 28, 1853, which designated a master pro hac vice, to take the account. He declined to act, and, on October 20, 1853, Reuben H. Walworth, formerly chancellor of the state of New York, was appointed master pro hac vice, in his stead. The taking of testimony before the master was commenced, by the plaintiffs, April 5, 1854. The testimony for the plaintiffs was concluded December 31,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 10 Blatchf. 223, and the statement is from 6 Fish. Pat. Cas. 85.]

[2] [From 6 Fish. Pat. Cas. 85.]

1863. The testimony for the defendants was commenced February 8, 1855, and was concluded June 10, 1864. The printed record of the pleadings and testimony covers 5,328 printed octavo pages. One witness was under examination 195 days, another 136 days, another 133 days, and another 118 days. The report of the master was made in May, 1866. It found that nothing was due from the defendants to the plaintiffs. On exceptions to the report, the court [Case No. 14,196] directed a decree for the plaintiffs for $8,475.09, with interest from March 31, 1849, to the date of the decree, with costs. A decision as to the taxation of the costs in the cause is reported in [Id. 14,197]. The further circumstances of the case are sufficiently set forth in the opinion of the court.] [2]

Elisha Foote, for plaintiffs.
William A. Sackett, for defendants.

NELSON, Circuit Justice. This is a motion founded upon affidavits, and other papers of record, to have the court determine which of the respective parties shall pay the master's fees that have accrued in the cause, or in what way they shall be disposed of; and, further, to instruct the clerk in respect to the taxation of the costs and expenses which have accrued in the proceedings before the said master. The motion is made in pursuance of a reservation in the order of the 16th of June, 1870, in which compensation for the master's services was determined. The reservation is as follows: "But such payment, and this order, shall be without prejudice to the right of the defendants to claim and insist that the whole, or any part, of the expenses of the reference in this suit, or of the said master's compensation and expenses, should be borne by the adverse party, and, also, without prejudice to the right or claim of the said plaintiffs to tax the whole amount, or any part thereof, and, also, the sums heretofore advanced and paid by the said plaintiffs to the said master pro hac vice, against the said defendants."

This has been a most unfortunate case. The decree therein was founded upon an alleged infringement of a patent for making hook-headed spikes by the use of a bending lever, and was rendered against the defendants, with a reference to a master to ascertain the amount of profits due to the complainants, arising out of said infringement. Some eight years have been consumed before the master, in taking an account of these profits. The complainants claimed before him some $500,000 profits, and $240,000 for damages. The master reported that no profits were made by the defendants from the use of the bending lever. The court, on exceptions to this report, modified it, and found due $8,475.09. This exaggerated and extravagant claim, together with the irregular and useless course of proceedings before the master in support of it, or rather, in the endeavor to support it, accounts for the painfully protracted litigation. The books of the defendants were called for by the complainants, and were produced, soon after the examination commenced. These contained an account of all the spikes made during the period of the alleged infringement, and, also, the sales, and prices for which sold. These two elements being ascertained, the third, the cost of manufacturing the spikes, was really the only debatable question before the master, for, when that was found, the amount of profits was a question of arithmetic; and, in respect to the cost of manufacture, it was in evidence, that the defendants manufactured the bars or rods out of which the spikes were made, and which had a market value. This left unascertained and undetermined the mere cost of the work or manufacture, exclusive of the price of the material, to be settled by proofs, and most of the facts were to be found in the books, to enable the master to determine this question. I think, upon the evidence before me, that the question of profits before the master should have been satisfactorily determined in the period of three months, certainly, in six, instead of consuming eight years, in the attempt to enhance and aggravate the amount. This evidence was before Judge Shipman and myself, on the argument of the exceptions of the complainants to the report of the master, and was then very particularly examined. It would extend this opinion to an unreasonable length, to go into an examination of it in detail, with a view to show the irrelevancy and immateriality of the largest portion of it, and that it arose chiefly, if not wholly, out of the line of proofs adopted by the complainants. In this view of the case, it is well settled, upon the cases in equity, that the court will apportion the costs according to its view of the fault of the party or parties, or will give to neither party costs against the other. An apportionment, in this case, from the volumes of proofs taken before the master, would lead to endless labor, and then afford a most unsatisfactory result. I shall, therefore, adopt the other alternative, and hold that no costs or expenses that accrued before the master shall be charged by either party against the other. Each party must bear their own. This disposes of witnesses' fees before the master, the taking and printing of the evidence, and all disbursements before him. Upon the same principles, governing courts of equity, no costs are to be taxed in respect to exceptions to the master's report, as nearly all of them were overruled by the court. I have not looked at other items in the bill of costs before me, nor examined them to see if they are in conformity to the law in this court on the subject of taxa-

[2] [From 6 Fish. Pat. Cas. 85.]

tion of costs. They are left to the taxing officer.

As to the disposition of the moneys advanced by the respective parties to the master for compensation, as determined by this court, the question is not one of taxation. It was originally agreed, at the time of the appointment of the master, that the court should determine his compensation. That was done by the order of the 16th of June, 1870. A previous order had been made, that each party should make advances, equal in amount, to him, as the cause progressed. I understand that these advances have been made, and, if so, on the ground and principles already established in this opinion, as it respects other expenses before the master, these will be equally divided, and, hence, no order will be necessary. But, if one party has advanced more than the other, he must be reimbursed, to the amount of the excess.

[The complainant filed a bill of revivor, and the case came on for a final hearing upon pleadings and proofs, which bill was dismissed, with costs. Case No. 14,199.]

Case No. 14,199.

TROY IRON & NAIL FACTORY v. WINSLOW et al.

[11 Blatchf. 513; 1 Ban. & A. 98.] [1]

Circuit Court, N. D. New York. March 17, 1874.

PARTNERSHIP—DEATH OF ONE—BILL OF REVIVOR—PATENTS—DAMAGES FOR INFRINGEMENT—PROFITS.

1. A suit in equity was brought against three persons doing business as copartners, and, as such, carrying on a manufactory, to restrain them from using a machine for which the plaintiff held letters patent, and to compel the defendants to account for and pay to the plaintiff the profits realized by the defendants from the use of said machine at said manufactory. The plaintiff had a decree for such injunction and account. The accounting was had, the master's report thereon was filed, reporting an amount of profits as due to the plaintiff, exceptions thereto were filed and argued, the opinion of the court on such exceptions was filed, but no final decree had been entered. Then one of the defendants died, leaving a will appointing an executor. The plaintiff then filed a bill of revivor, praying the revival of the suit against the executor. *Held*, that the profits reported constituted a debt due by the copartnership to the plaintiff;

2. The suit did not abate by the death of one of the copartners;

3. It not being alleged that the surviving copartners were insolvent, or that the copartnership assets were not sufficient to satisfy the plaintiff's demand, the bill of revivor must be dismissed.

4. No suit at law or in equity can, in this country, be sustained against the representatives of a deceased copartner, or to charge his estate for the copartnership debts, if the surviving partners are solvent and the assets of the firm are sufficient.

5. Cases in England, holding apparently a contrary doctrine, noticed.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here compiled and reprinted by permission.]

In equity.

Elisha Foote, for plaintiff.

Amasa J. Parker, for Erastus Corning, Jr., executor.

WOODRUFF, Circuit Judge. A suit was begun, and has hitherto been prosecuted, against Erastus Corning, John F. Winslow and James Horner, doing business as copartners, and, as such copartners, being the proprietors of, and carrying on their business at, what was known as the Albany Iron Works, for an injunction to restrain the use by them of a machine for which the complainant held letters patent theretofore granted to Henry Burden, and to compel the said defendants to account for and pay to the complainant the profits realized by the defendants from the use of the said machine by them at the works aforesaid. The complainant had an interlocutory decree therein, declaring the rights of the complainant, awarding an injunction, and decreeing that the defendants account for such gains and profits. [Case No. 14,195.] For the purposes of such accounting, a reference was ordered, to ascertain the amount of such gains and profits, such accounting was had, and the master's report filed. Exceptions to such report were filed and were argued, and the opinion of the court upon the exceptions has been filed [Id. 14,196], but no final decree has been entered. Afterwards, Erastus Corning, one of the defendants, died, leaving a last will and testament, wherein he appoints Erastus Corning, Junior, executor. Thereupon, the complainant, preparatory to a final decree, and with a view to an appeal therefrom, moved this court that the said executor be substituted as defendant in the place of his testator, and that the cause proceed against such executor, and the other defendants in the suit, "in the same manner that it would proceed, were the said Erastus Corning, deceased, still living." That motion was denied. The complainant has now filed a bill of revivor, setting out the proceedings in such suit, alleging its abatement by the death of the said Erastus Corning, and praying that the same be revived against the said executor, &c. The executor has answered, and, by stipulation, the parties have agreed upon certain facts, and the case has been brought to a hearing upon pleadings and proofs.

Upon consideration of the facts disclosed by the pleadings and proofs, in substance as above recited, I adhere to the views which governed the decision of the motion heretofore made in the principal cause. The theory of the case made by the complainant, and by the proofs, &c., is, that the original defendants, as copartners, by the unlawful use of the invention, the exclusive right to the use of which was vested in the complainant, have realized gains and profits which rightfully and in equity belong to the complainant; that, in equity, they were liable to be treated as trustees, receiving those profits to the use and for

the benefit of the complainant; and that the defendants were, therefore, in equity, debtors of the complainant to the amount of such gains and profits. No question of damages sustained by the complainant by the wrong done arises in such case. When the original bill was filed, and when the decretal order was made, the law did not permit the recovery of damages in such a suit. To recover damages, a patentee must go to a court of law, treat the defendants as tort-feasors, and establish his damages, which, being proved, might be recovered, whether the defendants had made any profits by their infringement of the patent or not. The subsequent alteration of the law by a statute which enables the complainant in a suit in equity to recover damages, does not apply to this case nor affect the present litigation. The original defendants then, as copartners in the business of manufacturing, &c., have received gains and profits, for which they have been required to account to the complainant, and for which he is entitled to ask a final decree. Those gains and profits constitute a debt due by the copartnership to the complainant. The liability is, in equity, in its nature, ex contractu, and a copartnership liability or obligation. On the death of Erastus Corning, his two copartners survived him. The copartnership property became, on such decree, vested in them, and the copartnership liabilities devolved upon them, as survivors. The suit, therefore, did not abate. Nothing was necessary but a suggestion of the death of Erastus Corning, and the suit would thereupon proceed against the others. This is a familiar elementary principle, and there is nothing in an equity suit founded on letters patent, and a prayer for an account of the profits arising from the infringement thereof, which withdraws this case from its operation. The fact, that the infringement was a tortious act, and the original defendants were tort-feasors, and might have been so treated, will not help the complainant. He did not so treat them, and, so far as the tortious nature of the defendants' acts gave character to the defendants or their liability, the inference is the other way. As tort-feasors, they may have been severally liable, and, being so, it would be even more plain that the suit did not abate, and that the survivors are separately liable. There is no allegation or claim that those survivors are not solvent, or that the copartnership assets are not entirely sufficient for the satisfaction of the complainant's demand. Some modern English cases have held that a creditor of a copartnership may proceed in equity against the survivors and the representatives of a deceased copartner, in the same suit, for the recovery of a copartnership debt, and indicate that this may be done without first resorting to the copartnership fund or the surviving partners, and without showing that they are insolvent. See Wilkinson v. Henderson, 1 Mylne & K. 582; Devaynes v. Noble, 2 Russ. & M. 495. In other cases, the creditor was held entitled to pursue the estate of the deceased where the survivors had become bankrupt, and without reference to the state of the accounts between the partners or the fund in the hands of the assignees of the bankrupt survivors. See Devaynes v. Noble, 1 Mer. 529; Vulliamy v. Noble, 3 Mer. 592. The case of Wilkinson v. Henderson is pointed in its declaration that, in a suit in equity by a creditor of the copartnership against the representatives of a deceased partner and the survivor, the complainant is entitled to satisfaction out of the assets of the deceased, although it be not shown that the surviving partner is insolvent; and it was held that, in that suit, no decree could be made against the surviving partner, but against the assets of the deceased only, because the liability of such survivor was at law, and, when that was the case, equity could not even render a decree against such survivor and the representatives of the deceased jointly, but the decree must be against the estate of the deceased alone. The decision was by the master of the rolls, and his opinion does not, it seems to me, very satisfactorily meet the grounds upon which the contrary doctrine rests. The copartnership property is the primary fund for the payment of the copartnership debts. That fund has passed to, and the title therein has become vested in, the survivors, and, in their hands, it is held, in equity, in trust for the payment of those debts. At law, confessedly, the representatives of the deceased are not liable at all, and the survivors are solely liable, and there is, in ordinary cases, no reason for going into equity until legal remedies have been exhausted, or, at least, until it is shown that they will be unavailing; and this latter consideration has the same force, in an original suit in equity, to charge the copartnership with a debt, as if the original remedy was at law. Non constat, that a decree against the survivors, and, through them, to reach the fund presumptively in their hands, will not be completely effectual. They hold, and are legally entitled exclusively to hold, in this case, the very fund which the complainant seeks to recover. No case is cited showing that the doctrine somewhat loosely, as I think, indicated in the English cases above referred to has been adopted or followed in this country, and, so far as I have observed, the rule is held otherwise and in conformity with what I have already above stated.

Where it is shown that the survivors are insolvent, then, indeed, the court of equity will entertain a bill to charge the separate estate of the deceased partner, and, under statutes which limit the time for the presentation of claims to an estate in course of settlement and distribution before a surrogate or in courts of probate, and which statutes authorize and require that all claims be so presented, they may, perhaps, be received and allowed, lest they be barred pending a litigation with the survivors. Camp v. Grant, 21 Conn. 41. But, waiving such possible quali-

fications, it is held that the creditors of the copartnership have no claim, even in equity, to payment out of the estate of the deceased partner, unless the surviving partners are insolvent, nor even then, as held in some cases, and by law-writers, though not without conflict of decision, until the separate creditors of the deceased are satisfied. The United States bankrupt law (section 36) makes a like provision. Surely this case is not to be incumbered by an endeavor to marshal the assets of the deceased copartner, the defendants' testator. Thus, in Trustee, etc., v. Lawrence, 11 Paige, 80, the chancellor notices that there are some recent cases in England in conflict with the decisions in this country, and holds that a creditor of a copartnership cannot file a bill in equity against the representatives of a deceased copartner without showing that the survivors are insolvent, or showing some other ground of necessity for such a proceeding. The case of Wilder v. Keeler, 3 Paige, 167, proceeds upon the like principle, and upon the necessity, as the case may be, of marshalling the assets in favor of creditors of the separate estate of the decedent. The case of Trustees, etc., v. Lawrence, was considered further on appeal to the court of errors. 2 Denio, 577. The recent English cases were reviewed, and the decree of the chancellor was unanimously affirmed. Numerous cases in this country are cited to show that the doctrine upon which alone the decision seems to have been placed in England, viz., that the liability of copartners is joint and several, is not sustained in this country, so as to warrant any such conclusion as was drawn therefrom. That their liability is not solely joint in such sense that the death of a copartner terminates his liability, so that his estate can, in no event, be charged, must be conceded, but it is not several in such sense that a several action, either at law or in equity, can be maintained against his representatives on mere proof of a copartnership liability. Thus, in Sturges v. Beach, 1 Conn. 509, it is said, that it is only on the failure of the survivors that the estate of the deceased can be made liable in equity. In Alsop v. Mather, 8 Conn. 584, apparently overlooking some of the cases already decided in England, it is said, that "there is no case in England or in this country, in law or in equity, of pursuing the effects of a deceased partner while the surviving partner is solvent." The same rule is affirmed in the opinion of the court in Filley v. Phelps, 18 Conn. 294. The cases of Lang v. Keppele, 1 Bin. 123, Caldwell v. Stilleman, 1 Rawle, 212, and Hubble v. Perrin, 3 Ohio, 287, are cited to the same effect. The cases of Van Reimsdyk v. Kane [Case No. 16,871], by Mr. Justice Story, and Pendleton v. Phelps [Id. 10,923], in the circuit courts of the United States, affirm the same rule, and so does the case of Bennett v. Woolfolk, 15 Ga. 213. In the opinion of the court in Bloodgood v. Bruen, 4 Seld. [8 N. Y.] 362, 371, the same doctrine is positively stated, and it is declared that, until the insolvency of the copartner, no cause of action exists against the estate of the deceased, and that it is by such insolvency the cause of action accrues against such estate, and, therefore, that the statute of limitations does not begin to run in favor of the estate until the cause of action has so accrued. So late as the year 1858, the subject was again considered in the court of appeals of this state, after the enactment of our Code of Procedure, which, however, has no application to suits in equity in the federal courts, under the 5th section of the act of congress of June 1st, 1872 (17 Stat. 197). In that case, the court again review the cases in England, above adverted to, and collate most of the cases in this country above mentioned, and hold, that the personal representatives of a deceased partner cannot be joined as a party defendant with the surviving partner, in an action for a partnership debt, where the complaint does not show the complainant's inability to procure satisfaction from the survivor. The bill herein must be dismissed, with costs.

Case No. 14,200.

In re TROY WOOLEN CO.

[5 Ben. 413:[1] 6 N. B. R. 16.]

District Court, N. D. New York. Nov. 17, 1871.

BANKRUPTCY—MOTION FOR REHEARING—LACHES.

1. A reference was ordered in this proceeding, for the purpose of allowing the claim of C. V. & Co., a creditor, to be contested. The report of the referee, fixing the amount of the claim, was filed, and exceptions to the report were filed by a bank, which was also a creditor, and by the assignee. These exceptions were heard, and on July 13th, 1871, an order was made confirming the report, and the bank and the assignee were informed thereof; and on July 15th the bank endeavored to obtain a reversal of the order by a petition of review to the circuit court, which was dismissed. The assignee also endeavored to obtain a reversal of the order, by an appeal to the circuit court, but his appeal was too late, and was also dismissed. He then applied to this court for a reargument or rehearing on the report of the referee, in order by that means to obtain a review of the decision. *Held*, that, even if the court had the power to grant the application, the circumstances of the case were not such as to warrant it in granting the application.

2. The cases which hold that a court should not do, indirectly, what it has no power to do directly, should be adhered to, except, perhaps, in such extraordinary and extreme cases as ought to be considered as exceptions to an almost inflexible and absolute general rule.

This was an application by the assignee of the bankrupt for a reargument or rehearing on the report of a referee, sustaining claims of Cooper, Vail & Co., of New York, against the bankrupt, to the amount of $67,000, and the exceptions to that report filed by the assignee, and by the First National Bank of Troy, a creditor of the bankrupt. The decree confirming the report on the first hearing was filed July 13th, 1871, and the

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

bank and the assignee were, on or about the 15th July, informed thereof. The bank attempted to obtain a reversal of that decree by a petition of review to the circuit court, and the assignee, on the request of a portion of the creditors, took proceedings for its reversal by an appeal to the circuit court, but too late to make his appeal effectual; and both the petition and the appeal were dismissed by the circuit court.

[For prior proceedings, see Cases Nos. 14,201 and 14,202.]

HALL, District Judge. The present application, though in form an application by the assignee for a reargument or rehearing, is, in substance and fact, an application to this court in the interest of the other creditors of the bankrupt, who oppose the claim of Cooper, Vail & Co., for an order vacating the order or decree allowing the claim of Cooper, Vail & Co., that it may, on being re-entered, be subject to an appeal. It is an application to the court to do, in this indirect manner, what, it is conceded, it cannot directly do,—that is, to extend the time fixed by statute within which an appeal can be allowed; for there is not even a pretence that it is hoped upon a reargument to show that this court, in its former laborious and careful examination of the case, overlooked or misapprehended any portion of the evidence having such materiality as would by any possibility change its conclusions. The application is based upon the fact that the counsel of the assignee and the bank were mistaken in their views of the law and practice of the bankruptcy courts, in respect to the modes of proceeding to obtain the desired review; and it must be conceded that their mistake, in regard to the right of the creditor to be heard upon petition for review, should not be attributed to any unusual want of care, diligence, or learning. In respect to the time and manner of taking an appeal by the assignee, there was certainly less, and perhaps little, if any, doubt; but the delay in bringing the appeal probably resulted, in part at least, from the mistake which was made in respect to the right of the bank to obtain a review of the case upon its own petition, and the consequent intention of the assignee to leave the further litigation of the claim of Cooper, Vail & Co. to the bank. The delay is, then, to some extent, excused, and this has made it necessary to give the application under consideration a careful hearing and a deliberate and somewhat elaborate examination, the result of which, with some of the reasons which have influenced the decision, will now be stated.

It was insisted by the counsel of Cooper, Vail & Co. that the court had no authority to grant the motion, and that, if it had such authority, the motion ought,—according to well-established rules of decision, and upon controlling authority, to be denied. After an examination of the cases of Wait v. Van Allen, 22 N. Y. 319; Caldwell v. Mayor, etc., of Albany, 9 Paige, 572; Bank of Monroe v. Widner, 11 Paige, 529; Humphrey v. Chamberlain, 1 Kern. [11 N. Y.] 274; McMicken v. Perrin, 18 How. [59 U. S.] 507; Cameron v. McRoberts, 3 Wheat. [16 U. S.] 591, I should hesitate long before granting this motion, even if I could reach the conclusion that there was serious doubt of the legal validity of the claim of Cooper, Vail & Co., and that, aside from the strict legal rights of the parties, their equities were equal; for the cases, which hold that a court should not do indirectly what it has no power to do directly, should be adhered to, except, perhaps, in such extraordinary and extreme cases as ought to be considered as exceptions to an almost inflexible and absolute general rule.

The case of Jellinghaus v. New York Ins. Co., 5 Bosw. 678, is probably a stronger case, or one of more weight and authority, in favor of the petitioner than any other cited upon the argument. In that case, exceptions had been taken by the defendant at the trial, and a bill of exceptions and amendments had been proposed and settled; but in the mean time a judgment had been regularly entered, so that the right of the defendant to a review at general term had been cut off. A motion to set aside the judgment was made for the purpose of enabling the defendant to be heard on his bill of exceptions. It was shown that the defendant's attorney acted in perfect good faith, and at no time suspected there was any doubt of his right to be heard on the exceptions until long after that right was barred; and the attorney for the plaintiff seems not to have insisted upon a denial of the motion, except from a sense of duty in opposition to his inclination to relieve his professional brother from the consequences of his mistake. The report states that "the position taken by the plaintiff's attorney was, that although he was willing to oblige the defendant's attorney in every way possible consistent with his duty to his client, yet that judgment had been regularly entered, and notice thereof given, the time to appeal had elapsed, and the case and exceptions could not be heard, and he was not at liberty and had no power to waive the rights which his client had thereby acquired." And the judge who delivered the opinion says, "The plaintiff's attorney, in declining to waive the default now, does so only because he supposes he has not the power, authority, and right to do it." And, in deciding that "as no injury can result to any party from granting the relief sought, while possibly the ends of justice may be promoted, the defendants should be permitted to be heard;" the learned judge immediately added, "At the same time I deem it proper to say that to justify the granting of such relief, the case should be one of unquestionable mistake, and evincing perfect good faith, and should be mer-

itorious; and even then to grant such relief is going to the extreme verge of judicial discretion."

Even under the doctrines of this case, this motion should be denied. It is fair to presume, from the papers presented on the hearing, that the assignee did not intend or expect to appeal until he was urged and induced to attempt to do so by the creditors, under whose influence much expensive and unreasonable litigation has already been had in this case, to the great injury and loss of the parties interested; and this,—and not any mistake in regard to the law and practice regulating an appeal by him,—was the main, if not the sole, cause of the delay which resulted in the failure to take and perfect his appeal in time.

The application is not meritorious to any such extent as to induce a court to go to the extreme verge of judicial discretion. The assignee and the bank have had a laborious and expensive examination and litigation of the questions involved, before a very careful and competent referee; that referee has made a report, evidencing full, careful, and able examination and consideration, and fully sustaining the claim which it is now sought to overthrow. Numerous exceptions were taken to this report, and, after a full argument, and a careful and deliberate examination of the questions involved, this court confirmed the report of the referee. Scarcely a doubt of the justice or of the strictly legal validity of the claim of Cooper, Vail & Co. was then entertained; and the arguments made and papers submitted on the hearing of the motion for a rehearing, have strongly confirmed instead of weakening the confidence then felt in the justice and propriety of the referee's decision. It is, of course, possible that another judge might reach a different conclusion; and it is evident that the opposing creditors, in view of the fact that their own claims are very large, and that the claim of Cooper, Vail & Co. amounts to about one-third of the aggregate amount of the debts proved against the Troy Woolen Company, are quite willing, if the expense of the litigation can be thrown upon the fund in the assignee's hands, so that one-third must, in effect, be borne by Cooper, Vail & Co., even if their claim is established, to speculate further upon the possible chances and proverbial uncertainty of litigation.

But if there can be a possible doubt of the strict legal right of Cooper, Vail & Co., the equities of the case are not, in my judgment, in the slightest degree doubtful. To demonstrate this will not be attempted; to do so would require not only a full review of the evidence and exhibits before the referee, but also an elaborate statement of what has appeared before this court upon various applications made or opposed under the influences which have induced the assignee to make this application The probable origin and purpose of the Gale mortgage; the application in respect to the payment of $15,000 on that mortgage by the assignee; the petition for the sale of the premises mortgaged immediately afterwards, and their sale and conveyance, to the trustee of a combination of creditors, for scarcely a tithe of the value put upon them by the assignee in his sworn petition for authority to make payment upon the Gale mortgage; the strenuous opposition to the motion to set the sale and conveyance aside, and the appeal from the order setting aside the sale—a sale, the circumstances of which were such as to justify the circuit judge in stating in his written opinion upon the appeal that he thought it would "be a gross discredit to the administration of justice if the sale of the bankrupt's estate, made as was the one now in question, and at so great a sacrifice that real estate, mills, water-power and machinery of great value, have in the administration of the assignee, been rendered worse than valueless, should be permitted to stand," and many other facts and circumstances which might be stated, do not commend to the favor and discretion of this court an application for leave to use the assignee for the purpose of further unjust litigation at the expense of the bankrupt's estate, and to the certain and protracted postponement of any dividend to the creditors of the bankrupt.

The motion for a reargument or rehearing, or for an order vacating the former order and decree of this court is denied.

[The cause came up again before the court upon exceptions to the report of the referee, whereupon the court ordered the bank to pay the creditors their taxable costs and disbursements in the proceedings, and the costs, fees, and expenses of the referee and references. Case No. 14,203.]

Case No. 14,201.

In re TROY WOOLEN CO.

[8 Blatchf 465,[1] 4 N. B. R. 629.]

Circuit Court, N. D. New York. May 19, 1871.

BANKRUPTCY — SALE BY ASSIGNEE — NOTICE OF SALE—CREDITORS—RESALE.

1. The assignee in bankruptcy of a manufacturing corporation having sold, at auction, in one parcel, for a greatly inadequate price, two separate mills, each completely furnished with machinery, a hotel, a store, twenty dwelling houses, each susceptible of separate occupation, and sundry vacant lots, not necessary to the use of the mills, subject to a mortgage on the whole, and the property having been purchased, at such sale, by a combination of certain creditors of the corporation, while other creditors were ignorant of the time and place, and even of the fact, of the contemplated sale, and such ignorance was known and acted upon by the agent for the purchasing combination, the sale was set aside, on the application of such other creditors.

2. The facts, that such other creditors had not made formal proof of their debt, and even that the claim of such other creditors was disputed, were *held* to be of no importance, on such application.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

3. Provisions proper in the order for a resale, suggested.

4. The creditors who applied to set aside the sale, having, in such application, offered to bid, on a resale, a specified sum more for the property than it was sold for, were *held* to be bound to fulfil their order.

In bankruptcy. Petition in review.

Edward F. Bullard, for petitioners.
John Ganson, opposed.

WOODRUFF, Circuit Judge. It would, I think, be a gross discredit to the administration of justice, if the sale of the bankrupts' estate, made as was the one now in question, and at so great a sacrifice, that, real estate, mills, water power, and machinery of great value, have, in the administration of the assignee, been rendered worse than valueless, should be permitted to stand. Without entering fully into the details, I have no doubt of the power of the district court over the subject. Nor have I any less doubt that the discretion confided to the assignee, in regard to the manner of the sale, was greatly misused. No sufficient reason appears, in the proofs, for the sale of two separate mills, each completely furnished with machinery, a hotel, a store, 20 dwelling houses, each susceptible of separate occupation, and sundry vacant lots, not necessary to the use of the mills, at auction, in one parcel. The suggestion, that the whole was mortgaged, may furnish a reason for selling the property clear of the mortgage, and paying the mortgage debt out of the proceeds, but it seems to me quite obvious, that, had there been no combination among the creditors to purchase the whole, in the expectation, that, if offered in gross, subject to the mortgages, it would bring but a small amount, such a sale would not have been seriously contemplated.

It is possible, that the technical formal requisites to a regular sale were observed, but it is reasonably clear, from the proofs, that the ignorance of the petitioners, Cooper, Vail & Co., of the time and place, and even of the fact of the contemplated sale, was known, contemplated and acted upon, with a view to a purchase of the property by the trustee for the other creditors, at greatly less than its value; and, while I would not assert, that, under no circumstances, may a portion of the creditors unite in a purchase for the joint benefit of themselves, it ought, at least, to appear, that the sale has been so conducted, that no prejudice has come to the other creditors.

The suggestion, that the claim of Cooper, Vail & Co., as creditors, is disputed, and that they have not made formal proof of their debt, was properly held to have no weight upon the motion. They were properly before the court, petitioning for the protection of whatever may be found due to them. That amount will be rightly otherwise settled, and could not be settled on this motion.

The order appealed from must be affirmed, and the district court will be left to make such further order, regulating the resale and the notice thereof which should be given, as may be proper. The sale and conveyance being set aside, a resale can be had, and, out of the moneys in the hands of the assignee, and the proceeds of the resale, there will be no difficulty in refunding to the late purchaser the amount of his bid, and such expenses as he has reasonably and properly incurred in the preservation of the property; and his reconveyance to the assignee, or the new purchasers, will be proper, though, probably, not indispensable. The petitioners, Cooper, Vail & Co., should, however, be held to their offer to bid ten thousand dollars more for the property, and no resale should be made unless they will commence the bidding by that advance on the former sale, unless the district court, in giving further directions touching the resale, should deem it most advantageous to sell the property in parcels, in which case such a bid might be impracticable. The petitioning creditors will, however, in such last case, appreciate the responsibility they have assumed, in asking that the sale be set aside upon their offer of the advanced price, and will be bound to fulfil their pledge.

[For subsequent proceedings in this litigation, see Cases Nos. 14,200, 14,202, and 14,203.]

Case No. 14,202.

In re TROY WOOLEN CO.

[9 Blatchf. 191.] [1]

Circuit Court, N. D. New York. Oct. 11, 1871.

BANKRUPTCY—REVIEW—RIGHT OF OBJECTING CREDITOR TO CONTEST CLAIM.

A claim proved in the district court against the estate of a bankrupt was contested by the assignee and a creditor, and was allowed by that court. The objecting creditor then petitioned this court, under the 2d section of the bankruptcy act of March 2d, 1867 (14 Stat. 518), to review the decision of the district court allowing the claim, and to disallow the claim: *Held*, that the petition must be dismissed; that the 2d section of the act confers jurisdiction on this court to review, in the manner prescribed by such section, the decisions of the district court, only in cases where special provision is not otherwise made by the act for the review of such decisions; that the 8th section of the act makes provision for a review of the decision of the district court allowing the claim of a creditor, by authorizing an appeal to this court, by the assignee, from such decision; and that, although the 22d section gives to a creditor the right to institute an investigation into the validity of the claim of another creditor, yet, when an investigation has been had, and a decision as to the validity of the claim has been made by the district court, the right of the objecting creditor to contest the claim ceases, and any further proceeding to review the decision must be taken by the assignee, by appeal, under the 8th section.

[Cited in Re Boston, H. & E. R. Co., Case No. 1,677.]

In this case, the firm of Cooper, Vail & Co. proved against the estate of the bank-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

rupts, in the district court, a claim amounting to $67,252.22, for a balance due on account of advances made by them to the bankrupts, on consignment of manufactured goods. This claim was contested by the assignee and by an objecting creditor. On a reference to ascertain its validity, the referee reported in favor of it. The assignee and the objecting creditor filed joint exceptions to the report, and the district court overruled the exceptions, and confirmed the report. The objecting creditor then petitioned this court, under the 2d section of the bankruptcy act of March 2d, 1867 (14 Stat. 518), to review the decision of the district court allowing the claim, and to disallow the claim. Cooper, Vail & Co. now moved to dismiss such petition.

[For prior proceedings in this litigation, see Case No. 14,201].

William E. Curtis and James S. Stearns, for the motion.

Amasa J. Parker and Edward F. Bullard, opposed.

THE COURT (WOODRUFF, Circuit Judge) held, that the petition must be dismissed; that the 2d section of the act confers jurisdiction on the circuit court to review, in the manner prescribed in such section, the decisions of the district court, only in cases where special provision is not otherwise made by the act for the review of such decisions; that the 8th section of the act makes provision for a review of the decision of the district court allowing the claim of a creditor, by allowing an appeal to the circuit court, by the assignee, from such decision; and that, although the 22d section gives to a creditor the right to institute an investigation into the validity of the claim of another creditor, yet, when an investigation has been had, and a decision as to the validity of the claim has been made by the district court, the right of the objecting creditor to contest the claim ceases, and any further proceeding to review the decision must be taken by the assignee, by appeal, under the 8th section.

[See 20 Wall. (87 U. S.) 171. For subsequent proceedings in this litigation, see Cases Nos. 14,200 and 14,203.]

Case No. 14,203.

In re TROY WOOLEN CO.

[8 N. B. R. 412.] [1]

District Court N. D. New York. 1873.

BANKRUPTCY — SET-OFF — COSTS IN CONTESTING VALIDITY OF CLAIM—AGENCY.

1. Where a creditor of a bankrupt, knowing him to be in failing circumstances, agrees to open a new account, irrespective of the old indebtedness, and to account for the proceeds of goods sent him for sale, by turning over the cash or notes received therefor, the creditor cannot, after the petition is filed, set off the amount due by him on the new account against the amount due him on the old account.

2. Where the assignee in bankruptcy, at the instance and request of one creditor, contests the validity of the claim of a second creditor, and the cause is decided adversely to the assignee, the creditor at whose instance the proceedings were instituted will be required to pay all the costs of the proceeding, and the creditor whose claim is thus wrongfully contested may have execution therefor.

3. A party dealing with an agent may resort to the principal to compel performance of the agreement of the agent, unless the contract was made exclusively on the credit of the agent.

This case came before the court upon the joint exceptions of Shepard Tapen, assignee in bankruptcy of the Troy Woolen Company, and the First National Bank of Troy, a creditor of said bankrupt, which exceptions were filed to the report of Worthington Frothingham, Esq., to whom, upon the petition of the said bank, it had been referred, to take the proofs and accounts touching the claim of Cooper, Vail & Co., against said bankrupt, and to hear and determine the legality and amount of such claim, and report his conclusions to the court. The referee, after stating and reporting the facts found by him, reported that on the 28th day of October, 1869, the bankrupt was indebted to Cooper, Vail & Co. in the sum of sixty-seven thousand and twenty-nine dollars and eighty-one cents; and on the 30th day of June, 1870, in the sum of two hundred and twenty-two dollars and forty-one cents, and also that under an agreement referred to in said report, made on the 14th day of September, 1869, and the sales and transactions by virtue thereof, Cooper, Vail & Co. became, on the 10th day of September, 1870, indebted to the creditors of the bankrupt in the sum of nineteen thousand and eighty-four dollars and forty-three cents. To this report twenty-one exceptions were filed by the assignee and the First National Bank of Troy; and a hearing was had upon the report and exceptions, and the testimony, exhibits, books of account and other evidence returned by the referee. The claimants, Cooper, Vail & Co., filed no exceptions to the report. The amount of the claim of Cooper, Vail & Co. was not disputed, but the question in the case was whether they were creditors of the Troy Woolen Company, or were solely creditors of Knowlson & Morgan; the dispute arising from the failure of both Knowlson & Morgan and Cooper, Vail & Co. to keep distinct in their various transactions out of which this indebtedness arose, the difference between the Troy Woolen Company, of which Knowlson & Morgan individually were the sole stockholders, trustees and officers, and the commercial co-partnership of Knowlson & Morgan. An immense mass of evidence was introduced on this question. The evidence established, in the opinion of the judge, that the corporation, the Troy Woolen Company, received the benefit of the advances made by Cooper, Vail & Co., and that Cooper, Vail & Co. did not intend,

[1] [Reprinted by permission.]

in making these advances, to rely exclusively on the credit of the commercial firm of Knowlson & Morgan. Previous to the commencement of proceedings in bankruptcy the Troy Woolen Company had been for some time under the management of a committee of its creditors, and Cooper, Vail & Co. had acted as their agents in the sale of its products in the city of New York, having agreed that "they would receive productions of the Troy Woolen Company, and treat and handle the same as a special and independent account, and in settlement for sales would turn over the cash or the notes received, with their endorsement," and it was under this agreement that they became indebted in the sum of nineteen thousand and eighty-four dollars and forty-three cents, above stated, to the creditors of the bankrupt (the Troy Woolen Company), for which sum actions were then pending in the state court by the committee of the creditors, and in the United States court by the assignee in bankruptcy of the Troy Woolen Company.

[For prior proceedings in this litigation, see Cases Nos. 14,200–14,202.]

HALL, District Judge. The referee has found, and, I think, properly, upon the evidence, that Cooper, Vail & Co. gave credit to the corporation and not to Knowlson & Morgan exclusively, and the corporation is therefore liable for the amount of their claim. Whether Knowlson & Morgan are not also liable it is not necessary now to decide. That the party dealing with an agent has a right to resort to his principal to compel the performance of an ordinary or verbal contract made by the agent for the benefit and by the authority of his principal, unless the credit was knowingly given exclusively to the agent, was well settled; and this, though the agent contract in his own name, without disclosing his principal, and the other party supposes the agent to be acting for himself only, and it makes no difference that the contract is in such form that the agent is also personally liable. Story, Ag. (6th Ed.) §§ 154, 160a, and notes 161, 266, 270, and particularly sections 444–446a, and notes, and cases cited; Mechanics' Bank v. Bank of Columbia, 5 Wheat. [18 U. S.] 326; Brockway v. Allen, 17 Wend. 40; Bank of Columbia v. Patterson's Adm'r, 7 Cranch. [11 U. S.] 299; Randall v. Van Vechten, 19 Johns. 65; Pentz v. Stanton, 10 Wend. 270, 276. The exceptions to the referee's report are therefore overruled, with costs, and the claim of Cooper, Vail & Co. is allowed at the amounts reported by the referee, subject, however, to such order and disposition as may be made in respect to the claim set up by the assignee against Cooper, Vail & Co. for the balance due for goods consigned under the agreement between Cooper, Vail & Co. with a committee of the creditors of the Troy Woolen Company. It may be that this agreement will be attacked and set aside by some creditor of the company who was no party to this arrangement, but creditors who were parties to the arrangement are probably estopped from alleging its invalidity. As between the parties to the agreement, Cooper, Vail & Co. are in equity to be held to be trustees for all the creditors, so far that they cannot set off the balance due from them on this special account against the general balance due them from the corporation; and they will be paid no dividends on the claims now allowed, until such dividends equal the amount of the balance due from them on the special account. The proceedings in opposition to the claim of said Cooper, Vail & Co. having been instituted by the First National Bank of Troy, and the reference ordered upon its petition that bank will be ordered to pay Cooper, Vail & Co. their taxable costs and disbursements in these proceedings, and the costs, fees and expenses of the referee and references herein, within twenty days after the taxation thereof, on due notice after the entry of the decree or order herein, and that in case of a failure to pay the same an execution in the nature, and substantially in the form, of a writ of fieri facias, issue for the collection thereof.

TRUAX (MERCHANTS' NAT. BANK OF HASTINGS v.). See Case No. 9,451.

TRUAX (TUTTLE v.). See Case No. 14,277.

TRUESDALE (SUYDAM v.). See Case No. 13,656.

TRUESDELL (UNITED STATES v.). See Case No. 16,543

Case No. 14,204.

TRUESDALE v. YOUNG.

[Abb. Adm. 391.] [1]

District Court, S. D. New York. Jan., 1849.

SEAMEN — WAGES — PILOT — CUSTOM ON HUDSON RIVER—REPRESENTATIONS BY LIBELLANT.

1. Whether, under the established usage among steamboats plying upon the Hudson river, the mere hiring of a pilot at monthly wages, effected prior to the commencement of the season of navigation, carries with it an implied engagement that the employment shall continue throughout the entire season,—query?

2. Whether such engagement could be implied where the hiring was effected after the season was partly over,—doubted.

3. Where, in the case of a contract for services in which no definite term of service is expressed, there is proof that the party claiming to have been hired as pilot represented the engagement was terminable at his option, this affords a strong presumption that it was terminable, also, at the option of the other party.

This was a libel in personam, by Verdine Truesdale against Jacob Young, to recover wages as second pilot on board the steamboat Oswego. The libel stated, that in May,

[1] [Reported by Abbott Brothers.]

1848, the respondent, then being in command of the steamboat Oswego, engaged in towing between New York and Albany, hired libellant to serve as second pilot on the boat, at the wages of forty dollars a month and board; that by such engagement the libellant became hired for the remainder of the season,—that is, until January 1, 1849; and that he was unjustly discharged September 1, 1848. He claimed to be entitled to wages for the remainder of the season, including board, amounting to $228. The answer of respondent set up as a defence, that the employment was merely temporary, and during the consent of both parties. That libellant was a connection of his through the marriage of relatives, and was, as he had understood, destitute of employment and means of support; that libellant applied to him for temporary employment until he could find a situation; that he took libellant into the employ of the boat for so long, only, as his services should be required,—the libellant being also under no obligation to remain longer than he chose,—and that he dismissed libellant, September 1st, because he did not consider him competent to perform pilotage service in the fall months, during which the difficulty of the navigation is increased. Upon the trial, January 3, 1849, it appeared that the libellant was employed in May, 1848, and discharged September 1st, following. It also appeared that he had meanwhile made some efforts to obtain other employment, and had expressed some intention of leaving the Oswego. It did not appear that the engagement of libellant was definite as to time. But to show that it was an implied engagment until the close of the season, the libellant relied upon evidence of a usage on the Hudson river, in steamboat navigation, that pilots employed at monthly wages were understood to be employed for the entire season. The proper construction of the contract between the parties, in view of this usage, was the principal question in the case, and the chief evidence in reference to the usage was as follows: Edward L. Van Buren, testified: "I was first pilot on board the Oswego during the season of 1848. I have followed the business of pilot on the Hudson river for twenty years. The employment of a pilot on the river is usually considered to be a hiring for the season; that is the custom of steamboats upon the river. The season ends January 1st. It is the custom of the tow-boat lines to employ first officers for the entire season of ten months. I am not employed by the season." John Van Arsdale: "My business is that of pilot upon Hudson river steamboats. The custom upon the river is to hire pilots for the entire season, from March to January 1st." Henry Verplanck: "I have been first and second pilot for fifteen years. The custom of the river is to hire pilots for the season of ten months, beginning March 1st." Other witnesses gave evidence to the same purport respecting the alleged custom. Testimony was also given, touching the services of the libellant and his competency as pilot.

Edwin Burr, for libellant.
C. Van Santvoordt, for respondent.

BETTS, District Judge. The libel in this case is based upon an alleged hiring of the libellant, as second pilot, by the respondent, master of the steamboat Oswego, for the season. The answer denies that any such agreement was made, and alleges that the libellant being out of employment, the respondent from motives of friendship, and because of marriage connection, gave him temporarily the place of second pilot on the boat, and for so long a time only as his services should be wanted.

On the first of September, the respondent informed the libellant that his services would no longer be required. The libellant two days thereafter offered to respondent to continue as second pilot during the remainder of the season, and claimed the right to the place. The respondent declined to retain him; and this suit is brought to recover wages for the months of September, October, November, and December.

There is no proof by the libellant that an express agreement was made with him for any definite term of services. There is evidence conducing to prove an established usage and course of business among the steamboats upon the Hudson river, to engage pilots and engineers at monthly wages for the season, which is considered to extend from March 1st to January 1st, and to pay them for the entire ten months, although the boats may not continue to run during the whole period. But the testimony is not explicit or clear that this mode of payment obtains in cases where it is not a part of the express bargain that the hiring is for a season. And I am not prepared, upon the evidence adduced in this case, to pronounce that a mere hiring of a pilot at monthly wages, upon the Hudson river boats, implies, by the usage and custom of the business, that his compensation shall continue throughout the entire season. This point has been before the court in a previous case. The Hudson [Case No. 6,831].

If such custom prevails in respect to engagements made previous to or at the commencement of the season, there would be stronger grounds for the court to sanction and enforce it, than would exist if the pilot or officer is taken into service after the season has in considerable part expired. The usage proved relates to employments beginning with the season; and in such case, if it falls short of a fixed custom, a stronger presumption would arise that the engagement embraced the entire season, than when the hiring is at monthly wages in the progress of the season, and after it has nearly elapsed. The pilot is then without a place, and the

opportunity to seek one from among the whole body of steamboats is no longer open to him. Moreover, it will not be implied that a general usage of that character would include and govern the chance occasions for hiring a pilot as a supernumerary, or to replace another temporarily, which the conveniences of navigation must render frequent. Whatever, then, might be the effect of taking a pilot on the Hudson river at monthly wages, without stipulation of time, prior to the first of March, I am by no means prepared to say, upon the proofs produced in this case, that such employment, at any after period of the year, will create rights or responsibilities in respect to either party, beyond an agreement for services and compensation in ordinary cases of hiring.

This case cannot, however, be justly regarded as resting upon implication or presumption as to the intention of the parties. The evidence in the cause sufficiently shows an engagement terminable at the option of the respondent. The libellant was not by profession a pilot, and he leaves it at least equivocal upon his own evidence whether he had ever before acted in that capacity. He had for many years been master of sailing vessels and steamboats employed on the Hudson river and elsewhere, having passed three or four years of the intermediate time in keeping a public house, established near the Highlands. But even his character as captain in vessels of the description mentioned, would not import any ability or experience as pilot. The evidence shows that masters of steamboats are not charged with the duty of navigating them. And although upon the Hudson river, such duties are performed by masters of steamboats occasionally, and frequently by masters of sailing vessels, yet in neither case does the mere holding the place of master import any nautical skill or experience.

It is clear, from the testimony of Mr. Van Buren, the pilot of the Oswego, and who was examined on behalf of the libellant, that the respondent did not consider the libellant qualified to fill the place of second pilot at the time he was engaged and taken on board the steamer. Placing him in that position, under such circumstances, raises the presumption that he was taken temporarily or upon trial, to determine his capacity for the station, rather than absolutely assigned to the post of second pilot for the residue of the season.

The declarations of the libellant, made after he entered upon this service, to the witnesses King and Whittemore, confirm the inference that a temporary engagement only was contemplated by the respondent; and they show, also, that the libellant did not consider himself committed to any definite period of service. To King, he stated in June that he was making interest for a different employment in New York, and did not intend remaining with the Oswego longer than until he could get a better situation. This declaration was made on board the boat, and the libellant added that others besides himself were looking out for such a situation for him, importing that it was understood he was attached to the boat but temporarily.

To Whittemore, he stated early in August, and on board the boat, that he expected to leave her, and advised him to go down in her from Albany to New York, and obtain the berth which he occupied. He alluded to the office of harbor-master as one which he and others expected would be obtained for him. The witness does not recollect whether the libellant specified the time at which he intended to leave the boat. But after that conversation the respondent wrote him at Albany, desiring to employ him as second pilot; and the witness, in compliance with that request, came from Albany in the boat, on the first of September, in that capacity. The libellant was then on board, and came to New York, but made no remark to witness relative to the latter having displaced him. Neither pilot exacted any services of the libellant during the trip, nor is it shown that the respondent put him to any duty, though the first pilot says, once on the trip he saw the libellant rendering some assistance on the deck.

I think, upon the whole evidence, it is manifest that the libellant well understood he was engaged only provisionally, and was at liberty to leave the boat whenever he chose to do so. There must be strong and clear proof that the respondent bound himself absolutely to more than was secured in his own behalf against the libellant. In the absence of such proof, the presumption will be that the contract was reciprocal in respect to the right of each party to hold the other for a definite term, as also to the right of each to terminate it at his option.

So far from showing an obligation upon the respondent to retain the libellant in the service of the boat during the entire season, I think all the testimony tends to prove a mutual understanding that the libellant was engaged for so long a time only as the respondent should see fit to employ him, with a correspondent right on his part to seek other service, and leave the boat at his pleasure.

It ought, probably, to be added, that, in my opinion, the evidence fairly imports that the engagement was terminated by the libellant himself, as it is no more than reasonable to infer that he gave the respondent notice of the communication made by him to Whittemore, in August. The libel must accordingly be dismissed with costs.

Case No. 14,205.

TRUMAN et al. v. HARDIN.

[5 Sawy. 115.] [1]

District Court, D. California. March 5, 1878.

PAROL EVIDENCE—CONTRACT—SALE—PROMISSORY NOTE.

Where a promissory note has been executed with a condition that the mules, the consideration of the note, shall be delivered and vented when the note is paid, parol evidence is admissible to show the real nature of the transaction, and that the note was not paid notwithstanding the mules were delivered. The note is not a written contract inter partes, for it is signed only by one of them, and it would be ineffectual to establish, as against the vendor, the fact of sale.

[This was an action by S. J. Truman and Henry C. Hyde, assignees, against R. L. Hardin.]

William Craig and J. H. Dickinson, for plaintiff.

David McClure, for defendant.

HOFFMAN, District Judge. This was an action by the assignees of Gilbert Horton, to recover the possession of certain mules alleged to have been the property of the bankrupt at the time of filing the petition. It is admitted that the mules were formerly the property of the defendant, and that an agreement for their sale was made between him and the bankrupt. The question is, was the sale an absolute one, or was it agreed that the right of ownership should remain in the vendor until the purchase-moneys were paid? The only written evidence of the agreement is in the form of a promissory note by the vendee, which is as follows: "$1,500. Pope Valley, June 15, 1874. Twelve months after date, for twenty mules, I promise to pay Robert L. Hardin, or order, fifteen hundred dollars in United States gold coin, with interest from date till paid, at the rate of one and a quarter per cent. per month. The said mules to be vented and delivered to said Horton when the said sum and interest is paid. Gilbert Horton." On the execution of this note the mules were delivered to Horton and remained in his possession, with the exception of some short intervals unnecessary to notice, until the bankruptcy. A suit in replevin was subsequently brought by the defendant in this proceeding, and the bankrupt having interposed no defense the mules were delivered to the former by the sheriff. The assignee now sues to recover the possession or the value of the property.

It is contended on the part of the defendant that at the time of the sale it was distinctly understood and agreed that the mules should remain the property of the vendor until paid for.

The assignee resists the introduction of parol testimony to establish this agreement, on the ground that it would alter or contradict the written instrument above set forth. But it will be observed that this instrument is merely a promissory note signed by the vendee alone. It does not purport to create any obligation on the part of the vendor. It indicates an executory agreement to pay for twenty unspecified mules when delivered—a certain sum on a certain day. But it would be unavailable to charge the vendor, because it is not signed by him as the statute of frauds requires. It is, therefore, in no sense a bill of sale or an agreement for a sale. It is merely an agreement to pay for certain property to be thereafter delivered. The mere production of this note with proof of the signature of the maker would of itself be ineffectual to establish, as against the defendant, the fact of sale. Parol proof would be necessary to show his acceptance of it, and the transaction which led to its execution. This parol proof, and not the note itself, would be the evidence to charge the vendor, and the note could then be received as evidence of the terms of sale, not as a written contract inter partes, for it is executed by only one of them, but as a part of the res gestæ, and as showing the real nature of the transaction.

If then the proofs now offered were inconsistent with the transaction, as described by the note in relation to the price to be paid, the credit to be allowed or the number of mules to be delivered, they would be disregarded, not because they contradicted the terms of the written contract of the parties, for they have made none, but because the note being in writing and made by one and accepted by the other would afford the more reliable evidence. But the parol proofs offered do not contradict or vary the agreement, as evidenced by the note.

It is proposed to show an express agreement that the title was to remain in the seller until payment of the price upon a fixed day. This is not only not contradictory to the note, but confirmatory of it, for the note provides in effect that the mules are not to be delivered or "vented," (that is, branded with the owner's sale mark), until the price is paid. This agreement seems to have been waived, so far as the retention of possession by the seller was concerned, for the mules were delivered to the vendee. But the parol proofs show that the title was to remain in him, in accordance with the stipulation in the note with regard to "venting."

The parol proof and the terms of the note thus clearly establish what was the understanding of the parties, and bring the case within the rules governing conditional sales. Parsons, in his work on Contracts, observes: "But where the right to receive payment before delivery is waived by the seller and immediate possession is given to the purchaser, and yet by express agreement the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a condition precedent, and until

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

performance the right of property is not vested in the purchaser." 1 Pars. Cont. 449; 2 Kent, Comm. 495; Putnam v. Lamphier, 36 Cal. 157. And it has been held that the vendor's title will prevail over that of the innocent bona fide purchaser, for value from the vendee in possession. Kohler v. Hayes, 41 Cal. 455; Wright v. Solomon, 19 Cal. 64; Saltus v. Everett, 20 Wend. 267.

The assignee in bankruptcy is certainly in no better position than an innocent purchaser for value. See Benj. Sales (Am. Ed.) § 320, in nota.

Judgment for defendant.

TRUMAN (WORCESTER v.). See Case No. 18,043.

Case No. 14,206.

TRUMP et al. v. The THOMAS.

[Bee, 86.] [1]

District Court, D. South Carolina. Sept. 3, 1796.

SEAMEN—WAGES—LIEN ON VESSEL—LACHES.

The vessel was sold under sentence of the court of admiralty at Providence at the suit of others of the crew. These libellants had notice of the proceedings, but did not apply for their wages. Their lien on the vessel is at an end.

[Cited in The Utility, Case No. 16,806; Packard v. The Louisa, Id. 10,652; Herbert v. The Amanda F. Myrick, Id. 6,395; Wall v. The Royal Saxon, Id. 17,093; Pierce v. The Alberto, Id. 11,142.]

In admiralty.

BEE, District Judge. This is a suit for seamen's wages, against a vessel that has been condemned in a foreign court of admiralty, (on a like suit brought by others of the crew) sold at public sale under that decree, and purchased by a third person for a valuable consideration. These facts are stated and charged in the libel. It is contended on the part of the libellants that they have a lien on the vessel notwithstanding this decree and sale. On the other side it is insisted that by the maritime law, and usage of courts of admiralty, the lien of these men on the vessel is totally at an end.

I have considered this case with great attention, and find that the proceedings of the admiralty court at Providence were in the usual mode. The libellants were on the spot, and might, on the return of the monition have been made parties to the suit. Nay, even after the decree, and previously to the sale, I think the court, upon hearing their case stated, would have let in their demand. But it does not appear that they took a single step in the business, though there is proof before the court that they might have done so. They are therefore, strictly within the rule of law, "Vigilantibus non dormientibus subveniunt leges." The sentence of a court of admiralty is notice to all the world. The court at Providence had competent jurisdiction; this sale was made openly and without any pretence of collusion; and I am of opinion, that the present claim against the vessel cannot be sustained. If it could, no purchaser would be safe. I dismiss the libel, but without costs.

[1] [Reported by Hon. Thomas Bee, District Judge.]

Case No. 14,207.

TRUNDLE v. HEISE.

[2 Cranch, C. C. 44.] [1]

Circuit Court, District of Columbia. June Term, 1812.

MARSHAL—CAPIAS—FAILURE TO RETURN DEFENDANT—APPEARANCE OF DEFENDANT—DISCHARGE.

If the defendant has been discharged under the insolvent law upon a capias ad respondendum, the marshal will be discharged from his amercement for not bringing him in at the return of the writ, upon the defendant's entering his appearance in proper person.

The marshal was amerced for not bringing in the defendant on the return of the capias ad respondendum. The defendant had been discharged under the insolvent act. The marshal moved to be discharged from the amercement upon the defendant's entering his appearance in proper person without bail; granted.

Case No. 14,207a.

TRUST CO. et al. v. WEED et al.

[26 Int. Rev. Rec. 132; 14 Phila. 422; 37 Leg. Int. 166.]

Circuit Court, E. D. Pennsylvania. April 6, 1880.

CORPORATIONS—MISAPPLICATION OF FUNDS BY OFFICERS—CONTRACTS BETWEEN OFFICERS AND CORPORATION—HOW VIEWED.

1. The president of a corporation occupies a position of trust and confidence, and is liable to be called upon to account for, and make restitution of, any part of the property confided to his management and care, which he has improperly applied to his own use.

2. Contracts between a president and the corporation, by which the president agrees, in consideration of a certain commission, to effect and become liable for a loan to the company, while looked upon with suspicion and disfavor by the court, may be enforced when shown to have been made for the benefit of the company.

Motion for an injunction to enjoin the sale of collateral. The principal facts appeared as follows: [C. A.] Weed, the defendant, was president of the corporation plaintiff, and by an alleged agreement he procured a loan to the company by one Adams of $10,000, for which he became personally responsible, and for which he alleged an agreement that he was to receive $1,000 for commission. A note of the company was given him, payable to his order, for $10,000, and also cer-

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

tain collaterals, consisting of bonds and stock. The corporation, however, received only $8,000, Weed retaining the commission of $1,000, and $1,000 due him from the company. When the note became due, and was not paid, defendant advertised the collaterals for sale. Plaintiffs moved for an injunction to restrain said sale, on the ground of misapplication of the $2,000 to his own use by the said plaintiffs.

T. A. Freedley and W. H. Rawle, for plaintiffs.

T. Hart, Jr., and J. E. Gowen, for defendants.

BUTLER, District Judge. The bill, we think, presents a case within the equitable cognizance of the court. The defendant, Weed, as president of the corporation plaintiff, occupies a position of trust and confidence; and is liable to be called upon to account for, and make restitution of, any part of the property confided to his management and care, which he has improperly applied to his own use. Jackson v. Ludeling, 21 Wall. [88 U. S.] 616; Oil Co. v. Maubery, 91 U. S. 587; Kochler v. Iron Co., 2 Black [67 U. S.] 721; Drury v. Cross, 2 Wall. [69 U. S.] 299; Great Luxemburg R. Co. v. Magnay, 25 Beav. 586; Cumberland Coal Co. v. Sherman, 30 Barb. 553; Dodge v. Wolsey, 18 How. [59 U. S.] 331; Hill v. Frazier, 10 Har. [22 Pa. St.] 324; Ashurst's Appeal, 10 P. F. Smith [60 Pa. St.] 314; Ang. & A. Corp. (10th Ed.) p. 329, § 312. In addition to this, a part of the property in controversy passed into his hands upon an express trust, set out in the transfer under which he received it; and a trust is acknowledged, as respects all the property, in the third paragraph of the defendant's agreement. marked "Exhibit B," accompanying the bill. We do not, however, see anything to justify restraining the defendant to the extent asked for. The propriety of the contract entered into between him and the corporation is not questioned. While such contracts are looked upon with suspicion and disfavor by the court, they may be enforced when shown to have been made for the benefit of the corporation, and to be just. Oil Co. v. Maubery, 91 U. S. 587. The only complaint here is that Mr. Weed, on receiving the securities, "instead of paying the sum of $10,000 to the corporation, deducted therefrom certain sums, amounting to upwards of $2,000, under various pretences and allegations, that he was entitled to commissions thereon, and other demands, whereby the corporation, plaintiff, did not receive the sum of $10,000, but only received a sum much less in amount, and these sums the said Weed has since declined to pay or account therefor; and the complainants are informed and believe, and so aver, that the defendant has made various other gains and profits from the said transaction, the amount whereof is unknown to the complainants." Whatever balance may be due the defendant, on account of the loan, the plaintiffs aver their willingness to pay. It appears from the affidavits and exhibits that the defendant retained $1,000 as commission for negotiating the loan, and $1,000 further in payment, as he says, and as the corporation books show, of previous indebtedness to him. There is nothing before us at this time to justify a belief that he retained any more, or that he derived any other benefit from the transaction. Nor does it appear that he has received anything on the stock or bonds, as dividends or interest. As the case stands, therefore, the defendant, Weed, appears to have a just and virtually undisputed claim against the corporation to the extent of $8,000, with the interest due thereon.

The statement in T. H. Green's affidavit that the defendant "took an additional $225" has not been overlooked; but the circumstances that the abstract from the books, which this witness says "is an accurate statement relative to said loan," does not sustain his allegation respecting this sum; that it is not sustained by any entry in the books, so far as appears, while it was the duty of this witness to make an entry, if his statement is correct; that the witness is unsupported by any other evidence, and is contradicted by the defendant; that he fell into a very singular error in giving us the statement relative to said loan, from the books,—forbid a reliance upon this witness' testimony, respecting this sum. Nor have we overlooked the statement of Mr. Wheeler, respecting "other profits," said to be realized by the defendant, Weed. But this statement is contradicted by the defendant, and, of itself, is too shadowy and uncertain to be of value, on this hearing. Why, therefore, should not the defendant be allowed to proceed on his contract to obtain satisfaction of the amount thus appearing to be due? While it is unpaid the plaintiffs have no equity that would justify the court in restraining the defendant from proceeding to this extent. We can only interfere so far as is necessary to protect the plaintiffs against danger of loss from the alleged misapplication of the $2,000 referred to. The "unissued stock" was, as the bill states, left with the company to be applied to the "advancement of its best interests." The directors were thus made the judges of how it could most advantageously be used for this purpose. That they applied it to raising money for the company is not a subject of complaint.

We have treated Mr. Weed as the holder of the securities, as, for the purposes of this hearing, at least, seemed necessary.

An order will be drawn, modifying the decree in accordance with this opinion.

TRUSTEES OF UNIVERSITY (NORTH CAROLINA v.) See Case No. 10,318.

TRUSTY, The (ASHBAHS v.). See Case No. 573a.

TRUTCH (PAGE v.). See Case No. 10,668.

Case No. 14,208.

TRYON v. WHITE.

[1 Pet. C. C. 96; [1] 1 Robb, Pat. Cas. 64.]

Circuit Court, D New Jersey. April Term, 1815.

NONSUIT—PLEADING—PATENTS—SPECIFICATIONS—VARIANCE.

1. It is not a foundation for a nonsuit, that the declaration for an invasion of a patent right, does not lay the act complained of to be "against the form of the statute," under which the rights of plaintiff are derived. Contra formam statuti, is a matter of form, and may be cured by verdict.

[Cited in Parker v. Haworth, Case No. 10,738.]

2. When the declaration professes to set forth the specification in a patent, as part of the grant, the slightest variance is fatal, and the defendant is entitled to claim a nonsuit. In general, it is sufficient to state the grant in substance, in the declaration.

[Cited in Wilder v. McCormick, Case No. 17,650.]

Action for violating a patent right of the plaintiff, for a machine for making combs.

After reading the pleadings, the defendant moved for a nonsuit, on the ground, that the declaration does not lay the act complained of, to be against the form of the statute, but merely claims damages at common law. 1 Com. Dig. 329; 1 Chit. Pl. 357; 2 East, 341; Wils. 599; Fessenden, Forms, 209; 3 Woodeson, 214; 4 Burrows, 2387; 5 Johns. 175; 1 Saund. 135, pt. 4; 4 Burrows, 2333, 2351. To support the practice of a motion for a nonsuit, at this stage of the cause, the counsel cited 1 Esp. 484; 2 Camp. 397; 1 Camp. 253.

On the other side, the counsel contended; that the declaration states the patent to be granted under the act of congress, and brings them into court, and also states the case, precisely within the act. Contra formam statuti, therefore, need not have been laid. Mr. Chitty gives the forms of declarations in this case, in which these words are not inserted. 1 Chit. 336.

THE COURT refused to direct a nonsuit on this ground, inclining to the opinion, that, as the case stated in the declaration, is precisely within the act of congress, to which the declaration refers; contra formam, &c. is matter of form, the want of which would be cured by verdict.

The declaration, after stating the patent, which refers to the specification, proceeds to set forth the specification verbatim; but in doing so, the word whirl in the specification, is called wheel in the declaration. The specification speaks of the wheel and the whirl, as distinct parts of the machine. For this variation, the defendant renewed his motion for a nonsuit. Bull. N. P. 6; Vin. Abr. tit. "Variance," A.

[1] [Reported by Richard Peters, Jr., Esq.]

WASHINGTON, Circuit Justice. This is an action brought upon a grant, to recover damages for the privilege secured by it. The grant refers to the specification, to explain what is granted; and, although it would have been sufficient to state in the declaration the substance of the grant, yet, when it professes to set forth the specification as a part of the grant, according to its tenor, the slightest variance is fatal.

Nonsuit directed.

A rule was afterwards granted, to show cause at the next court, why the nonsuit should not be set aside.

Case No. 14,209.

TRYPHENIA v. HARRISON.

[1 Wash. C. C. 522.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

FORFEITURE—SLAVE TRADE—CARRYING AS PASSENGERS.

1. Libel in the nature of an information, for a violation of the act of congress, prohibiting the slave trade. The vessel, the property of a citizen of the United States, being at St. Thomas, took on board, as passengers, two ladies, with some slaves, their domestic servants, for all of whom the price of their passage was paid at Havana, where the ladies and their slaves were landed. The slaves were not carried for sale, nor in any other manner than as the property of the ladies, and as their attendants. *Held*, that the law of the United States, passed 22d March, 1794 [1 Stat. 347], was intended to prohibit any citizen or resident of the United States from equipping vessels within the United States, to carry on trade or traffic in slaves to any foreign country.

2. The law of 10th May, 1800 [2 Stat. 70], extends the prohibitions to citizens of the United States, in any manner concerned in this kind of traffic, either by personal service on board of American or foreign vessels, wherever equipped; and to the owners of such vessels, citizens of the United States.

3. The provisions of those laws, were not intended to apply to a case, where slaves are carried from one foreign port to another as passengers, and not for sale.

[Cited in The Wanderer, Case No. 17,139.]

This was an appeal, pro forma, from the district court [for the district of Pennsylvania]. It was a libel, in the nature of an information, against the brig, for a violation of the act of congress of the 22d of March, 1794, prohibiting the slave trade from the United States to foreign countries. The answer and claim of Crousillat, the owner of the brig, denied that the brig had been engaged in carrying on trade or traffic in slaves; and in opposition to the particular charge laid in the libel, of transporting slaves from St. Thomas to the Havana, stated; that the slaves were the property of two French ladies, taken on board the

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

brig at St. Thomas, and carried to the Havana, who paid the price of passage for themselves and their slaves; and that they were not carried for sale or traffic, but as the servants, or attendants of those passengers. The answer was fully supported, by the evidence of the two lady passengers, the supra-cargo, and another witness.

Lewis & Rawle, for appellee, insisted, that whatever might be the construction of the act of 1794, the act of 10th May, 1800, prohibits the transportation of slaves from one foreign country to another; and that in this case it is admitted, that the slaves in question, were carried from St. Thomas to the Havana. That the last law was intended to go much farther than the first, in order to render a violation of its provisions more difficult to be effected.

Ingersoll & Duponceau, for appellants, contended; that the two laws were to be construed together, and that the obvious intention of both was, to interdict the carrying slaves from one country to another, with a view to traffic; and that no such trading was proved in this case, but the contrary.

WASHINGTON, Circuit Justice. No person can doubt, but that the act of 1794 was intended to prohibit any citizen of, or resident in the United States, from equipping vessels within the United States, with a view to carrying on the trade or traffic in slaves, to any foreign country. But, as this law was confined to vessels equipped in the United States for this purpose, and it might be difficult to prove that such was the intention of the equipment, and indeed the provisions of this law did not reach the mischief, since citizens of the United States might, without such equipments, contribute in other ways to carrying on this inhuman and unjustifiable traffic; the act of 1800 was passed in addition to the former acts, and extends the prohibition to citizens of the United States, in any manner concerned in this kind of traffic, either by personal service on board of American, or foreign vessels, wherever equipped; and also, to the owners of such vessels. The words of this last law, I admit, are so general as to extend to the case of transporting slaves from one foreign country to another; but this law must be construed in connection with the former, which was not intended to embrace a new subject, but to render the former law more effectual, for prohibiting the slave trade. If a doubt could exist on this subject, it is cleared up by the latter law; which, differing from the second only as to the vessel on board of which the citizen has served, immediately varies the expression, and speaks not of a vessel employed, in carrying slaves from one country to another, but of one employed in the slave trade. Whatever may be the true construction of these laws, as to the carrying slaves from one country to another, even for sale; I very much question, if it was in the contemplation of congress, to go farther than to prohibit American citizens from carrying on this trade from Africa, or other countries, so as to consign to slavery, those who were free in their own country. This was laudable. But why should congress prohibit the carrying persons, already slaves in one of the West India islands, to be sold in another? The situation of these unfortunate persons, cannot be rendered worse by this change of situation and masters. This, however, is a mere suggestion as to the probable intention of the legislature. The construction of the two laws may possibly force us to a different conclusion. At any rate, neither of the laws extend to the present case; it being clearly proved, that the negroes in question, were not carried to the Havana for sale. Sentence reversed, and claim sustained.

Case No. 14,210.

TSCHEIDER et al. v. BIDDLE.

[4 Dill. 58;[1] 5 Am. Law Rec. 689; 4 Cent. Law J. 323.]

Circuit Court, E. D. Missouri. March Term, 1877.

LANDLORD AND TENANT — LEASE — COVENANT TO RENEW—SPECIFIC EXECUTION—RENTAL TO BE FIXED BY THIRD PERSONS.

1. A lease of certain real property in St. Louis was made for ten years, with a covenant by the lessor for periodical renewals, extending through terms aggregating a period of five hundred years; the amount of rental at the end of each ten years was to be ascertained by assessors to be appointed by the parties. The lessor fraudulently sought to evade the provisions of the lease in respect to renewals. The lessee, on the faith of the covenant for renewal, had expended in buildings on the demised premises $113,000. The lessor sued the lessee at law for use and occupation, whereupon the lessee filed this bill in equity, to stay the action at law until the lessor appointed an assessor, as required by the lease: *Held*, that a general demurrer to the bill should be disallowed; and the lessee being willing to comply with the lease as to renewal, the court entered an order staying the proceedings at law until the lessor should appoint an impartial assessor to make the valuation, reserving the right to discharge or modify the order as justice might require.

[Cited in Joy v. City of St. Louis, 138 U. S. 46, 11 Sup. Ct. 256; Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 2 C. C. A. 174, 51 Fed. 330.]

[Cited in Coles v. Peck, 96 Ind. 341; City of St. Louis v. St. Louis Gaslight Co., 70 Mo. 110.]

2. As to the specific execution of agreements to refer or to arbitrate, see note at end of case.

In equity. Catherine Biddle brought an action at law in this court against Peter Tscheider et al. for use and occupation. In her petition she simply alleges that she is owner of a certain lot of ground (describing

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

it); that Peter Tscheider et al. had occupied said lot of ground during one year with her permission; that the value of the occupation of such premises was worth the sum of —— dollars; that Peter Tscheider et al., the occupants, are bound in law to pay her that amount for such occupation, and therefore she prays judgment. In defense, Peter Tscheider et al. set up as a bar to the action a clause in an original lease for ten years, dated the 28th day of May, 1864, between Catherine Biddle and Peter Tscheider et al.; that within the last quarter of said term of ten years the said Catherine Biddle, lessor, and the said Peter Tscheider et al., lessees, should appoint two assessors,—one each,—who should proceed to ascertain the value of the said lot of ground as a naked lot, without reference to the improvement, and after having ascertained the true and fair market valuation of said lot they should fix and agree upon the rent which should be paid by the lessees for another term of ten years, which rents, however, should not be less than six per centum upon the value of the property so ascertained; that after the said assessors had so agreed upon the amount of the rental of said property, then Catherine Biddle should execute to the said lessees another lease of the lot for ten years, at the rental so fixed by the assessors. If the assessors so appointed by the parties should not agree as to the valuation of the lot, or to the rent to be paid upon that valuation, then they should select a third assessor to assist them. Then, when and if these three assessors should unanimously agree upon the valuation of said lot, and the rental to be paid for said lot, Catherine Biddle should execute a new lease for the said lot to said lessees for ten years, at the rental so fixed, and so on for each succeeding term of ten years, for the period of five hundred years. The answer then proceeds to aver that the parties have made five different attempts to have the rental of said lot fixed and determined by assessors, as provided in said original lease; that these five efforts have failed; that the failure is attributable entirely to the bad faith of Catherine Biddle, who, it is charged, appointed incompetent and prejudiced men as her assessors, and instructed and limited them as to value, with a view of forcing upon respondents, the lessees, an extravagant valuation of said premises; that by reason of her instructions and limitations, no agreement could be had among the assessors; that the only rent which Catherine Biddle is entitled to receive for said property is the rent which shall be fixed in the manner provided in said lease, and, as no rent has been fixed in the manner provided in said lease, Catherine Biddle could recover no rent whatever for the use and occupation of her said property, and that the suit for the use and occupation should be dismissed, and its progress stopped. To this answer Catherine Biddle demurred, on the ground that it was not a sufficient or legal defence to the action. After argument the demurrer was sustained, and all that portion of the answer setting out the agreement to appoint assessors and to grant a new lease upon the basis of their finding was stricken out.

The case was set down regularly for hearing on the 30th day of September, 1876. On that day Peter Tscheider et al. filed the present bill in equity in this court, in which they set out substantially the agreement and facts set out in the answer, as a bar to the action of use and occupation, and which the court held to be bad on demurrer; that no rental had been fixed in the manner provided in said agreement; that no new lease or renewal had been executed in accordance with the terms of said agreement; that the lease was obtained for the purpose of enlarging a church edifice thereon, and erecting thereon a dwelling house for the religious body using the church edifice; that, relying upon the covenants of the lease, the lessees have enlarged said church edifice, and erected a building on the demised premises, at a cost of $113,240.27; that the complainants are ready to comply with the lease in all its parts, and have five times appointed assessors, who were disinterested, to meet assessors appointed by the lessors, but the attempts to procure a valuation failed, because the lessors appointed men as assessors whose opinions as to valuation were previously known, and whom they had instructed or restricted not to go below a certain valuation, which was excessive, and fifty per cent. more than the value of the property; that the lessors' assessors made excessive valuations accordingly, whereas the lessees' assessors made fair valuation; that the lessors have purposely and fraudulently prevented any valuation of the rental, as provided by the lease, with a view to extort an unconscionable rental from the lessees, who aver their willingness to appoint an assessor to meet one appointed by the lessors, who refuse to make such an appointment; that defendant Catherine Biddle is now seeking to recover, in an action at law in this court, for use and occupation of said premises, against your orators Peter Tscheider and Joseph Weber an exorbitant and excessive rent. They therefore pray that the further prosecution of said case of Catherine Biddle against Peter Tscheider and Joseph Weber be enjoined.

The prayer of the bill of Peter Tscheider et al., as amended, is as follows: They therefore pray that plaintiff and defendants be required to appoint assessors, as required and contemplated by said lease, and in accordance with the terms and provisions thereof, and proceed to an ascertainment of the rental value of the premises, as in and by said lease contemplated and provided, and that defendants be ordered and directed to execute to said lessees a renewal term of said lease, as therein provided; and unless they do so, and in the meantime, the further pros-

ecution of the said case of Catherine Biddle against Peter Tscheider and Joseph Weber be enjoined, and for such other and further relief as the equity of the case may require, and to your honors may seem meet. The cause is now before the court on the demurrer of Catherine Biddle to the bill of complainants.

E. T. Farish, for complainants.
Grover & Ellis, for defendant.

DILLON, Circuit Judge. On the demurrer the averments of the bill in equity are admitted on the record. The lessees obtained a lease for ten years, with the right to periodical renewals for five hundred years, the rental to be ascertained by assessors in the manner provided in the lease. The lessees have entered into possession, and on the faith of the efficiency of the covenant to renew have made improvements on the demised premises costing over $100,000. At the end of ten years the lessors, instead of complying in good faith with the covenant as to renewal, act, as it is alleged, in bad faith and fraudulently, to prevent a valuation and a renewal. Hence no renewal has been had. The lessees are still in possession. The lessors bring an action at law in this court for the use and occupation of the premises,—of the whole premises, and not simply of the premises aside from the improvements made by the lessees. On a demurrer to the answer at law we held that the unexecuted provisions of the lease as to renewal, although attributable to the fault of the lessors, was no answer to the action; and this holding was in accordance with the decisions of the supreme court of Missouri in a case which arose under a similar lease. Finney v. Cist, 34 Mo. 303, and its sequel, Garnhart v. Finney, 40 Mo. 449; and see, also, Biddle v. Ramsey, 52 Mo. 153. And if, under such circumstances, the lessor can recover at law for use and occupation, he could recover the possession in ejectment, if he had seen fit to adopt that remedy. The lessees being without fault, and willing to comply with the lease, what are their rights and remedies?

They may, it is said, sue the lessor at law for a breach of the covenant in respect to renewals, and recover damages. This was so held in Garnhart v. Finney, supra, and has been adjudged in other cases. Greason v. Keteltas, 17 N. Y. 491; Hopkins v. Gilman, 22 Wis. 476.

It will be observed that it is so held, although the obligation to renew does not become consummate until the valuation is fixed, and such valuation is to be ascertained by arbitrators, who had never been appointed or acted. But assuming that on the facts stated in the present bill, the lessees might sue the lessors for damages, is this their only remedy? If so, it is obvious that the law is so defective as to shock the sense of justice, and that it rewards the party who fraudulently seeks to evade his obligation at the expense of the party who has trusted the covenants of the lessor and expended large sums of money on the faith that he would observe those covenants. If this lease contained a simple covenant to renew at a fair valuation, such a covenant, it is admitted, could be specifically enforced, and the court would settle the valuation or rental to be paid. The lessee in such a case is not confined to an action at law for damages, but may go into equity for a specific execution of the covenant to renew. This is settled law. Is the right, the equity, to a renewal in these lessees any the less cogent and persuasive because they have provided the means for ascertaining the rental on the renewal, and the lessor purposely and fraudulently thwarts the execution of those means? As an original proposition, after much reflection, I should say that it was in accordance with sound principle to hold that if the lessor were guilty of the fraudulent conduct charged in the bill, he subjected his conscience to be laid hold of by the chancellor, who would say to him, "You have agreed to renew. The lessee has expended large sums of money on the faith of that agreement. You refuse to execute the provisions for the fixing of the valuation by arbitrators. You cannot, therefore, object if the court, with the concurrence of the lessee, proceeds to fix the valuation under the provisions of the lease." Some adjudications, however, have been made, with which it might not be easy to reconcile the view just stated. Milnes v. Gery, 14 Ves. 400; Greason v. Keteltas, 17 N. Y. 491; Hopkins v. Gilman, 22 Wis. 476. These cases proceed upon the notion that such provisions as those in this lease are in effect an agreement to arbitrate, and that agreements to arbitrate will not be specifically enforced in equity. I agree to the reasonableness of the doctrine that a court of equity will not enforce a specific performance of an agreement to arbitrate. The grounds of this doctrine and the cases in its support are given by Mr. Justice Story in Tobey v. County of Bristol [Case No. 14,065]. To refuse judicially to enforce an agreement to arbitrate occasions no injustice, for the courts remain open to the parties, with better provisions for securing justice than are possessed by arbitrators. So, when the refusal of a court to appoint or compel the appointment of arbitrators, or substitute its judgment for the judgment of arbitrators, will occasion no injury which cannot be fully and adequately redressed by an action at law, as in the ordinary case of an agreement to sell, it is entirely consistent with sound principle for a court of equity to decline to interfere. In this view I can agree to the actual decision on the facts of the cause of Sir William Grant, the master of the rolls, in the leading case in Milnes v. Gery, 14 Ves. 400, without assenting to the reasoning

of that great judge that equity is absolutely disabled from interfering to compel a specific execution unless the price of the property has been ascertained in the prescribed mode. That was the case of an agreement to sell. The parties could be placed in statu quo. No mala fides was imputed, and the failure of arbitrators to agree was not owing to bad faith. Under such circumstances the refusal of the court to appoint its own master to fix upon the price can be well justified. But such a case as that made by the present bill is entirely different. Here the parties cannot be put in statu quo; here mala fides is imputed; here a remedy at law for damages does not satisfy the covenant or the demands of enlightened justice. It is a well-settled principle that courts will not compel the specific execution of a mere agreement to arbitrate; but I am strongly convinced that it is erroneous to apply that principle to cases like the present, where it would result in manifest and gross injustice. The cases somewhat like the one before us (Greason v. Keteltas, 17 N. Y. 491; Hopkins v. Gilman, 22 Wis. 476), while asserting that the lessees have a remedy at law, but none in equity, for specific performance, deserve, I think, further consideration before assenting to their entire correctness.

In Greason v. Keteltas the refusal of the lessor to appoint arbitrators or take steps for an appraisal was held to subject him to liability at law for the value of the building on a valuation fixed by the court, although the covenant was that this valuation was to be fixed by arbitrators. If such refusal on the part of the lessor is a breach of the covenant so as to render him liable for damages or to pay for the improvement on a judicial valuation, why is it not such a breach of duty as to justify a court of equity, when substantial justice requires it, to compel the lessor either to make the appointment or to make one for him, or otherwise judicially to ascertain the valuation? Where is the equity of the party who purposely and fraudulently seeks to evade the contract on his part to insist that a valuation by arbitrators is a sine qua non to equitable relief? Is he not in such a case estopped to set up his own wrong and fraud in defence to the relief to which his adversary is otherwise clearly entitled?

I suggest these views that attention may be directed to this subject, and not because they are absolutely essential in this stage of the cause to support the present bill. I admit that in specific performance the court must enforce the contract made by the parties, and that it cannot ordinarily modify this contract or make another and enforce that; but this sound and necessary principle does not preclude the operation of the principle of estoppel where this principle is necessary in order to do justice. Where the covenant to renew on an appraisal by third persons has, as in this case, been acted on by the lessee, and where the failure to secure a renewal will work an injustice for which an action for damages is not a complete remedy, and where the lessor fraudulently thwarts the appraisal, why is he not estopped to set up the want of an appraisal caused by himself as a bar to appropriate equitable relief?

The leading English decisions, from Mitchell v. Harris, 2 Ves. Jr. 129, to Scott v. Avery, 5 H. L. Cas. 811, and Dawson v. Lord Otho Fitzgerald, L. R. 9 Exch. 7, have been critically examined, and, when thoroughly understood, I do not think that in their essential facts they are in conflict with the above views. And the right to some equitable relief in cases like the present is directly decided by the supreme court of Missouri, under a lease exactly similar to the one before us, in Biddle v. Ramsey, 52 Mo. 159, and is also recognized by the supreme court of Wisconsin in the case of Hopkins v. Gilman, before cited.

In this connection it may be useful to refer to a provision in the English common-law procedure act of 1851, the eleventh section whereof provides that: "Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any existing or future difference between them, or any of them, shall be referred to arbitration, and any one or more of the parties so agreeing, or person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, for any of them, or against any person or persons claiming through or under him or them, in respect to the matters so agreed to be referred, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration, according to such agreement as aforesaid, and that the defendant was at the time of bringing such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit on such terms, as to costs and otherwise, as to such court or judge may seem fit; provided, always, that any such order may at any time afterwards be discharged or varied as justice may require." 17 & 18 Vict. c. 125, § 11; 2 Daniell, Ch. Prac. (4th Am. Ed.) p. 1861.

It may be true, as suggested by the defendant's counsel, that the statute had its origin in the doctrine of the cases in the English courts before referred to, which, to a large extent, nullified agreements to refer matters in dispute to arbitrators; but, if so, it shows

that the cases which were relied upon by defendant's counsel were productive of such results that this enactment was deemed expedient. However it may be in England, I see no reason for the position that such a statute in this country is necessary in order to justify a court of equity in making by analogy such a rule or order as therein provided for when justice requires it and no good reason exists for not making it.

A rule or order will accordingly be entered in this case staying the prosecution of the law action for rent until the further order of the court. If the law action would settle the amount of rental on a renewal, there might be good reason for allowing it to proceed; but it will not have that effect. Such a rule or order does not contravene the principle contended for by the defendant that before there can be a decree for renewal the rental must be fixed by arbitrators and cannot be fixed by the court, since the object of the rule or order is to compel the defendant (lessor) to himself appoint the assessor, who is to represent him. If he appoints an impartial person, without instructions, and he is met with an impartial appointment by the lessee, it is probable that an agreement as to the rental will be reached. The defendant is, of course, at liberty to answer the bill and contest its averments. When the answer is filed and the proofs are in, the court can discharge or vary the order here made, as justice may require. The demurrer to the bill is accordingly disallowed, and the rule or order, as above suggested in respect to the law action, will be entered. Ordered accordingly.

NOTE. In Mitchell v. Harris (A. D. 1793), 2 Ves. Jr. 129, it was held that a general agreement in a contract to refer all disputes arising thereunder to arbitrators, was no bar to a bill for discovery of matters under the contract in aid of a contemplated action at law; the lord chancellor observing "that a mere agreement to refer can take away the jurisdiction of any court in Westminster Hall, where no reference has taken place." In Milnes v. Gery (1807) 14 Ves. 400, the master of the rolls, in respect to an agreement to sell real estate at a valuation to be fixed by arbitrators, and where, after several meetings, they were unable to agree either upon the price or an umpire, and where no mala fides was imputed, held that a bill for specific performance, praying that the court will appoint a person (its master) to make the valuation, would not lie,—the reason being that the vendor had a right to have the price ascertained in the specified mode; distinguishing the case from one of an agreement to sell at a fair valuation where no particular means of ascertaining the value are pointed out, and where, therefore, the court is at liberty to adopt any means adapted to the purpose. In Morse v. Merest (1821) 6 Madd. Ch. 26, it was held that a vendor who agrees to sell at a valuation to be fixed by A, B, and C cannot be compelled by a court of equity to sell at any other price, but, if the vendor refuses to permit the referees to come upon the land in order to fix upon a valuation, equity will remove this impediment, and decree the defendant to permit the valuation according to the contract. In Greason v. Keteltas (1858) 17 N. Y. 491, a lease was made, with a covenant by lessor to pay, at the end of the term, for the buildings, at a price to be fixed by arbitrators, or if he did not pay for the buildings, to renew at a rent to be determined by arbitrators. The lessor refused to appoint arbitrators to take any steps towards an appraisal, and he was held liable as at law for the value of the buildings on a valuation fixed by the court, the court observing that the case was not one in which there could be a specific performance, since "the covenant to renew is entirely dependent on the failure to pay (for the buildings), and there could be no such failure until the value was ascertained, and the only decree for a specific performance which the court could make would be one compelling the defendant to choose an appraiser; it being well settled that courts of equity will never entertain a suit to compel parties specifically to perform an agreement to submit to arbitration,"—citing Gourlay v. Duke of Somerset, 19 Ves. 431; Agar v. Macklew, 2 Sim. & S. 418; Mitchell v. Harris, 2 Ves. Jr. 129. The case of Greason v. Keteltas, supra, was followed in Hopkins v. Gilman (1868) 22 Wis. 476, where a decree compelling the lessor to choose an arbitrator to fix the rent was reversed, and it was held that the agreement to renew could not be specifically executed, and that the lessee was entitled to have the value of the improvements determined by the court (though the lease provided they should be determined by arbitrators), and to restrain the lessor's action for possession until the payment of the value of the improvements. In Biddle v. Ramsey (1873) 52 Mo. 153, on a lease like the present, where the lessee refused in bad faith to appoint a disinterested arbitrator and remained in possession, held that a bill in equity would lie by the lessor for the settlement of the rights of the parties.

A court of equity will not enforce an agreement to submit a question or dispute to arbitrators—Tobey v. County of Bristol (1845) [Case No. 14,065]—where the grounds of the doctrine and the cases in its support are given. The effect of agreements to refer disputes to arbitration is settled in England by the case of Scott v. Avery, 5 H. L. Cas. 811; and the doctrine of that case, as understood by the English court of appeals, will be found clearly stated in Dawson v. Lord Otho Fitzgerald, L. R. 9 Exch. 7. See, also, Yeomans v. Guard. etc., Ins. Co., 3 Cent. Law J. 792, and cases cited; Randel v. Chesapeake & D. Canal Co., 1 Har. (Del.) 275; Contee v. Dawson, 2 Bland (Md.) 273; Gray v. Wilson, 4 Watts (Pa.) 39; Stone v. Dennis, 3 Port. (Ala.) 239; Scott v. Corporation of Liverpool, 3 De Gex & J. 334; Caledonian Ry. Co. v. Greenock & W. B. Ry. Co., L. R. 2 H. L. Sc. 347. Refusal to refer according to agreement, ground of action at law for damages for such refusal. Livingston v. Ralli, 5 El. & Bl. 132.

In the principal case, after the delivery of the foregoing opinion, an answer was filed, and the court refused to modify the order staying the law action, after which new assessors were appointed in pursuance of the provisions of the lease, who fixed a rental satisfactory to the parties, and the case was accordingly settled.

Case No. 14,211.

The TUBAL CAIN.

[Blatchf. Pr. Cas. 240.] [1]

District Court, S. D. New York. Oct., 1862.

PRIZE—VIOLATION OF BLOCKADE—SPOLIATION OF PAPERS—REFUSAL TO ANSWER—CONTRABAND CARGO.

1. Vessel and cargo condemned for an attempt to violate the blockade.

2. Spoliation of papers by the master.

3. Refusal of the master to answer interrogatories as to the destination of the vessel.

4. Part of the cargo contraband of war.

[1] [Reported by Samuel Blatchford, Esq.]

In admiralty.

BETTS, District Judge. This ship is claimed as a British vessel engaged in a lawful trade at the time she was seized. The capture was made by the United States steamer Octorara, July 24, 1862, at sea, in latitude 32°, and longitude 78° 20', about ninety miles off the coast of South Carolina. A claim and answer was filed August 5, 1862, denying the legality of the capture. On the cause being called for hearing at this term, the United States attorney moved for judgment of condemnation on the pleadings and proofs. The counsel for the claimant appeared in court, and contested the condemnation upon the law and facts presented in the suit. The voyage commenced at Liverpool. By the shipping articles, the vessel was destined to Nassau, thence (if required) to any ports and places in the West Indies, and back to a port of discharge in the United Kingdom, within twelve months. She cleared at Liverpool, April 22, 1862, for St. Johns, New Brunswick. She had on board a miscellaneous cargo, including knapsacks, saltpeter, and cases of rifles, contraband of war, John Smeitherwait, of Liverpool, was her sole owner. Henry Lafone, of the same place, was the shipper of the cargo. That was consigned to the master or order. The master destroyed his private papers when pursued by the Octorara, and just before he was captured, and at Nassau, he destroyed his letters of instructions furnished in England; and he says that some of these papers destroyed might have related to the vessel or cargo. Before the ship left England it was well known that ports of the Southern States were under blockade. This was also publicly known in Nassau. The vessel was consigned to the master, and the cargo was to be delivered to the holder of the bills of lading. The master, on his examination in preparatorio, declined to answer the eleventh and thirty-fourth interrogatories. On the statement to him of the 39th interrogatory by the commissioner, and a demand of him that he should reply to it, he answered: "I have stated all I know or believe, according to the best of my knowledge and belief, regarding the real and true property and destination of the vessel and cargo, except as to the port or place to which the vessel was bound when captured, and which I have declined, and do still decline, to state." This refusal of the witness the prize commissioner reported to the court, and, on motion of the district attorney, the court thereupon peremptorily ordered the witness to be re-examined upon the 39th interrogatory, and to answer the same fully and truthfully. The commissioner subsequently reported to the court that, pursuant to the order of the court, he had re-examined the witness to the 39th interrogatory, and that, after it had been fully and distinctly read to the witness, he said: "I have already stated, in my former examination, all I know or believe in regard to the real and true property of the vessel and cargo. I answer, that I intended to go to Charleston, South Carolina, if I could get there, and if not, then to any place on that coast where I could run my ship in." A passenger on the vessel, Levy, testifies that he was bound to Charleston, and understood, from conversation with the officers and crew, that the vessel was to go there. There was, plainly, a studied exertion in the papers prepared for the voyage to give it a semblance of neutrality and honesty which did not belong to it. There is no necessity for imputing to any of the crew a connivance or complicity with the owners of the vessel or cargo, but the contumacy of the master in giving his evidence, and his ultimate avowal of the culpable purpose of the adventure, together with his suppression of the papers in his possession on the voyage, stamps its hostile character as against the United States, and fixes the confiscable character of all the property seized.

A decree is, accordingly, directed to be entered, condemning the vessel and cargo to forfeiture, because both of them were despatched with the intention of violating, and were arrested whilst attempting to violate, the blockade of Charleston; and, also, because it was a part of such intention to import, for the use of the enemy, into his ports, under blockade by the authority of the United States, articles contraband of war.

Case No. 14,212.

The TUBAL CAIN.

The ANNIE DEAS.

[Blatchf. Prize Cas. 347.] [1]

District Court, S. D. New York. May 22, 1863.

UNITED STATES MARSHALS—APPOINTMENT OF AUCTIONEER TO CONDUCT JUDICIAL SALE —USAGE—COSTS.

1. The marshal is not authorized to appoint an auctioneer to conduct a judicial sale, at the expense of the government or of a private party, without the consent of the party for whose benefit the services are performed.

2. Any custom or usage to that effect rests only on the direct consent of the party using the process of sale.

3. An auctioneer cannot have costs or disbursements taxed in his favor by the court, in invitum, against the libellants or claimants personally, or against the res, nor can the auctioneer's charges be taxed to the marshal as a part of his disbursements.

In admiralty.

BETTS, District Judge. The clerk, on taxation of the marshal's disbursements in the above causes, disallowed, in the first, the sum of $654.80, and in the second the sum of $411.48, fees to be paid an auctioneer for his commissions in disposing of the prize property at public sale. The marshal, in behalf

[1] [Reported by Samuel Blatchford, Esq.]

of the auctioneer, appeals to the court to have those disallowances reversed, and to order the above sums to be taxed and certified in favor of the marshal's accounts. It will be assumed that the marshal laid before the clerk adequate proof that he had employed the auctioneer to render those services in the suits; that the services were necessary and proper, and have been performed therein; that he actually made the disbursements to the auctioneer, as charged therefor; and that the same were charged at a reasonable and proper rate. These vouchers, and the evidence to verify them, have not been brought before me on this appeal; but as the admission of the amounts by the secretary of the interior could not be obtained without evidence to that effect, it will be presumed that such evidence accompanied the vouchers on the presentation of the charges to the clerk, and were properly considered by that officer. The purpose of this appeal is to obtain from the court an adjudication that the commissions claimed by the auctioneer are legal liens upon the proceeds of the public sales, which the marshal is bound to disburse and have satisfied on the adjustment of his charges by the court.

The point has been earnestly discussed, on this appeal, by counsel for the auctioneer, and the justness of the allowance is maintained upon its intrinsic merits and upon the long, unvaried usage in this respect of the courts of the United States within this district. The district attorney and the counsel for the captors state that they have positive instructions from the treasury and navy departments to oppose this class of charges for services rendered since a time anterior to the period of those services; and the marshal raises the same objection unless the sanction of those departments is produced for the disbursements.

No provision of law authorizes the marshal to appoint auctioneers to conduct judicial sales at the expense of the government or of private parties without the consent of the parties for whose benefit the services are performed. The official duty is imposed on the marshal, and his compensation therefor is appointed by law; and the custom or usage supposed to exist in the courts, sanctioning the designation and compensation of an additional agent to that end, is found, on examination, to rest only on the direct consent of the party using the process of sale. Two fatal objections to this appeal, therefore, exist: First, the auctioneer is not an officer in the suit, recognized by law as entitled to claim and have taxed costs or disbursements in his favor by the court, in invitum, against the libellants or claimants personally, or against the res produced by the action; second, the court cannot enforce, or recognize as of any legal effect against the suitors, arrangements which may exist between the marshal individually, or in his official capacity, touching proceedings in suits with other persons not being also under the authority of the court, in establishing fees, commissions, or other rewards, by way of taxation, adjustment, or otherwise, except in due course of law on suit brought. For the foregoing reasons, the above application on the part of the auctioneer must be denied.

Case No. 14,213.

TUCK *v.* BRAMHILL.

[6 Blatchf. 95; 3 Fish. Pat. Cas. 400; Merw. Pat. Inv. 428.] [1]

Circuit Court, S. D. New York. April 14, 1868.

PATENTS—SEPARATE CLAIMS IN ONE—DISCLAIMER—EFFECT OF—COSTS.

1. In the letters patent, granted June 26th, 1855, to Joseph Tuck, for "improvements in packing for stuffing boxes, &c.," the claim, in these words: "The forming of packing for pistons or stuffing boxes of steam engines, and for like purposes, out of saturated canvas, so cut as that the thread or warp shall run in a diagonal direction from the line or centre of the roll of packing, and rolled into form, either in connection with the india-rubber core, or other elastic material, or without, as herein set forth," is a claim for a new article of manufacture, and not for any special use thereof.

2. The claim to the forming of the roll, "either in connection with the india-rubber core, or other elastic material, or without," is equivalent to two separate claims, one for the forming of the roll with the core, and one for the forming of it without the core.

3. The roll without the core being old, but the roll with the core being new, the patentee had a right, under the 7th section of the act of March 3, 1837 (5 Stat. 193), to enter a disclaimer, disclaiming the forming of the roll without the core, and limiting his claim to the forming of the roll with the core.

[Cited in Session v. Romadka, 145 U. S. 40, 12 Sup. Ct. 801.]

4. Although such disclaimer is entered after the commencement of a suit on the patent by the patentee, he can, nevertheless, under the 7th and 9th sections of the said act of 1837, recover in such suit, unless he unreasonably neglected or delayed to enter such disclaimer, but he cannot recover costs therein.

[Cited in Taylor v. Archer, Case No. 13,778; Smith v. Nichols, 21 Wall. (88 U. S.) 117; Burdett v. Estey, Case No. 2,145; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 135; Guaranty Trust & Safe-Deposit Co. v. New Haven Gaslight Co., 39 Fed. 269; Sessions v. Romadka, 145 U. S. 41, 12 Sup. Ct. 802.]

[This was a bill in equity filed to restrain the defendant, William Bramhill, from infringing letters patent No. 13,145, for "improvements in packing for stuffing boxes," etc., granted to plaintiff, Joseph H. Tuck, June 25, 1855. The nature of the invention, the claim of the patent, and the facts of the case are fully set forth in the opinion of the court.] [2]

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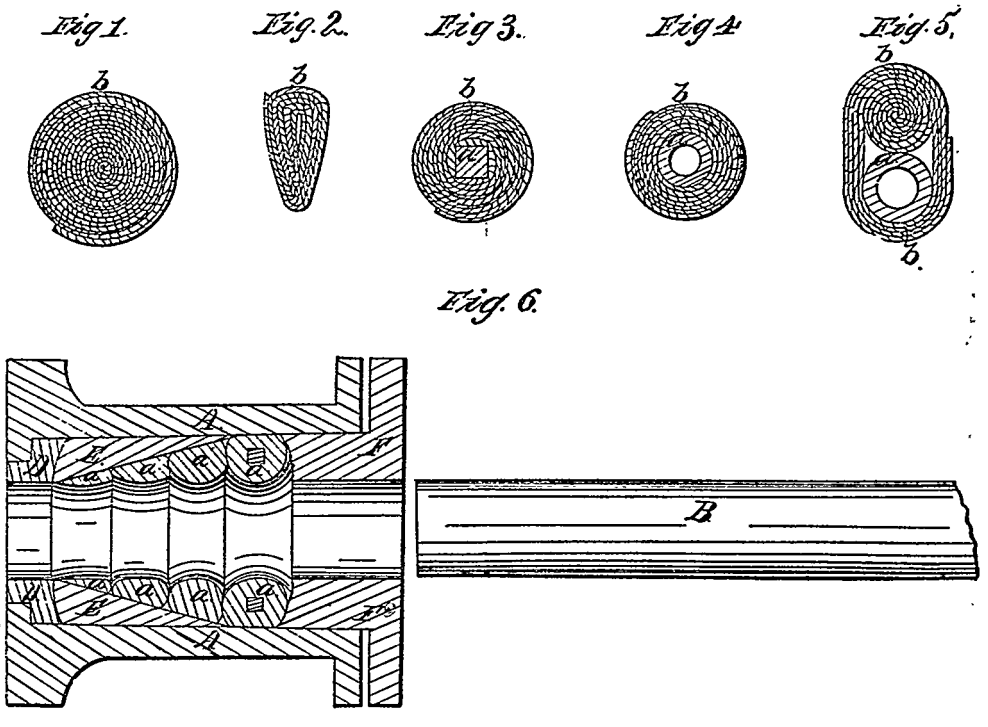
[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here reprinted by permission. The syllabus and opinion are from 6 Blatchf. 95, and the statement is from 3 Fish. Pat. Cas. 400. Merw. Pat. Inv. 428, contains only a partial report.]

[2] [From 3 Fish. Pat. Cas. 400.]

George Gifford, for plaintiff.
Charles M. Keller, for defendant.

BLATCHFORD, District Judge. The patentee says, in his specification: "My invention relates to an improved manner or mode of making or forming packing for pistons, valves, and other parts of steam engines, and for like purposes, from india-rubber and canvas saturated with india-rubber, or other suitable material or composition." He describes, as follows, the mode of carrying out his invention in practice: "I first take canvas, or other suitable material, and saturate it with a solution of india-rubber, or other equivalent composition. I then cut the canvas, thus prepared, in a diagonal manner, into strips of any required width, cement the diagonal ends together, so as to form any length of fillet required, then roll it up into a roll, and allow it to cement in a firm but elastic or flexible roll, of any suitable diameter required. In cases where greater elasticity is required, I roll the canvas round a core or centre-piece of india-rubber, or other suitable elastic material." Annexed to the patent are six figures of drawings, which are described in the specification. Figure 1 represents a section of the packing, which is rolled up from its own centre, and may be round, or nearly so. Figure 2 represents a section of the packing, which is rolled loosely at one point, and tightly at the opposite point, whereby a conical form may be given to the packing, so as to be used in conical seats. Figure 3 represents a section of the packing, rolled around an elastic core of rubber, which core may be square, round, oblong, oval, or of any desired form which the roll of packing is designed to possess. Figure 4 represents a section of the packing, having a hollow cylindrical core. Figure 5 represents a section of the packing made according to the combined forms shown in figures 1 and 4, the canvas being first rolled from its own centre, and then rolled around the core, so as to embrace both its own coils and the core in its outer folds. The specification then says: "In all these figures, but a modification of one general plan is illustrated, namely, the rolling of canvas, first saturated as described, into a fillet, in any reasonable length, and of any diameter, from which packing may be cut in lengths, as required. A packing, such as herein described, has heretofore not been known as an article of commerce or of manufacture, and, as such, I claim to be the first inventor or producer of it." Figure 6 represents a vertical section through a packing-box, showing the manner of applying the packing to the cylinder of a steam engine. The specification adds: "Any of the forms of packing represented in the several figures 1, 2, 3, 4, and 5, may be used, that represented at figure 2 being more particularly adapted to the lower part of the packing-box, on account of the conical form of the block

[Drawings of patent No. 13,145, granted June 26, 1855, to J. H. Tuck; published from the records of the United States patent office.]



behind it. Piston heads and valves, or other places, may be packed in a similar manner, the packing being cut off in suitable lengths, to suit the thing to be packed. By this mode of manufacture, it will be seen that each fold of the packing in contact with the rubbing or moving surface must be entirely worn away, and cannot be drawn out by the rubbing surface, (as is frequently the case when packing is made in concentric folds of prepared canvas,) being held in its place by the ring above and below it." The claim is as follows: "The forming of packing for pistons or stuffing boxes of steam engines, and for like purposes, out of saturated canvas, so cut as that the thread or warp shall run in a diagonal direction from the line or centre of the roll of packing, and rolled into form, either in connection with the india-rubber core, or other elastic material, or without, as herein set forth."

The principal defence set up in the answer, is want of novelty in the invention. The answer avers, that, before the alleged invention by the plaintiff, strips of canvas and other cloth, saturated or coated with india-rubber, were rolled up into rolls, both upon and without an inner core of india-rubber, and with the threads of the cloth placed in a direction diagonal to the axis of the roll, and in various other directions, constituting a new manufacture for various uses, and that the application of such manufacture to any special purpose, such as the packing of stuffing boxes, is not an invention, and does not constitute the subject-matter of letters patent. The answer also avers, that the defendant has never made, used, or sold, what is claimed as the invention of the plaintiff, in the patent.

The evidence as to infringement shows the sale by the defendant of two different rolls of packing, which are produced, one of larger diameter than the other, and each having an elastic solid india-rubber core, the section of which core is a square, the rolls of packing being cylindrical. It is also shown, that the defendant, on inquiry being made for "Tuck's patent packing," sold packing similar to the two rolls referred to. The two rolls were purchased by a person who sells the packing as an agent or licensee of the plaintiff, and for the purpose of their being used as evidence of their sale by the defendant. The two rolls are made exactly in accordance with the packing described in the patent.

The defendant showed, by satisfactory proof, that an article, made in the same manner as the plaintiff's packing, but without a core, was known and used several years before the invention of the plaintiff was made. No evidence was given of any prior knowledge of any such article made with a core.

After the testimony on both sides had been put in before the examiner, the plaintiff, on the 18th of February, 1867, filed in the patent office a disclaimer, setting forth that he was still the sole owner of the patent, and entering his disclaimer "to that part of the claim which covers the packing therein described without a core, thereby causing the claim to include only the packing formed out of saturated canvas, so cut as that the thread or warp shall run in a diagonal direction from the line or centre of the roll of packing, and rolled into form in connection with and around an india-rubber core, or one of other elastic material, meaning the said claim to include only the combination of an elastic core, with saturated canvas, having threads running in a diagonal direction, as described in said patent, wound around the same."

The plaintiff claims that he is entitled to a decree for a perpetual injunction restraining the defendant from making, using, or selling, the packing which has a core, and for an account in regard to the packing of that kind which he has made and sold. The claim of the patent is, undoubtedly, as the defendant contends, and as the plaintiff does not deny, for an alleged new article of manufacture, and not for any special use thereof. But the defendant insists, that what is claimed in the patent is not so divisible as to admit of a disclaimer being made to a part of it, and that the alleged invention is not so divisible; in other words, that the plaintiff did not make, and the patent does not make, claim to two separable inventions, but to only one invention, and that that invention is shown not to have been new with the patentee. The ground taken by the defendant is, that the patentee, in his specification, states his invention to be merely the roll formed in the manner described, and that the modification of making it with a core, so as to produce greater elasticity, was not a separate invention in fact, and is not spoken of in the specification as a separate invention, distinct, as such, from the making of the roll without a core. It is true, that the specification speaks of the plan of rolling the canvas, first cut and saturated as described, into a fillet of any reasonable length and of any diameter, as one general plan, and says that the five figures of sections of rolls show what are only modifications of such one general plan. But the claim claims the forming of the roll "either in connection with the india-rubber core, or other elastic material, or without." This is equivalent to two separate claims—one for the forming of the roll with the core, and one for the forming of it without the core. The patentee might have made two such claims, separately numbered, and both would have been good claims, if the inventions were new with him. He did that, in effect, in the claim he made. The roll with the core is a distinct thing from the roll without the core. It has a utility of its own, as is quite apparent from the fact that the defendant sells it. The prior existence of the roll with-

out the core is shown, but it is not shown that the roll with the core was known or used before the invention of it by the plaintiff. If the plaintiff had known of the existence of such roll without the core, he could have patented the combination of it with a core, if such combination was invented by him and was new. There is sufficient utility and invention in such combination to support a patent. The result produced by the combination is a new article, and, being useful, it is patentable. Crane v. Price, Webst. Pat. Cas. 409; McCormick v. Seymour [Case No. 8,726].

It having been shown that the forming of the roll in the manner described, without the core, was old, the next question is, whether the plaintiff could disclaim, as he has attempted to do, the forming of the roll without the core. and limit his claim to the forming of the roll with the core. The 7th section of the act of March 3, 1837 (5 Stat. 193), provides for the making of a disclaimer, where a claim is too broad, and claims more than that of which the patentee was the original or first inventor; but the disclaimer cannot be made unless some material and substantial part of the thing patented is truly and justly the invention of the patentee, and, in such case, he is authorized to make disclaimer of such parts of the thing patented as he does not claim to hold by virtue of the patent. The defendant contends, that the claim of this patent is not equivalent to two claims, and that, therefore, under the statute, the patentee has no right to disclaim any thing in the claim. But this objection has been already disposed of. The forming of the roll without the core is one material and substantial part of the thing patented. The forming of the roll with the core is another material and substantial part of the thing patented. The patentee was not the first inventor of the former. He was the first inventor of the latter. The two are clearly separable and distinguishable. The claim is too broad, and claims more than that of which the patentee was the first inventor. A clear case, therefore, existed, under the 7th section of the act of March 3, 1837, for a disclaimer by the patentee of so much of his claim as covers the forming of the roll without the core. The disclaimer goes exactly to that extent. It disclaims that part of the claim "which covers the packing therein described without a core;" and then it goes on to state what the claim will be after such disclaimer, namely, that it will "include only the packing formed out of saturated canvas, so cut as that the thread or warp will run in a diagonal direction from the line or centre of the roll or packing, and rolled into form in connection with and around an india-rubber core, or one composed of other elastic material," and that it will "include only the combination of an elastic core with saturated canvas having threads running in a diagonal direction, as described in the said patent, wound around the same." This disclaimer is unambiguous, and leaves the claim as if it had originally claimed only such combination. It is substantially just such a disclaimer as the supreme court, in Silsby v. Foote, 14 How. [55 U. S.] 218, 221, held to be valid. The claim there was, to "the application of the expansive and contracting power of a metallic rod, by different degrees of heat, to open and close a damper, which governs the admission of air into a stove, or other structure, in which it may be used, by which a more perfect control over the heat is obtained than can be by a damper in the flue." It having been shown that the application of the expansive and contracting power of a metallic rod, by different degrees of heat, to regulate the heat of other structures than a stove in which the rod was acted upon directly by the heat of the stove, or the fire which it contained, was not new with the patentee, he entered a disclaimer "to so much of said claim as extends the application of the expansive and contracting power of a metallic rod, by different degrees of heat, to any other use or purpose than that of regulating the heat of a stove in which such rod shall be acted upon directly by the heat of the stove, or the fire which it contains." The supreme court sustained such disclaimer as a good disclaimer, under the 7th section of the act of 1837.

But the defendant contends, that the disclaimer in this case, if properly made at all, cannot affect the issues in this suit, because it was not filed till after the commencement of the suit. In other words, the defendant contends that the plaintiff cannot recover in this suit, because the claim, as it stood when the suit was brought, embraced more than that of which the plaintiff was the first inventor. In urging this view, the defendant relies on the general principle of law to that effect, as recognized before the act of March 3, 1837, was passed, and on the provision of the 7th section of that act, that "no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing the same;" and he insists, that the claim of the patent must be construed, for the purposes of this suit, as if no disclaimer had been filed. But the 7th section of the act of 1837 must be construed in connection with the 9th section of the same act. The latter section provides, "that whenever, by mistake, accident, or inadvertence, and without any willful default or intent to defraud or mislead the public, any patentee shall have, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor, and shall have no legal and just right to claim the same, in every such case the patent shall be deemed good and valid for so much of the invention or dis-

covery as shall be truly and bona fide his own, provided it shall be a material and substantial part of the thing patented, and be definitely distinguishable from the other parts so claimed without right, as aforesaid; and every such patentee, his executors, administrators, and assigns, whether of the whole or of a sectional interest therein, shall be entitled to maintain a suit, in law or in equity, on such patent, for any infringement of such part of the invention or discovery as shall be bona fide his own, as aforesaid, notwithstanding the specification may embrace more than he shall have any legal right to claim." Under this provision of the 9th section, taken by itself, the plaintiff is entitled to recover in this case, without having entered any disclaimer. The patentee, by inadvertence and mistake, and without any willful default or intent to defraud or mislead the public, claimed, in his claim, to be the original and first inventor of forming the roll without the core, which was a material and substantial part of the thing patented; but still, under this provision of the 9th section, the patent is valid for the forming of the roll with the core, which was first invented by the plaintiff, and is a material and substantial part of the thing patented, and is definitely distinguishable from the forming of the roll without the core. Therefore, the plaintiff, even without the disclaimer, is authorized, by the 9th section, to maintain this suit, for the infringement of so much of the claim as covers the forming of the roll with the core, although the claim embraces also the forming of the roll without the core. It is provided, indeed, by the 9th section, that "no person bringing any such suit shall be entitled to the benefit of the provisions contained in this section, who shall have unreasonably neglected or delayed to enter at the patent office a disclaimer, as aforesaid." It is not pretended, however, that the patentee in this case has been guilty of any such neglect or delay. It is further provided, by the 9th section, that, where the plaintiff recovers under that section, "he shall not be entitled to recover costs against the defendant, unless he shall have entered at the patent office, prior to the commencement of the suit, a disclaimer of all that part of the thing patented which was so claimed without right." Therefore, the plaintiff can recover no costs in this case.

But, it is urged that the provision of section 7, that "no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing the same," forbids a recovery by the plaintiff in this suit, notwithstanding the provisions of the 9th section. This is not so. It is true, that Judge Story, in Reed v. Cutter [Case No. 11,645], says, that if a disclaimer is filed during the pendency of a suit, the plaintiff will not be entitled to the benefit thereof in that suit; and that the same judge, in Wyeth v. Stone [Id. 18,107], says, that the disclaimer mentioned in the 7th section, must be interpreted to apply solely to suits pending when the disclaimer is filed in the patent office, and the disclaimer mentioned in the 9th section to apply solely to suits brought after the disclaimer is so filed, and that the proviso to the 7th section, as to the disclaimer affecting a pending suit, prevents its affecting in any manner whatsoever a suit pending at the time it is filed. But the plaintiff does not need to claim any benefit in this suit from the disclaimer. He recovers in this suit by virtue of the 9th section, it not appearing that he unreasonably neglected or delayed to enter a disclaimer. I cannot concur, however, in Judge Story's view of the provision in the 7th section, as to the disclaimer's affecting a pending suit. I understand that provision to mean, that a suit pending when the disclaimer is filed, is not to be affected by such filing, so as to prevent the plaintiff from recovering in it, unless it appears that the plaintiff unreasonably neglected or delayed to file the disclaimer. The "unreasonable neglect or delay," mentioned in the 7th section, manifestly refers to the unreasonable neglect or delay mentioned in the 9th section, and the disclaimer mentioned in the 9th section is clearly the disclaimer provided for in the 7th section. Moreover, the provision of the 9th section, that the plaintiff, where he is entitled to recover under that section, shall not recover costs, unless he has entered a disclaimer, prior to the commencement of the suit, of what he claimed without right, is a strong implication, that, where he does not enter the disclaimer until after the commencement of the suit, he may still recover in the suit, if otherwise entitled to do so, but without recovering costs. And such has been the view heretofore held by Mr. Justice Nelson, in this court. In Guyon v. Serrell [Case No. 5,881], he allowed a recovery, without costs, in a case where a disclaimer was filed after suit brought; and in Hall v. Wiles [Id. 5,954], he says: "If the disclaimer was entered in the patent office before the suit was instituted, the plaintiff recovers costs in the usual way, independently of any question of disclaimer. But if, in the progress of the trial, it turns out that a disclaimer ought to have been made as to part of what is claimed, the plaintiff may recover, but will not be entitled to costs." Of course it follows, that if a disclaimer is made after suit brought, the plaintiff may still recover, but without costs.

The plaintiff is entitled to a decree for a perpetual injunction, as prayed for in the bill, in respect to the packing formed with a core, and for an account in respect to such packing, and for a reference to a master to take and state such account. He will not be entitled to recover any costs in the suit.

Case No. 14,214.

Ex parte TUCKER.

[1 Cranch, C. C. 89.] [1]

Circuit Court, District of Columbia. April Term, 1802.

NATURALIZATION—RESIDENCE—DEPOSITION.

Upon application for naturalization a deposition in 1802, that the deponents have known the applicant "since the year 1793, in New York," is not evidence that he was residing in the United States before the 29th of January, 1795.

John Tucker, a native of the Island of Bermuda, applied to be admitted a citizen of the United States, under the law of April 14th, 1802. A deposition of Governeer and Kemble, taken before a notary-public, stated that they have known him "since the year 1793, in New York, and that he was a supercargo in their employ in the year 1795, and continued till 1798."

The application was made under the clause authorizing persons resident in the United States before the 29th of January, 1795, to become citizens on proof of two years residence, &c.

THE COURT were unanimously of opinion that the affidavit was not sufficient.

TUCKER. Ex parte. See Case No. 10,547.

Case No. 14,215.

In re TUCKER.

[2 Tex. Law J. 171.]

District Court, W. D. Texas. July 12, 1878.

BANKRUPTCY — DISCRETIONARY POWERS OF ASSIGNEE—EXEMPTIONS.

An assignee in bankruptcy, under the discretionary powers vested in him by the provisions of section 5045, Rev. St., cannot set apart money, unless such money is the proceeds of the sale of specific property embraced within the exemptions, which should and ought to be set apart to the bankrupt, or for temporary support, where the family is entirely destitute.

In pursuance to an order of the honorable court made in the chambers at Austin, on the 22d day of June, 1878, referring to me, one of the registers of said district, the petition of F. N. Tucker, bankrupt, aforesaid, praying that an allowance of five hundred dollars in money be paid to him out of the funds belonging to said bankrupt estate in the hand of F. B. Bryan, assignee, which he claims as an exemption, under the provisions of section 5045, Rev. St. U. S., I ordered a hearing of said matter at Dallas, in said district, on the 12th day of July, 1878, and also ordered, at the same time and place, the examination of the bankrupt. The petition of said bankrupt, asking such allowance, having been indorsed and recommended by said assignee at the hearing thereof, I appointed Messrs. Brookhout & Simpson, attorneys, to represent the interests of the general creditors, and Gen. W. L. Caball & Harris appeared as attorneys for said bankrupt. At the hearing said bankrupt and other witnesses were examined touching his business and dealings prior to the commencement of proceedings in bankruptcy, his means of support and present status, and condition of those connected with him, from which, and from an examination of the schedules of said bankrupt, on file, the following facts are made to appear: (1) That said bankrupt is a single man, has never been married, and has no family, of his own; that his liabilities, as shown by his schedules on file, amount to near $6,000, and assets, consisting of a stock of groceries, merchandise, etc., was invoiced by the assignee at $2,643.03, with some notes and accounts of no fixed or determinate value. (2) That the family consists of said bankrupt, his mother and two brothers, who live together on the homestead of his mother in the city of Dallas; that his mother is an invalid, and that his younger brother, who is about 19 years of age, has nearly lost his eyesight; that said bankrupt filed his petition in voluntary bankruptcy on the 22d day of January, 1878, in said court; that prior thereto he was possessed of certain real estate, to-wit, a house and lot in the city of Dallas, which he claimed as a homestead, and that between the 1st and 10th of January, only a few days before he filed his petition in bankruptcy, he sold said property to Messrs. Snieder & Davis, merchants in the city of Dallas, and agents for Zeeblow & Beacham, for the sum of $1,400, $1,100 of which he paid to said parties, and the balance, $300, he paid to another house in the city of St. Louis. It further appears that the furniture for his mother's house was furnished by said bankrupt, which he states still belongs to him, though not rendered in his schedules of assets, and value not given.

By S. T. NEWTON, Register:

The assignee having indorsed and recommended the allowance claimed by the bankrupt in his petition, it may be viewed, so far as his act is concerned, in the light of the certificate of exemptions which the law requires him to make to each bankrupt, under section 5045, Rev. St., and by which act he is invested with discretionary powers.

The question then presented upon the facts as above reported is, was the assignee correct, in the exercise of the sound discretion with which the law invests him, in recommending the allowance, and do the facts bring the case within the purview of any reported adjudications upon the subject where money out of the assets of the estate has been allowed? I have been referred, by counsel for the bankrupt, to the following adjudications as authorities sustaining their position: In re Ruth [Case No. 12,172]; In re Cobb [Id. 2,920]; In re Thornton [Id. 13,994]; In re Hay [Id. 6,253]; In re Thompson [Id. 13,938]. From a careful examination of these authorities, I am unable to see their applica-

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

tion. In the case In re Thornton [supra] the court decides: "That money may be set apart when the family is entirely destitute, without house, bedding, furniture, provisions, and means for temporary subsistence or support." The other two cases above cited are to the same effect. In the case In re Welch [Case No. 17,366], where an application by the bankrupt, who was of the age of seventy years, and wife sixty-eight, with one grandchild aged seven years, to an assignee for allowance in money, Judge Blatchford held that, under the word "article" or word "necessaries," money could not be set apart, unless such money is the proceeds of specific things which could and ought to be set apart under the head of "other articles and necessaries" of the bankrupt. In applying the facts and circumstances of this case to the law, I do not think the allowance can or ought to be made.

The evidence shows that the bankrupt is a single man, has never been married, nor had any family of his own. Our state statute (article 6834, 2 Pasch. Dig. p. 1401), after enumerating the articles exempted and set apart to heads of families, says: "And to every citizen, not the head of a family, one horse, bridle and saddle, all wearing apparel, all tools, apparatus and books belonging to his private library." Under this head I think no claim can be set up to an allowance in money. Is he then entitled to it under the act of congress? The bankrupt, in his examination, states that he resides with his mother on her homestead in the city of Dallas; that he furnished the house with his own furniture, which he still owns, but was not rendered in his schedules, and no fixed value placed upon it; that he is a merchant by profession, and has a brother 21 years of age to assist him in the support and maintenance of his mother, who is shown to be an invalid, and a younger brother 19 years of age, who is partially blind. The evidence further shows that the bankrupt filed his petition in voluntary bankruptcy in the district court of said district on the 22d day of January, 1878, and he states that between the 1st and the 10th of that month he sold the house and lot which he owned in the city of Dallas for the sum of $1,400 in cash, and that he paid the entire amount of the proceeds of that sale to two creditors residing in the city of St. Louis, thus applying more than one-half of the entire value of his estate to two of his creditors. Whether this sale was made in violation of section 5128, Rev. St., is not necessary for me, for the purpose of determining the merits of the claim before me, to inquire. This section declares: "If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such preferment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and knowing that such attachment, seizure, sequestration, preferment, pledge, assignment, or conveyance, is made in fraud of the provisions of this title, the same should be void, and the assignee may recover the property, or the value thereof, from the person so receiving it or to be benefited."

Whether the sale of this property, by said bankrupt, was intended to give a preference to the two creditors receiving the proceeds thereof or not, the presumption is irresistible that he knew his financial condition and inability to pay all his creditors in full, and that he was depriving his other creditors of an equal participation in his property, and a just and equitable distribution thereof among them. If the condition of the family is such now as to make necessary for an allowance in money to be made for their support, it is but fair to presume that the same necessity existed at the time he disposed of his property in Dallas, and had the proceeds under his control, which he could have reserved. I think it would be unjust to the creditors, who have not been benefited or received any portion of the proceeds of said property, to contribute one-fourth, at least, of the funds in the hands of the assignee for the support of the family, when it is not contended or shown that the money in the hands of the said assignee is the proceeds of the sale of any portion of the bankrupt's property which should have been set apart to him; when it is evident, too, that the creditors have not been paid for the goods from the sale of which this money was derived. The application, I think, should be refused and disallowed, which is respectfully submitted.

The attorneys for the bankrupt request that my ruling be certified to the honorable court for revision.

DUVAL, District Judge. In connection with the petition of the bankrupt, F. N. Tucker, to be allowed five hundred dollars out of funds in the hands of his assignee, I have duly considered the facts as presented in the depositions accompanying said petition, and am of the opinion that the allowance prayed for would not be authorized by the law. The foregoing opinion of the register is, therefore, in all things approved and confirmed, and said allowance refused.

TUCKER (AVERILL v.). See Case No. 670.

Case No. 14,216.

TUCKER v. BURDITT et al.

[4 Ban. & A. 569.] [1]

Circuit Court, D. Massachusetts. Oct., 1879.

PATENTS — PRELIMINARY INJUNCTION — FORMER SUIT—NEW ARTICLE—NEW PROCESS—REISSUE.

1. Upon a motion for a preliminary injunction, the defendants showed that, in a prior suit against the manufacturers who had supplied them with the infringing articles, the complainant had obtained an interlocutory decree: *Held*, not a sufficient reason for withholding the injunction.

2. Such infringing articles could not be released from the monopoly of the patent until a final decree, in the former suit, had been rendered, and satisfied.

3. Where an original patent describes a new article made by a new process, the reissue may be in two parts, one for the process, and one for the article of manufacture

[This was a bill in equity by Hiram Tucker against Charles A. Burditt and others for the infringement of letters patent No. 40,964, granted to plaintiff December 15, 1863, reissued September 11, 1866, Nos. 2,355 and 2,356.]

C. M. Reed, for complainant.

C. E. Mitchell, for defendants.

LOWELL, Circuit Judge. In the year 1863 the plaintiff patented a new and ingenious process for bronzing iron, and in 1866 the patent was surrendered and reissued in two patents, one for the process, and one for the manufacture. The patent for the process has been twice sustained; by Justice Clifford, in this district (Tucker v. Tucker Manuf'g Co. [Case No. 14,227]), and by Judge Shipman, in Connecticut. In the latter case, the suit was against P. & F. Corbin, the manufacturers who have supplied the defendants with the articles of bronzed iron, the sale of which the plaintiff seeks to enjoin.

For the purposes of this hearing, the novelty and validity of the patent for the process are admitted, and infringement of the second patent is not seriously questioned. Objection is taken that the subject matter will not admit of a valid patent for a new article of manufacture; that the commissioner exceeded his power in issuing two patents; that the decree against the manufacturers frees the article from the monopoly of the patent.

Taking the third point first, the evidence is that the master's report has not yet been made up in the case against the Corbins, and of course no final decree has been rendered or satisfied, and it cannot be known when, if ever, it will be satisfied. Possibly, when that event occurs, the profit upon these articles will be found to have been included; and, if so, I should suppose the articles themselves would be thereafter exempted from injunction. When that time comes, the defendants can raise the question.

In respect to the issue of two patents a large discretion is left to the commissioner; the matter is specially made discretionary with him in the existing law (Rev. St. § 4916); and such was the construction of the earlier statute (Bennet v. Fowler, 8 Wall. [75 U. S.] 445); and especially in the case of a new article made by a new process, the reissue of separate patents has been pronounced valid (Goodyear v. Providence Rubber Co. [Case No. 5,583], 9 Wall. [76 U. S.] 788).

The last objection, that the bronzing of iron does not make it a new article of manufacture within the meaning of the patent law, has been ably argued. The objection does not strike me with sufficient force to require, in this case, that an injunction should be withheld. The patent is prima facie valid, and I do not at present see why it may not be sustained. The articles sought to be enjoined must, as I understand it, derive a very considerable part of their value from the beauty given them by the patented process, and, therefore, there is no reason for refusing to enjoin, on the ground that the damage by injunction will be excessive. Injunction granted.

[For hearing on a motion for an attachment on account of breach of an injunction, see 5 Fed. 808.]

[For other cases involving this patent, see note to Tucker v. Tucker Manuf'g Co., Case No. 14,227.]

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

Case No. 14,217.

TUCKER v. CARPENTER.

[Hempst. 440.] [1]

Circuit Court, D. Arkansas. Oct., 1841.

INJUNCTION—DISSOLUTION—REINSTATEMENT.

1. Where an injunction has been dissolved on the coming in of the answer denying the equity of the bill, and testimony has afterwards been taken and published tending to show the right of the complainant to relief, the injunction, on application, may be reinstated.

2. The granting or dissolving an injunction rests in the sound discretion of the chancellor, and on the justice and equity of each particular case.

[Cited in Commerford v. Thompson, 1 Fed. 424.]

[This was a bill in equity by Wood Tucker against George W. Carpenter. Heard on application to reinstate an injunction, which had been dissolved.]

Chester Ashley and George C. Watkins, for complainant.

F. W. Trapnall and John W. Cocke, for defendant.

JOHNSON, District Judge. In this case the injunction was dissolved on the coming in of the answer denying the equity of the bill.

[1] [Reported by Samuel H. Hempstead, Esq.]

Testimony has been taken and published on the part of the complainant since that time, which certainly goes far to sustain the complainant's right to relief, as set forth in the bill; and at this point an application, supported by special reasons, is made by the complainant to reinstate the injunction. The counsel of the defendant contend that this cannot be done, and consequently resist the application. It is not to be denied that there are many cases where an injunction will be revived, although it has been dissolved on the merits. Eden, Inj. 146, 153; Fanning v. Dunham, 4 Johns. Ch. 36. Where new facts are stated in an amended or supplemental bill, a fresh injunction may be awarded on special motion. Travers v. Lord Stafford, 2 Ves. Sr. 19, 21. It is true that in such a case an injunction is not as a matter of course, but depends on the sound discretion of the court. And it may be safely asserted as a general rule in our courts, that all injunctions depend upon the discretion of the chancellor, and are to be granted or denied according to the justice and equity of each particular case. A writ of injunction may be said to be a process capable of more modifications than any other in the law; it is so malleable that it may be moulded to suit the various circumstances and occasions presented to a court of equity. It is an instrument in its hands capable of various applications for the purposes of dispensing complete justice between the parties. It may be special, preliminary, temporary, or perpetual; and it may be dissolved, revived, continued, extended, or contracted; in short, it is adapted and is used by courts of equity as a process for preventing wrong between, and preserving the rights of parties in controversy before them. The court is always open to reinstate an injunction. Radford's Ex'rs v. Innes' Ex'rs, 1 Hen. & M. 8; Bellingslea v. Bradford, 1 Bland, 568. It could not, however, be allowed to a complainant, after an injunction had been denied or dissolved on the merits, to move for another on the same state of case; nor could he have one upon an immaterial amendment in his bill. But on the other hand, where an injunction has been dissolved, and it afterwards appears, from proof taken, that the injunction ought to be continued, a court, in the exercise of a sound discretion, will reinstate it, because otherwise irreparable mischief might ensue. In this case, the testimony taken since the filing of the answer and dissolution of the injunction goes far towards overturning the answer and sustaining the right of the complainant to relief, and if not weakened by counter proof, would probably be sufficient for that purpose; but at all events is, in my judgment, quite sufficient to warrant me in reinstating the injunction originally granted until the further order of the court. Ordered accordingly.

NOTE. In April, 1844, this cause came on for final hearing on the equity side of the circuit court, before the Hon. Peter V. Daniel, associate justice of the supreme court, and the Hon. Benjamin Johnson, district judge, and the injunction was by decree made perpetual.

TUCKER (DEAN v.). See Case No. 3,711.

TUCKER (DERMOTT v.). See Case No. 3,818.

Case No. 14,218.

TUCKER v. FAIRBANKS.

[Cited in Wilson Packing Co. v. Clapp, Case No. 17,851, and King v. Frostel, Id. 7,794. Nowhere reported; opinion not now accessible.]

Case No. 14,219.

TUCKER et al. v. FOWLER et al.

[1 Hayw. & H. 67.] [1]

Circuit Court, District of Columbia. March 31, 1842.

BANKS—ASSIGNMENT—HOLDER OF NOTES—PREFERENCE—ILLEGAL ISSUE OF NOTES.

A firm of bankers having issued and circulated notes payable to bearer of less denominations than five dollars, and subsequently having made an assignment giving a priority or preference in payment to the holders of these notes, it was held that such holders were entitled to the preference in the distribution of assets, notwithstanding the act of congress of July 7, 1838 [5 Stat. 309].

[This was a bill in equity by Enoch Tucker and others against Charles S. Fowler and others and their assignees Joseph H. Bradley and Charles F. Frary.]

R. S. Coxe and Walter Lenox, for complainants.

Walter Jones and Joseph H. Bradley, for defendants.

BY THE COURT. The bill averred that complainants were depositors with the banking-house of the defendants Fowler & Co.; that said firm had issued and circulated as currency a number of notes made payable to bearer of various denominations under the value of five dollars; that said defendants had made an assignment to the defendants Bradley and Frary, which provided that the said assignees, after deducting, from the proceeds of property assigned which might come into their hands, certain expenses and compensation, should then apply all moneys, proceeds and avails accruing to them, to satisfy and pay the holders of said circulating notes, and the balance remaining, to the payment of the other creditors of the assignors; that by act of congress of July 7, 1838, it was made unlawful for any individual after the 10th of April, 1839, within the District of Columbia, to issue any note or other paper currency of a less denomination than five dollars; that said notes were circulated in said District, and were consequently il-

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

legal, null and void, and prayed an injunction to restrain the assignees from giving a priority to the holders of such notes. The notes were drawn by Fowler & Co., dated at Baltimore, Md., and were made payable at their exchange office at Washington, D. C.

The court allowed a preliminary injunction, a motion to dissolve was made by the defendants, which was granted, and the court held that the holders of said notes were entitled to a priority of payment over the other creditors, and that the assignment so far was legal.

TUCKER (GULLAT v.). See Case No. 5,866.
TUCKER (HENOP v.). See Case No. 6,368.

Case No. 14,220.

TUCKER et al. v. KANE.

[Taney, 146.] [1]

Circuit Court, D. Maryland. Nov. Term, 1850.

CUSTOMS DUTIES—MERCHANT APPRAISERS — FORMALITIES — REVIEW AND REVERSAL—SECRETARY OF TREASURY—OFFICIAL APPRAISERS—APPEAL.

1. An appraisement made under the act of congress of 30th August, 1842 [5 Stat. 548], by merchant appraisers, appointed by the collector of customs, to appraise and value imported goods, in a case of dissatisfaction on the part of the importer with the official appraisement, is final, and must be deemed and taken to be the true value of the goods, and the duties must be levied upon them accordingly.

[Cited in U. S. v. Leng, 18 Fed. 22.]

2. The appraisers are referees appointed to decide between the officers of the government and the importers.

3. The law does not require that the appraisement of the merchant appraisers should have all the formalities and precision of a common law award, nor is it necessary to set forth in it the principles upon which they acted, nor the evidence by which they were governed

4. If it could even be proved that there was evidence before them sufficient to show that their decision was against the weight of evidence, yet their judgment could not on that account be reversed; there is no tribunal authorized to review it; the law makes it final as to the question of value.

5. If, indeed, it appeared on the face of the appraisement, that they merely intended to ascertain the price paid for the article, and not its market value in the principal markets in the country, the appraisement would be a nullity.

6. The construction of their award cannot be influenced by the knowledge of the secretary of the treasury, that there was evidence before them, which ought, in his judgment, to have produced a higher valuation.

7. The appraisement must speak for itself, and be construed by its own language; if its validity is to be impeached by anything outside of the award, it must be by testimony showing that the question referred was not decided, or some misconduct in the appraisers.

8. The twenty-third and twenty-fourth sections of the act of 30th August, 1842, do not confer upon the secretary of the treasury, the power to set aside the appraisement, because, from the terms used by the appraisers, and his knowledge of the evidence before them, he was of opinion, that they intended to estimate the value of the importation at its cost to the importers, and not at the general market value.

9. The appraisement, if a nullity at all, is so, independently of his decision, and he has no power to review it.

10. The twenty-third section of the act of congress authorizes the secretary to establish rules and regulations to secure a just and impartial appraisal, and all appraisers, official or merchant, are bound by the rules and regulations. But they are merely modes of proceeding by which the appraisers are to obtain evidence and ascertain the value; the valuation they make, under these rules and regulations, must be their own impartial judgment, and the secretary cannot set it aside, because he is of opinion that it is against the weight of evidence.

11. The twenty-fourth section of the act does not apply to an appraisement regularly made by merchant appraisers.

12. During the pendency of an appeal under this act, made by the importer, it is the duty of the collector to proceed, until he has obtained a valid appraisement by merchant appraisers; and until this is done, he has no right (after the appeal is made), to exact duties on the enhanced valuation of the official appraisers, nor the penal duty which may follow this valuation.

13. The importer is not bound to make a second appeal, nor is the collector authorized to charge and collect the duties, as if the decision of the official appraisers were final and conclusive, while the appeal from their decision is still pending and undecided.

[This was an action by Richard Tucker and Henry Tucker against George P. Kane, collector, to recover for duties paid under protest.]

J. Glenn, for plaintiffs.
Z. C. Lee, Dist. Atty., for defendant.

TANEY, Circuit Justice. This action is brought by the plaintiffs against the defendant, as collector of the port of Baltimore, to recover back certain duties paid by them under protest upon a quantity of pimento imported, in the schooner Juliet, from St. Ann's Bay, in the Island of Jamaica.

The official appraisers determined that the true value of this pimento, in the principal markets of the country from which it was imported, exceeded the invoice price; and this excess being, according to the appraisement, more than ten per cent., the penal duty of twenty-five per cent. was added, and the whole amount demanded by the collector. The importer was dissatisfied with this appraisement, and gave notice of his dissatisfaction to the collector, according to the provisions of the seventeenth section of the act of 1842; and the collector then appointed E. P. Cohen and Wm Lemmon, two merchants of the city of Baltimore, and both citizens of the United States, to appraise and value the said goods. These appraisers undertook the duty assigned to them, and made their award in the following words.

"Baltimore, 16 November, 1849. The undersigned merchants, appraisers appointed to review the appraisement of the cargo of the schooner Juliet, from St. Ann's Bay, Jamaica,

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

beg leave to report, that they have carefully investigated all the facts connected with this shipment, and feel satisfied, from the positive, as well as corroborative testimony submitted to them, that the price named in the invoice of pimento (viz., 2½ per pound), was the actual price paid for the same, and the true value of the article, at the time of shipment, and that the duties here should be adjusted accordingly. We are very respectfully your obedient servants, E. P. Cohen, Wm. P. Lemmon.

"To Col. Geo. P. Kane, Collector, Port of Baltimore."

This appraisement, it appears, was reported to the secretary of the treasury, by the collector, and the reply of the secretary states that, from the language of the appraisement, and from the circumstance, "that the merchant appraisers had before them evidence, furnished on appraisements at New York, of importations of pimento from Jamaica, shipped about the same time, going to show that the market value of the article was higher than that stated in the invoice under review, the department was compelled to infer that their estimate of value referred solely to the price or cost, paid by the owner or shipper, and not to the actual market value or wholesale price, at the time of shipment, in the principal markets of the country." And he proceeds to state that, upon these grounds, this appraisement was not in conformity with law, and must be disregarded; and that, if the importers were still dissatisfied with the appraisement of the United States appraisers, the collector, upon being notified by them, in writing, might select another set of merchant appraisers, to appraise these goods, and lay before them all the evidence in his possession, bearing upon the case.

The importers, however, refused to apply for another appraisement by merchant appraisers, insisting that the one already made was conclusive upon the subject; and thereupon, the whole amount of duties, as ascertained by the officers and appraisers, was, under the order of the secretary, demanded by the collector, and paid by the importers; and this suit is brought to recover back the excess thus paid, over and above the amount due on the appraisement of the merchant appraisers.

The act of congress declares that the appraisement of the merchant appraisers shall be final, and deemed and taken to be the true value of the goods, and the duties are to be levied upon them accordingly.

They are referees, appointed to decide between the officers of the government and the importers, when a difference shall exist between them, as to the value of the goods, upon which the duties are to be charged. The subject-matter in dispute, in this case, referred to the merchant appraisers, was the market value, or wholesale price of the pimento, at the time of the shipment, in the principal markets of the country from which it was imported. They report that they have carefully investigated all the facts connected with this shipment, and feel satisfied from the positive, as well as corroborative testimony submitted to them, that the price named in the invoice was the actual price paid for the same, and the true value of the article. When they speak of the true value, they must, of course, be understood to speak of the value referred to them, that is, the market value or wholesale price, at the time of shipment, in the principal markets of the country from which it was shipped; this is the natural import of the words used, when taken in connection with the subject referred.

The law does not require that the appraisement of the merchant appraisers should have all the formalities and precision of a common law award; nor is it necessary to set forth in it the principles upon which they acted, nor the evidence by which they were governed. It is not suggested, that there was any misconduct on the part of the appraisers; they were selected by the collector himself, and admitted on all hands to be highly respectable and intelligent merchants. And if it could even be proved, as mentioned in the letter of the secretary, above quoted, that there was evidence before them sufficient to show that the invoice value was too low, and their decision against the weight of evidence; yet their judgment could not, on that account, be reversed; there is no tribunal authorized to review it; the law makes it final, as to the question of value.

Certainly, if it appeared on the face of the appraisement, that they merely intended to ascertain the price paid for the pimento, and not its market value in the principal markets in the country, the appraisement would be a nullity, and would not fix the dutiable value of the goods. But as we have already said, the language used by the merchant appraisers will not justify that construction; the fair construction of the instrument is, that the true value of which they speak, is the dutiable value they were required to ascertain, and concerning which they heard evidence, as appears by the correspondence produced by the government. And the construction of their written award cannot be influenced by the knowledge of the secretary, that there was evidence before them, which ought, in his judgment, to have produced a higher valuation. The appraisement must speak for itself, and be construed by its own language; and if its validity is to be impeached by anything outside of the award, it must be by testimony showing that the question referred was not decided, or showing some misconduct in the appraisers.

The power exercised by the secretary of the treasury, and contended for in the argument here, is supposed to be conferred upon him by the twenty-third and twenty-fourth

sections of the act of 30 August, 1842. It has been argued that, inasmuch as it is made his duty, under these sections, to secure a just, faithful and impartial appraisement of all goods, wares and merchandise, imported into the United States, and just and proper entries of the actual market value and wholesale price thereof, he had the power to set aside this appraisement, because, from the terms used, and his knowledge of the evidence before them, he was of opinion that they intended to estimate the value of the importation at its cost to the importers, and not at the general market value. Undoubtedly, if it had appeared that the merchant appraisers had not decided the question submitted to them, their appraisement would have been a nullity, without any action upon it by the secretary of the treasury; and it would have been the duty of the collector, without any instruction or authority from the department, to call upon the appraisers for their award upon the matter actually referred; or perhaps, he might, in such a case, have appointed new merchant appraisers. But the decision of the secretary could not invalidate it; he has no power, we think, under the twenty-third and twenty-fourth sections, to review their judgment, nor to exercise any control over their decisions.

Indeed, even as relates to the government appraisers, the appraisement must be the impartial and independent judgment of their own minds. The twenty-third section, it is true, authorizes the secretary to establish rules and regulations to secure a just and impartial appraisal; and all appraisers, official or merchant, are bound by these rules and regulations; but they are merely modes of proceeding, by which the appraisers are to obtain evidence, and ascertain the value; the valuation they make, under these rules and regulations, must be their own impartial judgment, and the secretary cannot set it aside, because he is of opinion that it is against the weight of evidence. The twenty-fourth section, in terms, is confined to the officers of the revenue, and cannot be construed to give him the power to set aside an appraisement, regularly made by merchant appraisers, nor does it make his construction of the law, as has been intimated in the argument, binding upon the court.

But if this award was open to the objections taken to it, still these duties were, we think, unlawfully exacted. The act of congress gives the importer the right to appeal from the decision of the official appraisers; that appeal has been made by the importer, and has not been withdrawn. It was the duty of the collector to proceed, until he had obtained a valid appraisement from merchant appraisers; until this was done, he had no right, after the appeal was made, to exact duties on the enhanced valuation of the official appraisers, nor the penal duty which followed this valuation. The importer was not bound to make a second appeal, nor was the collector authorized to charge and collect the duties, as if the decision of the official appraisers was final and conclusive, while the appeal from their decision was still pending and undecided.

But, as we have already said, we consider the appraisement of the merchant appraisers a valid one, and binding upon both parties; and the plaintiffs are, therefore, entitled to recover the amount collected, over and above the sum due on that appraisement.

Case No. 14,221.

TUCKER v. LEE.

[3 Cranch, C. C. 684.] [1]

Circuit Court, District of Columbia. Dec. Term, 1829.

APPEAL BOND—BREACH—INDEMNITY—DAMAGES—PLEADING—PLEA—DISJUNCTIVE CONDITION—VERIFICATION.

1. In an action upon an appeal-bond, given upon a writ of error to the supreme court of the United States, the breach to be assigned must be a single breach, denying each alternative; that is, it must aver that the plaintiff in error did not prosecute his writ to effect, nor make his plea good, nor answer the damages and costs; which damages and costs the plaintiff must specially set forth.

[Cited in Bank of Metropolis v. Swann, Case No. 902.]

2. The plaintiff in error is not bound, at all events, to answer the damages adjudged to the defendant in error in the supreme court; he is only to indemnify the defendant in error for whatever losses he may have sustained by the judgment's not being satisfied, and paid after affirmance.

3. The damages and costs must be made to appear, at least, in the allegation of the breach. They are not such as the law implies, but are special damages, which must exist before a cause of action, on the bond, can accrue to the plaintiff.

4. A plea is bad, which purports to be a plea to the whole declaration, and yet covers only a part.

5. To an action upon an appeal-bond, setting forth a special breach, it is not a good plea to say that the plaintiff is not damnified by any thing in the condition mentioned. The only design of the general plea of non damnificatus is to force the plaintiff to assign a breach of the condition; but when the breach is already specially assigned, the plea must answer that special assignment.

6. When a condition is in the disjunctive, the defendant must, by his plea, show which part he has performed.

7. When the plea is not a direct denial of some material fact stated in the declaration, it should conclude with a verification.

8. In an action upon an appeal-bond, the damages may not be limited to the averment of damages accruing upon affirmance of the judgment, and adjudged by the supreme court to the plaintiff, for his delay and his costs.

9. The court, upon the issues of fact, refused to instruct the jury, that the plaintiff was not entitled to recover damages for the amount of the original judgment, in a suit upon the bond.

Debt upon an appeal-bond, given upon the issuing of a writ of error, upon a judgment of this court, against Peter R. Beverly, in

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

favor of Henry St. George Tucker. The bond was given by the said P. R. Beverly, as principal, and the defendant, Henry Lee, as surety. The condition of the bond, after reciting the judgment, &c., is as follows: "Now if the said Peter R. Beverly, the plaintiff in error, shall prosecute his writ to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void," &c. The declaration, after setting forth the bond and its condition, assigns the breach thus: "And the plaintiff avers that the said P. R. B., plaintiff in the said writ of error, did not prosecute his said writ of error to effect; and that afterwards, that is to say, &c., the said judgment of the circuit court was in all things affirmed," as by the record, &c.; "and that the said Peter did not answer the damages and costs of the said Henry to the said Henry adjudged, in the said supreme court; and so, the condition of the said writing obligatory the said defendant has not kept, but has wholly broken, whereby action has accrued to the plaintiff to demand and receive from the defendant the said penal sum of $9,233.92." Nevertheless, &c. To this declaration there was a general demurrer; and the only question was, whether the breach is sufficiently assigned.

C. C. Lee, for defendant, contended that the breach was defective, in not setting forth the amount of the damages claimed; and cited 1 Saund. 58; 2 Saund. 187a; Roles v. Rosewell [5 Term R. 540] cited in Hardy v. Bern, Id. 636; Minor v. Mechanics' Bank, 1 Pet. [26 U. S.] 46; 1 Saund. 47; Hazel v. Waters [Case No. 6,283], in this court.

J. Dunlop, contra. The declaration sets forth the judgment below, the writ of error, and affirmance, and the breach, in the words of the statute, namely, did not prosecute his writ to effect; and did not pay the damages, &c. Damages means the whole debt and damages,—indemnity. Brodie v. Catlett, 9 Wheat. [22 U. S.] 553. The judgment upon this demurrer, if for the plaintiff, is peremptory. It is as certain as it could be, unless it were to go on and say, to wit, the sum of ——, and interest, ——, and costs. The first breach is, that he did not prosecute his writ with effect. This is sufficient. The damages are set out in the declaration. 1 Chit. Pl. 643; Roe v. Crutchfield, 1 Hen. & M. 361; Judiciary Act 1789, § 26 (1 Stat. 73).

Mr. Lee, in reply. The only question is, whether it is necessary to set forth a breach of the condition. Saunders is positive. 1 Saund. 58; 2 Saund. 187, 188.

CRANCH, Chief Judge. Upon bonds with collateral condition, the plaintiff must, under the statute of 8 & 9 Wm. III, c. 11, § 8, assign the breach or breaches upon which he intends to recover. Hardy v. Bern, 5 Term R. 636; Wilmer v. Harris, 5 Har. & J. 1; 1 Saund. 58, note 1; 2 Saund. 187a, note 2. And if he undertakes to set them out in his declaration, they must be as precisely averred as in a replication; and if they are all insufficiently set out, the declaration must be adjudged bad upon demurrer. T. Jones, 125; Rea v. Burnis, 2 Lev. 124; Anon. Hardres, 320. But if there be one good breach well set out, the demurrer, if to the whole declaration, must be overruled. Gordon v. Kennedy, 2 Bin. 287; 1 Chit. Pl. 326, note 1; Adams v. Willoughby, 6 Johns. 65. Although if some of the breaches assigned be insufficient, and there should be a general verdict for the plaintiff, the judgment would be arrested. Fletcher v. Peck, 6 Cranch [10 U. S.] 87.

The counsel for the defendant supposes that the breach assigned in this declaration is insufficient, because it does not set forth specially the damages which the plaintiff has sustained, by reason of the judgment's not being satisfied and paid after the affirmance in the supreme court. The counsel for the plaintiff contends, that there are two breaches assigned in the declaration: namely, that the plaintiff in error "did not prosecute his writ to effect;" "and that he did not answer the damages and costs of the said Henry, to the said Henry adjudged by the said supreme court;" and that the first breach is certainly well assigned. To prosecute his writ to effect, is the same thing as to make his plea good. He was not bound to prosecute his writ to effect, and also to answer all damages and costs; for he could not prosecute his writ to effect, unless he should make his plea good; and if he made his plea good, he is not bound to answer the damages and costs. The condition of the bond, then, is really alternative; so that if the plaintiff in error either prosecuted his writ to effect, or made his plea good, which is the same thing, or answered all damages and costs, the plaintiff has no cause of action. The breach to be assigned, therefore, must be a single breach, denying each alternative; that is, it must aver that the plaintiff in error did not prosecute his writ to effect, nor make his plea good, nor answer the damages and costs, which damages and costs the plaintiff must set forth specially; for the plaintiff must have sustained damages and costs, before the condition can be broken by the non-payment of them. The condition is not to "answer the damages and costs of the said Henry to the said Henry adjudged in the supreme court," as averred in the declaration. In the case of Catlett v. Brodie, 9 Wheat. [22 U. S.] 554, the supreme court says: "It has been supposed, at the argument, that the act meant only to provide for such damages and costs as the court should adjudge for the delay; but our opinion is, that this is not the true interpretation of the language. The word 'damages' is here

used, not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to, if the judgment is affirmed. Whatever losses he may sustain, by the judgment's not being satisfied and paid after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security. Upon any suit brought upon such bond, it follows, of course, that the obligors are at liberty to show that no damages have been sustained, or partial damages only; for which amount only is the obligee entitled to judgment."

It is clear, then, that, by the condition of this bond, the plaintiff in error is not bound, at all events, to answer the damages adjudged to the defendant in error in the supreme court; and yet the breach assigned is, that he has not answered them, and them only. By the decision of the supreme court in Catlett v. Brodie [supra] he is only to indemnify the defendant in error for whatever losses he may have sustained, by the judgment's not being satisfied and paid after the affirmance. What those losses were is not stated in the declaration, nor can they be judicially ascertained by any allegation therein. It is not even averred that the plaintiff has sustained any loss for which the defendant is bound to indemnify him. If the breach vary from the sense and substance of the contract, and either be more limited, or larger than the covenant, it will be insufficient. 1 Chit. Pl. 328. The declaration avers only a single breach, although that breach consists of two negatives; for it was necessary to deny both branches of the alternative condition, in order to show a breach. It is bad, because it avers that the plaintiff has not done what he was not bound to do; and does not deny that he has done what he was bound to do. Before the defendant can be made liable to the penalty of the bond, for not answering the damages and costs, those damages and costs must be made to appear, at least in the allegation of the breach. They are not such as the law implies, and which it is not necessary to state in the declaration, because they are presumptions of law; but they are special damages, which must exist before a cause of action can accrue to the plaintiff. This idea is strongly stated by Mr. Chitty (Pl. 385, 386). "General damages," he says, "are such as the law implies to have accrued from the wrong complained of: special damages are such as really took place, and are not implied by law. It does not appear necessary to state the former description of damages in the declaration, because presumptions of law are not, in general, to be pleaded. But when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity." And again in page 389, he says, "if the action be not sustainable independently of special damage, the declaration would be bad on demurrer, or in arrest of judgment."

The plaintiff in error is not bound absolutely to prosecute his writ to effect, or to make his plea good; and, therefore, the law does not necessarily imply damages for not doing it. The condition of the bond gives him another alternative, which, as construed by the supreme court, is to indemnify him for whatever losses he may sustain by the judgment's not being satisfied after affirmance. These are losses which must arise before the bond can be forfeited; and must, therefore be set out in the breach. The only damages which the law would necessarily imply, in this case, would be the damages for not paying the damages actually contracted to be paid. Whenever the amount of these shall be ascertained, the condition of this bond will be equivalent to a condition to pay that sum of money; and in that case the only damages which the law would imply, would be the damages for the non-payment of that sum. We are, therefore, of opinion that the breach of the condition of this bond, is not well assigned and that the judgment upon the demurrer ought to be for the defendant.

There is another objection to the assignment of the breach; and that is, that it says "the said Peter did not answer the damages," &c. It might be true that he did not answer the damages and costs on the first day after the affirmance, and yet he might have answered them before the suit brought, so that the plaintiff might not have had a cause of action at the time of bringing the suit. This does not seem to be "certainty to a common intent." However, our opinion is not founded upon this defect.

THRUSTON, Circuit Judge, not having heard the argument, gave no opinion.

The plaintiff had leave to amend his declaration, which he did by striking out the averment "that the said Peter did not answer the damages and costs of the said Henry, to the said Henry adjudged in the said supreme court," and inserting the following: "Nor did the said Peter R. make his said plea good; nor did he, nor has he the said Peter R., or any other person for him, answered, satisfied, or paid, though often requested by the plaintiff so to do, to wit, the 18th December, 1824, and often before and afterwards, at Washington county aforesaid, the damages and costs sustained by the said plaintiff by the failure of the said Peter R., to prosecute his said writ to effect, to make his said plea good, and to satisfy and pay to the said plaintiff the said recited judgment, so affirmed as aforesaid, in the said supreme court, which said

damages and costs amount to the sum of $4,616.96 with interest thereon, from 22d December, 1820, and —— costs of suit in the said circuit court, and —— costs of suit in the said supreme court; but to pay the same or any part thereof, the said Peter R, or any other person for him, hath hitherto refused and still refuses."

The defendant pleaded five pleas in bar. 1. The 1st plea is, "That after signing and sealing of the writing obligatory in the declaration mentioned, and before the commencement of this suit, to wit, on, &c. one William S. Jett and Peter R. Beverly, were held and bound to the plaintiff in a large sum of money, to wit, in the sum of —— as sureties for one Henry Lee, since departed this life, the said Jett by writing obligatory, and the said Beverly by promissory note, and being thus held and bound to the said plaintiff, he instituted separate suits against the said Jett and Beverly, and recovered judgments against both. That the said Beverly obtained a writ of error, to reverse the said judgment, in and about the obtaining of which writ of error, the writing obligatory, in the declaration mentioned, was sealed and delivered, and after it was so sealed and delivered, and after the commencement of the present action, and before plea pleaded, to wit, on the —— day of —— the said William S. Jett, wholly paid and satisfied to the said plaintiff, the said original debt of the said Henry Lee, deceased, of which the said sum of $4,616.96, in the declaration mentioned, with interest thereon, &c. was part. Wherefore, &c. whether the said plaintiff ought further to have and maintain, &c." To this plea there was a general demurrer. 2. Upon the second plea there was an issue of fact. 3. The third plea is a general non damnificatus. To this plea there was a general demurrer. 4. The fourth plea is "that another person, namely, one William S. Jett hath answered, satisfied, and paid to the said plaintiff, the said damages, and of this the said defendant puts himself on the country." To this plea there is a special demurrer. 1st. Because it concludes to the country, when it ought to conclude with a verification. 2d. Because, if good, it amounts to a plea of payment, and ought to have been so pleaded.

CRANCH, Chief Judge, said, as to the first plea: The words "after the signing and sealing of the said writing obligatory, in the declaration mentioned and," may be rejected as surplusage, for they are not at all necessary to the validity of the plea. But the plea is bad because it purports to be a plea to the whole declaration and yet covers only a part. The damages alleged in the declaration, the non-payment of which constitutes the breach assigned, consists not only of the $4,616.96 with interest from the 22d of December, 1820, till paid, but of the costs of suit in the circuit court, and in the supreme court. The plea does not state the payment of that part of the damages which consists of those costs. It only avers the payment of the whole original debt due by H. Lee, the elder, to Tucker, of which those costs did not constitute a part. It does not aver that the payment made by Jett to Tucker, was made for or on account of Beverly; nor that it was made or received in discharge of the judgment of Tucker against Beverly; nor in full of the damages, which plaintiff is entitled to recover under the bond upon which this action is founded. The plea does not expressly aver that any debt was ever due by H. Lee, the elder, to Tucker; nor that Jett and Beverly were bound to Tucker for any debt due to him by the said Lee. It only avers that they were bound to the plaintiff as "securities" for the said Lee, but for what object or purpose does not appear. It does not aver that they were jointly bound, nor bound at the same time, nor that each was bound for the whole; so that it does not appear what right Jett had to pay for Beverly, or what right Beverly had to appropriate to himself the payment made to Jett. Jett may have originally been sole surety for Lee to Tucker, and Beverly may have come in afterward to release Jett. They might have been not simultaneous, but successive sureties. These are possibilities which are left open by the plea, and show that there is not enough stated in the plea to give Beverly a right to avail himself of the payment made by Jett. But if he could, or even if Beverly himself had paid the original debt and interest due by Lee to Tucker, it would be no answer to the present action so long as the judgment against Beverly remained unsatisfied; it would be only matter of argument to show that the plaintiff had sustained no damage covered by the bond upon which this suit is brought. We are, therefore, of opinion that upon this demurrer the judgment ought to be for the plaintiff.

The 3d plea is a general non damnificatus; that is, "that from the time of making the bond to the day of the commencement of this action, the plaintiff was not damnified by reason of any thing in the condition of the said writing obligatory mentioned; and this the defendant is ready to verify, &c." The plea does not state that the plaintiff was not damnified by any thing in the declaration alleged; nor in manner and form as the plaintiff has averred in his declaration. If he had done so, it would have been a direct denial of the gist of the count, and ought to have concluded to the country, and not with a verification. The plea, perhaps, might have been good, if the condition of the bond, and a special breach of that condition, had not been set forth in the declaration. But it is now no answer to the declaration setting forth such a breach, to say that the plaintiff is not damnified by reason of any thing in the condition mentioned. The general forms of the plea of non damnificatus given in 2 Chit. Pl. 480, 481, are to declarations in which no particular breach, nor any particular damages are set forth. So also

is the plea in Cutler v. Southern, in 1 Saund. 116. This general way of pleading is bad upon special demurrer, even to a declaration for non-payment of the penalty. 1 Saund. 116, note 1. And there is no case where it has been permitted after the assignment of a special breach; for the only design of the general plea of non damnificatus is to force the plaintiff to assign a breach of the condition; but when the breach is specially assigned, the plea must answer the special assignment. Williams, in his note to 1 Saund. 116, says, "But in all cases of conditions to indemnify and save harmless, the proper plea is non damnificatus; and if there be any damage the plaintiff must reply it." This shows that the general plea is to precede, not to follow the special assignment. But the condition of this bond is, in effect, in the disjunctive. It is to prosecute his writ to effect, (that is, to make his plea good,) and if he fail to make his plea good, to answer all damages and costs; and whenever the condition is in the disjunctive, the defendant must, by his plea, show which he has performed. Co. Litt. 303b. We are, therefore, of opinion that this third plea is bad, to this declaration; and that the judgment, upon this demurrer also, ought to be for the plaintiff.

The fourth plea is, "That another person, to wit, one William S. Jett, hath answered, satisfied, and paid, to the said plaintiff, the said damages, and of this the said defendant puts himself on the country." To this plea there is a special demurrer. 1st. Because it concludes to the country when it ought to conclude with a verification. 2d. Because, if good, it amounts to the plea of payment, and ought to have been so pleaded. This plea concludes to the country, as if it were a direct denial of a material allegation in the declaration. The averment, to which it purports to be an answer, is, "nor did he, nor has he, the said Peter R., or any other person for him, answered, satisfied, or paid, though often requested," "the damages and costs sustained by the plaintiff," &c. The plea does not say that the said Jett paid the damages for the said Beverly, or at his request; nor does it state any facts which show a right in Jett to pay the damages for Beverly, or any right in Beverly to claim the benefit of that payment. The plea is not a denial of any material fact averred in the declaration, and, therefore, ought not to have concluded to the country. It is therefore bad on general and special demurrer. The court is of opinion that the judgment upon this demurrer ought also to be for the plaintiff.

At a subsequent term, upon the trial of the issues of fact joined upon the second and fifth pleas, the plaintiff read in evidence to the jury the bond and condition upon which the action was founded, and offered no other evidence; but claimed damages to the amount of the original judgment recited in the said condition, with the damages and costs awarded in the supreme court, on the affirmance of the said judgment as stated in the declaration; whereupon the counsel for the defendant, Mr. Lee and Mr. Jones, prayed the court to instruct the jury, that upon the evidence aforesaid the plaintiff was not entitled to recover damages beyond the amount of damages accruing upon the affirmance of the judgment in the said condition mentioned, and adjudged by the supreme court, upon such affirmance, to the plaintiff, for his delay, with the costs adjudged to the plaintiff by the supreme court on such affirmance.

But THE COURT (nem. con.) refused to give the instruction.

Whereupon the defendant prayed the court to instruct the jury, "That the condition of the said bond does not bind the defendant to pay the original judgment in the said condition recited, at all events in case of affirmance, but only such losses or damages as the plaintiff shall show he has actually sustained by means of the writ of error in the said condition mentioned; and that the plaintiff is not entitled to recover damages in this case upon the evidence aforesaid, for the amount of the said original judgment, in addition to the damages and costs so adjudged by the supreme court as aforesaid, as of course; but only for such further losses or damages as he shall, by substantive evidence, show that he has actually sustained by reason of the said writ of error. That the evidence so as aforesaid produced by the plaintiff is not, of itself, and without any other evidence of loss or damage, sufficient to authorize the jury to include in the amount of the damages to be assessed in this case, the amount of the original judgment recited in the said condition to have been recovered by the plaintiff against the said Beverly, in the circuit court of the District of Columbia for the county of Alexandria;" which instruction, also, THE COURT refused to give, being of opinion that upon the issues of fact joined in this cause, the burden of proof is prima facie upon the defendant.

Verdict for the plaintiff, for the whole amount of the judgment recited in the condition of the bond, and costs. The defendant took bills of exception, but did not prosecute a writ of error.

Case No. 14,222.

TUCKER v. MARSTELLER.

[1 Cranch, C. C. 254.] [1]

Circuit Court, District of Columbia. Nov. Term, 1805.

GARNISHMENT — ACCEPTANCE OF DRAFT BEFORE SERVICE.

An acceptance, by the garnishee, of the defendant's draft in favor of a third person before service of the attachment, binds the garnishee, and cannot be overreached by the attachment.

[Cited in Garland v. Harrington, 51 N. H. 415.]

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

The garnishee answers on oath that Stonemeitz told him he should send goods to his vendee to be sold, for which the garnishee should settle with Stonemeitz's wife. The goods were sent and sold, and Stonemeitz's wife on the same day drew two orders, one in favor of Myers, or order, for sixty-one dollars, and one in favor of —— or order, for forty-six dollars, which the garnishee accepted to pay, if the proceeds of the sale should amount to so much. On the next day the attachment of the plaintiff was served.

THE COURT decided that the acceptance of the orders bound the garnishee, and that the attachment should not overreach the acceptances.

Case No. 14,223.

TUCKER et al v. The MARY C. POTTER.

District Court, D. South Carolina.

SALVAGE—LIEN—CUSTOMS DUTIES.

[In respect to the lien of salvors, it was held that customs duties, in the order of payment, constitute a prior debt. They belong to the government; are regarded as the claim made by the supreme authority of the nation. Such duties are not possessed of any peculiarity distinct from other liens, making it necessary for the court to deduct them, and consider the balance only as representing the property saved. Decided by MAGRATH, District Judge. Nowhere reported; opinion not now accessible. The above statement of the point determined was taken from Cohen, Adm. Law, 189.]

Case No. 14,224.

TUCKER et al. v. MAXWELL.

[2 Blatchf. 517.] [1]

Circuit Court, S. D. New York. Nov., 1852.

CUSTOMS DUTIES—PROTEST—WHAT TO BE STATED—APPRAISED VALUE—MARKET VALUE—PURCHASE PRICE.

1. Under a protest against the payment of duties and of a penalty, which only sets out that the entry invoice is in all respects correct and just, and that no legal forfeiture or penalty has been incurred, the invoice value of the goods having been increased on an appraisement, no question can be raised, in an action to recover back the duties and penalty, except as to the difference between the appraised and the market value of the goods at the place of shipment at the date of the invoice; nor can it be shown that the invoice value was the actual purchase-price.

2. What should be stated in such a protest, defined.

This was an action against [Hugh Maxwell] the collector of the port of New York, to recover back an alleged excess of duties and a penalty. A verdict was taken for the plaintiffs [Robert A. Tucker and Alpheus Lightbourne], subject to the opinion of the court.

Thomas W. Tucker, for plaintiffs.

J. Prescott Hall, Dist. Atty., for defendant.

BETTS, District Judge. The plaintiffs moved for and obtained a rehearing of this case, and have submitted, in writing, the points upon which they ask a review of our previous decision. We have attentively considered the points and the reasons presented. The plaintiffs, on the 29th of October, 1849, entered, at the custom house in New York, 640 bags of pimento imported from St. Ann's Bay, in the island of Jamaica. The invoice was dated St. Ann's Bay, October 5th, 1849, and the pimento was valued on that and on the entry, at 2¾d. sterling per pound. The pimento was appraised by merchant appraisers on the 3d of November, 1849, at 3¼d. sterling per pound. Duties were charged conformably to that valuation, and a penalty or additional duty of $1,020 was imposed because of the undervaluation upon the invoice. Against the exaction of the duty on the increase in valuation and of the penalty, the plaintiffs protested in writing, in this language: "That the said invoice, as originally presented by us, is in all respects correct and just," and that "no legal forfeiture or penalty has been incurred."

On the trial, the plaintiffs proved that they purchased the pimento in the summer of 1849, and that the invoice price was the fair market value of the article at that time. It was further proved that the price advanced in October following. No evidence was given, on the trial, that the appraised valuation exceeded the market price at St. Ann's Bay at the date of the invoice, other than what is to be implied from the proof that in October the price had advanced to 3d. sterling per pound at that place, and that the article was then worth ¼d. sterling more at Kingston.

We held, at the last term, that the protest would not authorize the plaintiffs to recover back any thing beyond the difference between the appraised and the market value of the pimento at the time it was invoiced. And, even as to that fraction of ¼d. sterling per pound, there was no clear and satisfactory evidence to outweigh the judgment of the public appraisers, supported by the valuation of merchant appraisers. Indeed, the only direct evidence to the point is a different valuation of the article by the Baltimore appraisers, on an importation into that port, of pimento purchased and shipped at St. Ann's Bay about contemporaneously with the shipment of the parcel in question.

We adhere to our former opinion, and hold further, that the plaintiffs cannot recover the duties paid on the ¼d. sterling per pound extra, supposing the appraisement to have been to that amount above the market value at the date of the invoice, because they did not specify in the protest that cause of objection. Had that particular been brought to the notice of the collector, he might have ordered a reconsideration of the subject, and the importer might have been relieved from the improper charge; or, if justice had been

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

denied him at the custom house, he would then have had a legal foundation for an action to recover back the excess of duty.

The plaintiffs offered in evidence, on the trial, a letter written to the collector by the merchant appraisers, on the 27th of November, 1849, in which they asked him to re-appraise the pimento, on the ground that a like article had been entered and appraised in Baltimore at 2½d. sterling per pound, and that the information on which they acted in their appraisement might not have been so reliable as the evidence adduced at Baltimore, and that injustice might have been done to the plaintiffs in their valuation. That evidence was excluded by the court, and we think it was properly rejected, as there was no color for holding it to be legal testimony in the cause. It was not brought to the attention of the collector when the duties were liquidated on the 29th of December, 1849, nor when they were paid on the 12th of January, 1850, and can, therefore, in no way be considered as forming part of the protest or notice in writing to him So, also, it is manifestly out of our power, on this re-argument of the case, to notice the letter, if it might be regarded as legal evidence, no exception having been taken at the trial to the exclusion of the letter. We can only pass upon the evidence presented by the case agreed between the parties, and we discover nothing in that to support the allegation of the plaintiffs that the appraisers overvalued the pimento. We think, therefore that in so far as respects the appraisement and the proceedings of the collector thereon the plaintiffs make out no legal ground for reclaiming the moneys paid by them.

The plaintiffs further protested against the imposition and exaction of duties upon the invoice weight of the merchandise, and insisted that the same should be imposed upon the actual real weight thereof which was ascertained by the custom-house weigher or other officer of the government. We find no evidence in the case showing that any difference in weight between the invoice statement and that of the custom-house existed in respect to the pimento. The court cannot assume that there was such difference, and they offer no opinion as to what would have been the effect of such difference, if one had been proved.

A further protest was added "against the imposition and exaction of any duties or penalty upon said merchandize whatever, the same being actually exported in bond." We find no evidence of that fact in the case. It is set forth in the petition for a re-hearing, but is in no way admitted by the United States attorney. He declined to appear on the re-argument, stating to the court that he relied upon his previous argument and the decision of the court at the last term. We are not, therefore, at liberty to act upon the allegation of the protest, or the re-statement of the fact in the petition for a re-argument. The plaintiffs should have shown on the trial the facts which would bring their importation within the act excepting it, on re-exportation, from payment of duties at all, and then the protest would have brought up the objection now raised. The documents put in evidence only prove that the goods were entered for warehousing on the 29th of October, 1849, and that the duties were liquidated on the 29th of December, 1849, and paid on the 12th of January, 1850, under the above protest, but they nowhere prove the fact of re-exportation, or that the satisfactory security required by the act of congress, that the goods should be landed out of the jurisdiction of the United States, was given to the collector.

Judgment for the defendant.

Case No. 14,225.

TUCKER et al. v. OELRICHS et al.

[36 Hunt, Mer. Mag. 325.]

Circuit Court, D. Maryland Nov. Term, 1856.

WAREHOUSEMEN—INJURY TO COFFEE FROM GUANO—NEGLIGENCE.

[In order to make warehousemen liable for discoloration of coffee stored with them, arising from the storage of guano in the same building, it must be shown that they were wanting in ordinary diligence in so storing the two articles together.]

This suit was brought by the plaintiffs [R. & H. B. Tucker], merchants, of Baltimore, against the defendants [Oelrichs, Lurman, and Schumacker] as owners of Belt's wharf and the warehouses thereon, to recover for the injury alleged to have been done to a lot of coffee belonging to the plaintiffs, by storing it in the same warehouse with a quantity of Peruvian guano. It appeared, upon the trial, that the coffee was imported by Messrs. Oelrichs & Lurman in the summer of 1852, and stored by them in one of their warehouses on Belt's wharf; that they sold it in the fall of 1853 to the Messrs. Tucker, who continued it in store in the same place until the fall of 1854, when, on being sampled, it was found to be in part discolored, and therefore considerably injured in value. It was sold at auction, on notice given to the defendants, at a loss; and this suit was then brought to recover to the extent of the injury. On the part of the plaintiffs, merchants of the city were called, who expressed the opinion that the discoloration of the coffee was the effect of guano; and that it was not, in their judgment, a prudent act in the storekeeper to put guano in the same house with coffee. The same opinion was expressed by three merchants who, as surveyors, at the request of the plaintiffs, examined the coffee while it was still in store, and recommended an immediate sale at auction. On the part of the defendants, it was shown that the warehouse in question was one for general storage; that the guano had been stored in it for at least eight or ten years,

together with coffee, flour, tobacco, and other articles; that up to the time of this transaction no injury had ever been done to any of these articles, so far as was known or heard of, by guano; that coffee, in one of these warehouses, had been stored for more than two years, in an upper room, with guano immediately underneath—there being an open hatchway between the two stories—and had not been at all discolored, or affected in either taste or smell. It was also stated by some witnesses, that they had seen coffee discolored as was this coffee, when it had never been in the neighborhood of guano, and that they believed the change owing to the condition in which the coffee was shipped, and the action upon it of a humid atmosphere.

Captains of guano vessels were examined, who stated that they were in the habit of taking coffee with their other stores, on voyages from the Chincha Islands, and that they had never known it to be affected in color, taste, or smell, though the vessels were filled with guano. They all agreed in stating that, until this case was spoken of, they never heard of any instance in which it had been alleged or supposed that guano would discolor or injure coffee, and that they would, therefore, not have hesitated to bring them together in the same cargo. The coffee, in this case, was stored in a front room on the ground floor; and, while owned by Oelrichs & Lurman, guano was put, without any apprehension by the storekeeper, into the back room adjoining, with an open door or archway between the apartments. It was not injured, so far as known, during the first year of its storage. After the purchase by the plaintiffs, the door of communication between the apartments was tightly boarded up, and guano still kept on store in the back room. It appeared, also, that the room containing the coffee had not been opened more than two or three times during the storage; the storekeeper stating that it was customary to keep coffee on store on the lower floors, and not to ventilate the apartments containing it, unless specially so ordered by the owner of the coffee.

THE COURT instructed the jury that the defendants, as warehousemen, were liable, under their contract for storage, only for ordinary diligence, by which was intended, in law, that degree of diligence which prudent men ordinarily exercise in respect to their own property and business; and that, in order to entitle the plaintiffs to recover, the jury must find—First, that the coffee was, in fact, injured by the guano; and, secondly, that the defendants were wanting in ordinary diligence in storing the coffee and guano in the same warehouse, in the manner in which they were stored.

The verdict was for the defendants.

TUCKER (OXLEY v.). See Case No. 10,638.

TUCKER (PULLING v.). See Case No. 11,464.

Case No. 14,226.

TUCKER et al. v. SLACK.

[Holmes, 485;[1] 19 Int. Rev. Rec. 149.]

Circuit Court, D. Massachusetts. March 26, 1875.[2]

INTERNAL REVENUE — WHOLESALE DEALERS— "PLACE OF BUSINESS."

1. The selling agents of a manufacturing company, who sell all the company's goods at their place of business or that of their sub-agents, on behalf of the company, by samples only, the goods being delivered to purchasers direct from the company's factory, and the proceeds, if received by the agents, paid over to the company, are not liable to a special tax on such sales as wholesale dealers, under the act of June 30, 1864, as amended by the act of July 13, 1866 (14 Stat. 98).

2. The term "place of business" in section 9 of the act of July 13, 1866 (14 Stat. 113), exempting from special tax, sales by manufacturers of their own goods, wares, and merchandise, "at their principal office or place of business," if the goods, wares, or merchandise, are kept there only as samples, means the principal place of business for the sale of the goods, wares, or merchandise.

Action [by William W. Tucker and others] against [Charles W. Slack] the defendant, collector of United States internal revenue, to recover duties assessed upon the plaintiffs, and paid by them under protest.

Henry D. Hyde and Hillard & Dickinson, for plaintiffs.

George P. Sanger, for defendant.

LOWELL, District Judge. This case was tried before us without a jury, and we find the facts to be as follows: The plaintiffs were the selling agents of four manufacturing companies, and sold all the goods for those companies, either by themselves at Boston, by the house in New York, or by their sub-agents in Philadelphia. All the sales passed through the books of the Boston house, and their place of business was the principal one for sales They kept no separate bank-accounts for the different companies, but deposited the cash to their own credit, paying over from time to time as requested, and making a full settlement monthly. But separate sets of books were kept for each company, through which every sale could be distinctly identified; and when the payments were made in the notes of their customers, they were made either to the order of the treasurer, whose goods they represented, or, if the customer preferred it, to his own order, and were in all cases handed over to the treasurer. Notes were never made to the order of the plaintiffs; nor were sales ever guaranteed by them. Their agency was known to all their customers.

The plaintiffs kept only samples at their place of business, and the goods sold were

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

[2] [Reversed in 23 Wall. (90 U. S.) 321.]

delivered from the factory of the company on the plaintiffs' order. Goods occasionally found their way to the plaintiffs' place of business, but only when they had been missent, or for some other reason had not been accepted by a customer.

Each of the companies for which the plaintiffs were selling agents had an office or counting-room separate from that of the plaintiffs', and in a different part of the city of Boston, at which the treasurer of the company transacted all the financial business. The treasurer was the superior officer, and was the person to whom the plaintiffs rendered their accounts, and from whom they were bound to take instructions.

The plaintiffs were assessed, monthly, as wholesale dealers, for the excess of their sales above $50,000, under the statute of June 30, 1864, as amended by the statute of July 13, 1866 (14 Stat. 115), and paid, under protest, the several sums sought to be recovered in this action. Appeal was taken from the assessment, and was decided by the secretary of the treasury against the plaintiffs.

Upon this state of facts we decide that the plaintiffs are entitled to recover the several sums demanded by them, for the following reasons: The sales were made by the plaintiffs as agents of the several manufacturing corporations, and were made in such a mode and under such circumstances that it is clear an action could have been maintained by or against the several corporations directly upon the contract of sale. They were sales for a disclosed domestic principal, and were made by samples; the agents not having, so far as appears, any possession or any special property whatever in the goods. That they were the sales of the companies is further shown by the well-known and proper course of the officers of the revenue in assessing all these sales as the sales of the manufacturers. No question was made that the companies had returned all these sales, and paid the much more considerable tax upon them of five per cent ad valorem, so long as that tax remained assessable by law.

The statute declares that nothing contained in it shall require a special tax for the sale by manufacturers of their own goods, wares, and merchandise, at the place of production or manufacture, and at their principal office or place of business provided no goods, wares, or merchandise, shall be kept, except as samples, at said office or place of business. Section 74, as amended, 14 Stat. 113.

It was argued that the office of the treasurer was the principal office of the company; and this appears to be so, if the statute refers to the office where the highest officer of the company transacted business; but our opinion is, that, whatever the meaning of the word "office," "place of business" in this section means the principal place for sales of goods. This is the subject-matter of the section. It was of no importance to the government whether the treasurer of the company had an office in the same building with the selling agent, or that the course of affairs might require different places for different parts of the company's business; what they were legislating about was the special tax on manufacturers, and they intended that the payment of the special tax by manufacturers should authorize them to make sales at their factory, and at one other and principal place of selling, whether the office or not.

This view of the case is confirmed by the provisions of section 82 of the principal act, a section which was not changed by the act of 1866, and which requires all manufacturers to furnish to the assistant-assessor a statement, subscribed and sworn to, or affirmed, setting forth the place where the manufacture is to be carried on, and the principal place of business for sales, the name of the manufactured article, &c. 13 Stat. 258. One purpose of this return was to enable the assessor to check the monthly accounts of sales, on which the large duty of five per cent was payable; but it was a part of the purpose, in all probability, to obtain a definite statement of the place of business at which the manufacturer considered himself entitled to sell under the seventy-fourth section, as his principal place, without further payment of a special tax.

We see very little reason to doubt that the words "office" and "place of business" are used disjunctively, and that a manufacturer might elect at which of them he would sell; and in this connection it may be noted that the seventy-fourth section, as it stood in the act of 1864, was in this form: "Nothing herein contained shall prohibit the storage of goods, wares, or merchandise in other places than the place of business, nor the sale by manufacturers or producers of their own goods, wares, or merchandise, at the place of production or manufacture, or at their principal office or place of business, provided no goods, wares, or merchandise shall be kept for sale at such office." 13 Stat. 249. As amended, the section reads, as we have seen, that nothing shall be held to require a special tax of manufacturers selling at their factory, and at their principal office or place of business, provided no goods shall be kept, except as samples, at such office or place of business. We do not mean to say that the meaning is different, but it is much more clearly expressed, in the amended form, that manufacturers may sell at two places, if they please: namely, the factory, and at their principal office or place of business; but at that office or place of business, whichever it be called or whichever it in fact be, they must sell by sample.

If this interpretation be wrong, the law is not uniform, because the liability to this additional tax would depend on accidental circumstances, such as whether the manufacturer kept his accounts and transacted his financial business in one place or another. It would often be very difficult to say which

was the principal place of business, if we are to compare the importance of different parts of the business. We know of no reason why selling is not as important an object with manufacturers as any other part of their business. But if the license is to sell at the factory, and at one other principal place of business used for that purpose, there is no difficulty.

For these reasons, we are of opinion that neither the manufacturing companies, nor their agents the plaintiffs, were liable to pay a special tax as wholesale dealers, in respect to these sales.

Judgment for plaintiffs.

[This case was taken by writ of error to the supreme court, which reversed the judgment above, with directions to award a venire de novo. 23 Wall. (90 U. S.) 321.]

TUCKER (SPAULDING v.). See Cases Nos. 13,220 and 13,221.

TUCKER (TINGLE v.). See Case No. 14,057.

Case No. 14,227.

TUCKER v. TUCKER MANUF'G CO.

[4 Cliff. 397; 2 Ban. & A. 401; 10 O. G. 464.] [1]

Circuit Court, D. Massachusetts. Sept. 1, 1876.

PATENTS—SPECIFICATIONS—EXACT DESCRIPTION—REISSUE—VALIDITY—CONSTRUCTION—INFRINGEMENT—BRONZING IRON.

1. An exact description of an invention is requisite for three purposes. That the government may know what they have granted, and what will become public property when the patent expires. That licensees may know how to use and practise the invention during the term of the patent. That subsequent inventors may know what portion of the field of invention has been occupied.

2. Persons seeking redress for the unlawful use of an invention covered by letters-patent owned by them are obliged to allege and prove that they, or those under whom they claim, are the original and first inventors of what is claimed in said patent; but the letters-patent in due form, introduced in evidence, afford a prima facie presumption sufficient to support such allegation until rebutted.

[Cited in Herring v. Nelson, Case No. 6,424.]

3. Where it appears, on a comparison of the two instruments by the court, that the reissue patent is for a different invention from that described in the original, then the reissue is invalid, as the state of facts shows that the commissioner exceeded his jurisdiction.

4. Errors and imperfections in the original may be corrected in the reissue, and the patentee be allowed to redescribe his invention, within the limit of what was described, suggested, or indicated in the original patent.

5. Whether a reissue covers no more than the invention described in the original patent, is a question of construction for the court, aided or not, by expert evidence, as it may or may not appear that technical terms, or terms of art, in the specifications, require explanation, in order to arrive at their true meaning.

6. Corrections may be made in a reissue specification, but not of a character to change the substantial nature of the invention.

7. In this case the defendants, while assignees of the complainant, had acknowledged the validity of his patent.

8. After reassigning the patent back to the complainant (the inventor), the respondents endeavored to reach the same results as were accomplished by the patented process, without infringing the complainant's patent; but the court *held* that the attempt to avoid the charge of infringement was merely colorable, and that complainant was entitled to an account and an injunction.

Bill in equity [by Hiram Tucker] for the infringement of certain letters-patent [No. 40,964, granted to complainant December 15, 1863, and reissued September 11, 1866, Nos. 2,355 and 2,356] for a new and useful method for coloring iron, in imitation of bronze.

Chauncey Smith, Walter Curtis, and Charles M. Reed, for complainant.

George L. Roberts and Reuben L. Roberts, for respondents.

CLIFFORD, Circuit Justice. Inventors, if they desire to secure letters-patent for their inventions, must apply to the commissioner therefor, in writing, and the requirement is that they shall file in the patent office a written description of the invention, and of the manner and process of making, constructing, and using the same, in such full, clear, concise, and exact terms as to enable any person, skilled in the art or science to which it appertains, to make, construct, and use the invention. 16 Stat. 201.

Pursuant to that provision, the complainant in this case applied, in writing, to the commissioner for a patent, describing his invention as a new and improved process or method of superficially bronzing or coloring iron, as more fully set forth in the specification of the patent. Iron, he asserts, has heretofore been japanned by covering its surface with oily solutions of asphaltum and pigments, and by the subsequent application of heat sufficient to produce hardness; and he also admits that metals have been lacquered or bronzed by the application of a solution of resin and metallic powders or salts, dried by exposure to air or heat. Both of these operations, he admits, are old and well known. Instead of that, his invention, as he alleges, consists in a process of covering iron with a very thin coating of oil, and then subjecting it to heat, the effect of which is to leave upon the iron a firm film, which is very durable, and which gives the iron a highly ornamental appearance, like that of bronze. Exact and complete description is given, in the specification, of the steps to be taken in applying the process so as to effect the described result. Three directions of the kind are given, as follows:—

1. That the surface of the iron to be bronzed shall be cleansed from sand, scales, or other foreign matter, and, where fine effects

[1] [Reported by William Henry Clifford, Esq., and Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

are desired, the suggestion is that the surface should be polished or made smooth.

2. That the surface of the iron so prepared should be covered with a very thin coating of linseed oil, or some equivalent oil, and the suggestion of the patentee, in that regard, is that he attains such a coating by applying the oil with a brush, and then rubbing the oiled surface thoroughly with a rag, sponge, or other suitable implement.

3. That the iron so prepared and oiled should be placed in an oven, and exposed to heat of an intensity sufficient to change a brightened surface of clean unoiled iron, to a color varying from that of light straw to deep blue, until the required bronze color is developed upon the iron, the statement of the patentee being that the resultant shade of color will depend very much upon the degree of heat employed, as well as upon the duration of its application, which, in every case, may depend upon the skill, care, and judgment of the operator, both in the application of the oil, and in regulating and determining the degree and duration of the heat. Boiled linseed oil is preferred by the patentee, and he directs that the iron, when the desired shade of bronzing is obtained, be removed from the oven or furnace, and he specifies that the process of oiling and heating may be repeated with profit if it be desired to deepen the shade of the bronzing, it being understood that the effect of each repetition will be to deepen the shade until the color becomes black. High heat, the patentee states, when applied to unoiled iron, will have the effect to produce upon the surface of the iron the series of colors pointed out in the specification, but he asserts that a thin coating of oil, applied as directed before heating the iron, has the effect to modify the oxidation, and to produce a new and improved surface resembling bronze, and which is highly ornamental, and of a character to resist the effects of moisture and handling. Exhibits showing the practical results of the patented process were given in evidence at the final hearing, and they are abundantly sufficient to prove that the described steps are respectively essential to attain successful results, or, in other words, that it is essential that the surface of the iron should be cleansed from sand, scales, or other foreign matter, that the surface should be covered with linseed oil or its equivalent, unmixed with pigment, lacquer, or japan, that the coating should be extremely thin, and that the iron thus prepared and oiled should be placed in an oven or furnace and be subjected to a high degree of heat.

Exactitude in the description of an invention is required, for three reasons: (1) That the government may know what they have granted, and what will become public property when the term of the monopoly expires; (2) that licensed persons desiring to practise the invention may know, during the term, how to make, construct, and use the invention; (3) that other and subsequent inventors may know what part of the field of invention is unoccupied. Sufficient appears to show that the description of the invention given in the specification constitutes a full compliance with those several requirements. Discussion of the title of the complainant is unnecessary, as it is admitted in the answer filed by the respondents, and the complainant alleges that the respondents have, since they reassigned the patent to the complainant, infringed his exclusive right and privilege to make and use the invention, and to vend the same to others to be used, and he prays for an account of all gains and profits realized by the respondents from the unlawful use of the same, together with the damages suffered by the complainant by reason of such unlawful use, and for an injunction.

Process was served, and the respondents appeared and filed an answer, in which they deny the charge of infringement, and set up four other defences: (1) That the reissued patent on which the suit is founded is not for the same invention as the original; (2) that the process described in the specification was not the subject-matter of invention at the time the original patent was granted; (3) that the complainant is not the original and first inventor of the described improvement; (4) that the alleged invention was known to, and was used by, the persons named in the answer before the complainant applied for a patent.

Persons seeking redress for the unlawful use of letters-patent are obliged to allege and prove that they, or those under whom they claim, are the original and first inventors of the improvement, and that the same has been infringed by the party against whom the suit is brought, and the burden to establish those allegations is, in the first place, upon the party instituting the suit; but the law is well settled that the letters-patent in question, where they are introduced in evidence in support of the claim, if they are in due form, afford prima facie presumption that the alleged inventor is the original and first inventor of what is therein described as his improvement. Seymour v. Osborne, 11 Wall. [78 U. S.] 538. Apply that rule to the case before the court, and it is clear that the decision must turn chiefly upon the defences set up in the answer.

Due description of the invention is given in the specification, and, the letters-patent being regular in form, the prima facie presumption is that the complainant is the original and first inventor of the alleged improvement. Defective patents may be surrendered and reissued, but the act of congress expressly requires that the reissue must be for the same invention as the original, and, consequently, where it appears on a comparison of the two instruments, as matter of legal construction, that the reissued patent is not for the same invention as that

embraced and secured in the original patent, the reissued patent is invalid, as that state of facts shows that the commissioner exceeded his jurisdiction. He may allow the specification to be amended if the patent is inoperative or invalid, and in that event he may reissue the patent in proper form. Errors and imperfections may be corrected, and with that view the commissioner may allow the patentee to re-describe his invention, and to include in the description and claims of the patent, not only what was well described before, but whatever else was suggested or substantially indicated in the specification, model, or drawings, which properly belonged to the invention as actually made and perfected. Interpolations of new features or devices which were neither described, suggested, nor indicated in the original specifications, drawings, or patent-office model are not allowed, for the plain reason that the commissioner has no jurisdiction to grant a reissue unless it be for the same invention as that embodied in the original patent. Sickles v. Evans [Case No. 12,833].

Whether a reissued patent is for the same invention as that embodied in the original patent, or for a different one, is a question for the court, to be determined as a matter of construction on a comparison of the two instruments, aided or not by the testimony of expert witnesses, as it may or may not appear that one or both may contain technical terms, or terms of art requiring such assistance in ascertaining the true meaning of the language employed.

Reissued patents are valid unless the differences between the reissued patent and the original are such that the court can see, upon the comparison of the two instruments, as matter of legal construction, that the reissued patent is not for the same invention as the original. Common knowledge shows that the mechanism of a loom and of a sewing-machine are essentially different, and it would follow that a patent for one could not be surrendered and reissued for the other, as the court could see, as matter of construction, that the commissioner, in granting the reissue, had exceeded his jurisdiction. Defects in the description may be cured, but the patentee may not strike out the entire description of one of the ingredients of a combination, and insert in lieu thereof a description of other devices, unless it be alleged that such other devices are the equivalents of the device stricken out. Gill v. Wells, 22 Wall. [89 U. S.] 2.

Corrections may be made in the specification, but they must not be of a character to change the substantial nature of the invention, either by enlarging or diminishing its legal effect or substantial mode of operation. Questions of some nicety may arise, but the rule being that the reissued patent must be sustained unless it appears, as matter of legal construction, that it is not for the same invention as the original, it will seldom happen that the question will be involved in much difficulty. Differences undoubtedly exist between the expressions contained in the respective specifications in this case, but it is clear that they are not of a character to warrant the court in deciding that the reissued patent differs in substance and legal effect from the original which was surrendered.

Much examination of the second defence is unnecessary, as the issue presented is entirely one of fact. Taken as a whole, the proofs are convincing that the oil coating, under the process of the complainant, is oxidized with the surface of the iron, and that the joint effect is to produce a new surface resembling bronze in color, better calculated to resist the effects of moisture and handling than iron smoothed in the ordinary way.

Properly construed, the invention of the complainant is the process of ornamenting iron in imitation of bronze by the application of oil and heat, as specifically described in the specification, by which a new surface is produced to the iron, which resembles bronze in color, and is better calculated to resist the effects of moisture than iron smoothed in the usual way. Construed in that way, as the patent should be, it is clear that there is no proof in the record to show that the complainant is not the original and first inventor of the improvement. Widely different views are entertained by the respondents as to the construction of the patent, and hence they contend that the proofs sustain their defence, that the invention is not novel; but the court is unable to adopt their theory as to the construction of the patent, and consequently does not think it necessary to respond very fully to their course of argument under the present head, the court being decidedly of the opinion that the complainant is the original and first inventor of the alleged improvement.

Most of the remarks of the court under the preceding head are also applicable to the fourth defence set up by the respondents. Assume that the patent is properly construed by the court, and it follows that the respondents utterly fail to show that the process of the complainant was ever known or used prior to the application of the complainant for his original patent.

Nothing remains to be considered except the question of infringement, which may properly be disposed of by a few observations. Enough appears to show that on the 15th of December, 1863, the original patent was granted to the complainant; that on the 3d of March, 1865, he assigned the same to the respondents; that on the 11th of September, 1866, the original patent was surrendered and was reissued to the respondents as the assignees of the complainant; that the respondents, on the 27th of August, 1872, reassigned the invention, as secured by the reissued patent, to the complainant.

Throughout that period, to wit, from the 3d of March, 1865, to the 27th of August, 1872, it appears that the respondents held the title to the invention, as secured by the original and reissued patent, and it appears that they, during that time, manufactured large quantities of goods by the process described in those patents, and that they paid royalties to the complainant for the right to use the process, and that throughout that whole period they acknowledged the validity of the patented invention.

None of those matters are in controversy, but the charge is that respondents, since they reassigned the patented invention to the complainant, have unlawfully continued to use the same without license, and have refused to pay any royalty to him for such, or to acknowledge his legal and just rights under the reissued letters-patent. Suffice it to say that the proofs fully establish that charge, and show that the respondents went immediately to work to see if they could not effect the same results as those accomplished by the patented process without infringing the same, and they now contend that they have been successful in their efforts. Instead of that, the court is of the opinion that they have plainly infringed the patented process, that the attempt to avoid the charge of infringement is merely colorable, and that the complainant is clearly entitled to an account and to an injunction.

[For other cases involving this patent, see Tucker v. Burditt, Case No. 14,216; Id., 5 Fed. 808; Tucker v. Corbin, Id. 810; Tucker v. Dana, 7 Fed. 213; Tucker v. Sargent, 9 Fed. 299.]

TUCKER, The JOHN. See Case No. 7,431.

Case No. 14,228.

TUCKERMAN v. BIGELOW et al.

[1 Brunner, Col. Cas. 631;[1] 21 Law Rep. 208; 3 Quart. Law J. 369.]

Circuit Court, D. Massachusetts. May Term, 1857.

COURTS—FEDERAL JURISDICTION—CITIZENSHIP—JOINT ACTION.

Where the interests of parties are joint, to sustain the jurisdiction each of the plaintiffs must be competent to sue each of the defendants in the federal courts.

[Cited in Grover & Baker Sewing Mach. Co. v. Florence Sewing Mach. Co., 18 Wall. (85 U. S.) 580; Romaine v. Union Ins. Co., 28 Fed. 636.]

[Cited in Bryant v. Rich, 106 Mass. 192.]

[This was a bill in equity by Samuel P. Tuckerman against Abraham O. Bigelow, and others. Heard on demurrer.]

H. M. Parker, for complainant.

J. C. Dodge, contra.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

CURTIS, Circuit Justice. This case came before the court on a demurrer to the bill taken by one of the defendants, a citizen of New Hampshire, and which assigned for cause that he was not a proper party. On looking into the bill it was found that it was brought by a citizen of the state of Vermont against a citizen of the state of Massachusetts, and two citizens of the state of New Hampshire. Upon a suggestion by the court to that effect, the question whether the court can exercise jurisdiction over the two citizens of New Hampshire in this suit by a citizen of the state of Vermont has been argued by counsel.

The eleventh section of the judiciary act of 1789 (1 Stat. 78) requires the suit to be between a citizen of the state where the suit is brought and a citizen of another state; consequently the complainant, a citizen of the state of Vermont, could not sue the two defendants, who are citizens of the state of New Hampshire, in this court, in the state of Massachusetts, and the fact that a citizen of the state of Massachusetts is also joined with them as a defendant, does not enable this court to take jurisdiction over the citizens of New Hampshire. Strawbridge v. Curtis, 3 Cranch [7 U. S.] 267, has not been overruled, and the law requires each plaintiff to be competent to sue each defendant over whom the court is asked to exercise jurisdiction.

Nor has the first section of the act of February 28, 1839 (5 Stat. 321), nor the forty-seventh rule for the equity practice of the circuit courts, dispensed with this requirement. This act does not relate to persons who have been served with process, or who voluntarily appear in a suit. Its only purpose was to enable the court to proceed in certain cases, as between parties properly before it, and over whom the court had jurisdiction, although other parties might be out of the reach of process. It does not extend the jurisdiction of the court over parties not previously within its jurisdiction. Commercial Bank of Vicksburg v. Slocumb, 14 Pet. [39 U. S.] 60; Shields v. Barrow, 17 How. [58 U. S.] 141. And the same is true of the forty-seventh rule. "This was only a declaration, for the convenience of practitioners and courts, of the effect of this act of congress, and of the previous decisions of the supreme court on the subject of the rule." Shields v. Barrow, 17 How. [58 U. S.] 141.

I am of opinion the bill must be dismissed, as against the citizens of New Hampshire, for want of jurisdiction. Whether the subject-matter of the bill is such that the court can proceed to a final decree, as between the complainant and the citizen of Massachusetts, without affecting the rights of the citizens of New Hampshire, or whether the citizen of Massachusetts is competent to represent those rights, the complainant must consider. If not, no decree can be made, and the bill must be dismissed as against the Massachusetts citizen, for want of necessary parties.

Character of Parties Necessary to Give Federal Court Jurisdiction. See Case of Sewing Machines, 18 Wall. [85 U. S.] 580; Bryant v. Rich, 106 Mass. 192, citing above case.

Case No. 14,229.

TUCKER MANUF'G CO. v. BOYINGTON.

[9 O. G. 455.]

Circuit Court, N. D. Illinois. Oct., 1875.

TRADE-MARK—WORDS UPON PATENTED ARTICLE—COMBINATION—INJUNCTION.

1. It is a matter of discretion always with the court to issue an injunction or not, upon a case made in a trade-mark suit.

2. The words imprinted upon a patented article of manufacture are common property from the date of the expiration of the patent.

[Cited in Burton v. Stratton, 12 Fed. 700.]

[Cited in Dover Stamping Co. v. Fellows (Mass.) 40 N. E. 107.]

3. When a trade-mark consists of a combination of words, letters, monograms, and pictures, it is not infringed unless the whole combination be used.

[This was a bill in equity by the Tucker Manufacturing Company against Levi C. Boyington, praying for an injunction to restrain the infringement of a trade-mark.]

BLODGETT, District Judge. This is an application for an injunction to restrain the defendant from the use of the trade-mark which has been registered by the complainant in the manner required by the act of congress. As the record now stands, I don't think this injunction ought to issue. It is a matter of discretion always with the court to issue an injunction or not, upon a case made in a trade-mark suit. I cannot say but that the complainant may make a case upon final hearing that would entitle the complainant to an injunction; but it seems to me that it is not made as the record now stands. I have serious doubts whether the defendant infringes the complainant's trade-mark. The words "Tucker Spring-Bed" were certainly common property from the date of the expiration of the Tucker patent in 1869. In January, 1875, the complainant, being the Tucker Manufacturing Company, and the party who had owned the patent during the lifetime of the patent, obtained the trade-mark, which consists of a perspective of the Tucker bed-bottom, with the letters "T. M. Co.," in monogram in the center of the picture, and over it are the words "Tucker Spring-Bed." It strikes me very forcibly that this trade-mark is for the combination, and the defendant does not infringe unless he uses the whole combination. The defendant, Boyington, had the right to use a diagram of the spring-bed as common property, and it has been such since the expiration of the Tucker patent. It seems to me that while this may be a valid trade-mark, when all used together, yet, when the defendant manufactures the spring-bed, he has the right to designate it as the "Tucker Spring-Bed," indicating that it is manufactured under the Tucker patent, and that he has, also, the right to put any colored label upon it that he chooses, so long as he does not, by his label, indicate that it is the manufacture of the Tucker Manufacturing Company. Now, the only semblance between the label used by the defendant and the plaintiff's label is that the defendant uses at the same time a perspective of the bed-bottom, and the words "Tucker Spring-Bed." He does not use the monogram, and uses nothing but what is common property. It is true that he uses the same colored label as the complainant uses. There is no patent trade-mark upon the color. Either party has the liberty to adopt any color, green, blue, or all the colors of the rainbow; so that, as the record now stands, I think this injunction must be denied. In passing upon a motion of this kind, which involves to a certain extent the merits of the case, I have, as far as possible, refrained from expressing any opinion that would prejudice the ultimate decision of the court. I think it is right that I should indicate the doubt I have, in order that counsel may determine for themselves whether the case shall go any farther or not.

TUCKER MANUF'G CO. (LADD v.). See Case No. 7,974.

TUCKER MANUF'G CO. (TUCKER v.). See Case No. 14,227.

Case No. 14,230.

TUDOR v. The EAGLE.

[5 Hunt. Mer. Mag. 262.]

District Court, D. Massachusetts. Sept., 1841.

SEAWORTHINESS—BURDEN OF PROOF—LOSS OF CARGO—STRESS OF WEATHER.

This was a libel [by Frederick Tudor] against the ship Eagle, for the value of a cargo of ice shipped on board of her by libellant, in January, 1840, and valued in the bills of lading at between two and three thousand dollars, and destined to the island of Jamaica. It appeared from the evidence that within twenty-four hours after leaving port, the ship sprung a leak, which continued to increase, until, for the purpose of lightening her and getting at the leak, a portion of the cargo was thrown overboard. But the leak still continuing, the ship was put away for Bermuda, where she arrived in about seven days from the time of her departure; and it being impossible to store the ice, or otherwise preserve it, while she underwent repairs, the residue of it was thrown overboard.

In behalf of the libellant, it was contended that there is always an implied warranty on the part of the owners that the vessel is tight, stanch, and seaworthy, and fit for the voyage; and when, without any extraordinary occurrence, she springs a leak immedi-

ately after leaving port, it is for the owner to prove her seaworthiness at the inception of the voyage. The defendant maintained that the leak was caused by stress of weather such as might have produced the consequences proved, even to a seaworthy vessel.

It appeared that the Eagle was an Eastern built vessel and fifteen years old; and the opinion of experts was given that the log-book did not show any remarkable stress of weather, such as ought not to have been expected at the season of the year in which the voyage was undertaken.

DAVIS, District Judge, sustained the positions taken by the libellant, and decided that the vessel was unseaworthy at the commencement of the voyage, and the libellant was entitled to recover the value of the cargo, and a decree was entered accordingly.

TUDOR (LADD v.). See Case No. 7,975.

TUEL (VOSS v.). See Case No. 17,015.

TUFTS (BLAISDELL v.). See Case No. 1,491.

Case No. 14,231.

TUFTS et al. v. BOSTON MACH. CO.

[Holmes, 459; [1] 1 Ban. & A. 633; 8 O. G. 239.]

Circuit Court, D. Massachusetts. Jan., 1875.

PATENTS—PRIOR STATE OF ART—CLAIM—NOVELTY—ELEVATORS.

1. In view of the prior state of the art, the twelfth claim of the patent for improvements in hoisting-apparatus and elevators, granted Otis Tufts, Aug. 9, 1859, which is for "passing the shipping-rods, and the cord or rod that operates the friction-brake, through the car or platform, for the object and purposes set forth," must be construed strictly in accordance with its language, as a claim for passing the described shipping-rods, and the described cord or rod operating the friction-brake, or their equivalents, through the car or platform, for the purposes set forth.

2. The first claim of the patent for improvements in the mode of suspending and operating elevators, &c., granted Otis Tufts, May 28, 1861, which is for constructing an elevator, or hoisting-apparatus, with a series of two or more hoisting ropes or chains, having independent attachments, and winding simultaneously upon the hoisting-drum, for greater safety, substantially as described, *held* invalid for want of novelty.

3. The second claim of the patent of May 28, 1861, for "equalizing the strain upon the series of ropes or chains of my (Tuft's) improved elevator or hoisting-machine by automatic adjustment, substantially as described," *held* invalid for want of novelty.

4. The patent granted Otis Tufts, Dec. 11, 1866, for improvement in means for guiding elevators, *held* invalid for want of novelty.

In equity.

James B. Robb, for complainants.

Causten Browne, for defendant.

SHEPLEY, Circuit Judge. This is a bill in equity brought for alleged infringement of letters-patent issued to Otis Tufts, dated Aug. 9, 1859, and extended seven years, for improvements in hoisting-apparatus, and adapting that apparatus for use as a passenger-elevator for carrying persons to and from the different stories in hotels and other buildings; and also of letters-patent, dated May, 28, 1861 [No. 32,441], for improvements in the mode of suspending and operating the elevator. Also for infringement of letters-patent, dated Dec. 11, 1866 [No. 60,442], for improvements in the mode of adjusting the length and tension of the ropes of an elevator; and of letters-patent, dated Dec. 11, 1866, for an improvement in elevator-guides. All of these patents were duly assigned to complainants.

The twelfth claim in the patent of Aug. 9, 1859, No. 25,061, is the one on which infringement is claimed, and is as follows: "I claim passing the shipping-rods and the cord, or rod that operates the friction-brake through the car or platform, for the object and purposes set forth."

The shipping-rods are described in the specification as passing up through the car the whole height of the building, and operating a shipper, by which the driving-belt is shipped from a fast to a loose pulley when the power is to be thrown off. The cord is also described as passing down through the car or platform so as to be accessible within the car, which operates to apply a counterpoise spring so as to put on a friction-strap brake, its office being to check, or perfectly stop, the descending motion of the car at the will of any person within the car or on the gallery. "The great advantage" (claimed) "of running the shipping-rods and the cord or rod up through the car itself is, that they are thus rendered accessible to the conductor, or any person within the car, without incurring the danger of protruding the hand or arms beyond the same while in motion."

If the twelfth claim be construed broadly as a claim for passing any rod or cord, by means of which the appropriate mechanism is operated to move the car up and down, or hold it at rest, through the car or platform, instead of outside the car or platform, it is void for want of novelty. George V. Hecker had in his flour-mill, in Cherry street, New York, an elevator which was put in twenty years ago, and which has been in successful operation since that time. A chain passed through the roof and floor of the cage or car, which operated upon a friction-clutch and a brake. The conductor or operator within the car could, by means of this chain, operate the shipping apparatus and the brake without incurring the danger of protruding the hand or arms beyond the car while in motion. This chain was connected with a brake in such a manner that the brake could be thrown off by pulling upon the chain, or put on by relaxing the pull upon the chain, a weight then causing the brake to produce friction on the friction-pulley. The pull upon the

[1] [Reported by Jabez S. Holmes, Esq., and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

chain, by raising the weight, first relieved the friction of the brake, and then threw into gear a friction-clutch, and the car ascended by the force of the motor applied through the friction-clutch. When it was desired to stop, the pull upon the chain was relaxed, and the weight threw the clutch out of connection, and the cage stopped, held in place by the brake. When it was desired to descend, a slight pull was made upon the chain, sufficient to relax the pressure upon the brake, but not to throw the friction-clutch into gear. The car then descended, under control of the brake, by force of gravity, at a speed dependent upon the will of the operator who controlled the brake. Within the car was a lever with one long and two short arms, with a friction-pulley on each of the short arms, which device was for the purpose of making the necessary pulls upon the chain which passed through the inside of the car. The friction-clutch is a well-known substitute for a shaft with a fast and loose pulley, a belt, and belt-shipper.

It is manifest, therefore, that, in view of the state of the art, the twelfth claim in the patent can only be sustained by giving to it a much narrower construction than the one claimed for it, and one strictly in accordance with the language of the claim; viz., "passing the shipping-rods and the cord or rod that operates the friction-brake through the car and platform, for the objects and purposes set forth." The defendant does not infringe the twelfth claim, thus construed, or any other claim, of the patent of Aug. 9, 1859.

Infringement is also alleged of the first and second claims of the patent of May 28, 1861, which are as follows: "1st. Constructing an elevator or hoisting-apparatus with a series of two or more hoisting ropes or chains, having independent attachments and winding simultaneously upon the hoisting-drum for greater safety, substantially as described. 2d. Equalizing the strain upon the series of ropes or chains of my improved elevator or hoisting-machine, by automatic adjustment, substantially as described."

To construct "an elevator or hoisting-apparatus, with a series of two or more hoisting-ropes or chains, having independent attachments and winding simultaneously upon the hoisting-drum," was not new at the date of this patent. Letters-patent of Great Britain to Frederick Levick and Joseph Fieldhouse, sealed Jan. 13, 1854, describe a hoisting car or carriage with two hoisting-ropes wound around the same spirally grooved drum. The ends of both of these ropes are attached to a connecting chain which passes under a pulley attached to the top of the car. Another chain is attached to the first-described chain in such a manner that the chain surrounds the pulley. If one breaks, the other, with the chain, forms a loop around the pulley, and sustains the car. The second chain converts the attachment into an independent attachment of each rope, and, when one rope breaks, the other rope will continue to sustain the weight of the car. Mr. Renwick, the expert, correctly states that "the ropes act precisely as if they were attached to the two ends of a horizontal lever, whose centre, upon which it could turn, was secured to the top of the car." In the patent of 1861, the patentee, Tufts, says: "I do not confine myself to the precise method herein described of effecting the automatic adjustment of the strain upon the hoisting-ropes, as I sometimes accomplish the same by a rocking lever when two ropes are used."

It is plain, that, in the Levick and Fieldhouse elevator, the two ropes when intact have equal strain upon them, and that, if one of the ropes should break, the weight of the car would be supported by the other rope. If the chain should break under the pulley, the car would fall, as it would in the form last described of the Tufts elevator, if the attachment to the car at the centre of the rocking lever should fail. It is contended that the purpose of the two ropes in the Levick and Fieldhouse machine was to keep the cage in the centre of the shaft, and that, therefore, the Levick and Fieldhouse patent does not anticipate the first claim in the patent of 1861. The answer to this is, first, that, whether they were placed there for the purpose of greater safety or not, they effected that result, and, secondly, that the patentees evidently contemplated that as one of the beneficial results to be attained by the use of two ropes instead of one, as there is no conceivable use for the cross-chain before described, except, in case of the breakage of one rope, to form a loop around the pulley, thus attaching the surviving rope to the car.

In the elevator which was placed in the mill of the Parsons Paper Company, at Holyoke, Mass., in 1856, there were two hoisting-ropes, having independent attachments to opposite arms of a rocking lever. They jointly and equally took the strain of the weight of the car, and each rope was sufficient to sustain the load put upon the machine. This elevator has been in constant use; and when one rope has broken, the elevator has been worked several days with the remaining rope. The ropes in the Holyoke elevator did not, it is true, wind around a drum, but were passed around a series of pulleys, and the free ends of the ropes were attached to counterpoise weights; but these two means of winding up a rope to which a weight is attached are well-known substitutes for each other.

Without adverting to the other patents, which have been introduced in evidence, and relied upon in defence on this branch of the case, enough has been stated to show that the first claim of the patent of 1861 is void for want of novelty. The second claim in this patent is, "equalizing the strain upon the series of ropes or chains of my improved elevator or hoisting-machine by automatic adjustment, substantially as described." This

claim can only be construed as a claim for the described means of performing this function, and for well-known substitutes or equivalents of those described means. The means the patentee describes are three. One of those modes is by means of a rocking lever, or system of rocking levers, to the ends of which the suspensory ropes are attached. The Holyoke elevator and the Levick and Fieldhouse elevator both anticipate this claim. One had a rocking lever, and the other had a device which operated in the same way and produced the same result. If the claim is valid, defendant is not proved to have infringed it; for there is no evidence in the record tending to show that the contrivance used by the defendant of a series of pistons fitting into a set of cylinders with connecting pipes, the cylinders being filled with an incompressible fluid, were at the date of the patent known substitutes for either of the means of adjustment described in the patent.

The patent of Dec 11, 1866 (No. 60,441), so far as the second claim is concerned, which is the one alleged to be infringed, relates to "means for manipulatory relative adjustment, within reasonable limits, of the series of ropes or chains, which are independently attached to the winding drum and to the car of the elevator, so that an equal degree, or very nearly equal degree, of tension can be had upon each rope or chain of the series, by proper attention or manipulation on the part of the party having such an elevator in charge." The patentee states in his specification that considerations of saving in the first cost of construction render it desirable in many instances to substitute for an automatic adjustment of the ropes or chains a means for adjusting them from time to time, as occasion may require; in other words, that the means of manipulatory adjustment in the patent No. 60,441 were intended as a substitute or alternative means for the automatic adjustment described in the patent of May 28, 1861 (No. 32,441). The defendant has put into its elevators means of mechanical manipulatory adjustment; but they do not perform the function described by Tufts as a substitute for the automatic adjustment, because the tension on the ropes or chains cannot be varied by any manipulation of the nuts. Owing to the presence of the equalizer, the means of automatic adjustment in the defendant's elevator, the nuts or the stumps may be screwed up or down to their fullest extent on any rope, without any variation of the tension on that or any other rope. As defendant does not infringe, it is not necessary to consider the question of novelty of this claim.

The patent of Dec. 11, 1866, relates to means by which an elevator is so guided as to prevent the sway thereof, and the noise consequent upon contact with the ways by which the elevator is guided. The claim is as follows: "I claim combining the suspended car of an elevator with the ways or rails which confine it, by means of guides kept by springs constantly in contact with said ways or rails, when said guides are so arranged as to be capable of motion towards and from the rails." In the provisional specification filed April 6, 1858, in the office of the commissioner of patents for Great Britain, accompanying the petition of Louis Tétar van Elven for a patent, which did not proceed to the Great Seal, but which specification was printed by Eyre & Spottiswoode, is a clear and accurate description which contains all the features of this claim. Defendant's exhibit No. 13 is a model of the device described in the Tétar van Elven specification. It fully anticipates every feature of this claim.

Bill dismissed.

Case No. 14,232.

TUFTS v. TUFTS et al.

[3 Woodb. & M. 426.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1847.

PRACTICE IN EQUITY—REHEARING—WHEN GRANTED—WASTE OF PUBLIC TIME.

1. A rehearing will not be granted in this court merely on a certificate of counsel, stating as a reason only an error in law on a particular point.

2. There should be shown, in order to justify a rehearing some new fact or precedent, or some specific mistake.

[Cited in Giant Powder Co. v. California Vigorit Powder Co., 5 Fed. 201.]

3. The same court should not be asked, on the same facts and cases and arguments, to consume the public time and consider whether to change its opinion or not, but such an examination belongs more properly to an appellate tribunal.

[Cited in Gage v. Kellogg, 26 Fed. 243.]

This was a petition for a rehearing in the case decided between these parties near the commencement of this term [Case No. 14,233]. The petition sets out a certificate of two counsel as to the propriety of a rehearing, but assigns no other ground, except that the petitioner feels aggrieved by the former decision, and thinks it erroneous in holding the agreement or trust between these parties named in the opinion to have been executory instead of executed.

Mr. Rand, for petitioner.

Sewall & Fletcher, for respondents.

WOODBURY, Circuit Justice. This petition does not aver any new evidence, new point, new precedent or new argument, as a ground for a rehearing, though that course is usual in such applications. Doggett v. Emerson [Case No. 3,961]; Jenkins v. Eldredge [Id. 7,267]; Hunter v. Marlboro' [Id. 6,908]; and Bentley v. Phelps [Id. 1,332]. Nor does it, as is customary, when nothing new has

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

been discovered, set out any special mistake in law or fact as a reason for a rehearing, except that the contract or trust between these parties described in the bill was held by the court to be executory, when they were executed. The petitioner claims, however, that the certificate of counsel offered here, stating the case is a proper one for a rehearing, is alone sufficient to warrant it. But the decision by my predecessor, as well as of myself, against the sufficiency of such a certificate, standing alone, and the reasons for our opinions, may be seen fully in two recent cases, and supersede the necessity of going into them here. Jenkins v. Eldredge [supra]; Emerson v. Davies [Case No. 4,437].

The application, then, must rest entirely on the general ground specified as to the decision of the court having been erroneous, in respect to the agreement or trust growing out of it having been executory. Where counsel certify to the propriety of a rehearing in England, without stating the reasons, it is to be presumed that there is usually some specific ground for it in some particular accident or mistake which has happened, or in something new to be presented, by way of fact or argument, and not a mere difference of opinion between the failing party or his counsel and the court. Otherwise, as my predecessor remarked in Jenkins v. Eldredge, "I fear that suits would become immortal." It is certainly somewhat extraordinary to apply to the same judge to go over again forthwith the same matter and arguments, and nothing more. Before pressing such cases, it should be remembered what is due to the rights of the opposite side, what to other suitors, waiting to have their important business on the docket despatched, not to dwell on what is also due to self-respect, both in counsel and the court. But I have felt inclined to waive much of this in favor of a party, situated like the present complainant, in order to discover if any error is shown to be probable, and I have listened patiently to the argument in favor of the petitioner with an anxious desire and determination to correct any such error, if any such should be satisfactorily shown. But after two days thus spent, I must confess, that doubts enough have not been excited in me to justify the delay and expense to the other party and to the other large amount of business on this docket, which must be incident to a reargument of a cause like this, which has already occupied several weeks of the public time. Perhaps I came to that conclusion the more readily, as the petitioner has now an opportunity to have her case reheard on appeal before the supreme court, where she has expressed a determination to carry the cause. It may be further strengthened by the reflection that she was at first fully heard here by counsel, both orally and in writing, and after an opinion delivered has again been heard on this motion very widely, and has been able to point out nothing omitted, either in the former argument or opinion of the court, and nothing overlooked by accident or inattention, and nothing new to be presented on a rehearing.

The whole reasoning on this motion and all the cases cited in connection with it, seem to be merely those which were before urged. As understood by me, the answer to them all will be found in the former opinion delivered, and if there be anything different in the form of now presenting them by the counsel for the petitioner, it has not altered nor increased the force, and certainly the great force with which they were before pressed. I then stated that many of the conclusions drawn by the counsel for the petitioner connected with this and other points, were sound and legal, if the facts were regarded as she in my view improperly regarded them. But as I was compelled, sitting in equity, and still am to settle the facts, as well as the law, I differed more from her counsel as to the former than the latter. Probably I should still do the same, as it is not proposed, on a rehearing, to offer in any way any new facts, nor is it even pretended, by affidavit or otherwise, that a single new fact of importance could be offered, or has been discovered. It is, to be sure, argued that some surprise existed in the decision of the court being mainly on a point or question not raised in the pleadings. But it was one raised in the evidence early, and argued to the court for days on both sides, and no suggestion then of surprise, or any wish expressed then or now for leave to offer new testimony upon it. All the facts and precedents and reasons proposed to be offered on a rehearing being then the same as before, I can see no probable benefit likely to result from it, but lasting injury to the other public business, and a bad example for future applications. It is hardly in the power of the human mind, surely not of the sound judicial mind, after forming deliberate opinions on long arguments and much examination, to change at once its conclusions, merely on a repetition of the same arguments and the same facts. Opinions thus liable to change, would be as worthless after altered, as they were before. The changes, which are valuable and to be reasonably expected, are on new matter, new light, new information. And hence it is wisely provided in most judicial systems, as in ours, that where nothing new exists to justify a change in a judgment, a general review on the old grounds should be made by different persons, by a higher and appellate tribunal. That tribunal exists in this case. The petitioner has already expressed a determination to go to it, and nothing could be more gratifying to me, both personally and officially, than to have that tribunal correct any error of mine in attempting to administer justice with purity and correctness. In order to enable parties to have such errors corrected, rather than opposing or discountenancing their efforts, I have hitherto lent, and shall hereafter lend,

all the assistance in my power consistent with the laws and the rights of antagonist parties.

Case No. 14,233.

TUFTS v. TUFTS et al.

[3 Woodb. & M. 456.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1847.

PLEADING IN EQUITY—PROOF—VARIANCE—LAND CONTRACT—AGAINST PUBLIC POLICY—EXECUTORY AGREEMENT—STATUTE OF FRAUDS.

1. If a bill in chancery describe a contract, which it asks to have enforced, as originating after a sale had been made of certain land, and it appears in evidence to have originated before or at the time of the sale, the case must be considered as if the contract was made as proved, and the merits must be decided as if it was so made, or the variance be deemed fatal.

2. Before the sale of land by an executrix to pay debts under a will, a contract made with the expected purchasers, she being a relative to one of them, to hold the land for her benefit, on her paying the interest quarterly, till she should find it convenient to pay the principal, and then to convey to her, and they purchasing the land at less than its true value at that time, was a contract against public policy, and voidable, but generally not void.

3. If, after some years, the purchasers request her to get some other persons to take the land, and she procures her step-son to do it, who pays in part and secures to them the rest of the money, and agrees to stand in their shoes, and do all they had promised, the invalidity of the contract remains the same as it was originally.

4. This last transaction does not raise a resulting trust in her favor, as she did not advance the consideration, nor claim in the bill that the step-son was to take a deed running to her.

[Cited in Kelley v. Jenness, 50 Me. 461.]

5. Nor is it a mortgage, as no absolute debt became due from her to him, but a mere right existed, on paying the interest quarterly and the principal when she became able, to have a conveyance to herself.

6. The transaction was a special contract merely, either agreed to be performed according to its terms, or imposing an ordinary trust to perform it in consequence of the original purchase of the land on the terms stipulated.

7. If the contract be not set out with exactness, any variances will be allowed to be cured by amendments or easy terms, where the substance of it appears. So will be any mistakes in form in pleading the statute of frauds.

[Cited in Bentley v. Phelps, Case No. 1,332.]

8. A consideration is necessary in an executory agreement or trust, in order to require them to be enforced, and it must be a legal and honest one.

9. Where an agrement or trust is executed, or is evidenced by a writing sealed, a consideration will usually be presumed.

10. As a special contract this one was not mutual, she not being obliged to advance the money and take a deed, and hence it may have been inoperative. Time in this case was probably not a part of the essence of the contract.

11. As a contract or a trust in respect to lands, the statute of frauds was pleaded against it, and must prevail, unless continued possession by the executrix with her step-son, and several acts of apparent ownership exercised over it by her, and charges made in his books, implying some rights in her, are sufficient to take the case out of that statute.

12. In Massachusetts the writing to obviate the statute as to a contract, need not contain the consideration, and perhaps the rule should be the same there as to the writing to evidence a trust.

13. After the lapse of several years, the executrix not paying all the interest nor tendering the principal, the step-son notified her of his determination not to convey to her, and sold a portion of the land to others, who are co-defendants in this bill, but claiming to have bought without notice of her interests, and as the land had greatly risen in value, the complainant, after making an offer of payment to the extent of the original purchase money and interest, instituted this bill, and it was *held* that such purchasers, if without notice, were not to be affected, so far as they had made payments to the step-son, but if buying with notice, stood like him, and, for all still due, were liable to her, if he was.

14. It was further *held*, that, as a contract or trust, this collateral undertaking was an executory, and not an executed one, and the present bill being brought to compel its execution, a defence against this, that there was no consideration, or that the consideration was illegal, is not to avoid an executed contract or trust, but to prevent the enforcement of an executory one.

15. Whether, then, the original sale of the land, under such a collateral agreement or trust, was void or voidable, it has been executed, and it cannot probably be avoided, except by creditors or heirs under special proceedings or pleas for that purpose.

[Cited in Mason v. Crosby, Case No. 9,236.]

16. But this collateral agreement or trust being still executory and not executed, and being without any consideration except one against public policy and illegal, a court of equity without any special pleadings should not enforce it by its extraordinary means of relief, but leave a party, thus situated and claiming, to any remedies which may exist at law.

[Cited in Hunter v. Marlboro, Case No. 6,908; Almy v. Wilbur, Id. 256.]

This was a bill in equity founded on the following allegations. Peter Tufts of Cambridge, Mass., died in 1827, leaving a small farm and house thereon, where a part of his family continue to reside till the present time. He died insolvent, and the plaintiff, his wife, being executrix under his will, sold the estate at auction for the purpose of paying the debts, September 22d, 1828. The purchasers were Cutter and Cummings, for about $3,460. It was alleged in the bill that she made an agreement with the purchasers that she might retain possession of the premises, and have a reconveyance of them on paying the sum for which they had sold and interest thereon. It was averred, also, in one part of the bill, that this agreement was made subsequent to the sale, and at the time the deed was executed, and that relying on it, she proceeded to make valuable and permanent improvements on the premises. That in January, A. D. 1831, Cummings conveyed his share in the estate to R. Perkins, and in January, 1832, Perkins conveyed to Cutter, the occupation and improvements by her still going on under the agreement. That in February, 1834, Cutter becoming embarrassed, and anxious to sell the property, she procured Charles Tufts, her step-son,

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

to take a conveyance on the same terms which had before been agreed with Cutter. That Charles Tufts lived in the house with her, professed to be friendly, and continued to let her occupy and improve under the agreement, and to make sales of gravel and trees on her own account till 1842, the property in the meantime having risen much in value, so as to be then worth $40,000. That he then refused to fulfill the agreement, though she was ready and offered to pay the principal and interest due, and demanded a conveyance from him. That in September, 1844, Charles Tufts sold a portion of the premises to E. Wheeler, the other respondent, who was notified of the agreement before named when he purchased. The complainant prayed further, an account, by the respondent, Charles Tufts, of any rents or income, and a conveyance by him and Wheeler of the premises, setting aside his to Wheeler on her paying the original consideration and interest, as by agreement with Cutter and Cummings at first, and afterwards with Charles Tufts. She also asked an injunction against further conveyances by Charles Tufts or Wheeler while these proceedings were pending.

The answer of Charles Tufts admits several of the matters alleged, but denies that Cutter and Cummings entered into any agreement which made the conveyance to them a trust or mortgage, or that he bought of Cutter under any such agreement with him or the complainant, though he made a verbal promise, in the close of 1831 or the first of 1832, that if she paid him his advances and interest within five years, he would convey to her. He further alleged that such only was the agreement between her and Cutter originally, except that originally it was to be done in ten years. He further denied that she had made any valuable improvements, or remained on the premises, except from kindness, or that she had paid rent or interest, though charged against her, or had ever offered to pay them within the original ten or subsequent five years. He also pleaded the revised statute of frauds to her demands, and annexed many accounts between them to show her indebtedness to him.

The answer of Wheeler expressed his belief in the statements of his co-defendant, and denied any knowledge, when he purchased in September, 1844, that the plaintiff claimed any interest in the premises, except as tenant at will.

There was a supplemental bill charging the respondent Charles Tufts with instituting proceedings at law to oust the plaintiff, pending the present bill, and an answer admitting the allegation, and upon this an injunction had issued against further proceedings there till otherwise permitted by this court. A great mass of evidence was put into the case to prove the agreement on which the plaintiff relied, and to show a trust or mortgage as between the plaintiff and Cutter and Cummings till the conveyance to Charles Tufts and since, as between the plaintiff and him. Much proof was also offered to rebut these. Such portions of the testimony on both sides as may be pertinent will be stated hereafter in the opinion of the court.

Mr. Rand, for complainant.
Sewall & Fletcher, for respondents.

WOODBURY, Circuit Justice. This case has been argued very elaborately on both sides, and requires a full and detailed examination. The allegations in the bill are claimed to make out a case for the complainant to recover on several distinct grounds. One is on an agreement, and virtually asks for a specific performance of it, as if it was founded on a proper consideration, and was otherwise valid, and as if everything previously required on the part of the plaintiff had been done. Another is on what amounts to a mortgage, and seeks, in substance, to be allowed to redeem it on the payment of all which is equitably due. Another is on a constructive trust, growing out of the agreement, which is considered binding on the respondent, but is alleged never to have been performed by him. Another still is on a resulting trust, which is contended to arise in favor of the complainant, on the supposed fact that she advanced all the consideration for the deed from Cutter to the respondent Charles Tufts, the latter acting merely as her agent. The bill in terms sets up none of these gronds for a recovery, except the agreement first mentioned. But in argument, they all have been urged, and it may be just to sustain the bill if either of them come within the facts duly alleged and duly proved. Either of these grounds, also, if well supported under the objections taken against them, would certainly be sufficient to give jurisdiction to this court on its equity side, and hence might justify a decree in favor of the complainant after amendment, even if the grounds be not now sufficiently described. Before examining, however, each of these positions separately and in detail, it may be observed, that there are two general exceptions which are made, and which apply to most of them. They are, first, that the consideration connected here with any agreement, a mortgage or trust is not a good one, while it should in each be legal, or it cannot have the assistance of a court of chancery to enforce it. And secondly, that none of them are proved in writing, though when an agreement, mortgage or ordinary trust relates to an interest in land, it must, by the express requirement of the statute of frauds, be proved by some "writing signed by the party to be made liable." These two general exceptions I shall examine last, as they apply to several of the grounds relied on for a recovery, and as the separate objections to each ground can be best weighed in the first instance and by themselves.

The claim set up by the plaintiff, that the transaction between her and Charles Tufts

created a resulting trust in her, or amounted to a mortgage of these premises by her to him, which she should now be allowed to redeem, is a very important one for her to make out, if practicable, because such a trust would not be affected probably by the statute of frauds. Resulting trusts are expressly excepted from the operation of such statutes generally, and mortgages, where an absolute deed exists, may be shown in chancery by proving by parol, the relation of debtor and creditor between the parties, or the recognition in other ways that the transaction was a mere security for a loan. See cases in Hunter v. Marlboro' [Case No. 6,908], and Bentley v. Phelps [Id. 1,332]. It is still more important for her to make out either of these, as the consideration connected with them, if it exists, was one between her and Charles Tufts alone, and not between her and the original purchasers, Cummings and Cutter, and hence probably it would not be tainted by any illegal arrangement with them, if one existed between them and her. Is there, then, as insisted by the plaintiff, proved against the respondent anything which raises as against him a peculiar trust merely by operation of law, such as is termed a resulting trust, and which by statute need not be evidenced in writing? or anything which amounts in equity to a mortgage in which the complainant has all the rights of a mortgagor, and the respondent should perform all the duties of a mortgagee? The test fact as to a resulting trust is this. If the respondent, Charles Tufts, used his own money and credit, there is nothing in or from her to raise a resulting trust to her. 4 Burrows, 2255; 4 East, 577; 2 Atk. 74; 5 Johns. Ch. 1; 2 Paige, Ch. 238; 3 Sugd. Vend. 260. While, on the contrary, if he acted then merely in the capacity of her agent, and used her money and not his to buy the land with, a resulting trust would arise in her favor in law, not supposed to be prohibited by the statute of frauds, and independent of its provisions. See cases in Hunter v. Marlboro' [supra]; 1 Russ. & M. 53; 11 Bligh, 397, 418; Hill, Trustees, 55; Lewin, Trusts, 168; 2 Story, Eq. Jur. §§ 1201–1206. So if she borrowed the money of him, and he took her note for the amount, and then had the deed from Cutter and Perkins made out to him, rather than the plaintiff, wrongfully and contrary to agreement, a resulting trust would arise to her. The independent facts separate from the face of the deed are, in such cases, provable by parol, notwithstanding the statute of frauds, sometimes under an express exception in the statute, and sometimes in order to prevent fraud. Lewin, Trusts, 155; 1 Spence. Eq. Jur. 571; 2 Vent. 390; 1 P. Wms. 322. But it is apparent, on a little scrutiny of this transaction, that neither a resulting trust nor a mortgage were intended to be the case in form. I apprehend that the other facts show, also, that neither of them was intended, in substance, because the respondent became liable to Cutter and Perkins for the whole consideration, and paid part in money and gave his own mortgage for the rest, and did not charge to her the amount in his books (Hill, Trusts, 92), or charge it in any account rendered to her which is produced and proved, though one of her sons swears it was charged in some account he had at some time seen, yet none such is produced. Nor did he take any note of her for the consideration paid, or any mortgage, though the deed running to himself from Cutter and Perkins would perhaps furnish him with a strong security, if he really had made an absolute loan to his step-mother, and if this course was intended as mere security for it. But against either of these parties having intended such a loan, is the further fact that by the agreement as proved, both originally and with the respondent, she was under no obligation to pay the consideration and take the farm, but merely had liberty or permission to do this, if she pleased, and should ever become able to do it. Consequently she could not then mean to pay for it by an agent and by a loan. Nor is it pretended in the bill, or proved, that the respondent promised to take the deed in her name, and to treat her as at once the debtor for the consideration, and to advance the money and credit as hers, which is the usual mode of raising a resulting trust, and which is raised on such facts only, and then in order to prevent a breach of faith operating injuriously and fraudulently. 1 Spence, Eq. Jur. 451, and Lloyd v. Spillet, 2 Atk. 150; Amb. 150. But there is neither any such breach of faith and breach of contract at that time averred in the bill, nor any such attempted to be shown by evidence. There was, likewise, a paramount reason why she should not make any such agreement, or wish to have any such deed at the time of her arrangement with Charles. She appears to have been embarrassed by debts, and did not like to have any interest she possessed in these premises taken to satisfy her debts. Hence she would not desire to have any deeds executed to herself, or any property so situated that the title would be vested in her by resulting trust or mortgage, and be liable to be seized and sold to the extent of her interest. This in some degree, likewise, reconciles her disclaimers to several persons of her having any interest in these premises, because she had intended to have it so situated, that she might in future obtain an interest, if she afterwards pleased, but not have any in præsenti to be exposed to satisfy her debts. On the contrary, no circumstances existed there which would be likely to prevent the respondent from buying at that price and being willing to retain the land himself, if not soon wanted by her, when it was worth more than the consideration, or from taking the deed in his own name, being out of debt, or from paying with his own mon-

ey in part, as he had money and she had not, or from getting credit for himself for the rent, as he had credit, or from holding it sometime as his own to benefit and oblige her, if she became able and willing to pay for it, as he was young and disposed by kindred and residence with her to accommodate her. Nor was there, on the evidence, a single circumstance to show that in this he had violated, or was for years accused of violating, any promise or duty to her so as to cause a resulting trust or mortgage.

In the next place is there sufficient proof to show a mortgage between them?

The test as to that in equity, there being no pretence here of a mortgage in law, is the existence of a debt between these parties for the consideration paid to Cutter, and which the deed to the respondent was executed to secure. See cases in Bentley v. Phelps [Case No. 1,331]; Almy v. Wilbur [Id. 256]; 1 Vern. 262; 1 Johns. Ch. 370; Taylor v. Luther [Case No. 13,796]; Flagg v. Mann [Id. 4,847]; 4 Johns. Ch. 189; Coote, Mortg. 24; Greenl. Ev. 288. There may be mortgages to secure bail, covenants, &c., and not debts. But there is no claim here that this was a mortgage to secure anything except a debt. Nor is it shown that Charles Tufts was a lender of money generally at that time, or that any note was taken for this as a debt, or any charge made of it to her. And the whole current of the evidence, though with some exceptions, is that she was not bound at all then to buy the land, unless she afterwards chose to do it and advance the money, rather than that she had thus bought it, and virtually mortgaged it for payment of the consideration. All the reasons, too, existed against her being a mortgagor of this land, which existed against her having a resulting trust, on account of her indebtedness to others, and telling them, as she did, that she had no interest in these premises to pay them with. Opposed to a mortgage, as well as a resulting trust, it also seems very likely that all her interest then rested in mere contract, and was so meant to rest. It was conditional, and depended on her option and pleasure afterwards, whether it should ever become a vested interest of any kind or to any extent. It rested on a special agreement or ordinary trust growing out of it—not a mortgage or resulting trust, on an agreement, to be sure, not very technical nor business-like in its terms, but one which, if executed, would operate kindly among relations, and which, if executory in its terms or conditions, and not able to be enforced on account of objections interposed, either legal or equitable, was an agreement, not in my opinion, as the respondents' counsel argued, so unusual or irrational as to be disbelieved under all the evidence and circumstances of this case. Even the bill does not purport to proceed on the ground of a resulting trust, or a mortgage, which she wishes to be opened for redemption. It avers no loan from Charles Tufts to her, nor any mortgage. It proceeds rather on facts connected with the idea, either of a common trust in the original and subsequent purchase of this farm in her behalf, which has not been fulfilled, or an ordinary but valid agreement made in relation to the land in her behalf, which is set out in terms, as is a non-performance, by the respondent. And though a trust not being alleged in the bill, is not to be presumed or implied, unless necessary and clear (3 Swanst. 591; 1 Spence, Eq. Jur. 496), yet both a common trust resting on an agreement, and an agreement to some extent express rather than implied, are, in my view, quite clearly shown by the evidence, as before explained. Yet both a common trust, resting on an agreement, and an agreement of a certain character are perhaps sufficiently shown by the evidence.

The next inquiry, then, is what was that agreement or trust arising from it, and what are the objections, if any, which should oppose and defeat the execution of it, independent of the statute of frauds, and of the consideration of the agreement or trust, which will both be examined separately before closing. I pass by many subordinate points in the case, it being almost a Proteus in the shapes it has assumed, and do not go into the inconsistencies between different parts of the answer, or the want of credibility in that and several of the witnesses, or whether an answer is evidence or not, when responsive to the bill. That it is, see Russell v. Clark, 7 Cranch [11 U. S.] 70; Gould v. Gould [Case No. 5,637]; Morgan v. Tipton [Id. 9,809]. That it is not, but is a quasi bar till overcome by evidence, see 6 Clark & F. 295; 2 Daniel, Eq. Prac. 826; 1 Madd. 1; 1 Younge & C. 59. But I hasten to the trust or agreement to see what are their true terms and the objections to them, as on these the merits of the case in controversy must finally be disposed of. When the evidence was examined, which the complainant offered in order to prove the terms of the original agreement that she had alleged in her bill to have been made about the conveyance of this farm to her by Cutter and Cummings, it became clear, in the first place, that though it may have been finally settled when the deed was executed, yet it was arranged before and at the sale, and was then acted on. This is positively sworn to by one of the parties to it. It is also testified to, that the property was in fact knocked off to them at the auction sale of it by her, as executrix, at $1,000 less than others were then and there willing to give the same day. This was another strong feature or incident of it. The original purchasers also bought with a sole view to aid her by this agreement, both being engaged in other business, and one of them being her cousin, and desirous to assist her. This was another element in it, and no consideration whatever was advanced by her individually, in order to cause the agreement, but the reconveyance was promised to her in conse-

quence of this arrangement and sale to them, in order that she might have the benefit of it. This was the moving cause, this her only privilege, except that she was to remain on the premises by paying only the interest and taxes as rent, and take her own time for paying the principal, and asking a conveyance. But it was left entirely optional with her to buy or not, as her means might happen to permit, or the land become in time more valuable or not. After some years Cutter, in whom all the farm had become vested, being in need of money, and she being unable to raise it, her step-son, the present respondent, who had boarded with her since his father's death, and rendered some aid in paying the rent, and had acquired some property, was induced to come forward and take the land and agreement off Cutter's hands. She had like confidence in him as in Cutter, and he was therefore substituted for Cutter. He was to stand, as a witness swears, "in Cutter's shoes." I do not think it was an independent purchase, or new and different agreement in its terms and consideration, though it has been strenuously insisted by her counsel, that this arrangement with the respondent was an independent transaction, and that the old trust was entirely executed. In that view he urges it as a new trust or agreement created in the respondent, unaffected and uncontaminated by anything wrong in the first sale. But I think the balance of the evidence and circumstances is the other way, and at the same time is against the position taken by the respondent, that he did not promise or become liable to do all which Cutter was bound to do. The question, as one of fact, is difficult, and I wish a jury had passed on it, rather than the court. Yet the weight of facts and circumstances seems to me to indicate that the deed to the respondent, and his agreement and trust in conformity to it, were not made without full reference to the former agreement and trust to reconvey in a certain event, and without full reliance placed on it. But it was at the same time very far from being meant as the total execution of the old trust, and the creation of an entirely new one, or one of a different character. On the contrary, it was a mere continuance of the old one in new hands, the respondent knowing and promising to comply with the old one, and she asking that, and that alone. And whether he promised to do it or not, in all respects, which is questioned some in Charles Tufts' answer, and the argument of his counsel, he is still liable to do it, if he took the land merely knowing, as he doubtless did, all the previous trust attached to it. He took it cum onere. 2 Dru. & W. 31; 2 Ball & B. 304, 416; 1 Schoales & L. 262; 1 Ves., Sr., 498; 2 Vern. 271, 447; Lewin, Trusts, 205; 20 Johns. 421; 1 Johns. Ch. 305. From all the circumstances, that, and nothing either beyond or short of it, must manifestly have been the intention of both parties. He merely assumed the obligations and confidence which existed in Cutter & Co. for the same object and consideration and with like designs, and she merely desired that. Indeed, in the bill itself, it is alleged that Charles Tufts took the land under the same agreement as Cutter and Cummings, "under the agreement aforesaid,"—"holding said premises under such agreement as aforesaid." It is not set out, to be sure, as it is proved, in respect to the time the agreement was first made, but in other respects it is substantially the same. Indeed, though some parts of the written argument of the plaintiff contend that the old trust was executed, and a new trust formed, yet other parts make it a point, that both were the same. Thus "fifthly," after insisting that the trust had been executed, it is added, "Charles Tufts took the conveyance with knowledge of and subject to that trust, and therefore takes subject to it, or stands in a like situation," as Cutter, the first trustee, swears. Charles Tufts "was to hold the estate on the same understanding and agreement as C. had done," and Smith testifies "the agreement was that he, (Charles Tufts,) should step into Mr. Cutter's shoes." In short, a new promisor was merely agreed to be substituted for the old one, but to the same obligation, or a new trustee as to the same trust, or, in other words, the old agreement and trust were only assigned to Charles Tufts, he agreeing to do all which the assignor had been engaged to do, and the promisee in the agreement assenting to this assignment. It was as if a new tenant under a lease should attorn to the landlord and be accepted, instead of the old tenant, for the same rent or consideration. Afterwards, the respondent showed a disposition, not unnatural, to limit to ten years from her sale, or five years from Cutter's, the continuance of any right in her to have a conveyance of the premises on paying the original consideration and interest. The evidence, however, is, in my view, decidedly in her favor, that there was no such limitation, and though this gave her a great advantage, it was not a very unusual advantage, under all the circumstances of indigence and relationship on one side, and prosperity, if not wealth, on the other. In Welsh mortgages no time of payment or redemption is fixed. 3 Pow. Mortg. 947, 948; 3 Atk. 518. But then the mortgagee enters and takes the profits (1 Pow. Mortg. 373), and here the indulgence has some limit to it, probably, if the party chooses to resort to chancery and have the time for redemption or payment restricted to some reasonable period. She is entitled, then, to all the benefits of the agreement or trust, as it stood originally in Cutter and Cummings' hands, and is subjected to all the disadvantages or imperfections of it as originally made. These, in my view, are its terms, its privileges and defects.

Among the defects which have been deemed most prominent, its exposure to the plea

of the statute of frauds, on the ground that the agreement or trust was not in writing, and next, that illegality existed in the consideration for either of them. Besides these the agreement and trust, deeming them, as I do, throughout, to be the same in their terms, conditions, object and consideration, are open to some other exceptions as to their conditions, which it may be well to advert to before proceeding to the two most prominent. One of these others is, that the terms of the agreement and trust were, on the part of the plaintiff, not imperative, but resting only in her pleasure were optional, and hence were not valid. To this effect, certainly as a matter of fact, is the balance of the testimony, though not the whole of it.

This conclusion is, likewise, fortified by her own declarations frequently made, that she had no interest in the land, and hence everything must have been voluntary or optional with her in order to justify, in any true view, such declarations.

Conceding, then, that it was optional in the plaintiff to pay the original money or not, the trust or agreement could not, as a general principle in such case, be enforced for the want of mutuality. Cooke v. Oxley, 3 Durn. & E. [Term R.] 653; Routledge v. Grant, 4 Bing. 660. It will at once occur to every lawyer, that unless a party is bound to pay money to another, the latter is not bound to convey in cases like these. That there must be a duty or obligation usually on both sides, see 6 Paige, 288; 1 Cow. 733; 4 Johns. Ch. 497; Bunb. 111; Newl. Cont. 152; 1 Schoales & L. 13; 2 Story, Eq. Jur. p. 96; 2 Vern. 415; 12 Ves. 46; 3 Brown, Ch. 12; 1 Ves. Jr. 50; 18 Ves. 99; 6 Ves. 662; 5 Ves. 818; Hamilton v. Grant, 3 Dow, 33, and 1 Bligh (N. S.) 594; 2 A. K. Marsh. 346; 2 Story, Eq. Jur. §§ 750, 769; 16 Me. 92; 1 Johns. Ch. 282, 370; [Brashier v. Gratz] 6 Wheat. [19 U. S.] 528, 539; 16 Ves. 406; 7 Brown, P. C. 279; 4 Ves. 66; Walton v. Coulson [Case No. 17,132]; 1 Jac. & W. 465; 2 Freem. 35. There may be exceptions to this rule, which it is not necessary here to enter into. So there are various discriminations as to what does and does not constitute mutuality. Thus it may not be necessary to have mutuality, as it is argued, in an executed trust, that is one whose conditions are performed, and not one merely executory. 1 Hare, 34; 1 Craig & P. 63. But this trust is not considered by me as in this sense executed, and this very bill is brought to compel it to be executed. As already shown, a new trustee was substituted for an old one, but nothing more. So if the mutuality on one side consisted merely of a conveyance of land to the other, that, if done, might be sufficient to sustain an agreement to reconvey on the other side. But unfortunately that is not the whole of this case. The conveyance on the one side here was the mutuality for the consideration which was paid on the other side, and divided among the creditors of her husband's estate. But for the promise to reconvey on her paying a certain sum, there was no mutuality in any promise by her absolutely to pay such sum at any time and take the land. Nor was there any other consideration for the promise to reconvey, except the illegal one originally existing for them to buy for her benefit, and thus buying at a price quite $1,000 less than persons the same day offered to give. I do not, however, propose to decide the case on either of those points, but merely to call attention to the difficulties attending them. Nor do I decide whether time here was of the essence of the agreement or not, another question much argued and strongly insisted on by the respondent, though the inclination of my mind is it was not. See cases where time is material. 2 Story, Eq. Jur. § 776; 1 Sugd. Vend. 410–413; [Pratt v. Carroll] 8 Cranch [12 U. S.] 471; [Hepburn v. Auld] 5 Cranch [9 U. S.] 262; 4 Brown, Ch. 469, note; 7 Ves. 273; 16 Me. 92; Williams v. Ash, 1 How. [42 U. S.] 14; 5 Ves. 818; 6 Paige, 288; Tam. 381; 5 Ves. 720, note; 2 Story, Eq. Jur. §§ 771, 776; 13 Ves. 228; 2 Sim. & S. 29; [Brashier v. Gratz] 6 Wheat. [19 U. S.] 528; 1 Fonbl. Eq. bk. 1, c. 6; 1 Ball & B. 69. If property has altered in value, and the complainant has been dilatory or negligent (Walton v. Coulson [supra]; Longworth v. Taylor [Case No. 8,490]; Garnett v. Macon [Id. 5,245]), time is often material and affects the question of enforcing performance. In that view the great delay here is unfavorable to the plaintiff. Though it may alter the case some as to delay, considering that she was in possession of the estate, and hence did not tender nor bring her bill so speedily as otherwise would have been likely if not proper. Coote, Mortg. 22. But in short how could time be deemed a material element in a contract when that contract, in my view, had no time whatever fixed, within which it was to be performed, and when the other party never had resorted to chancery and obtained a limitation as to time; Nor do I decide whether the interest was payable quarterly or not, though the weight of the evidence and the character of the transaction both indicate that it was. If it was not, the respondent might be without interest or principal for years. But if payable quarterly, it might be in equity that a failure to pay at the day would be relieved against in a mortgage or trust, as properly as would a failure to pay the principal at an agreed day. But in a suit at law on the agreement this objection might be fatal. And in equity, seeking a specific performance of the agreement, rather than the execution of a trust, it would be very difficult for the plaintiff to succeed without showing she had complied with the stipulation as to quarterly payment of interest, if such in truth was the agreement. 3 Madd. 392; Wood v. Mann [Case No. 17,953]; 3 Atk. 133; 5 Russ. 42; Story, Eq. Pl. § 333. Without

this obligation to pay interest quarterly, the argument would be a strong one, that if the plaintiff was neither obliged to pay the principal within a given time, nor pay the interest quarterly, without forfeiting her rights, she might live there her whole life and pay nothing. She might, in this way, also have all the advantage of a large rise in the value of the property, and risk nothing. It would be difficult in equity to tolerate this. Sanborn v. Stetson [Case No. 12,291]. The only answer to the inequitable if not illegal aspect of such an agreement would be, that the respondent in chancery might perhaps compel her in a reasonable time to pay the principal and interest, or have his land exonerated from the trust, and claims of any kind to it. See Almy v. Wilbur [Id. 256]; Skillern's Ex'rs v. May's Ex'rs, 4 Cranch [8 U. S.] 137. So if the contract proved varied essentially from that set out in the bill, that is fatal. 2 Ball & B. 369; 5 Ves. 452; 2 Ves., Sr., 299; 2 Ves., Jr., 243; 2 Schoales & L. 10; 1 Ball & B. 404; 5 Wend. 644. But the testimony is contradictory as to this, and if stronger for the respondent, an amendment would be allowed to the plaintiff, if she appear otherwise to have merits. It is sometimes allowed after an opinion delivered. 2 Colly. 389; 1 Craig & P. 62; 2 Schoales & L. 347; 1 Dowl. Prac. 520; Morgan v. Tipton [Case No. 9,809]; Almy v. Wilbur [supra].

The practice in chancery has long been very liberal as to amendments. As early as 9 Ed. IV. Chancellor Stillington said—"In the chancery a man shall not be prejudiced by mispleader or for default of form, but according to the verity of the matter." 1 Spence, Eq. Jur. 375. They have by acts of congress expressly prohibited objections of form in the courts of the United States from barring justice, whether in law or equity. If at any time before judgment is entered up an amendment is necessary, it is usually allowed, even in England, of late years, in an improved spirit to reach and enforce what is substance. 1 Spence, Eq. Jur. 253; Steph. Pl. 81. Indeed some amendments are made there after judgment, and writs of error are brought to reverse them. See United States v. Jarvis [Case No. 15,469], Maine Dist., October term, 1847; Morgan v. Tipton [supra].

Having gone over most of the special exceptions to the agreement, and to any constructive trust, I shall next proceed to the two general exceptions, and firstly, that of the statute of frauds. The mode of pleading this is objected to by the plaintiff. The plea refers to the "revised" statute of frauds, when the transaction occurred under the old one. But this seems much overcome by the circumstance that in this respect the two statutes are alike. 5 Metc. [Mass.] 168; 22 Pick. 430. Nor would it generally answer in chancery, if the statute of frauds is pleaded to hold the plea bad, and admit evidence under it, not competent by either statute, merely because in the reference to the statute it is recited as the "revised," rather than the old statute. If necessary to have an amendment in such case it would usually be allowed without much terms for reasons just stated in respect to amendments, where the evidence varies from the averments in the bill. Beside that, the pleading of such a statute and the relying on it are not to be discountenanced, because the law now not only imperatively requires written evidence as to important matters on grave public principles to prevent frauds and perjuries, but it is a reasonable mode of preventing them (Rob. Frauds, 157), and was required centuries before by the civil law, even as early as the days of Constantine. 1 Spence, Eq. Jur. 160.

Several eminent jurists have lamented that the strict construction of the statute was ever departed from. Looking, then, to the subject matter of this agreement, I have no doubt that it was one made in relation to the title of lands, or to the creation of a trust in real-estate, so as in either view to come under the prohibitions of the statute of frauds. The prohibitions of that statute extend to declarations or "creations of trusts" in land, as well as contracts concerning an interest in lands. 1 Spence, Eq. Jur. 496. Though they reach only to the proof of such trusts, requiring it to be in writing and signed, rather than requiring the creation of them to be in writing. Forster v. Hale, 3 Ves. 707, and Randall v. Morgan, 12 Ves. 74. Thus by the statute of 29 Car. II. (chapter 3), the clause creating trusts says they "shall be manifested and proved by some writing signed by the party," &c. See Rob. Frauds, 91. While the clause as to a contract or agreement creating an interest in land is differently expressed, and may be thought to require more matter as to the terms of the contract to be in writing (Rob. Frauds, 104), it is that "some memorandum or note thereof must be in writing, signed by the party," &c. Rev. St. Mass. p. 472, c. 74, is the same as the English one in respect to contracts, except it is expressly provided that the consideration need not be stated in writing. It had been so held before in 17 Mass. 123. And as to trusts (Rev. St. Mass. p. 408, c. 59), the Massachusetts provision is like the English one, and has no statutory exemption as to the consideration. But in England it has been held that the writing to prove a trust must contain the terms of the agreement. Seagood v. Meale, Prec. Ch. 560; Rob. Frauds, 106; 1 Atk. 12; 6 Brown, P. C. 45; 3 Atk. 503; 3 Brown, Ch. 318; 1 Ves., Jr., 330; 2 Bos. & P. 238; Cooke v. Tombs, Anstr. 420. So must the writing to prove a contract. 10 Bing. 383; 2 Barn. & C. 627; Story, Sales, § 269. And one of the terms of the agreement is held to be the consideration, according to 5 East, 10; 8 Johns. 29; Rob. Frauds, 119; 2 N. H. 414; 3 Johns. 210; 4 Barn. & Ald. 595;

3 Brod. & B. 14. But the correctness of this view has been drawn in question in other states than in Massachusetts, holding the writing sufficient, if showing the promise or terms of it, and not the consideration. 6 Cow. 90; 14 Ves. 189; 15 Ves. 287; Smith v. v. Ide, 3 Vt. 290. Whether, then, this case be regarded as an agreement to reconvey on certain terms a tract of land, or to fulfill a common trust concerning them, which grows out of that agreement, and is identical with it in its terms, it must be proved by some writing signed by the party to be bound (2 Bos. & P. 238; 1 Ves., Sr., 82), and the paper or writing must contain the terms of the contract, and if it be a trust, the writing may, even in Massachusetts, be required to show the consideration, though otherwise if a mere contract. But I do not decide this last point concerning the consideration, whether necessary to be expressed in writing or not.

Suppose it is not in Massachusetts, how would the matter then stand in the present case. The only writings attempted to be shown in relation to it here are the accounts and books of Charles Tufts, under his signature, and hence sufficiently signed perhaps to prove legally all they contain. But what do they contain? Not the original agreement itself, or any of its terms. They show charges of interest and rent to the plaintiff by the defendant, and show sums paid by the latter for this estate, and gravel and trees sold by her, and matters of like character. But they do not make any charge against the plaintiff, as if he had bought the farm on her account as an agent, and loaned to her the money on credit; or contain any statement conforming to the terms of the agreement as set up in the bill to convey the farm to her on receiving the consideration he had advanced with interest thereon. Nor do they disclose the fact that though buying it nominally on his own account, and opening a separate head with it as "The Cambridge Estate," he held it under a trust, the specific terms of which are detailed and can be ascertained without parol evidence and without some of that danger of fraud and perjury which the statute of frauds and perjuries was made to guard against. It is true, however, that they contain charges against her of interest paid in several instances, which, from the amounts, were probably the interest on the consideration advanced and secured by him for this farm. But as she occupied the farm with and under him, and the legal title being in him, this interest and the taxes might be charged as rent, as in some subsequent years after 1839, the item was charged eo nomine to "rent." These written charges against her do not, therefore, show with so much certainty that there was a contract such as she now sets up, because they are consistent with the idea of a lease to her with very liberal indulgences towards a mother-in-law, or if accompanied by some special agreement or corresponding trust, not under one very clearly of the exact tenor now claimed. But certain independent or collateral facts are next proved, which are supposed to remedy this defect in the written evidence as to the terms of the agreement, and even to be sufficient to prove the contract or trust under the statute, independent of the writing. There is first her continued occupation of these premises ever since the death of her husband, and as fully after the first sale in 1828 down to the 1842, as before. This, however, is impaired some by his residence with her till his marriage in 1840. There is next her improvements made in the buildings which, though disputable in their value, have clearly been considerable. There is her seeding the ground, planting trees, selling much gravel, assenting to and being consulted as to sales of some of the land, making leases of it, and trying to raise money on it to pay Cutter and Perkins, without resorting to the direct parol testimony of Cutter in favor of the trust and agreement in the form now set up, as well as that of numerous other witnesses concerning confessions and acts of some of the parties to such a trust and agreement. All these combined raise a very strong presumption that a trust or agreement of some kind existed in her favor, and probably much like what is now set up. And some of the acts indicate a part performance of such a possession so long a time and exercising so many acts of ownership. 3 Swanst. 593; 2 Story, Eq. Jur. §§ 759, 761; Newl. Cont. 181–187; 3 Ridg. 518, 519; 1 Sugd. Vend. 201. But if these acts can otherwise be accounted for, they do not prove a sale. Rob. Frauds, 155; 3 Ves. 713. Some cases hold, also, that these acts of part performance, in order to avail, must be such as to injure the plaintiff if the contract is not carried into effect. 15 Mass. 93; 18 Ves. 328; 1 Schoales & L. 41; 1 Ves., Sr., 297; 14 Ves. 386; 7 Ves. 341. Some hold that it must tend to defraud him, or else the statute must operate. But in this way all the evidence as to a part performance, when combined together, is quite strong to show a trust existing such as is before stated, and it is defective only in making out all its terms, except by parol. That is the great hiatus in this part of the evidence.

On what is a part performance and sufficient to take a case out of the statute, the authorities are numerous. See 14 Ves. 386, 488; 3 Ves. 378; 1 Schoales & L. 41, 123; 7 Ves. 341; 2 Story, Eq. Jur. §§ 750, 763, 764; 1 Sugd. Vend. 200; 6 Ves. 467; 1 Johns. Ch. 283, 284. Coupled with the admissions in the answer as to parts of the trust and agreement, the legal proof might be sufficient to show that some trust existed. Yet it would, as thus admitted, be a trust like the agreement, optional with the plaintiff; a favor, too, rather than a right, as not mutual, and limited in time, and for the same consideration with that existing between her and Cutter. Nor

is the other evidence strong enough to vary what the respondent admits, except as to the length of time the privilege was to be enjoyed. But whether the admission, if taken at all to eke out the other testimony, must not be taken as a whole in the whole answer, is another difficulty (Gres. Eq. Ev. 304), and one which it is not necessary to attempt now to solve, for reasons which will be hereafter stated.

In respect to the money paid here, it is objected that money paid in part is not deemed a part performance, because it can be recovered back if the sale is not executed, and thus no fraud or injury be necessarily inflicted. Rob. Frauds, 134; Hollis v. Edwards, 1 Vern. 159. This course of reasoning, showing no injury or fraud by this result, will in some decree obviate the effects of other improvements or acts being considered as part performance or part payment, if compensation can be made for them, and I am inclined to think if the case was not taken out of the statute, she can be compensated in some way, and should be, if anything be due. Rob. Frauds, 134, 154; 3 Ves. 713. When forced out of possession she would in most states be entitled to compensation for any improvements made by her under a supposed interest or title, being called betterments. See Laws in Maine, N. H., and Vt., as to betterments, and in Ohio, Kentucky, &c., as to occupying claimants. See the civil law on this, and Withington v. Corey, 2 N. H. 115; 20 Mart. 609. So it is held in Bryan v. Bancks, 4 Barn. & Ald. 410, if the tenant is led by the course of the landlord to make improvements, he may get his pay in equity. Usually one must not make improvements without a supposed title or interest in lands. 5 Johns. 272; Green v. Biddle, 8 Wheat. [21 U. S.] 1; Bartle v. Coleman, 4 Pet. [29 U. S.] 186. So one must not willfully mix his goods or labor with another's, or he will lose it. In some cases when the owners look on and expressly or impliedly assent to such improvements, an action lies for money paid and expended on their account. Rob. Frauds, 134, 154; Beers v. Haughton [Case No. 1,230]; Gray v. Munroe [Id. 5,724]; 3 Ves. 713. Where one bought and entered and was then evicted for a fraud in the deed to his grantor, a bill for the improvement made was sustained against the legal owner. Utterbach v. Binns [Case No. 16,809]. Special laws, like those just referred to, exist in many states, authorizing commissioners to appraise such improvements made under a supposed title, and making the owners pay for them. Parsons v. Bedford, 3 Pet. [28 U. S.] 457. So a jury may do this in New Hampshire and Maine. Society for Propagation of Gospel v. Wheeler [Case No. 13,156]. See Webster v. Cooper [Id. 17,333], Mass. Dist., October, 1847; Parsons v. Bedford, 3 Pet. [28 U. S.] 457. Or let them be deducted from mesne profits received. 2 Johns. Ch. 441; 2 Kent, Comm. 334–339, and note; [Society for the Propagation of Gospel in Foreign Parts v. Pawlet] 4 Pet. [29 U. S.] 480. And in this state (Massachusetts) there was such a law passed March 2, 1808, under which have occurred various decisions. See 2 Metc. Laws, p. 178, c. 74; 17 Mass. 350; 6 Mass. 303; 15 Pick. 141, &c. The occupying claimant law of Kentucky is similar in character, and the jurisdiction of chancery over the matter is maintained by averring mistake or accident in making the improvements, or a trust arising in him to pay for them, who has been benefited by them. The occupying claimant law in Ohio, under which commissioners appraise the value of improvements by tenants, has been held to be constitutional so far as regards our own citizens. [Bank of Hamilton v. Dudley] 2 Pet. [27 U. S.] 525; Bonaparte v. Camden & A. R. Co. [Case No. 1,617]. The betterment laws are constitutional for future cases as to our own citizens. Society for Propagation of Gospel v. Wheeler [supra].

In another view, also, there may be a remedy, as where a specific performance of a contract is defeated by a plea of the statute of frauds, any money advanced must be refunded. Johnston v. Glancey, 4 Blackf. 99; 1 Sugd. Vend. 145, note; 2 Hov. Frauds, 4; 1 Schoales & L. 129; 1 Vern. 159. In Fay v. Valentine, 12 Pick. 44, it was held that if one promises not to redeem, though the promise is not enforcible, he will not be allowed in equity to recover against it; if there be not good faith and justice in the plaintiff, he must not expect aid of a court of equity to sanction a violation of his engagement. It is to be conceded, however, that some of the proof of these acts relied on as part performance, is in writing, such as those before named of the sale of gravel and trees credited in the respondent's books, and that others are rendered probable by several independent facts and acts looking like part performance; and I entertain little doubt, therefore, that some such agreement as is contended for by the complainant existed originally, and that it was renewed by the respondent, though it is certain that some of the counter evidence as to her declarations denying the possession of any interest or property to pay her debts, is strong, and many of the favors and indulgences to her by her step-son are susceptible of being considered kindnesses, rather than the result of an agreement or trust which the parties deemed binding in justice and honor, if not in law. I shall not, therefore, dispose of the case on this ground. See Jenkins v. Eldredge [Case No. 7,269]. See cases showing how much of the trust or agreement must appear in the writing. 9 Ves. 253; 3 Mer. 53; 4 Taunt. 209; 3 Atk. 503; 1 P. Wms. 770, and note; 2 Vern. 288; 2 P. Wms. 412; [Morris v. Nixon] 1 How. [42 U. S.] 118; 3 Ves. 686; 1 Sugd. Vend.

166; 1 Atk. 449. If the substance does not, the danger of fraud and falsehood is not renewed. Without going farther into this difficulty now, the following cases show to what extent it may be relieved by parol evidence: 1 Ves., Sr., 76; Barnard. 30; 4 Brown, Ch. 62, 472; Coote, Mortg. 26; Hill, Trustees, 522; 2 Atk. 71; Sugd. Vend. c. 20.

The case, then, stands thus under the first leading objection interposed of the statute of frauds, that there may be enough proved by writing, by occupation and improvements on the land, and admissions in the answer, (to recapitulate nothing more,) to be satisfactory that some special agreement and consequent trust existed on the part of the original purchasers, as well as of the respondent, to reconvey the premises on some terms and conditions, but, there being doubts as to the exact character or extent of those terms and conditions without a resort to parol evidence, I leave this point unsettled, and I do this the more readily, as the next and last objection is, in my view, fatal to the bill. And I shall therefore proceed to it without saying more either on this or some other kindred positions advanced in the arguments.

The other fatal objection just referred to, is the consideration in which or for which the transaction originated, the shade cast over the transaction, and over the claim made here by the illegality of that consideration. The law in relation to this is really not so much in dispute as the facts. For one side argues here from the idea of a consideration connected only with an executed trust, and contends the respondent's agreement and trust to be new, and the old trust to be executed, and if so, its consideration not to be material. For this is cited 4. Hare, 74; Hill, Trustees, 83; 1 Hare, 474; and various other cases. While the other side, and as before shown, correctly in my view, treat this case of the collateral undertaking to be as it stood originally, and hence to be an executory trust in respect to its conditions founded on a like consideration. Again, one side argues that the original transaction of the sale was only voidable, and that in a particular way or form, and by particular persons, while the other side, somewhat contrary to my views, holds it void and hence assailable by any person and under any form. Again, one side regards the objection now urged against enforcing the collateral agreement as setting aside the original sale, while the court regards it as leaving that sale untouched, and merely declining to interfere to help execute a collateral and improper agreement or trust connected with that sale.

Much of the reasoning and many of the cases cited on both sides relating to this point in the inquiry rest, therefore, on principles or facts different from those on which rest the conclusions of the court, but are very sound reasoning and very pertinent cases, looking to the principles and facts on which the counsel for the complainant argue. I shall go at greater length into this point of the consideration, as it has been most mooted at the bar, and requires careful discriminations between much which seems on the face not very unlike it, nor particularly different. Observe that in this view it is not the want of any consideration which is here interposed against enforcing the executory promise or trust, as the deed of the land at a price below its value may have been some consideration, not a mere nudum pactum. But it was that this inducement, this difference was a consideration which belonged to heirs and creditors, and which the executor had no legal right to use for her private benefit. It originated in an act forbidden by public policy and illegal, and this constitutes the strong objection to aid the plaintiff to enforce it. In this case the plaintiff, being an executrix, undertook to obtain an interest in the estate as an individual, which she was selling as a trustee for the benefit of the creditors and heirs. It turns out in evidence that she did this by a previous agreement with the purchasers, and that the estate was thus in fact bid off for less than others present were willing to give, and was held under this trust or parol agreement on this consideration, and no other, to be reconveyed to her in her private capacity, whenever advancing the purchase money and interest. But no advantage is taken of this in answer, as it is not set out in the bill as made before the sale, nor since it was disclosed in evidence has any supplemental answer or cross-bill been put in, making use of it to defeat the plaintiff from enforcing such a trust or agreement, though there has been a motion to put one in, if necessary. Now were this bill founded on the deed or sale, which has been executed and carried into effect, and this objection was to avoid that, such a conveyance could probably not be avoided, except by heirs or creditors under appropriate pleadings. Of this more hereafter.

I do not decide this point, as not necessarily arising, but throw out this impression because, though such conduct by an executrix is unfaithfulness to her trusts, and dangerous as a matter of public policy to be upheld or enforced, yet it is perhaps only voidable, and not void after it is executed. Van Epps v. Van Epps, 9 Paige, 242; 13 Pick. 159; 4 Kent, Comm. 438; 4 Cow. 717; 2 Cow. 196; Veazie v. Williams [Case No. 16,907]; 2 Burge, Col. Law, 459. The material distinction for this case between void and voidable is this: An act is void which when done was bad or against law in respect to the whole community, and nobody is bound by it. But it is voidable, if only bad as to a particular person, who may or may not avoid it. Bac. Abr. tit. "Void and Voidable." So when void, it may be so treated after by any person, and without a special plea or motion, but when voidable, it is otherwise generally if it has been executed. If the present collateral agreement was, there-

fore, void, it would make no difference whether it has been executed or not, for in either event it could not be upheld probably, even as the pleadings now stand. But it probably is not void in this sense of the term. A thing is void in this sense and with this fatal effect when the consideration or purpose or act was malum in se, as murder, for instance, or malum prohibitum, as an offence, because both are prohibited on account of the community at large. Every moral man is, in some points of view, as much bound to avoid what is malum prohibitum as malum in se. 2 Bing. (N. C.) 646; 2 Bos. & P. 370; 7 Greenl. 113; 1 Emerig. 210, 542; 7 Wend. 276. Beside what has already been referred to in respect to the distinction between what is void and what is only voidable, it may be necessary to look at other illustrations in some detail, in order to settle, which of the two the present collateral contract and its consideration were. Because if they were void, technically the objection against the bill might prevail, even if they related to an executed agreement or trust, and on the present state of the pleadings. Thus, on the principle already stated, that some acts may be void as to some persons and purposes, but not others, such acts are regarded as usually only voidable. Thus, if some of the parties are femes covert or infants, and others are not, it is good as to the others. So a fraudulent gift is good against the donor, though not against creditors. Cro. Eliz. 445. Hence one conveying to defraud creditors cannot enforce the trust on the grantee (20 Pick. 247), nor set it up in any way, unless it has been executed. Then he may. Flagg v Mann [Case No. 4,847]; Hunter v. Marlboro' [Id. 6,908].

But such conduct as the complainant's is against public policy, and is certainly not to be upheld as a general principle, whether it be called void or voidable. 1 Sugd. Vend. 226, 237; Lewin, Trusts, 376; Dana, 188; 11 La. 48; 11 Mart. (La.) 297; [Wormley v. Wormley] 8 Wheat. [21 U. S.] 441; 1 Paige, 397; 13 Pick. 28, 276; 1 N. H. 186; McLean v. Lafayette Bank [Case No. 8,888]; 2 Johns. Ch. 252; 3 Bing. 254; 4 Bin. 43; 5 Har. & J. 147; 2 Madd. 338; 10 Ves. 292; Michoud v. Girod, 4 How. [45 U. S.] 503; 3 Johns. Ch. 29; 13 Johns. 112; 2 Ves. Sr. 238; 5 Johns. 194; 8 Johns. 144; 2 Caines, Cas. 183. Though the title passes by the deed, it is subject to be devested in such an event. 11 Ves. 165; 13 Ves. 581; Newl. Cont. 6, 471; 1 Ves. Sr. 9; 2 Schoales & L. 661; Hawley v. Cramer, 4 Cow. 718; 1 Spence, Eq. Jur. 512, and note. The Case of Mackintosh, 1 Bing. 50, cited against this general principle, is where the sale was made to one of the trustees who had before renounced the trust, and hence stood in no fiduciary capacity at the time of the sale. The language in the books as to what is void or only voidable, is not always purely technical. Sales like the present have, therefore, been at times called void, as in Michoud v. Girod, 4 How. [45 U. S.] 503, yet they are not considered as preventing a ratification by heirs or cestui que trusts, if sold for consideration enough, and they should prefer the consideration to the land itself. The words "void" and "voidable" are often indiscriminately used for the last; meaning, in both instances, that which may be deemed a nullity by proper persons and in proper modes. And sometimes the substitution of another sham purchaser, per interpositam personam, is regarded as strong evidence of real fraud, and hence the sale in such case is at times deemed actually void. See cases cited in the above case in 4 How.; 1 Ves. Sr. 9; 2 Schoales & L. 661; 4 Cow. 718. Then the maxim may apply, "He that hath committed iniquity, shall not have equity." Fran. Max. 2. This means iniquity, not merely moral, nor necessarily what is against sound morals, but anything illegal. 7 Ves. 473; 1 How. Frauds, 163; 1 Spence, Eq. Jur. 422; Jones v. Randall, Cowp. 38; 1 Bos. & P. 296. But whether the act is utterly void or only voidable here, remains to be settled on sound principle.

None standing in a fiduciary relation, like executors and agents, are, without special license, permitted to buy the trust property, either at public or private sale made by themselves, because it opens a door to fraud and injury to the rights of the principals, and gives to the agents an undue advantage, and the law, therefore, prohibits it in order to remove temptation and prevent probable usury. Indeed, the agreement or trust, if of any advantage, and it is difficult to see why it is created if of no advantage, is manifestly obtained, not by the trustee's own private funds, but by the property of others, the cestui que trusts. The transaction, in such a view, then, is clearly immoral when the consideration to be received for the cestui que trusts is less than the true value of the property, because the difference, belonging to others, creditors and heirs, is pocketed by the executor or agent in his private capacity, without paying anything for that difference from his own funds. Nor is such a sale legal if the consideration was ample, though it would then not be plainly immoral or fraudulent. For public considerations it is forbidden, and is wrong absolutely, though the party likely to be injured by it may waive objection and confirm it. It is still wrong, and will continue to be wrong till the principal clearly ratify it, knowing the injury attempted, if one was attempted, and overlooking it. 4 Kent, Comm. 438, and cases cited there; Story, Ag. §§ 11, 200. So is the civil law. But it can hardly be said, speaking technically, that the conduct of the plaintiff, unless selling for too small a consideration, would be evil in itself, malum in se, or be prohibited by statute, malum prohibitum, though it would be against public policy. And contracts merely against public policy have frequently been pronounced void, and not only voidable. Thus is it said "there can be no doubt that

any contract made in fraud of the law or against public policy is void" (Piatt v. Oliver [Case No. 11,114]), and will ever be set aside as a matter of course ([Id. 11,115]; 1 Story, Eq. Jur. § 318; 2 Johns. Ch. 252; [Wormley v. Wormley] 8 Wheat. [21 U. S.] 421; 1 Paige, 147; 4 Cow. 682; 3 Johns. Ch. 29; 6 Johns. 194; 13 Johns. 112; 4 Cow. 732; 4 Johns. Ch. 254; 1 Story, Eq. Jur. 290-293; 6 Ves. 625; Cowp. 395; McLean v. Lafayette Bank [Case No. 8,888]). "Arguments drawn from considerations of public policy have and ought to have great weight, both in equity and at law." Parsons, Chief Justice, in Boynton v. Hubbard, 7 Mass. 118. Thus marriage brokerage bonds, though not fraudulent, have a bad tendency, and hence are "void" and "relieved against as a public mischief for the sake of the public." Id. So bargains to procure offices. So post obit bonds and measures affecting legacies. Courts in their decisions respect the public policy of the realm, whatever it may be, on any subject. 1 Chit. Comm. Law. So again, "there are numerous cases in the books where an action on a contract has failed, because either the consideration for the promise, or the act to be done was illegal, as being against the express provisions of the law, or contrary to justice, morality or sound policy." Wetherell v. Jones, 3 Barn. & Adol. 225. "It is a fundamental rule, that all contracts which have for their object anything repugnant to the general policy of the law, or contrary to the provisions of a statute, are void" (Chief Justice Spencer in Thallhimer v. Brinckerhoff, 20 Johns. 397), or in conflict with the settled policy of a state (Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519). So if the act done is illegal, though not immoral, still other cases than what have been cited consider it void. See ante, and [Bank of U. S. v. Owens] 2 Pet. [27 U. S.] 527; Bartle v. Coleman, 4 Pet. [29 U. S.] 184. "A thing is void which was done against law at the very time of the doing it." 7 Bac. Abr. tit. "Void and Voidable." [Ocean Ins. Co. v. Polleys] 13 Pet. [38 U. S.] 157; Steers v. Lashley, 6 Durn. & E. [Term R.] 61; [Ogden v. Saunders] 12 Wheat. [25 U. S.] 264, 275. And it is added that "no person is bound by such an act." "Every stranger may take advantage" of it. 2 Lev. 218; 7 Bac. Abr. tit. "Void and Voidable," F. But this last must perhaps be with some allowances. Instances of void acts are not only obligations to do what is malum in se and malum prohibitum, but "bonds to oblige persons to neglect their duty to the king and kingdom are absolutely void." Id. B. Even a vendor of secret medicines cannot have an injunction against others for imitating and using his marks. Fowle v. Spear [Case No. 4,996], July, 1848; Pidding v. How, 8 Sim. 477. It follows, then, that though the sale and agreement in this case were both illegal and against public policy, as will soon be shown more fully, and though for either of these causes a contract is often held to be void, yet it may be, this is one of those cases where either the sale or agreement, if executed—that is, carried into effect—cannot be avoided, except by particular persons who may have been injured by it. Whelpdale's Case, 5 Coke, 119; Bac. Abr. tit. "Void and Voidable," E.

Besides the cases already cited, it has often been held that an executed contract cannot be avoided, unless the illegality was set up technically as a defence in some of the pleadings or answers. 15 Pick. 23; 6 Pick. 452; 13 Pick. 272; 14 Pick. 345; 7 Pick. 8; 10 Pick. 111. And unless it was set up by the party or person on whose account it is made voidable, and not by others, as to whom the transaction may be valid. See above, and 2 Johns. Ch. 254; 5 Ves. 682; 12 Ves. 477; 3 Ves. 740; 6 Ves. 627; Jac. 418; [Finlay v. King] 3 Pet. [28 U. S.] 364; 1 Paige, 147; 5 Pick. 519; 6 Halst. [11 N. J. Law] 385. The cases of annuity bonds may be sui generis and avoided, if contrary to statute, whether asked by a party doing wrong or not, but this is under express statutory provisions. 13 Ves. 587, note; 9 Ves. 13, 292; 1 Ves., Jr., 50; 4 Ves. 129; 5 Ves. 235. And such may be some cases of gaming. 1 Spence, Eq. Jur. 626, note; Story, Eq. Jur. § 304; 2 Freem. 221; 1 Salk. 343; 2 Burrows, 1077. Supposing, then, the sale here and the agreement to have been only voidable, and both executed, neither could probably be anulled on the present pleadings. Thus, in Kerr v. Lord Dungannon, 1 Con. & L. 335, where an estate had been bequeathed to A for trusts to several, and then demised to A for too low a rent, and the lessee sold, it was held to be void on proper pleadings, as the trustee was gaining by the transaction, and the purchaser knew it, though without such pleadings it was not permitted. The lord chancellor said: "But I hold it to be a settled principle, that if a man has an equitable interest and comes into court in support of that interest, if the defendant has a strong case to show that no such equitable interest ought to have been granted, as in the present case, that no such lease ought to have been executed, in general the defendant may file a cross-bill, and then the case comes regularly before the court. If the case come thus before the court, I am inclined to think it would give the plaintiff great embarrassment." Id., Con. & L. 359. He was not at liberty to let a person come into court to set up such a title. It is fraudulent, and must dismiss the bill. In that case the agreement was held to be voidable in strong terms, and being executed, was on a cross-bill by a proper party avoided. So as before suggested, a sale to defraud creditors is good against the grantor, and good in hands of a second bona fide purchaser without notice of fraud, and good in the hands of the original grantee till avoided. The possession is legal till then, but the sale may by proper pleadings be set

aside. Bean v. Smith [Case No. 1,174]; 9 Mart. (La.) 649; 20 Pick. 247. But see 1 Day, 527, note; 3 Johns. Ch. 371. It must be avoided in Louisiana before a sheriff can seize the property by a bill in chancery, or a suit revereaterim. Yocum v. Bullit, 6 Mart. (N. S.) 324. By the civil law, also, an executed contract was avoided by "the party complaining," "by a recissory action." 1 Spence, Eq. Jur. 323; Dig. xxi. 1, 1, 2. Indeed, in some states, as for instance Louisiana, a fraudulent sale of land accompanied by possession cannot by express law be avoided in any collateral proceeding, but must be done by a separate suit or bill in chancery. Bean v. Smith [supra]. And if a sheriff seize the property as still belonging to the fraudulent grantor, he will be enjoined till the title is avoided in a distinct proceeding instituted for that purpose. See Code Prac. art. 303; Ford v. Douglas, 5 How. [46 U. S.] 143; Yocum v. Bullitt, 6 Mart. (N. S.) 325. In other states the sale may be avoided collaterally, though a judicial sale under a license from a court of probate. Rhoades v. Selin [Case No. 11,740]. And if a trustee sell by license, and the trustee become interested, the cestui que trusts may have it set aside and new sale ordered (Davoue v. Fanning, 2 Johns. Ch. 252), and it makes no difference if done at public auction, and a fair price be obtained, and a third person bought for the benefit of the wife of the deceased, as here. Id., and Hendricks v. Robinson, 2 Johns. Ch. 311. No matter whether actual fraud existed or not (Lewin, Trusts, 266, 377, 378; 10 Ves. 385), though even chancery regarded every breach of trust as a fraud (1 Spence, Eq. Jur. 621, note).

For reasons like these it has, therefore, been suggested in the progress of this case, that if the sale was voidable, or even void in the milder sense some use the term, it having been executed, stands good till avoided by the proper person, and in a proper manner, as by a supplemental answer, or cross-bill, or amendment of the original answer setting up the illegality, and in behalf of a creditor or heir. Often in such cases the illegality must be spread on the record in chancery, (though at law under the general issue the question may arise,) in order to show the grounds of decision, and that what is only voidable is to be avoided by a proper person, if it has been executed. Unless, then, the proper parties object, and object probably on the record, and not on the hearing merely, when the record shows nothing illegal or by way of exception, it is doubtful whether the court can regularly interpose and dismiss the case of an executed contract, on the ground that such a sale was voidable. Though the defendant is one heir and one creditor here, it may be that alone he could not object, but that it must be done by all or a majority, and by a bill or otherwise (1 Jones & La T. 120, and Con. & L. 457), after notice in the probate court for them to unite or disagree. It is said here, also, that some attempt was made by some of the creditors to avoid the proceedings of the sale when the plaintiff's account was settled, and that the account has been so long settled it could not be reopened. But where faud has occurred, a sale may usually be avoided at any time, on its discovery, and in a case like this the property be sold again. Bean v. Smith [supra]; Michoud v. Girod, 4 How. [45 U. S.] 503. This last was a case of this character, and avoided after the lapse of near a quarter of a century. I am not aware that under the laws of Massachusetts the rule is at all different from that adopted in Michoud v. Girod. This depends on the views and wishes of the creditors or heirs. Such a purchase may be permitted beforehand by the court sometimes in certain cases, and on certain terms. Lewin, Trusts, 381. The heirs and creditors may not be injured by it, if the sale was for a full consideration, and the land has since fallen in value, and hence they may not wish to have it avoided. 2 N. H. 221–225; Brackett v. Tillotson, 4 N. H. 208; The Tilton [Case No. 14,054], and cases cited there. They have their election. It will be sold, then, after such a discovery, under order of the court of probate, if necessary to pay creditors, and the excess of consideration obtained will go to their benefit, or if not needed to pay debts, will go to the heirs. [Michoud v. Girod] 4 How. [45 U. S.] 503; 20 Pick. 510; 7 Pick. 1; 14 Pick. 405. To be sure, there must not be manifest laches or neglect by the creditors or heirs to avoid the sale, or time will impair their rights. Lewin, Trusts, 390; 15 Mass. 264; 6 Pick. 330; 20 Pick. 510, and cases. But time cannot begin to run till they know the facts and know their rights at law or in equity to get rid of the sale. 9 La. 555; Fonbl. Eq. 509, 519; Michoud v. Girod, 4 How. [45 U. S.] 503; Story, Cont. § 227.

For reasons like these the sale itself of the land having been executed, or the conveyance completed, I should not feel satisfied to avoid that sale, whether regarded as void or voidable, without proper pleadings and by proper persons, such as creditors or heirs.

Nor is it necessary to grant the motion which has been made in the argument for the respondent, as a creditor and heir, to file a supplemental answer, asking that the sale be avoided as illegal and against public policy. For there is another question back of this which disposes of the case, and which is well raised probably without such a bill. It is not whether the sale itself is here or can here be annulled, as the pleadings now stand, or as they may be amended. But on the contrary, it is whether the agreement or trust collateral to the sale, and connected with it, was not founded on an illegal consideration, and if so, whether, when not executed, as it has not been, they can be enforced if objected to, as the case now is,

leaving the sale itself untouched and unavoided, by this bill and this defence. The respondent, so far as a creditor and heir, cannot really desire here to avoid the original sale to Cutter and Cummings, and theirs to him under full notice of the facts, because that would injure him as a purchaser more than he would gain as creditor or heir. But his object must be to avoid or prevent the execution of the agreement, collateral to the sale and not yet executed, or carried into effect in its material conditions. Whether he can do this without first avoiding the sale, and whether he can do it on the present pleadings, is next to be considered. I am inclined to think that much less is required to defeat the execution or fulfillment of an executory contract which is illegal and only voidable, than to avoid such a contract after executed. When I speak of executory and executed agreements or trusts in this case, I do not mean agreements or trusts promised to be formed or created, and those actually formed or created, but those formed or created and not yet fulfilled, if executory, but fulfilled if described as executed. And that a court may, on very general principles, and without much formality in pleading, decline to be a party to, or give aid to execute a voidable sale or a trust and agreement connected with it and against public policy and sound principle, and not voidable on a mere personal exemption or privilege. 2 Story, Eq. Jur. § 769; 1 N. H. 184; 2 Vern. 470; Fuller v. Dame, 18 Pick. 472; 11 La. 48; 14 La. 114; 11 Mart. (La.) 297; Collins v. Blantern, 2 Wils. 341; 2 Bing. 247; Flowers v. Sproule, 2 A. K. Marsh. 57; 1 Hill, 293; 4 Bibb. 70; Mills v. Goodsell, 5 Conn. 475; Saltmarsh v. Beene, 4 Port. [Ala.] 283; 5 Wend. 579; 3 Cow. 299; 3 Paige, 154–158; 2 Caines, Cas. 133; 2 Ch. Cas. 196; 1 Eq. Cas. Abr. 228; Evans v. Richardson, 3 Mer. 469; Whitby v. Parken, Turn. & R. 366; Jac. 418; 1 Bell, Comm. 292. Why should the court shut its eyes to the illegality of the claim? Because the sale itself may not have been avoided by the heirs or creditors. Why in the mean time aid a party to do another thing about a collateral contract which is against public policy? 2 Story, Eq. Jur. § 769; 7 Ves. 470; 10 Ves. 292; Broom, Max. 350; 7 Scott, N. R. 499; 2 Ch. Cas. 196; 1 Eq. Cas. Abr. 228. Nor is it against one of those kinds of public policy which is questionable in its character (2 Bing. 247), but it is a clear policy reprobating such transactions in almost every age and country where jurisprudence is a science, and especially when, as here, the consideration obtained was less than the true value, and thus, if designed, a benefit was sought to be secured immorally by the agent in his individual capacity, at the expense and loss of this principal. But even when no immorality de facto appears, the transaction is so dangerous, so corrupting in its tendency, so open to alarm, so much against public policy, courts will set it aside (Downes v. Grazebrook, 3 Mer. 209; Twining v. Morrice, 2 Brown, Ch. 331), if executed, on a proper application, or if executory and objected to, will refuse to enforce it.

It is considered by Spence on Equitable Jurisdiction (part 1, p. 437) that to annul contracts because against public policy is one of the peculiar provisions of a court of chancery. And he considers this very case as one of them, and cites it among the cases thus to be annulled, (and if annulled after executed, certainly not to be enforced before executed,) and assigns reasons for it, and not merely cases mala in se, but "on the ground that from the circumstances under which the parties stood as regards each other, or for other reasons of a general nature affecting not only the particular cases, but all others of a like nature, if such transactions were permitted to stand, it might afford an inlet to fraud or unfair or improper practices without the means of their being detected, or might enable one of the parties to obtain an advantage even unknowingly, which he ought not to be permitted to retain." He goes to the avoidance of an executed contract in such case, if against public policy, though then perhaps under different pleadings. And occasions often arise to avoid executed, as well as executory contracts and trusts, as may be seen in Michoud v. Girod [supra]. But the course proposed here is not so strong as to annul; the court merely refuses to aid a person violating public policy in a contract to carry it into effect when not yet fulfilled. It is mere inaction in the court, when asked to move in favor of illegality, and is not taking any forward step to annul it. "The court simply refuses" to use its extraordinary powers, and to enforce the specific performance of such a contract, but leaves the party to his remedy at law. Vigers v. Pike, 8 Clark & F. 645, 646. This is very different from refusing to enforce equities founded on an executed contract. Id. This is the exercise of a fair discretion on the facts, and must be a judicious exercise of it on the general pleadings, putting in issue, as they do, whether such performances or such facts ought to be enforced or not. All the facts are pertinent to that question, and that question is not the avoidance of the original sale, either because void and voidable, executory or executed, but relates merely as to the specific performance of a collateral agreement connected with it, illegal in character and not yet executed, and the decision on that is that the court does not feel bound to assist such a party in such a case on such facts with that particular remedy. This puts a different aspect on the case—the object of it—the effect of it—and the forms proper to accomplish it.

An executory contract is defined to be where something remains yet to be done under it, and not a contract not yet made or created. Story, Sales, § 232. That is the very

case, and this suit is for the very object of having this something executed, that is, fulfilled or done. All this appears in the evidence, and in the plaintiff's own evidence, without any special pleadings or any apparent necessity for them in order to defeat the bill. In Craig v. Missouri, 4 Pet. [29 U. S.] 426, it is held that under the general issue in assumpsit you may give want of consideration or badness of it—in short, everything which disaffirms the contract. So probably in a bill in equity in a general answer you can show and insist on everything directly impugning the propriety of affording the particular remedy or relief sought. It is laid down as an elementary principle, also, that if "the plaintiff himself alleges fraud and proves it as a part of his own case, there is no rule of law which prevents the defendant from taking all the benefit." Broom, Max. 322; 2 Inst. 713; 2 Doug. 472; 4 Scott, N. R. 165. But here, though the plaintiff fails to allege this in respect to one fact, the time when the agreement was made, yet he alleges it in all other respects, and proves it in this, and must fail for a material variance as to time, unless amending and stating the time correctly, or considering the time now to be as proved. If so considering, or if he so amend, then he both alleges and proves his own wrong. So whichever way the matter is left, the defendant must be saved on this objection. Again, it has been held in Tobey v. County of Bristol [Case No. 14,065], that a court of equity will not lend its aid to enforce specific performance, if useless or unjust. A specific performance is not a right of a party, but an appeal to the discretion of the court. Tobey v. County of Bristol [supra]. Hence on the discovery of a consideration existing, and tainted with illegality on the part of the plaintiff, whatever may be the pleadings, it is competent for the court in its discretion not to assist to compel a specific performance of the contract, or the defendant's trust.

It may be useful to illustrate this subject a little further as to what is sufficient illegality to vitiate the plaintiff's application. Fraud is, of course, enough, or anything clearly void, but less than this suffices in case of an executory contract. Illegality of almost any kind is enough. Indeed, we have before shown that being against policy is enough to avoid even an executed contract. How much more, then, should it, on principle, prevent the fulfillment of one yet executory. Here it has been held, as to a contract, that if against the policy of the law, or against public policy, courts will not enforce it, though it be not against morality. 5 Halst. [10 N. J. Law] 89; 2 South. [5 N. J. Law] 756, 763; 3 Halst. [8 N. J. Law] 54. "Considerations against the policy of the common law, or against the provisions of a statute, or against the policy of justice, or the rules and claims of decency, or the dictates of morality, are void in law and equity." 1 Fonbl. Eq. 122; 4 Yeates, 84. Where an insurance was of neutral property, though in fact belligerent, it was illegal and against public policy, and hence void, and the insured was not aided by the court to recover back the premium. Schwartz v. United States Ins. Co. [Case No. 12,505]. See other cases. And this, though ex æquo et bono, the defendant has no right to retain it (Id.), and could not sue to recover it, if not paid, Cowp. 793; 2 Bing. 250; 8 Durn. & E. [Term R.] 575; 4 Taunt. 165. See like cases. The court will not interfere to aid either, from public considerations, and hence the possession is left undisturbed, and not because his course was justifiable. In pari delicto potior est conditio possidentis. Broom, Max. 325. The only exceptions to this are believed to be those before named, where by express statute a recovery back is sometimes allowed in cases of gaming, &c., from motives, however, of greater hostility to the act, than of favor to the particeps criminis. So if to uphold a sale would be mischievous, courts will not enforce it, though it is not by any law declared to be void. Ryan & M. 386; 7 Mass. 112; 5 Barn. & C. 406; 4 Bing. 84; 2 Car. & P. 544; 12 Moore, 266; 3 Car. & P. 128; 3 Taunt. 6; 9 Vt. 23, 310; 7 Greenl. 113. Indeed, in this view of the matter, the plaintiff asking virtually a specific performance of what is against public policy and injurious to creditors, it is settled that a court of equity will not carry into effect an executory contract by decreeing a specific performance, even if it was not illegal, but was hard merely, and inequitable. King v. Hamilton, 4 Pet. [29 U. S.] 327; 1 Vt. 480. Or if there has been only negligence with the complainant. Scott v. Evans [Case No. 12,529]. Under this position the neglect to pay interest so long, or any principal is important. 2 Jac. & W. 428; Skillern v. May, 4 Cranch [8 U. S.] 140. Much less will courts aid to enforce an executory contract, if the consideration was either fraudulent or illegal, or against public policy. Scudder v. Andrews [Case No. 12,564]. This was a sale of land belonging to the United States by A, never owning it, but trying to recover the price. No man shall take advantage of his own wrong. It need not be fraud, but anything "de injuriâ suâ propriâ." Co. Litt. 148, b. By pursuing this course a court neither confirms nor annuls a voidable contract, because the parties interested in it may never choose to do it. But they say, if the contract appears to be one against public policy, the court will leave the parties to their remedies at law to enforce or annul it, and decline to use its own extraordinary modes of relief in cases of that culpable or at least equivocal character. Tobey v. County of Bristol [supra]; Le Roy v. Crowninshield [Case No. 8,269]; U. S. v. La Jeune Eugenie [Id. 15,551]. Thus under the civil law, in case of

an executory contract, "if there was a want of complete bona fides, the jus honorarium, furnished a good defence to any attempt to enforce it at law. 1 Spence, Eq. Jur. 323; Dig. 19, 1, 11. So if a contract be immoral, though made abroad, courts here have held that they should not enforce it here. Story, Confl. Laws, §§ 244, 254, note, 257; 8 Mart. 95; Wetherell v. Jones, 3 Barn. & Adol. 221. This is not avoiding a sale or contract executed, but merely as to one still executory, and asked to be fulfilled, saying in reply we do not feel bound to enforce contracts "which offend public morals or violate the public faith." Le Roy v. Crowninshield [supra]. Ex turpi causâ nón oritur actio. Broom, Max. 350-352; Holman v. Johnson, Cowp. 341

The objection to enforcing an executory contract may be much slighter than what is required to avoid an executed one. It may not be a fraud, or malum in se, or malum prohibitum, but if illegal or against public policy, it is the duty of the court to halt in the exercise of its extraordinary powers to enforce a specific performance. U. S. v. La Jeune Eugenie [supra]; The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409; Doug. 250; Armstrong v. Toler, 11 Wheat. [24 U. S.] 258; Story, Confl. Laws, § 245; 1 Maule & S. 751; Toler v. Armstrong [Case No. 14,078]; Mather's Case, 3 Ves. 373; 15 Pet. [40 U. S.] Append.; 3 Story, Const. p. 245, § 1374; Smith v. Barstow [2 Dougl. (Mich.) 155]. Where the contract "is expressly or by implication forbidden by the statute or common law, no court will lend its assistance to give it effect." Pennington v. Townsend, 7 Wend. 276; Sharp v. Teese, 4 Halst. [9 N. J. Law] 352; 11 East, 502; 3 Barn. & Adol. 221; Forster v. Taylor, 5 Barn. & Adol. 887; 2 Cowp. 790. Thus a court will not enforce a contract selling the command of an India ship (8 Durn. & E. [Term R.] 89). They will not enforce it, though the parties may not have meant to violate the law, but mistook it. Craig v. United States Ins. Co. [Case No. 3,340]. So the agreement, though not immoral, will not be enforced if made in fraud of an act of congress (Hannway v. Eve, 3 Cranch [7 U. S.] 242, and Armstrong v. Toler, 11 Wheat. [24 U. S.] 258), or if growing out of an illegal or immoral act. "A court of equity cannot decree a specific execution of a contract made in violation of law or against the policy of the law." Longworth v. Taylor [Case No. 8,491]. When a trust or agreement is desired to be enforced in chancery, under its extraordinary powers over trusts and specific performances, it is a settled principle that it is to be done only in favor of those who have themselves acted legally, if not equitably, in respect to the subject. The complainant must come into court as a wronged and innocent party, not alleging his own turpitude, nor even showing it mingled with the grounds for a recovery. Bolt v. Rogers, 3 Paige, 154; 4 Paige, 229, 248; 1 Esp. 153; 3 Esp. 253; 1 Maule & S. 594; Com. Dig. "Chancery" (3 F 4); 1 Vern. 53; 2 Vern. 602. The party stands ill in court. Allegans suam turpitudinem non est audiendus. Gould v. Gould [Case No. 5,637]. "The law will not sanction dishonest views and practices by enabling an individual to acquire through the medium of his deception any right or interest." Broom, Max. p. 320. In Creath's Adm'r v. Sims, 5 How. [46 U. S.] 192, it is said that one coming into court to ask relief by an injunction against a judgment, must not only come with clean hands, but must first offer to do equity in respect to the subject matter. Indeed, it is a settled rule that whoever asks equity must first do or offer to do equity. 1 Spence, Eq. Jur. 422; 2 Swanst. 156. Once chancery required moral duties first to be performed as to the subject matter, e. g. to recall slanderous words, &c., &c. But now the plaintiff must, at least, not stand as acting illegally, and ask aid to enforce illegality. 1 Spence, Eq. Jur. 423, note. It is laid down as an elementary principle, that "a party to the fraud shall not be relieved." See last cases cited. So the complainant must be diligent himself, as well as pure. Longworth v. Taylor [Case No. 8,490]. One delinquent cannot maintain an action against another. Booth v. Hodgson, 6 Durn. & E. [Term R.] 409; Warburton v. Aken [Case No. 17,143]; 3 East, 222. Nor will the trustee even be assisted in carrying such a sale into effect. Davoue v. Fanning, 2 Johns. Ch. 267; Munro v. Allaire, 2 Caines, Cas. 183. Courts will in some cases refuse to set aside a sale which has been confirmed by a trustee, but will never assist to effectuate a purchase (of this kind,) either by having the thing purchased decreed to him specifically, or by having the means decreed to him whereby he may recover at law. Id. 194. Again, "a court of equity ought never to aid a party to have the bargain enforced or perfected, with intent, that any profit or advantage should be taken by it." Munro v. Allaire, 2 Caines, Cas. 193. A further illustration of this distinction is, that where usurious interest had not been paid, a court of equity would not aid to get it, but if already paid it would not order it paid back. Nor will the court compel a performance of a contract which works a breach of trust. That is very nearly the present case. Roberts v. Tunstall, 4 Hare, 257. The executrix, if refusing to give the deed in this case, could not have been compelled in equity to give it, because it would have been a breach of trust. Wood v. Richardson, 4 Beav. 176; 5 Madd. 438; Thompson v. Blackstone, 6 Beav. 472. Then how could she compel the purchaser to carry it into effect, so far as regards the collateral agreement, and to fulfill that which was illegal to be done? A case is in point that she could not in 6 Beav. 472. But if an illegal contract be once carried into effect, that is, after made or created, if it be executed, a court, as before explained, may require more form and notice

and particularity in the proceedings to avoid what has been executed and what is not void, but merely voidable. Fieri non debuit, sed factum valuit. 5 Coke, 38; 9 Mees. & W. 636.

Much of the argument and many of the cases connected with this point of the impropriety of aiding to enforce any illegal contract, relate to what in this sense I consider executed rather than executory agreements, and to the avoiding or rescinding of them, rather than to the enforcement of what is yet executory. The distinction, however, is strong in principle between these and runs through all the books. See cases before and others in Broom, Max. 325. Considering this trust or agreement as yet executory, I can, therefore, come to no other conclusion on the whole evidence and nature of the transaction, than that the cases and principles all harmonize against the policy of sustaining this bill.

The complainant comes into this court to enforce a trust or agreement which has no consideration whatever, except an act forbidden by law, hostile to sound policy, and voidable when executed, not only in equity, but now in most of the courts of law in the United States. It is illegal, then, and against public policy, and not to be aided in our discretion to enforce specific performances, though if it had been fulfilled or executed, it might not be annulled, except by creditors and heirs. But it is still, in and of itself, illegal; one not to be aided, assisted, or encouraged before it is done. A trust, or agreement, to be valid and to be enforced, must rest on a like foundation, and must have a good consideration. 2 Story, Eq. Jur. §§ 787, 793, 973; 2 Hawks, 302; 6 Paige, 288; 1 Ves., Jr., 55; 3 Atk. 399; 18 Ves. 149; Com. Dig. "Chancery" (2 C, 8); Winthrop v. Lane, 3 Desaus. Eq. 341. It is otherwise a nudum pactum. And ex nudo pacto non oritur actio. Broom, Max. 336. This doctrine applies to a common trust, as well as a contract, because almost every contract is in one view but a trust to pay on one side, and to convey on the other. Lewin, Trusts, 76. Without a good consideration the contract or trust resting on it is voluntary, which the volunteer may carry into effect or not at his pleasure, and which chancery will not lend assistance to enforce. Minturn v. Seymour, 4 Johns. Ch. 497; Fraser v. M'Pherson, 3 Desaus. Eq. 398; Colyear v. Countess of Mulgrave, 2 Keen, 88. The doing an act forbidden by law is manifestly not a good consideration for either a trust or agreement, and for the enforcement of their specific performance. The executrix in this case had no equities or law on which to ground a trust or contract, except an unlawful act. It is not enough to say that a consideration is not necessary for an executed trust. Hill, Trustees, 53. This was an executory trust in the sense before explained. Before the trust, all she did was in her capacity of trustee for the creditors, to let the purchasers have the land at less than others would have given, and this under a promise to reconvey to her for that reduced sum, which was in truth a fraud on the creditors to the extent of the difference, and was forbidden by law, and which she is in this bill attempting to enforce.

It is virtually conceded now, that the first consideration and the original agreement were illegal, but it is contended that there were new and good ones when the land was assigned or transferred to the respondent. But we have already shown that they were the same, except a new trustee. And it has been well said, "the same principle applies not only to contracts growing immediately out of and connected with an illegal transaction, but also to new contracts, if they are in part connected with the illegal transaction, and grow immediately out of it." Story, Confl. Laws, § 247; [Chiroc v. Reinicher] 11 Wheat. [24 U. S.] 281; 3 Barn. & Ald. 179; Toler v. Armstrong [Case No. 14,078]; 5 Barn. & Ald. 335. The money advanced to Cutter & Co. was not advanced by her, nor that paid by the respondent since. Nothing legal was done by her at any time to lay the foundation as a good consideration for either a trust or agreement. Before this trust or agreement, both the last and first, she had owned no part of the land in her own right—she had sold nothing in her own right—paid nothing—suffered nothing—done nothing to raise an equity. Chancery will not interfere, and parties will be left in such a state of things to their legal rights in the courts of law. King v. Hamilton, 4 Pet. [29 U. S.] 327. The case of voluntary settlements has been referred to as not needing a consideration to enforce them, whether regarded as trusts or agreements. But those are usually created by deeds and wills, sealed instruments, and hence imply a good consideration, and are by means of a writing by deed taken out of the statute of frauds. So love and affection is a good consideration for them, and in most cases of that kind exist. And when the contest is with the trustee, as are many of these precedents, he has already received the property, which constitutes another good consideration for him to go on and fulfill his duty, and according to the terms of the deed, and not as here against the deed and its legal operations on its face. The consideration there, too, which does exist, or is presumed, is a good one, and not as here illegal and against public policy.

I am aware of another class of cases, some of which have been cited as applicable here, where a party may be proceeded against in chancery to enforce an obligation which would have been performed by another, except for fraud interposed by the respondent. But that is not this case on the facts. Here the defendant, looking to public policy and the rights of the creditors and heirs, interposes no fraud. He tries to defeat only what is illegal. While there, he tries to defeat what is legal, and interposes fraud or falsehood to accomplish his object, and hence a court of

equity will sometimes make such a party answerable for a legacy or devise which he has defeated by falsehood. 1 P. Wms. 288; 2 Vern. 700; 3 Atk. 539; 1 Atk. 448, note; 3 Ves. 39; 1 Story, Eq. Jur. §§ 252, 254; 1 Vent. 318; 2 Ves., Sr., 627; 14 Ves. 290; 11 Ves. 638; 2 Story, Eq. Jur. § 1265; Story, Eq. Pl. § 768. So if a failure to fulfill a promise will work a fraud, it will sometimes be enforced when the promise is lawful. 1 Hov. Frauds, 274, 275, 495; Morris v. Nixon, 1 How. [42 U. S.] 115; 6 Watts & S. 97; 1 Paige, 147; Coote, Mortg. 24; 1 Madd. 418; 4 Ves. 16; 18 Ves. 475; 13 Ves. 580; 1 Ves., Sr., 123; Vin. Abr. "Contract" H., pl. 31; 1 Atk. 449; 1 Wils. 227; Newl. Cont. 111, 179, 181; Jeremy, Eq. Jur. 499; 2 Atk. 254; Beames, Eq. Pl. 183; 1 Eq. Cas. Abr. 20; 1 Dick. 44; Gres. Ev. 208. But in this case the failure to enforce this executory agreement defeats rather than works a fraud, looking to the public and to the interests of heirs and creditors, and it advances what is legal and what is sound public policy. If it defeats anything, throws obstacles in the way of anything, it is of an executory, illegal contract between parties, neither of whom can properly or conscientiously invoke any aid from a court of equity. In the case of Jenkins v. Eldredge [Case No. 7,266], in this court, there was a parol promise to give written evidence or a written declaration of a trust, and which promise there was a failure through fraud to fulfill. But there was nothing illegal or against public policy in doing what was promised, as would be the case here, but directly the reverse. Here it may be added as a distinguishing feature of the present case, that the only ground for the trust or agreement by Cutter and Cummings in favor of the plaintiff, was the illegal act by the plaintiff, in a public capacity, professing to sell the land as an executrix, and obtain the highest price practicable for the benefit of the creditors and heirs, and in reality letting others buy it at a reduced price for her individual advantage and gain. Afterwards, to be sure, after the sale and before this bill, some expenditures were made by her on the buildings and land of a durable character, and beneficial to the purchasers and their grantees But these did not lead to the trust set up, and were not its cause or foundation. And as to these, she had sold gravel enough and had rent enough to remunerate her, probably, or if not, must have her redress or relief in some other independent form. See the cases on part performances. If one enters as if donee of land and makes improvements, he will be allowed their value out of land before sold under a decree in chancery to pay debts. King's Heirs v. Thompson, 9 Pet. [34 U. S.] 204. But by Carver v. Jackson, 4 Pet. [29 U. S.] 101, it was held that one could not be remunerated for money expended on land against the wish of the owner. [Green v. Biddle] 8 Wheat. [21 U. S.] 1. I have no doubt that sympathies for a relative and widow in poverty, and with a large family, induced Cutter to enter into this arrangement, and while the heirs were minors, and to be brought up by her, it probably looked to their benefit rather than injury, and was disadvantageous chiefly to the creditors. But we are required to refrain from proceeding further, not that our sympathies or regard for the condition of the complainant is less than for that of the respondent; they both have, in several respects, exhibited excellent traits of character towards a destitute family, but in others have attempted, in aid of them, what the law does not tolerate to the injury of creditors or heirs, often very helpless and destitute. In some things we do not respect her motives less, but the law more. And while that law requires us to leave the respondent in possession, it is quite clear that the creditors first, and next the heirs, should have the benefit of the rise in value of this property from extraneous causes, or at least its real value in 1833 beyond what it was then sold for. On the contrary, had the complainant recovered, it ought to have been for the benefit of the same class of persons. Indeed, a widow in possession of property with her children is at times presumed to be in for them, and her acts inure to their benefit, rather than her own. Atherton v. Johnson, 2 N. H. 34; 1 Johns. 163; 5 Johns. 66; 7 Johns. 157; 1 Johns. Cas. 219; 3 Wils. 516. It is certain here, that unless the heirs or creditors are allowed to have the benefit of this agreement or trust, but the widow has it in her private right, she gets it at their cost and expense or loss. She has paid for it only by their property or what she sold on their account. And though the complainant here, as before remarked, was undoubtedly influenced more by affection for her children than any hope of personal gain, still in several cases the idea of any moral fraud on either side has been fully rebutted, and yet the sale held to be improper and invalid. Commendable as may have been the motives in some respects, the act was, therefore, one of bad policy as to creditors and heirs, was dangerous and illegal as to general principle, and not to be assisted or enforced at her request, by a court of conscience, which lends its extraordinary aid only to those who are blameless in the matter in dispute. This conclusion is strengthened in its legal force by the long neglect of the plaintiff to pay even interest at all, instead of quarterly; by never having offered to pay any principal, except as parts of the land were sold, and the money received by the respondent, rather than by her; by never tendering anything till a great change in value had occurred by the rise in value of real estate (2 Story, Eq. Jur. 484), and by the general rule to let parties resort to law for redress on their contracts, rather than ask a specific performance in equity, an extraordinary power for only the clearest cases, unless appearing there without negligence or breach of duty, or without a request to aid what is against public policy. See cases ante;

King v. Hamilton, 4 Pet. [29 U. S.] 328, 329.

If there be an inadequate price, or improper conduct, equity will not enforce specific performance, but leave a party to his remedy at law. Seymour v. Delancey, 6 Johns. Ch. 222. The discretion over this is not arbitrary, but what is sound policy, reasonable secundam arbitrium boni judicis. 2 Story, Eq. Jur. § 693. It may be well to notice, also, that we came to these conclusions, not because the respondent stands here irreproachable in his title. The consideration as to Charles Tufts rested on the same basis as the former, looking to the whole essence of the case. It was the old trust and agreement, as we have before seen, transferred to him, and for like reasons and like consideration. He was in truth the mere assignee of Cutter and Cummings, with a probable knowledge and acquiescence in all that had happened. He was her relative, her confidant, and if her betrayer under an illegal undertaking, this court must leave the parties to such an undertaking to adjust it at law or among themselves without resort to law. But he holds the land by a very precarious title, if the creditors or heirs choose to interpose, unless they are barred by lapse of time. And I see no reason why the plaintiff or all parties cannot after this obtain redress at law in their own state courts after we decline to give relief by a specific performance, if she or they ever had any legal rights which have been violated.

These conclusions as to Charles Tufts, the principal respondent, render it unnecessary to decide whether in any other aspect of the case the possession by the plaintiff was not sufficient notice to the other respondent, Wheeler, so as to bind him in relation to her rights and claims. To show that it is, we have been referred to 16 Ves. 249; 2 Swanst. 281; 2 Schoales & L. 595; 2 Ball & B. 301; 5 Price, 306; 1 Mer. 252; 13 Ves. 121; 1 Colly. 203; 1 Jac. & W. 181; Flagg v. Mann [Case No. 4,847]. For some exceptions, see Leland v. The Medora [Case No. 8,237]; 5 Barn. & Ald. 145; 2 Russ. & M. 626; 1 Johns. Ch. 566; 14 Serg. & R. 333. It is in most of the states, if it be a new possession. 13 Ohio, 408, 413; 4 Blackf. 96; 4 Whart. 259; 10 Gill & J. 316; 4 Mass. 67; 2 Rand. 101; 2 Paige, 300; 3 Paige, 424; 9 Conn. 286; 3 Conn. 146; 24 Pick. 222. But several of these cases rest on a peculiar state of facts; and mere occupation in towns and villages, where so many tenements are leased, and where the registry laws govern as to titles, is a very uncertain indication or presumption of anything beyond a leasehold estate. Independent of this, public policy certainly requires that a purchase without notice should not be injured by a secret trust. 1 Spence, Eq. Jur. 445, note. And that a possession, not only new like this, but with a frequent disclaimer of title, and where Charles, also, receives possession with a deed recorded, and occasionally exercising as strong acts of ownership as herself, should hardly be deemed conclusive notice as to title of real estate being probably in her, rather than him. Much has been said, also, of the validity of the sale to Cutter and Cummings, and by them to Charles Tufts. But without intending to decide absolutely any questions not necessary to be decided for the proper disposal of the case, I would add to the remarks already made on this point, that if Cutter and Cummings purchased the land under an improper arrangement with Mrs. Tufts, I see no reason why the creditors or heirs should not be allowed to avoid that sale, and if their assignee or grantee, Charles Tufts, bought with a full knowledge of that arrangement, and with a view to carry it into effect, why the sale should not be avoidable also in his hands by the heirs or creditors. That is the usual state of things and the usual controversy in cases in this category. But as before remarked, the question here is not about the deed to Cutter and Cummings, and its avoidance. It is about the enforcement of a collateral agreement, which has never yet been fulfilled or executed.

In conclusion, there is one other aspect of the difficulties in this case, which, fertile as have been the objections raised, has escaped much attention of counsel, but seems to me deserving of some weight. It is a want of power to do what has been attempted here. It is the inability of any executor, selling lands to pay debts, whether under a general clause in a will or a license, to create a trust estate for himself, or any other person, not paid for separately and additionally. His duty is to sell, to sell the whole title, and to get pay for the whole, to sell a fee if a fee exist, a freehold if a freehold exist, and be paid for them. He seems to have no authority to carve out different estates or interests, and sell some and reserve some, or give some away for nothing. Suppose it is done by deed, and not by parol, as here, it is still an apparent departure from his power or authority, though it might then escape any objection from the statute of frauds, it being then an express trust created, as well as evidenced, by writing. 1 Spence, Eq. Jur. 496. But such express trusts are defined to be those "created by the act of some party having the dominion over property, with a view to the creation of a trust." 1 Spence, Eq. Jur. 495. An executor in such case would seem to possess no such "dominion." Much less can we imply or presume he has, from his position and duty, when the policy of the law, as already shown, is hostile to such a course, and enables the persons suffering from it to avoid such sale, even after they are executed.

This is a question in the aspect of naked power, and not one of policy independent of that, and which policy may uphold such a sale if executed, and if ratified by those interested, but not without a ratification express or implied. Here, likewise, the com-

plainant herself was a trustee under the will, selling the land to pay debts (Taylor v. Savage, 1 How. [42 U. S.] 282; Lewin, Trusts, 65; 1 Spence, Eq. Jur. 508), and yet not in reality selling the whole title, but a trust estate merely, reserving rights of reconveyance to herself as an individual, and for her private benefit, which have never been paid for to the estate or accounted for, and which she had no legal authority to reserve. It is an attempt to sell property as a trustee, and for which she never paid anything in her own right in such way as to give her a private benefit at the expense of others, the cestui que trusts. It is virtually an attempt to secure a private advantage with the funds or means of others, rather than her own, and which she seems to have had no power whatever to do; and which attempt common honesty, as well as equity and law, must unite in discountenancing rather than in aiding. Nor does this reasoning rest on the idea that such a sale or agreement, after executed, may not be confirmed afterwards by creditors and heirs, if knowing it long, and not avoiding it; but until so confirmed, its validity looks on principle very questionable.

I should come to this conclusion with more reluctance, saying that these parties should be left to settle their rights at law, if it was not apparent that they both really belong to this commonwealth, live in the same town, and may yet, for aught known by me, try and settle their rights before the state tribunals, if they please to resort to them.

Let the bill be dismissed.

[An application was made by the complainant for a rehearing in this cause, which was denied. Case No. 14,232.]

TUG.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the names of the boats; e. g. "The tug C. F. Ackerman. See C. F. Ackerman."]

TULAM (COUSCHER v.). See Case No. 3,287.

TULEY (BUEL v.). See Case No. 2,101.

Case No. 14,234.

The TULIP.

[Fish. Pr. Cas. 1; 3 Wash. C. C. 181.][1]

District Court, D. Pennsylvania. Sept. 11, 1812.

Circuit Court, D. Pennsylvania. Oct. Term, 1812.

PRIZE — CARRYING ENEMY'S DISPATCHES — PROCEDURE IN PRIZE CASES.

[1. An American ship, engaged, with the knowledge of, and under contract with, her owner, in carrying dispatches of a public nature, sent under the charge of a messenger from a British minister in this country, after a declaration of war, to his own government, is subject to condemnation as prize, as being engaged in the service of the enemy. In such case the cargo, if it belongs to the owner of the ship, partakes of the offence, and is also lawful prize.]

[2. Common-law principles and rules of evidence cannot be applied in a prize court. Its proceedings are totally different from those of any other court. Proofs and evidence are, of necessity, and the nature and exigencies of cases, permitted in prize courts.]

[3. Quære: Whether when certified copies of dispatches and documents found on board a prize, and transmitted to the state department, are sent by the secretary to the court for inspection, with a request that their contents be not made public, the court has any power, as a substitute for the documents themselves, to certify their import for use as evidence in the proceedings.]

Prize.

PETERS, District Judge. This is a case of an American vessel, clearly documented as such, belonging to William Shaw, a naturalized citizen of New-York. The property in the vessel is not disputed; nor does there appear any objection to the title of William Shaw, to the brig captured. She was taken, as prize, by the Atlas, Moffat, duly commissioned as a privateer, on the 15th of July last, in her course from New-York for Lisbon. In appears, that great part of her lading was taken on board previously to the declaration of war. It was completed after that declaration was known, and generally promulgated. Her destination was originally, and, for aught that appears, decidedly to the contrary, ultimately, for Lisbon. Her cargo consisting of Indian corn, meal, beans, bees-wax, pork, and staves, was evidently calculated for the Lisbon market. After the war was declared, a contract was entered into, between the owner, William Shaw, and the late British minister, Mr. Foster, the evidence whereof is in the following words:—"New-York, 9th July, 1812. Sirs, In consequence of the declaration of war, by the United States of America, against Great Britain, it becomes indispensably necessary for me to forward despatches to his majesty's secretaries of state; and as no ordinary conveyance can be procured, I have been under the unpleasant necessity of entering into an agreement with the owner of the brig Tulip, James Funk, master, bound from hence to Lisbon, that, in consideration of his landing—Cleeland, the bearer of my despatches, in England, in his route to Lisbon, I would furnish him with a letter requesting and enjoining you, gentlemen, to permit the said brig to proceed to Lisbon, with her cargo, and to return to this port in ballast, without capture, or other interruption. I therefore beg you will be pleased to comply with my request. The Tulip was laden and ready for sea, at the time of my entering into the contract, and she has been detained several days by me. I have the honour to be, sirs, your most obedient humble servant, Aug. J. Foster.

[1] [3 Wash. C. C. 181, contains only a partial report.]

To the officers commanding his majesty's ships of war, and private armed vessels, &c."

I extracted, from an authenticated copy of a despatch (the original having been sent by me to the secretary of state, and the copy by him transmitted to the attorney of the district) the following sentence; being the only part relating to the cause. I certified—that it was a public despatch, giving important information to the British government, of a political and military nature, relating to force, preparation, and warlike operations. The despatch was directed "To the right honourable Lord Castlereagh." "My Lord. On condition of my granting a letter of recommendation to a merchant vessel, bound to Lisbon, the owner of the vessel, has agreed to land a messenger for me, in an English port." The passport appears to me, to have all the substantial ingredients of a licence, to which all British cruizers were bound to pay the like respect (its terms and consideration being either in progress to be fulfilled, or actually complied with) to which a licence immediately from the British government, would have been entitled. 1 Bl. Comm. 259, note; Donath v. Insurance Co. of North America, 4 Dall. [4 U. S.] 463. Although Mr. Foster was not, at the time, in a capacity to perform his official functions, as they related to the United States; yet, his acts, as they regarded his own government, and the officers of its navy, were binding; and, as to them, official. He was the minister of that government returning from an embassy. His powers had, indeed, ceased, as to the government to which he had been sent; yet they were not extinguished by his own country, as regarded its interests and concerns. However valid the contract stated, and the passport were, as connected with his own government, they were, as to us, illegal and highly unjustifiable. The passport was accepted, by the owner of the brig, after the passing of the act, entitled, "An act to prohibit American vessels from proceeding to, or trading with the enemies of the United States, and for other purposes:" passed the 6th July last. The law could not have been known to the collector of New-York on the 8th; when he cleared out the vessel and cargo, for Lisbon. She did not leave the Hook till the 12th. But whether it was or was not known on board of the Tulip, before her departure from the Hook, does not appear. Some despatches and letters sent on board by Mr. Foster, to the care of James Cleeland, the messenger (a Trinity house pilot, on his return home from New-York) were directed for Lisbon, which he was desired to deliver to the captain of the Tulip; though other letters sent under his charge, at the same time, were directed to be put in the post-office in England. Only the papers necessary to prove American character in the vessel, were shown to the captors, in the first instance. No papers or proofs, ascertaining the cargo to be American property, were then, or at any time since, shown to the captors, or exhibited to this court. The supercargo, Braine, swears, that he had verbal orders for selling the vessel and cargo, at Lisbon, for account of Shaw, of New-York; to whom, as he understood and believes, both belong. The master, Funk, swears, that he signed bill or bills of lading "to order;" and also declares his understanding and belief, that the property, in both vessel and cargo, belongs to William Shaw of New-York. As to the suspicion that this ownership was one in transitu, (induced by the circumstance of the bills of lading being "to order") there does not appear any other foundation for it; unless it can be laid in the papers herein after stated. No bill of lading, except the one hereafter mentioned, was found among the papers delivered into this court, by the captors, but an affidavit of the captain, Funk, was offered, to prove, that one had been delivered, by the captain of the Tulip, to the lieutenant of the Atlas. The court did not think this regular, in the stage of the cause in which it was offered; nor was it clear of the objection to it, it being sworn to by a witness who had been examined on the standing interrogatories, before an order for further proof. A ruse de guerre was practised by the captain of the Atlas, which was then and had been, under British colours, and called the privateer Pitt of Bermudas. He said "the Tulip was a good prize; and he should send her into Halifax." At this stage of the business, the passport from Mr. Foster was produced by the supercargo; together with the following document. An envelope (for there was no epistolary communication) was delivered with the passport, and not before, superscribed "to Messrs. Shaw and Carroll, merchants, Dublin;" and containing an invoice and bill of lading of the cargo, both dated the 17th of June, 1812. The invoice is without marks or numbers; it amounts in value to 11,839 dollars, 6 cents; it includes an item for commissions at five per cent. making 591 dollars, and 95 cents; and it is headed "Invoice of merchandise, shipped on board the brig Tulip, James Funk, master, for Lisbon, per order, and for account and risque of Messrs. Shaw and Carroll, merchants, Dublin." The bill of lading is signed by James Funk; it states the cargo to be shipped by William Shaw; it declares the cargo to be deliverable to the order of the shipper, upon payment of 4000 dollars freight; and an endorsement, by William Shaw, directs the captain to "deliver the within contents to the order of Messrs. Shaw and Carroll, of Dublin." This document with its enclosure, the character of Cleeland as a messenger, and the despatches entrusted to him by Mr. Foster, were all concealed in the first instance, from the knowl-

edge of the captor. Even at the time of the examination of the witnesses in preparatorio, it appeared, that six or seven letters directed for Lisbon, had also been concealed during the chase. They were never delivered up, nor mentioned, until such examination, when we find, unaccountably, that those letters do not relate to the Tulip, or her cargo; and that neither in them nor any other paper on board (though the ship, as well as the cargo, were to be sold by him), is the supercargo, who was going a perfect stranger to Lisbon, introduced, recommended, or named!

The messenger and despatches were captured on board of the Tulip. But the supercargo and the captain do not precisely agree, as to the plan originally contemplated for disposing of them. It must, however, be inferred, from what both have said, that, even if the Tulip was forbidden, by her owner, to enter or touch at any English port, for the purpose of landing the messenger with the despatches, she was to put them on board of any vessel proceeding to England, which she might casually meet; and if, in her direct course for Lisbon. she did not meet with a vessel proceeding for England, she was to sail to the Lands End (many degrees of latitude and longitude out of her direct course) and lie off and on there, until she found a vessel going into port. The envelope directed to Shaw and Carroll of Dublin, contained, most assuredly, the only papers exhibited in relation to the cargo. It is alleged by the claimant, that those papers were to be produced only in case the vessel should be carried into a British port. If the envelope and its contents, had been at their date (before the cargo, let it be noted, was all shipped) calculated as a mere cover; it was an unnecessary measure, after the passport, which would supersede all necessity for producing these papers in a British port. American papers were, then, the only documents the cargo required; if it were bona fide American property. I take no notice of the contents of a paper said to be signed by the captain of the Tulip, Cleeland, and Braine, after the capture. It cannot have the authority of a paper found on board at the time of capture; it is not proved on oath to have been signed; nor could it have been competent to prove the facts therein stated. It is contradicted, in its principal allegation, by the oaths of Braine and Funk; and could only be used to discredit their testimony.

Some animadversion has been made, by the advocate for the captors, on a short letter from Mr. Sampayo at New-York, directed to Mr. Sampayo at Lisbon, found on board the Tulip. There is no intrinsic evidence in this letter, that it relates to that vessel or her cargo. The external circumstances alleged to be grounds of suspicion, are not proved or judicially known to the court.

The claim of William Shaw, and an affidavit annexed, state, that he is a naturalized American citizen, resident in New-York, as a merchant, since 1795. That the lading of the brig (whereof he is the sole owner, as well as of the cargo) commenced on the 10th of June, and she was destined for Lisbon and no other port, and he had not since changed her destination, or that of her cargo. The supercargo had express orders to proceed to Lisbon; and not to touch on any account, at any port, or place, in Great Britain or Ireland. That, for the purpose of protecting the vessel and cargo from British capture, and for no other purpose, on her voyage to Lisbon, he received, from H. Barclay, son of the British consul, "a letter from Augustus J. Foster, lately the minister plenipotentiary of Great Britain near the United States; intended as a protection from British capture; and agreed to take on board one or two passengers; and to land him or them in England; provided the deponent's vessel, either in the course of the voyage, or off the Lands End, whither she was to go in case of necessity, should find a vessel bound in to England." If no opportunity (a vessel going in) occurred off the Lands End, the Tulip was to proceed directly for Lisbon; with the passenger or passengers. He states, that his so proceeding to Lisbon had it been necessary, was not objected to by Mr. Barclay, the British consul, on condition of his "forwarding the said passenger or passengers from thence to England, at his own expence." He states, that the letter to Shaw and Carroll, and the endorsed bill of lading, were intended to enable them to protect the property if carried in to a British port. "But the said deponent, at the same time, instructed the said supercargo, not to show either the said letter, or bill of lading, until the said brig and cargo should be actually captured, and carried in by a British vessel." That he was ignorant that the Tulip had on board any letters for England or Ireland (other than those enumerated) "except such as the said Augustus J. Foster should deliver to the said passenger or passengers, at New-York." He declares his ignorance of any letters being put on board for Lisbon; and if any were so put on board, even by Mr. Foster, they so were without his consent or privity. He repeats, that the sole destination was for Lisbon; where the supercargo was instructed to sell both vessel and cargo; and to invest the proceeds in bills of exchange, for the deponent's account. That he insured the brig and cargo for the Lisbon voyage alone. That neither the British government, nor any subject of that government, or any person inhabiting within the territories thereof, nor their factors nor agents, had or now have, any right or interest in the brig, or her cargo. A great number of letters for England, were found on board the Tulip, after her capture; but they did not relate to her, or her cargo.

The passport contains, in itself, ample evidence of the most essential fact, on which I

shall found my opinion. This document is sufficient, in my view of the subject, without travelling into the contents of the despatches themselves, whether innocent or noxious. Much less is it necessary, minutely to attend to the speculations of the claimant's advocates; who, without having seen them, claim the right of contradicting (as decorously as such a circumstance will, with any tolerable appearance admit) my statement. Thus calculating, ineffectually here, to induce the spreading the despatches on the minutes; or excluding them entirely from the notice of the court. These speculations extend to the groundless, and, considering the character of the minister, and the circumstances of the case, highly improbable supposition—that the packet might contain nothing inimical or noxious. Probably, as is surmised, it is mere blank paper! to give a colour to a collusion between the claimant and minister, for covering this cargo. Not a very favourable aspect in which to place either the minister or their client! or even the ownership of the cargo. But I should not be so exacerbated by the rage of war, as to presume the minister capable of such conduct; especially in an object so small; if I did not possess the means of proving the contrary. See 6 C. Rob. Adm. (Am. Ed.) 465. The minister declares in his passport;—"it becomes indispensably necessary" (and necessity is too often, state morality) "to forward despatches to his majesty's secretaries of state." Can any reasonable mind seriously presume, that these despatches were not, to them important; and, of course, to us, hostile and noxious? Is it within the compass of the most ardent credulity (I say not credibility) to believe, that the minister's envelope enclosed entirely innocent matter? or—what is more fanciful—blank paper? and that in charge of a messenger! Would a public minister prostitute his own, and the official characters of "his majesty's secretaries of state," for the petty and sole purpose of covering or protecting, a cargo—trifling indeed, to induce the sacrifice? And that, when the same object, for an innocent voyage to Lisbon, could have been effected, without such dangerous and unlawful pretexts?

I shall not, extensively, indulge myself in controversy about the legality (common law legality applied in a prize court!) or the "novelty" of the mode I took, from necessity, to certify an extract of part of the contents of a despatch; and to announce the import of the subjects of it. I am not myself prepared, confidently to declare, what mode is the most proper. One of the advocates, who is greatly dissatisfied with my mode, will suggest, or tolerate no other. He will have no middle course. The whole must be developed, or totally excluded. Another would submit to the judgment and certificate of the secretary of state, both as to state policy, and noxious character: but inhibits the judge—although the law expressly assigns to him the receipt of, and power over the papers—from all discretion, or instrumentality, in this part of the case. Now (however mistaken I may have been as to my mode of placing the facts among the exhibits) it would seem to me, that, in some way or other, the judge who is to determine the cause, should have an opportunity of seeing and deciding whether or not, any, or what part of the despatches were indispensably necessary to the justice of the case; and maugre this interdiction of the learned advocate, and throw myself out of the question, he seems to be exactly the character, who ought to be best qualified to form a just opinion on the subject; either of relevancy or necessity of development. No doubt, should the secretary of state, hereafter, certify, in the manner this worthy advocate would approve; we should hear, from some other, a variety of objections, which it does not become me to mention or surmise. It has, too frequently, fallen to my lot, through a period of more than 20 years past, to take the first step on to us, new, and often embarrassing points. It is not my habit to be overweeningly attached to my own modes, or opinions. But it is my habit to decide, and to act as it appears to me right at the time; and that as promptly as the case demands; leaving the dissatisfied party to his remedy in a superior tribunal. There is a protest to the extract from the despatch, and my certificate of its import. This was much desired by me, and I am gratified in the hope, that a superior tribunal will give explicit instructions in what manner I shall hereafter proceed, if similar circumstances (not likely to be frequent) should again occur. Whether this mode or any other, be settled by those to whom I look for correction of my errors, is to me immaterial. Common law principles, and rules of evidence cannot be applied in a prize court. Its proceedings are totally different from those of any other court. Proofs and evidence are from necessity and the nature and exigencies of cases here permitted; which would be at once rejected, not only in courts of common law, but on the instance side of this, or any other admiralty court. It is only on account of the novelty of this part of the cause, in this country, and by no means induced by any thing relating to myself, that I add to the foregoing observations. My leading object is, to obtain a direction for future government under such circumstances.

I abstracted, from the mass of papers delivered to me, the despatches of Mr. Foster, and sent them, with the seal of the envelope unbroken, through the law officer of the district (the usual organ of communication with the executive) to the secretary of state. This I did under my own view of its propriety; and without adverting, at the time, to the constant practice in other nations. In England and France, it is always customary. Those nations, unhappily for themselves and all the world, are the best ac-

quainted with the horrible trade of warfare, having been, through ages with short intermissions engaged in it. Finally their bitter and endless collisions have involved us; and we have, in our new situation much to learn. Both have alternated friendship and enmity with us, at different periods of our national existence. But I do not, on the latter account, disregard all their established practice in prize proceedings. Fas est et ab hoste doceri. In both England and France communications are, and have been through a long course of time, made by their executives or their ministers, to prize judicatories (Marr. Dec. in 1776; 6 C. Rob. Adm. 444; Code de Prisis, 1778, p. 705), as well of the fact of captured despatches (always sent to some executive department) as of their tendency and import. Our act of congress directs, that all papers found on board a prize, shall be delivered, on oath, to the district judge; as with him, and in the court in which he sits, all prize proceedings must originate. But the despatches, in extenso, are never, in any country developed in prize courts. How this is to be regulated in our courts—let the supreme courts, or the legislature, direct. The secretary of state transmitted to the attorney of the district, not as proctor in this cause, but in his capacity of law officer of the district, an authenticated copy of the despatch from which I made the extract, and certified its import. It was accompanied by a request, that it might not be made public; unless I should be of opinion, that the justice of the case so indispensably demanded its publicity, as to overbalance the policy and interest of the government and nation. I was not of that opinion, but placed among the exhibits, the extract objected to, it being the only part in any wise directly relating to the cause. I would not require the whole to be spread on the record; not only because I did not deem it essentially necessary, but because I would not establish a precedent, which if followed, might in some future case (however it might be in this) involve and injure the interest of the nation, to which those of individuals must ever give way. The judiciary of this country, being a co-ordinate branch of the government, is peculiarly bound to be attentive to the safety of the nation, on such points; and more especially in courts whose jurisdiction rises out of, and is employed exclusively in the incidents of war. If the superior court should deem the despatch, or the copy of it, essential in the cause, it is ready to be produced. As to the argument of the claimant's advocates, that they should have the opportunity of discussing its contents, showing its innocence, and refuting the imputation of noxious character;—I feel warranted in saying—that great national objects must prevail, over such minor considerations. Nor do I conceive the despatch (which, however, cannot but be believed to be calculated to serve the interests of the British government and not ours) of so much importance in this cause, as the example would be mischievous, on some future occasion. Our own citizens may easily escape any difficulties on this account, by avoiding all instrumentality in such business. Let it be remembered too, that the noxious quality of the despatch is only an aggravation of the offence; whereof the placing the vessel, for any unlawful purpose in the service of the enemy, is the gist and substance. True it is, as has been observed by the advocates for the claimant, that intelligence may be conveyed through a multitude of ordinary channels; but that going directly from or on plans suggested by a public functionary, especially if attended with the solemnity of a messenger, could not fail to be, in a ten fold ratio, regarded. It appears, in this case from Mr. Foster's passport, that ordinary means were not in plenty; for he declares "no ordinary conveyance could be procured." It also appears, that he would have preferred such means; as he avers that the employment of this vessel arose from "an unpleasant necessity."

I am not inclined to say (but I give no opinion on any point, save that immediately before me) that a passport unaccompanied with unlawful conduct, protecting the vessel in this case, if the cargo be really American, from British cruisers, would have been as to us, cause of capture and condemnation; however it might have exposed her to the risk of being made prize of by other enemies of Great Britain. Passports from a belligerent to neutrals (or possibly to our ships even now, when we have changed our neutral character) to proceed unmolested, from one lawful port to another, may not be considered as illegal; if not tainted with unlawful conduct or conditions. It is not unprecedented for a belligerent to exempt even enemy ships engaged in a particular trade, beneficial to such belligerent, from capture by its cruizers. It is yet lawful for us to trade with Portugal and Spain, with cargoes bona fide American property. If all our ships in this trade laden with cargoes belonging to our own citizens, were exempted from capture by the British, I do not now see, that we should have the right of condemning them as prizes to us. But when particular vessels are indulged with such exemptions, it creates suspicion, at least as to cargo. This has caused much animadversion in this case, and in all such cases clear proof is required to repel the fraudulent appearance. Simulated papers are not, in themselves, causes of condemnation; though they throw the proof on the claimants; and carry with them strong suspicions of fraud This vessel and cargo were insured, and should have been documented, as American property. It is on this score, strange that no papers as to cargo, but those sworn by the claimant to be simulated, should be found on board. If he was justified in covering, to delude the enemy, he

certainly should have contemplated the risk of capture by us. Incidit in Scyllam, cupiens evitare Charybdem. The solitary bill of lading, and that not in possession of the supercargo, offered to be proved to have been delivered to the lieutenant of the Atlas by the captain of the Tulip, even if the proof had been admitted, seems but slender evidence of bona fide American property. The captain generally retains one of the bills of lading for his own purposes. This has no operation, as to proofs of property, one way or another.

I am not now necessarily bound to determine whether the law of the 6th July embraces this case, or subjects the person and property of the owner to its forfeitures and penalties. If they even are so subject, they are not exempted from the laws of nations, when those are violated. I cannot agree in the doctrine insisted on, "that the claimant is only amenable to this law of our own country; and if that does not reach him, or his property, both are free from the operation of any other." It will be with more consideration than I think it necessary now to give the question, before I determine how far the prize jurisdiction, without special authority in penal acts of the legislature, applies to forfeitures accruing under our municipal laws. The law of the 6th July, only interdicts licenses to trade to a British port. It obliges vessels to give certain bonds, before clearance and departure. The Tulip was lawfully cleared; the law not being, nor could it be known to either the claimant or the collector, at New-York, before the clearance was given.

As to questions of trade with enemies, I will meet them, when they come directly before me. Possibly I may have to decide such questions in chief, and I do not choose, incidentally, to give an opinion. Bynkershock (Duponceau's, 23, 4) clearly states—"But although trading with the enemy be not specially prohibited, yet it is forbidden by the mere operation of the laws of war." He had before said, that most nations forbid such trading, either in their declarations of war, or by special laws or edicts. I notice this merely to show, that in the opinion of this justly celebrated jurist, such municipal laws were only cumulative prohibitions, re-enactments or additions to the law of nations; which would have been competent without them. In this light, I consider the law of the 6th July, in this case. Nor can I agree with the claimant's advocates, that a citizen, to certain intents, may not be considered and treated as an enemy. Municipal laws, it is true, may cumulatively, for offences against the law of war, operate personally and also on property within our territory. But both person and property are still subject to the laws of nations. The admiralty law operating in its proper tribunal, is peculiarly applicable to property within its jurisdiction; and when that is rightfully employed on subjects of prize, it is emphatically, a court of the law of nations, in whatever place or country it sits. The technical definition of "enemy," given by one of the advocates for the claimant, would do well for a philologist; but here it is more ingenious and learned than solid. A neutral violating his neutrality, is separated by his own misconduct from the character of his nation; and becomes individually an enemy. A citizen of a nation at war, lending himself or his property to the service of the enemy (see [W. B. v. Latimer] 4 Dall. [4 U. S.] Append. 3), becomes pro hac vice, and his property (though it may not be really or nominally, enemies' property) is subject to all the consequences. It is contrary to his allegiance, which is part of the law of nations; and there is no distinction, in this respect, between native and adopted citizens. He violates the obligations imposed on him by his allegiance when he affords service or assistance to the enemy, in any unlawful case. Conveying intelligence is accounted the most mischievous and unlawful attribute and concomitant of trading with the enemy. 2 C. Rob. Adm. 69. I should hold the opinions whereof my decision is the result, upon principle, if no decided case could be found. But see the case of The Hoop, 1 C. Rob. (Am. Ed.) 196, and particularly the note 184; Dur. Bynk. 157; 8 Term R. 561; 1 Term R. 185, Sr. Leon. Jenkins' Introd. 86, 92. And also see Sir W. Scott's definition of "Despatches," and his reasoning as to the nature of them. 6 C. Rob. Adm. 465.

I know of no case of service to an enemy, acts of humanity excepted, which is not unlawful. Modern warfare permits (as it does not though practised) offices of civility, between enemies. Bynk. 1. P. e. 12, p. 95. "Les offices de civilite ne sont pas incompatible avec les devoirs de la guerre." But acts of benevolence and offices of civility, are very different from services which assist in the operations of war.

The foundation of my decree is; that this vessel was, at the time of capture, with the knowledge of, and under contract with the owner, undeniably, in the service of the enemy; carrying despatches of a public nature, sent under the charge of a messenger, from a British minister, to his government, during open and declared warfare, between this country and Great Britain and Ireland; in violation of the duty of allegiance in the owner. Whether the service in which she was engaged was to be performed, by actually going into a British port or by transshipping the messenger and despatches at sea, is in my contemplation of the subject, immaterial. For this reason, I have passed over, in the statement, the circumstance of the capacity of the British pilot Cleeland to place the vessel in a safe and convenient situation for landing himself and a servant of Mr. Foster's, who was on board, at an English port, or place. Neither the pilot, nor the servant, could have contemplated a passage to England by the way of Lisbon. Trading with an enemy at sea, is equally

illegal, with so trading in port. Conveying intelligence, stands on the same principle, and subjects the vehicle employed, to capture as lawful prize. The cargo, if belonging to the owner of the vessel so employed, with his knowledge and by his express agreement, in committing the offence is confiscable ex delicto. "Si sciverit, ipse est in dolo." And the "scienter" of the owner in this case, is incontrovertibly proved. If it be enemies property, it is confiscable ex re, so that, in either case it appears to me to be lawful prize of war. On this view of the case, were I inclined to order further proof, on the claim of American ownership, it would produce no favourable result.

I have been compelled by a long discussion, often embarrassed with matter not necessarily belonging to it, and too much protracted to dilate on this subject so much more than I intended, that I do not pointedly notice all the authorities which, I think, fully support my opinion. In the case of The Atalanta, 6 C. Rob. Adm. 440, much information, on the subject of unlawfully conveying public despatches, will be found. Every thing there said to condemn the conduct of a neutral, applies, with double force, against the act of a citizen, in such a case. The ground of decision in the case of The Atalanta is not laid in the obnoxious British doctrines of colonial trade; but the importance of a colony to the mother country, is mentioned as an ingredient, to show the enormity and injurious tendency, of the offence. Nor is the judgment founded merely on the fraudulent conduct of the neutral; though that is also an ingredient; which, whatever there may be in this case of a similar nature, I have avoided introducing with any stress. The illegality and inimical conduct of the neutral in carrying enemy despatches, is by Sir W. Scott pointedly relied on. A neutral may carry despatches from a minister resident in his country, be the nature of them what it may, to the ports of the belligerent in the country to which the minister belongs. If the neutral is stopped on the high seas for search all he has to do, is to act candidly; and deliver the despatches to the enemy of the minister's government; which those who use such conveyances must expect. 6 C. Rob. Adm. 454. But concealment and mala fide conduct, are taking part with the enemy, and subject the neutral to the penalties inflicted by the laws of nations. Very different is the case of a citizen, whose country changes its state of peace and neutrality, to that of war. No service afforded to an enemy, as to despatches, or other assistance, can be justified. Delivery of the despatches, on capture, without even an attempt to conceal them, does not purify the original act, which was illegal ab initio in the citizen; though it might have been otherwise in the case of the neutral. If there be not a decision directly to the point of this case, I hesitate not to apply old principles to new circumstances. I agree in the reasoning of Sir W. Scott, on this subject. Although all his opinions are not in unison with our sentiments (nor in some important instances, are those of English common law judges) it would be illiberal and uncandid, to deny him the meed of great talents, sound sense, and a thorough knowledge of the laws of nations. I do not follow his decisions or opinions, as binding authorities. But his decisions are luminous guides, where they are not not warped by the executive edicts, or by the prejudices arising from inveterate state policy; which too often tarnish the character of the court in which he sits, and render it, when operated upon by them, no longer a tribunal governed by the laws of nations. He does not, however, stand alone, in supporting the principles which have directed my judgment. I do not reject the fact of noxious despatches. They are not, it is true, spread on the minutes, communicated in extenso to the claimant's advocates, or proved in the way they deemed exclusively proper. Yet the tendency and character of them are sufficiently unfolded for all the purposes of justice. I rely on the unlawful service, incontrovertibly proved by the minister's passport; to the evidence whereof no objection has been, or can be made; as the principal ground of decision, though both grounds are, in my opinion, sufficiently tenable. The claimant's own acknowledgment, on oath, would be competent proof, did not the passport, on its face, bear ample testimony, of the fact of employment in enemies' service. If I am mistaken, in this new course, which the unhappy contest we are now commencing has thrown upon me; my errors either in form or substance, may be corrected, on appeal.

Much complaint has been made, as to the form of the libel—the deficiency of the interrogatories—and conduct in the examination of witnesses. The libel I do not think objectionable, though it might have been in another form, as to the parties libellants. The interrogatories are sufficient to produce the facts necessary in the cause. The proceedings at the examinations in preparatorio, passed, for the most part, under my own observation. I saw nothing improper, or reprehensible. Experience will teach us what alterations, or additions are necessary, in or to any of the proceedings, and I shall always be ready, in future cases, to listen to her lessons; aided by the suggestions of the gentlemen of the bar; including, very desirably, the learned advocates for the present claimant.

As I now conceive both the facts and the law of this case, my duty imposes on me the unpleasant task of condemning both the vessel and cargo, as lawful prize, according to the prayer of the libel.

From the decree of the judge of the district court, an appeal was entered to the circuit

court of the United States for the third circuit Pennsylvania district. and the case was fully and most ably argued for the claimants by Messrs. Binney and Hopkinson, and by Mr. Dallas for the captors. The decision of the district judge was confirmed by his honor Judge Washington, and from the circuit court no appeal was made.

[2] [Binney and Hopkinson, objected to the sentence of the district court—1. Because the despatches themselves had not been made exhibits in the cause, so as that the claimant might have an opportunity to show that they were not of a nature to impute a crime to the owner in carrying them, but that the judge had, in lieu of them, filed a certificate, stating that they did communicate important information to the enemy. 2. That admitting the conclusion of the judge, as to the purport of the despatches, to be correctly drawn, still, it was no cause of condemnation in a prize court. They contended, that the offence of a citizen trading with the enemy, or conveying information to them, is punishable only by the municipal law, on the ground of a breach of his duty of allegiance to his country, with which the law of nations, the only rule of correct decision for a prize court, has nothing to do. They cited the following cases: 4 C. Rob. Adm. 210, 215; 6 C. Rob. Adm. 344, 420, 430, 456, 465; Doug. 613, 594; 1 Coll. Jurid. 130, 134, 152; 2 C. Rob. Adm. 64; Bynk. 24, 167; [W. B. v. Latimer] 4 Dall. [4 U. S.] Append. 4; Act Cong. July 6, 1812 [2 Stat. 778].

[Dallas, for the appellees, endeavoured to show from the papers that the cargo belonged to Shaw & Co. of Dublin, in whose favour the bill of lading was made out. He resisted the arguments on the behalf of the appellants, as to the jurisdiction of this court to condemn in a case of this kind, as prize, and cited the following cases: Marr. Dec. 3, 143, 247; 6 C. Rob. Adm. 127, 341, 350, 403, 405, 406, 440, 444, 458, 460–463; 6 Term R. 527; Bynk, 23–25; 2 Valin, Comm. 31; Sir J. Jenkins, 86, 92; 2 Brown, Civ. & Adm. Law, 249, 331; 1 Marsh. 85; 1 Term R. 85; 1 C. Rob. Adm. 106, 138, 165, 177, 208; 4 C. Rob. Adm. 8, 65, 69, 72, 206, 210, 215, 233; 8 Term R. 550, 554, 555, 560; 1 Bos. & P. 347; 4 Bl. Comm.; 3 C. Rob. Adm. 25, 34, 294; 2 C. Rob. Adm. 59, 64; [Maybin v. Coulon] 4 Dall. [4 U. S.] 298; [Duncanson v. M'Lure,] Id. 308; 1 Bin. 110.

[Washington stopped Mr. Dallas in that part of his argument in which he was endeavouring to prove that the cargo was enemies' property, observing that, if the cause should turn on that point, he should not decide it without further proof; the evidence to prove the property to belong to the claimant being very strong, though there was some obscurity in relation to the bill of lading.

[After Mr. Dallas had progressed in his argument, and had concluded his observations in respect to the despatches, the court directed the letters from Mr. Foster to Lord Castlereagh to be delivered to the counsel for the appellees, to be filed in the cause; observing that if papers of this kind can properly be kept back by the government or the judge, upon principles of state policy, and their import, as it strikes the judge, be substituted in their room (as to which no opinion is given or even formed) in this case there appears to be no necessity at this time for withholding them from the counsel for the appellants.] [2]

WASHINGTON, Circuit Justice. I have perused with attention, the papers, and the authorities, which have been exhibited and cited, in this cause; and I proceed, with perfect satisfaction, to pronounce an affirmance of the decree of the district judge. Trading with an enemy, was an offence against the maritime law, long before the American Revolution; and, as far back as the records of the English admiralty can be traced, it appears incontrovertibly, from a series of direct and uniform decisions, that the vessel and cargo of a subject, taken in the act of trading with an enemy, were liable to condemnation, in the prize court, as prize of war, to the captors. The principle which prohibits trade and commerce with the enemy, exists therefore, independent of those opinions and judgments, which have been pronounced by Sir William Scott, subsequent to the Revolution: and to that principle I should resort, on the present occasion, with complete confidence, although no adjudged case in point could be introduced. If trade and commerce with the enemy are unlawful, carrying the public dispatches of the enemy (the worst kind of commerce with the enemy) cannot be lawful. The same principle of the maritime law, which makes that species of trading, which consists in the mere intercourse of buying and selling, an offence; with stronger reasons, for the public safety, must condemn the act of conveying intelligence to the enemy. The argument from analogy is irresistible, I repeat, independent of all authority. Nor is it an adequate answer to this course of reasoning, that the offence committed by a citizen, in carrying the dispatches of the enemy is an offence at common law, or by statute. The same may be said of trading in the strict sense with an enemy, which is unquestionably, a misdemeanor at common law. In both cases, the offender may be prosecuted personally; and, in both cases, the offending vehicle, if taken in the unlawful act, may also be condemned as prize of war. In neither case, does the condemnation proceed on the ground of the party being actually an enemy, nor of the property being actually owned by an enemy; but in both cases, the party acts as if he were an enemy; and,

[2] [From 3 Wash. C. C. 181.]

[2] [From 3 Wash. C. C. 181.]

therefore, the maritime law, treats the property, as if it belonged to an enemy.

[There is no difference as to jurisdiction, or the right of confiscation, between the two cases, except that the offence of carrying despatches to the enemy is most dangerous. The despatches in question contain information respecting the state of preparation in which the United States were, in respect to our navy; the force of our frigates; the disposition of our government; and contains a recommendation to the British government, as to sending a fleet to the American coast.] [2]

Upon the whole, I do not think it necessary to go into a further detail of the grounds of my judgment, as I have not the slightest doubt upon the case. Let the decree of the district court be affirmed.

TULIP, The (UNITED STATES v.). See Case No. 14,234.

TULL v. The WASHINGTON IRVING. See Case No. 17,244.

Case No. 14,235.

In re TULLEY.

[3 N. B. R. 82 (Quarto, 19); [1] 2 Am. Law T. 137.]

District Court, W. D. Texas. 1869.

BANKRUPTCY—ASSIGNEE'S COSTS—ITEMS.

1. On revision of charges in the assignee's bill of costs, *held*, charges for expenses of publishing notice of appointment, advertising sale of property, recording deed of assignment, stationery, etc., are proper. Exceptions overruled.

2. Charge for making deed of conveyance is unauthorized.

3. Charge for counsel fee of twenty-five dollars suspended.

4. Charges for specific acts, such as drafting notice and acceptance of appointment, petition for order of sale, setting aside certificate of exempted property, are unauthorized; but the acts may be compensated as for general services by reasonable allowance, in the discretion of the court.

5. Suspended items referred to register to take testimony and decide, in his discretion, on their allowance in proper and reasonable amounts.

[In the matter of Riley Tulley, a bankrupt.]

DUVAL, District Judge. The only assets belonging to the estate of the bankrupt was a tract of three hundred and twenty acres of land, upon which a lien existed in favor of W. M. Stover, executor of W. F. Palmer, deceased, for five hundred dollars and interest. The land was sold under order of the bankrupt court, and purchased by said executor for two hundred and forty-nine dollars. In his report, the assignee, J. K. Williams, renders the following account, viz.:

1. By draft of notice and acceptance of appointment	$ 5 00
2. Setting aside certificate of exempted property	5 00
3. Petition for order of sale	5 00
4. Publishing notice of appointment	6 00
5. Advertising sale of property	1 50
6. Recording deed of assignment	1 25
7. 1 day's service selling real estate	7 00
8. Making out report	7 00
9. Stationery, etc.	1 00
10. Writing deed of conveyance	5 00
11. Attorney's fees	25 00
12. Commissions on $249 at 5 per cent.	12 45
	$81 20

All the items in the account are excepted to by the creditor, the said Stover, except the 5th and 6th, but the exceptions having been overruled by the register, the case has been certified to me for revision. As decided in the case of P. A. Pegues, bankrupt, No. 43, the charges Nos. 1, 2, and 3 are held to be unauthorized. I believe that five dollars would be sufficient for the services referred to in these three charges, and accordingly allow the same, and no more. The 4th, 5th, 6th, 9th, and 12th items are correct, and the exceptions to them are hereby overruled. The 7th and 8th items are disallowed. The law does not authorize these specific charges. For the services mentioned in both these items, I think seven dollars is a sufficient compensation, and the same is hereby allowed. The 10th item is unauthorized by the law, and the exception thereto is sustained. As to the 11th item, I am unable to understand for what purpose the services of an attorney could possibly have been needed by the assignee in this case. Without the most satisfactory evidence going to show the necessity for legal aid on the part of the assignee, and the actual rendition of the services charged for, this item should not be allowed. The matter is hereby referred to Mr. Register Whitmore, who will at once proceed to hear testimony on the subject, and take such action thereupon as he may deem proper, subject to the revision of the court. If, as is claimed by the creditor, the assignee has already received thirty-one dollars from the bankrupt, this amount should be deducted from the assignee's account.

TULLY (UNITED STATES v.). See Case No. 16,545.

TUMLIN (FRENCH v.). See Case No. 5,104.

TUNCKHOUSER (GRIFFITH v.). See Case No. 5,823.

TUNISON (CLOUTMAN v.). See Case No. 2,907.

[2] [From 3 Wash. C. C. 181.]

[1] [Reprinted from 3 N. B. R. 82 (Quarto, 19), by permission.]

Case No. 14,236.

TUNNO et al. v. The BETSINA.

[5 Am. Law Reg. 406.]

District Court, D. South Carolina. 1857.

SHIPPING — DISSENTING PART OWNER—MAJORITY AND MINORITY RIGHTS—STIPULATION.

1. A dissenting part owner is entitled to a stipulation to secure his interest in case of a loss on a voyage undertaken against his wishes.

2. The court of admiralty will not order an account as a separate and independent mode of relief, but only as incident to other matter of which it has admitted cognizance.

[Cited in Swain v. Knapp, 32 Minn. 432, 21 N. W. 416.]

3. In the management of a vessel the opinion of the majority shall prevail, unless it forbids its employment, in which case it yields to the minority, who desire its employment, because the public interest must be protected in securing employment to the vessel

[Cited in Lewis v. Kinney, Case No. 8,325.]

4. The court of admiralty has an admitted jurisdiction to secure the value of the dissentient minority's interest, in case of disagreement among part owners in the employment of the vessel.

5. The foreign authorities with regard to the employment and sale of a vessel in case of disagreement among joint owners, collected and commented on.

Libel for stipulation, account, and sale.

Petigru & King, for libellants.

Brown & Porter, for respondent.

MAGRATH, District Judge. The libel in this case asks the aid of the court in three modes of relief: First, in a stipulation from the other part owners for the return of the vessel; second, in having an account taken of her earnings; third, in a decree for sale, upon two grounds: 1st, an irreconcilable disagreement among the owners, as to the mode in which the vessel should be employed; 2dly, misrepresentation in inducing the libellant to become the purchaser of the shares now owned by him in this vessel. The application for the stipulation, intended to secure the interest of a dissenting part owner, in case of a loss in a voyage undertaken against his wishes, has now become a familiar subject for the exercise of admiralty jurisdiction. He who is unwilling that a vessel shall proceed on a given voyage, may give notice thereof to his co-owners; and in case of loss he cannot be made liable to contribute (Abbott, 125), or he may apply to this court, and will be entitled to a stipulation, by which, in the event of loss, they shall be bound to him for the value of his share (Id.). So much of the prayer in the libel as relates to the stipulation has therefore been granted. It may not be improper for me to say, that the stipulation, in such matters, is in its nature provisional. It is not treated nor allowed as a continuing, permanent arrangement, by which the rights of an owner are protected and preserved; but simply as a present measure of relief, afforded in a particular case, for a particular voyage. And when the application for it is regularly made, it then is apparent that a fixed discordance has arisen between the owners, which would seem to call for the exercise of some relief to be adopted, either by them or for them, more perfect and enduring. In relation to the account which is prayed for, it is, in this branch of the case, sufficient for me to say, that considered in itself as a separate and independent mode of relief, it cannot be obtained in the admiralty. The Orleans v. Phœbus, 11 Pet. [36 U. S.] 175; Minturn v. Maynard, 17 How. [58 U. S.] 477. An account will be ordered as an incident of other matters concerning which the court has admitted cognizance. Davis v. Child [Case No. 3,628]. In this case, therefore, the question for an account depends on another question involving the sale prayed for. If a sale can be ordered, then, before the court can divide the proceeds, the mutual accounts of the co-owners must properly be entertained and adjusted, in making a just distribution. Andrews v. Wall, 3 How. [44 U. S.] 568.

The question of the power of this court to order a sale, in a case of disagreement among part owners, has been, and is still, in some respects, a matter of equal importance and doubt. In coming to that conclusion which I shall now announce, it is fitting that with it I should state the reasons which have guided and governed me.

In Great Britain, the power of the admiralty to order a sale among part owners, in case of disagreement, has been hitherto stoutly denied. The case of Ousten v. Hebden, 1 Wils. 101, is cited as the direct authority for the opinion that the admiralty cannot compel a sale of a ship, on the application of a part owner who objects to a certain voyage; and Lord Stowell, in The Apollo, 1 Hagg. Adm. 306, speaking of the stipulation, has declared that "beyond this limit, the court has not moved." But it aids us very little to determine satisfactorily, the true nature and extent of the admiralty and maritime jurisdiction in the courts of the United States, to refer to the opinions of the courts in Great Britain. In the first place, it is now generally conceded, that the jurisdiction of this court, intended to be exercised in the United States, is not limited, as it was known in Great Britain anterior to the Revolution, and as declared by the courts of that kingdom. De Lovio v. Boit [Case No. 3,776]; The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443. In the next place, it is not always that we can be certain, that even in the judgments of these courts, will we find a reliable exposition of the powers which have been admitted to belong to this jurisdiction. In Great Britain, the right of the admiralty to order a stipulation is now undoubted; yet in the court of king's bench, Chief Justice Holt held that the practice was unlawful; and by others

the exercise of the jurisdiction was considered an assumption. Abbott, 125. No one familiar with the acrimonious controversy which was carried on in Great Britain, and had for its object the suppression of the admiralty, and who recalls the disadvantages under which the admiralty contended, will hesitate in understanding why a judge so eminent as Lord Stowell should acknowledge the abstemiousness with which the admiralty always proceeded in the exercise of its jurisdiction. Under the influence of this feeling, the admiralty in Great Britain, in its entertainment of all cases relating to the possession of vessels, has discriminated by separating such questions, into possessory, where the mere fact of possession was concerned, and petitory, in which a question of title was involved; in the former class, exercising, and in the latter, refusing the exercise of, its jurisdiction. But in the United States, the distinction between these classes of cases has never been recognized, and courts of admiralty from the earliest period, in this country, have entertained jurisdiction in cases involving not only the question of possession, but that of title also. The Tilton [Case No. 14,054]. It need scarcely be observed that in this they exercised a familiar jurisdiction which would not have been attempted by a judge holding admiralty jurisdiction in Great Britain. In like manner in the United States, although a mortgage of a vessel has been held not to be a marine contract or hypothecation; and on that ground not to be foreclosed in the admiralty (Bogart v. The John Jay, 17 How. [58 U. S.] 399), yet the right of the mortgagee to intervene in the admiralty, if the vessel was within the jurisdiction of the court, has been always maintained. Andrews v. Wall, 3 How. [44 U. S.] 568. But in England, proceeding from the same doubt of the right of the court to interfere in a question where title was even indirectly involved, a mortgagee could not intervene in behalf of his interest, until by the 3 & 4 Vict. c. 65, § 3, special authority is given to the admiralty to entertain jurisdiction in such cases. Abb Shipp. 130. While, then, the enactment of the British parliament may be relied on as showing that until its passage there was in the court of admiralty of that kingdom no authority to adjudicate a question concerning a vessel in which title is involved, at the same time we are able to see that the courts of the United States, by the exercise of the same jurisdiction without any corresponding legislative provision, very plainly indicated their opinion that a question affecting the title was not per se beyond their jurisdiction.

We are then enabled, in opening our examination of the question here to be decided, to start with two principles of admitted admiralty jurisdiction in the United States; 1st, that disagreement among part owners as to the employment of a vessel is a ground for the interference of this court, admittedly so far as may be necessary to secure to the dissentient minority the value of their interest; and 2d, that in rejecting any distinction between the possessory and petitory proceedings, a jurisdiction was affirmed, although a question of title might be involved. It is well, also, to be borne in mind, that in the case of Ousten v. Hebben, the question of a sale was not before the court. The application related solely to a stipulation, and the opinion of Chief Justice Holt, is in fact, little more than obiter dictum. Abb. Shipp. 126, note. Unquestionably, in the administration of admiralty and maritime jurisdiction in Great Britain and the United States, this marked difference exists in the sources from which the law is derived, as administered by each. In Great Britain the jurisdiction of the court is determined, partly by legislation—by conferences among the judges—and the opinions of judges of the king's bench, in cases before it, in which applications were made for a prohibition against the exercise of admiralty jurisdiction in some particular case. And we are constantly reminded that reference is not made to the maritime law of the world, to determine whether a case can be adjudicated by a tribunal created originally for the administration of that jurisprudence, but to another tribunal not superior, but equal, animated with a jealous rivalry equally unreasonable and unyielding. The Seneca [Case No. 12,670]. It is true, that the popular objection derived from the non obstante statuto clause in the admiralty commission, was rightfully one which, in a government resting upon popular principles, should be watched, and indeed should be exploded. But the legitimate consequence of the argument from this, used against the admiralty, should have been extended to, and embraced the king himself. Under the republican government of England, a juster sense of the mode in which the admiralty jurisdiction should be administered, seems to have been adopted; and the rule was then laid down, that matters submitted to it, should be determined "according to the laws and customs of the sea;" but this rule expired with the republican government, and was not re-enacted after the Restoration. Hall, Adm. 26; Ben. Adm. 54.

Considered then in this light, the great argument against the exercise of this or any other power, derived from the "abstemiousness" of the admiralty in Great Britain, to borrow the language of Lord Stowell, loses much of the force it would otherwise possess. We are not at liberty to consider the conduct of the admiralty courts in Great Britain, as the evidence of such a jurisdiction being inconsistent with the limits which should be here assigned to it, and are forced, in this, as in many other questions, to seek other sources of information, in enabling us to decide whether the power is properly to be exercised or not. I shall, therefore, proceed to

examine and ascertain, so far as it can be done with the sources of information within my reach, the maritime law in relation to the employment and sale of a vessel. In the marine ordinance of Louis 14th, it is thus laid down (section 5): "En tout ce qui concerne l'interest commun des proprietaires, l'avis du plus grand nombre sera suivy; et sera, repute le plus grand nombre, celuy des interessey qui auront sa plus grande part au vaisseau." (Section 6): "Aucun ne pourra contraindre son associate de proceder a la licitation, d'un navire commun, si ce, n'est que les avis soient egallement partagez sur l'enterprize de quelque voyage." Pard. Droit, Comm. 4, 336; Coll. de Lois Mar. In the Consulat de la Mer (2 Pard. 62–65, and cc. 10, 11) there is more detail preserved in the statement of the rule, and the reason for it. It is there laid down that no one shall sell his share or interest in a vessel until she has completed her first voyage, and this is said to arise from a consideration of what was due to the captain. He was obliged to have a certain interest in the vessel, had all the trouble and care of her construction, and would be unprotected if his rights were left to his co-owners, who were influenced "par legerete de conduite, ou parce qu-ils sont riches." But when that voyage was ended, a larger part of the owners could have the vessel sold, nor could the master oppose it, unless there had been some special agreement entered into, on the subject. And this sale so proceeding according to the wish of the majority, is stated upon the principle, "Qu'en quelque chose, que ce soit, ou une discordance d'avis se manifeste, la volonte de la majorite l'emporte." But these provisions seemed intended for the case of all, or a majority, (tous ou bien la majeure partie,) of the part owners; it appears, however, that the captain had his correlative rights. "Le patron a autant de droits pour forcer a la licitation les actionnaires que ceux-ci en ont envers lui." These provisions generally were adopted in Code de Com. § 220, liv. 2, tit. 3: "En tout ce qui concerne l'interet commun des proprietaires d'un navire, l'avis de la majorite est suivi. La majorite se determine par une portion d'interet dans le navire, excedant la moietie de sa valeur. Le licitation du navire ne peut etre accordée que sur la demande des proprietaires formant ensemble la moitie de l'interet total dans le navire, s'il n'y a par ecrit, convention contraire." In the law of the Hanse Towns (Droit Maritime de la Ligue Anseatiqué, 2 Pard. 527), there is no provision concerning a sale in case of disagreement. The proceeding is declared to be such as conforms "a l'ancien usage, qui etablit que ceux qui auront la moindre part, et le moins de voix, suivront l'avis de la majorite" Id. 57. It is, however, also provided in this code, that "if the master to displease his owners, (par animosite,) sells his part of the ship for more than it is worth, they shall have the right to take it at such valuation as arbitrators shall put upon it." Id. 54. In the note of Roccus, translated by Mr. Ingersoll, it is said (note 47), in "maritime controversies, the general maritime law is to be the rule of decision, provided it be not contrary to the law of the land." There is no express provision concerning a sale, but in the 6th note it is provided that if a ship has two owners, and both choose a captain, the judge shall decide between them; and "if the judge cannot effect a concurrence, the ship must remain without a commander, until a concurrent appointment can be made;" and in note 49, "if a controversy arise among several owners of a vessel, respecting different offers made for chartering a ship, he is preferred who offers the highest freight, and if the freights offered are equal, the judge will make the election to determine the dispute." In 1793, in the United States court in this state, an application was made to Judge Bee for a sale of the sloop Hope [Case No. 12,927], to make a division; and the application would appear to have been rested upon the apprehension of some fraudulent conduct, intended by the other part owner. The report of the case is brief, and far from satisfactory, nor can I find any authority in the admiralty for ordering a sale under the circumstances of the case, as they can be gathered from the report. There was enough, in all probability, to warrant a court of equity to interfere, and that court often exercises its authority auxiliary to a court of admiralty, as in the matter of a stipulation where the value of the vessel is uncertain. After much reflection, I cannot recognize this case, as determining a question of disputed jurisdiction, with all the respect I have for the learned judge by whom it was decided. In 1800, in Pennsylvania, the case of Willings v. Blight [Case No. 17,765], was decided by Judge Peters. In this case, the learned judge expresses an opinion as to the power of the court to order a sale; but the application in the case was not for a sale, but to be allowed to give a stipulation that the ship might proceed on her voyage. And the opinion so given as to the sale, seems rested on the Sea Laws, 442, and Beawes' Lex Mercatoria, 49. These authorities, the latter particularly, I shall refer to hereafter. The reference to the marine ordinances of France, does not appear to have been made, except incidentally, and instead of making a decree for a sale, the learned judge declares that, "a privation of freight, the fruit and crop of shipping, seems therefore to be the appropriate mulct on indolent, perverse, or negligent part owners."

In 1828, in Pennsylvania, the question again arose in the case of Davis v. The Seneca [Case No. 3,650], before Judge Hopkinson. The libellants were owners of one-half the brig. The other half of the brig was owned by the captain, who kept possession of her. The case, in fact, was one of disagreement between owners of equal shares as to the best

employment of the vessel. Judge Hopkinson refused the sale, and an appeal was taken to Judge Washington, who reversed the circuit decree, and ordered the sale. The Seneca [Case No. 12,670]. Judge Washington rested his judgment upon two leading principles: 1st. That in determining admiralty jurisdiction we must not be confined to the restrictions which in Great Britain have been adopted, but should refer to the general maritime law. 2d. That in making such a reference, the provision in the marine ordinances of France which provide for a sale, where a half or a larger interest desire it, was to be regarded as laying down a wise and salutary rule of the general maritime law, which he would enforce as the maritime law of the United States. No further proceedings by way of appeal were taken in this case. The opinion of Judge Washington, by an able commentator, is said to have "the support of the most eminent authority," and to express "the rule of American law." Flanders on Shipping, 372.

In the case of The Orleans v. Phœbus, 11 Pet. [36 U. S.] 175, Judge Story declared that "the jurisdiction of courts of admiralty in cases of part owners having unequal interests or shares, is not, and never has been applied to a direct sale, upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages." Nor do I understand him—although he is referred to as having done so—(Collyer, 996, in note) as extending the jurisdiction at any time farther than the case of an equal division among the owners, in relation to the employment of the vessel. Story, Partn. § 439. Although the title by which a vessel is held is not subject to the general law of a partnership, by which each partner has the power of disposition over the property of the concern; but instead of this, each stands to his associates in the relation of a tenant in common, with a perfect right to dispose of his own share, without affecting the shares of his co-owners; yet that general principle in all voluntary associations, by which the opinion of the majority controls in whatever relates to the subject matter of the common property, must still be recognized as applicable to the ownership in vessels. In the references which I have made to the established sources of the maritime law in Europe, it will be seen, that this, to me, seemingly necessary authority in the majority, is everywhere recognized as a part of the fundamental law. How far the practice, adopted at a very early day in Great Britain, of qualifying the right of the majority by a stipulation for the benefit of the minority, is adopted among continental courts in the exercise of admiralty jurisdiction, it is not easy to ascertain; but in Great Britain and in the United States, it is now recognized as an appropriate exercise of admiralty jurisdiction, and a proper condition to be imposed upon the general authority vested in the majority of the part owners for their employment of a vessel, against the wishes of the minority.

The right of the majority to employ a vessel, against the wish of a minority desiring some other voyage, subject to the condition of giving a stipulation, is then clear, and the right of the majority to employ a vessel against the wish of a minority not desiring any employment of the vessel, is equally clear, subject to the same condition. The source of the right is in the fact of there being a majority in interest who favor the employment; but superadded to it, is another reason, derived from the considerations of public policy, and which is said to require the employment of vessels. Whether in the case where a majority desiring the employment of a vessel, a minority not desiring any employment, and that majority unable to make a sufficient stipulation; considerations of public policy would override the condition for the stipulation, or the latter will be preserved to the suppression of the former, and the destruction of the vessel, is a question yet to be decided; and upon its decision depends the decision of another question, which is, whether the order for a stipulation is a matter of right, or subject in any degree to the discretion of the court. If the order for the stipulation be a matter of right, then it may be, that the inability of the majority to give it, might present the case of the vessel rotting in her dock. "The right," says Judge Story (Partnership, § 439,) "to order a sale of property subject to its jurisdiction, is clearly a matter within the competency of a court of admiralty, and indeed is familiar in practice, in order to prevent irreparable mischief, or impending losses." But conceding this to be so, as of course it must be, upon the familiar principle that a court has the power to preserve the subject of its jurisdiction pendente lite, yet it does not aid us in resolving the doubt, for the propositions stand to each other in this position; if the power of sale is in the court, (in case of irreparable mischief or impending loss,) it is because the case and the thing to which the case relates, is within its jurisdiction, and if the case is subject to its jurisdiction the power of sale (in the cases stated in the text) is necessarily in the court. The solution of either will determine the other, but neither or both decide the real question, whether a power in the admiralty to decree the sale of a vessel, as a substantive power, is or not, within its jurisdiction.

I have had occasion to refer to the article in the marine ordinances of Louis 14th, which provides that in everything which concerns the common interest of the owners, the opinion of the greater number will prevail; and farther, that, that shall be reputed the greater number which represents the larger interest. By this, the major part may employ the vessel in a certain voyage, by the mere fact of being the major part, though the minority object. 1 Valin, Comm. 582.

And such is the law in England, with the qualification of a stipulation for the minority. Beawes, Lex. Mer. 45; Molloy, 61, c. 1, 220. But if the major part do not desire to employ the vessel, but the minority do so desire, what then shall be the rule? According to the marine ordinances of Louis 14th, in this question, as in others, the rule of the majority prevailed; and if they so desired it the vessel would remain unemployed. 1 Valin, Comm. 582. But in England the rule would seem to be different, for it is laid down, that if but one is left for the voyage, yet the same right to employ the vessel, subject of course to the stipulation, shall be with him. Molloy, 220. To this is added, in the text, the seeming qualification, "especially if there be equality in the partnership." Page 120. On the other hand, Beawes lays it down, that if the greatest part refuse to fit out the vessel, they shall not be compelled on account of their majority, but the ship shall be valued and sold. Beawes, Lex. Mer. 49. Cleirac, as cited by Valin, 582, declares, that if two citizens own a ship, the one who wishes to navigate or employ (l'un d'iceux veut qu'il navige), and the other opposes, the right of him who wishes to navigate shall prevail. To the same effect, is Kuricke, sur le Droit Hanseatique, 759, cited in Valin, ut sup. "Certe eum prevalere debere qui navim navigare, quam otiosam domi manere mavult." And to these follow Straccha de Navibus, cited also in Valin, and who rests upon the principle that in association their wish should be consulted, who desire to employ a vessel in that use for which she was constructed. And the same conclusion, as to the right of the minority in such a case, was adopted by the supreme court of the United States. The Orleans v. Phœbus, 11 Pet. [36 U. S.] 175. I do not find the rule as laid down in Beawes, in the case of the refusal of a majority to employ the vessel, so expressed in any other authority. By the French law, the opinion of the majority would prevail, and the minority would have to submit. But according to Molloy, if the major part refuse to employ the ship, the minority shall have the privilege of employing her on the same terms which would have been imposed on the majority, that is, giving a stipulation for the shares of the dissenting part owners, in case of loss, and in this, concur Cleirac, Kuricke, Straccha, and Judge Story.

If we come to a closer examination and summary of the general maritime law upon this question, we shall arrive at these results: A vessel, although the subject of private ownership, is regarded as a matter also of public interest. The public interest is protected in securing the employment of the vessel. In the management of a vessel, the opinion of the majority in value shall prevail, unless it forbids its employment, in which case it yields to the minority desiring its employment. The sale of a vessel is not encouraged, because the interference of the court in aiding a discontented part owner to force a sale, would in many cases serve only to gratify caprice or passion, tend to the injury of other part owners, and invite frequent and injurious interruptions of commercial operations. In case of disagreement between part owners who have an equal interest concerning the employment of the vessel, a sale will be ordered, but such disagreement must not be upon the question of employment or not, for in such case, they who desire to employ, shall prevail, but it must be a disagreement as to the manner in which the vessel shall be employed. It seems to me that in these cases of disagreement among part owners, to which branch of the general question I confine myself, the admiralty will decree a sale; if beyond these, a sale will be ordered, it must depend upon some special considerations connected with a certain case out of which no general rule can be framed. In the first of these cases, a sale will be ordered, because it is impracticable to decide the differences between the owners by the application of any other principle of the maritime law. In the second case, because by the application of the general rule of the maritime law, injury may ensue. In the third case, because it carries into execution a fundamental rule of the maritime law. The first case is illustrated by a disagreement between owners equal in interest, and both desiring to employ the vessel; here it will be seen that the rule respecting the wish of the majority cannot prevail for they are equally divided, nor can you decide this difference by the rule which gives the preference to such as wish to employ the vessel for both desire to do so. It is obvious, then, that as no ground exists for the preference of one over the other, a sale is necessary. The second case is illustrated by what has been already hypothetically stated, where the minority do not wish to employ the vessel, but the majority who wish to employ the vessel, cannot give a sufficient stipulation. If the court cannot exercise a discretion in dispensing with the stipulation—and it would seem as if it were a matter of right which, demanded by the minority, cannot be refused—then a sale would also be necessary to prevent the destruction of the property. The third case, is where a majority in value showing it to be for the general good, ask for a sale; and in granting it the principle is recognized that the opinion of the majority in value shall prevail, which by the Consulat de la Mer is specially applied to a sale. Nor should it be forgotten, that when these principles of maritime law were laid down, a greater necessity existed for the exercise by the court of the power to sell than can now be presented. Then a restraint was imposed upon the exercise of the owner's right to sell, in some cases until a voyage was performed, in others until the expiration of a certain period of time. Dur-

ing the period when the right of the owner was thus controlled, a necessity would seem to exist for a power in the court to order a sale, but I find it nowhere affirmed But now the owner may at any time, to any person, and for any price, dispose of the vessel, or his share, and consequently no corresponding necessity exists from considerations of what is due to private rights. It is true, that in former days vessels were rather regarded as the means by which trade was encouraged and commerce sustained, than as in themselves objects of trade as any other kind of property. And this serves to explain the stringency of the rules by which they were managed. But the unrestricted power of disposition which now is exercised by every owner, provides a remedy for perhaps most cases of irreconcilable disagreement. Doubtless there are cases in which the exercise of this power would be attended with disadvantage, but such a consequence may result in any case where one having joined an association, sells his interest and retires. If the disadvantage is produced or enhanced by his associates, or in any other way invites the interference of the court, it will be afforded. If within the jurisdiction of the admiralty, it will give the proper relief. If not within the jurisdiction of the admiralty, a court of equity will be found adequate to the occasion, proper for the exercise of its authority. I consider that the power to sell, as exercised by Judge Washington, in the case of The Seneca [supra], was carried as far as the best authorities in the maritime law will warrant. Nor is it easy to comprehend for what useful purpose the power could be exercised, in any other cases than such as I have referred to, in which a disagreement between part owners cannot be determined by the operation of principles applicable to associated ownership, or such as are specially provided for an ownership in vessels. Of what use would be the principle which affirms the control resulting to a majority from the fact of its being so, if in any case in which it was to be applied, a court would be asked to decree a sale? It would soon be that the only mode for preventing a dissolution, would be for the majority to render unquestioning accord to the wishes of the minority; no matter how small that minority, or unreasonable its exactions. In this case, the libellant is not the owner of a half of the vessel. He represents a minority in value. And the examination now made satisfies me that he is not entitled to a decree for a sale on the ground of disagreement with the other part owners as to the best mode of employing the vessel owned by them in common.

The second ground upon which the libellant asks a sale, is that he became the purchaser of the share now owned by him in the vessel under certain representations made to him as to the employment of the vessel; that these have not been fulfilled, and the neglect has been productive of injury to him. This is no ground for a sale. If the representations were all that the libellant considers them, and if they were connected with it and affected the other part owners as if made by them, it would be a case for relief but not for a sale. Part owners may agree as to the mode in which the vessel shall be managed, and the substance of the representations charged by the libellant as made to him is not unusual in such agreements It is simply that the libellant should have the agency of the vessel for the purpose of employing her in the Florida trade. Such an agreement properly made out by proof and affecting the other part owners, would be enforced in this court, not upon the ground of the specific performance of an agreement, which is an appropriate head of equity and not of admiralty jurisdiction, but as a maritime contract. Whatever may be the representations made to the libellant by the captain, they have not been proved to affect the other owners. There is no evidence that such representations from the captain to the libellant were ever known to them. It was not an agreement which the captain, in that capacity, had authority to make, so as to bind the owners, nor as co-owner had he authority to bind his associates by any such agreement. He may have incurred a personal liability to the libellant, but he has not affected the other owners with any liability. The libel can only be retained for the stipulation which it asks, and which has been granted. The rest of the prayer, which asks for an account and sale, is refused.

Case No. 14,237.

TUNNO v. The MARY.

[Bee, 120.] [1]

District Court, D. South Carolina. Nov. 25, 1798.

BOTTOMRY—UNDER WHAT CIRCUMSTANCES BOND VALID.

A bottomry bond can be entered into by the master only under circumstances of great distress, and when he has no other means of repairing, &c.

[Cited in Leland v. The Medora, Case No. 8,237; Joy v. Allen, Id. 7,552.]

In admiralty.

BEE, District Judge. This is a suit on a bottomry bond executed by Henry White, master of the ship Mary, in the port of London, November 9th, 1797, to John Tunno, for the sum of 1,466 pounds sterling; with a premium of thirty per cent. payable within ten days after the arrival of the ship in Charleston. A claim and answer are filed on the part of Asher Robins of Newport, Rhode Island, as

[1] [Reported by Hon. Thomas Bee, District Judge.]

owner of this ship at the date of the bond, and from the 19th July preceding. It is alleged that the said bond was not executed in good faith, nor upon the principles of maritime hypothecation; and the claimant prays that the libel may be dismissed with costs. The replication to this claim and answer, denies that Robins was owner of the Mary on the 19th of July, averring that she was at that time registered in the name of Cyprian Sterry, who held her as trustee for the joint account of himself, Tunno and Cox, and Miller and Robertson of Charleston, merchants. That although a bill of sale to Asher Robins might have been executed on that day, yet he was fully informed by Sterry of the trust aforesaid, and received the bill of sale subject to the equitable rights of the joint concern. That Henry White was appointed master by the said Tunno and Cox, and Miller and Robertson, with the full knowledge and approbation of said Sterry The replication further states that the voyage from London to Charleston was not ordered by Tunno and Cox, and Miller and Robertson, but originated in necessity arising from the unexpected failure of Sterry, and his inability to advance funds for a different voyage, which had been contemplated by the owners of the ship previously to her leaving Charleston. It is admitted that John Tunno was the usual correspondent of Tunno and Cox, and Miller and Robertson, in London; but was totally unknown to Sterry or Robins. That at the time of the execution of the bond he had no money in his hands of Sterry or Robins, nor of Tunno and Cox, or Miller and Robertson, after appropriation of the out-freight of the ship from Charleston to London; nor could the captain have raised any on the personal credit of his employers. He was, therefore, under the necessity of thus pledging the ship. A rejoinder to this replication denies that Tunno and Cox, and Miller and Robertson were joint owners of the ship, insisting that Robins is sole owner by legal conveyance of 19th July, 1797, from the former registered owner. It also denies that Robins, at the time of sale and advancing of his money, had any notice of any interest or claim to the ship, in Tunno and Cox, and Miller and Robertson. It states that John Tunno received £1188 8s. 10d. for the out-freight of the vessel, that he was the usual correspondent and agent of Tunno and Cox, and Miller and Robertson; and that he acted under their orders, touching the ship and cargo. There are other allegations on both parts which do not appear to be material. A number of exhibits have been filed, and the evidence of Mr. Russel taken, vivâ voce, in court.

The point for my decision is, whether this bond creates such a lien on this vessel as to give jurisdiction to the court. The law respecting hypothecation requires that it be the voluntary act of the master when and where money was advanced for necessaries or repairs. The money ought to be advanced solely on the faith of the hypothecation and not on any personal credit, in a foreign port, and in such distress as that the voyage could not be completed without it. It appears that this ship sailed from this port about the 25th July, 1797, bound to London; that at the time of her sailing she was owned by Sterry, Tunno and Cox, and Miller and Robertson; that she had completed her lading on the 18th July; and, on the 19th, Sterry who resided in Rhode Island, sold his right in her and her earnings from a period antecedent, to Robins, the present claimant. His letter of the 29th July to Miller and Robertson, received by them on the 13th August, was the first notice they had of the sale. It appears, however, by a letter from Tunno and Cox to John Tunno, of the 5th August, that they had advice of Sterry's failure, on that day. I have called these gentlemen joint owners with Sterry of this ship, and I am authorized to do so by the exhibits, among which are Sterry's accounts between himself and them as joint owners of the vessel; a letter from Miller and Robertson to Sterry after the ship was loaded, in which they express a purpose of purchasing a further share in her; Robins' letter to them, in which he says: "Mr. Sterry informs me that, by contract, your house are owners of one third of the ship; I wish to know if you would not be inclined to take the whole ship to your account, and on what terms." The question of law, arising under the act of congress on the assignment and change of the register, is for another tribunal, and it would be improper that I should anticipate its decision. There is sufficient proof before me as to the acts of ownership of Tunno and Cox, and Miller and Robertson, on which to found my present decree.

I will proceed to consider the evidence, after the ship was loaded, and after she had sailed. The captain's instructions are dated on the 18th July, and contain as clear and positive a consignment of vessel, cargo, and captain as could be devised. "When you arrive, you will deliver the ship's papers to John Tunno, under whose directions you are on that side the water; his orders you will attend to, and no other. He will furnish money and necessaries for the ship, according to the voyage she goes upon, also yourself with what you may have occasion for. You are to consider yourself as fully under his instructions as if we were present, being our friend and attorney" Miller and Robertson in a letter to Sterry, 18th July, say: "The ship Mary is bare of sails, a new suit must be furnished in London, and will, with outfits, take all the freight." It is evident, then, that at this period, freight was contemplated as the fund for outfits in London for another voyage, and it was not till the 5th August, ten days after she sailed, that the orders were given to appropriate the freights in equal parts to Tunno and Cox, and Miller and Robertson; and this in consequence of advice that Sterry had failed. But we find the bill of sale from Sterry

to Robins dated on the 19th July preceding, so that Robins was owner of Sterry's share at the time this order is given to appropriate the freight. This surely cannot bind Robins, who was entitled to two thirds of the freight when the ship arrived in London, from which fund all necessary repairs and outfits might have been made The whole freight to London amounted to £1188. Two thirds of this make £792. The whole disbursements are £975. Two thirds of these are £650, which, deducted from £792, leaves a balance of £142 in favour of Mr. Robins, for his share of freight earned. Where, then, is any ground of maritime hypothecation, which, as I have already stated, can only arise out of an invincible necessity? I see none; and do, therefore, adjudge and decree that the libel be dismissed with costs.

Case No. 14,238.

TUNNO v. PREARY.

[Bee, 6.] [1]

District Court, D. South Carolina. 1794.

NEUTRALITY—SEA LETTER—SEIZURE.

A sea letter not the only document necessary to establish the neutral character of a vessel belonging to the United States under treaty with France.

[This was a libel by Thomas Tunno against Benedict Preary.]

BEE, District Judge. Libel states that on the 13th September last, the snow Nancy, Clark, master, an American vessel owned in this place, was boarded on the high seas by an officer and some of the crew of the Joujon French privateer; and that twelve thousand dollars were carried away from said snow by one Brown, the officer who boarded. That the said dollars were shipped by Thomas Plunkett, an American citizen, resident at the Havanna, and consigned to the actor in this cause. That they were put in charge of Don Lewis Cuesta, a passenger on board, who had also a bill of lading and letter of advice respecting this money, which, together with the money, were carried off as above stated. The claim and answer state that this was not a lawful American vessel, and not furnished with the usual and necessary papers. It is denied that the dollars in question belonged to Plunkett, or that said Plunkett was an American citizen; and it is alleged that the vessel was collusively engaged in the Spanish trade, and this money liable to seizure as Spanish property. It is clear from the evidence that this is an American vessel, owned by citizens of the United States, and duly registered in this port. It appeared also that she had no sea letter, there being none at the custom-house when she sailed.

The only ground relied on in arguing this cause, was the necessity of a sea letter, according to the 25th article of our treaty with France. It was strongly contended that the said article makes the sea letter or passport the only criterion of a free vessel. But this does not appear to me to be the case. If, indeed, an American vessel should be without this passport, and other suspicious circumstances should appear, the French ship of war would be justified in making further search, and, if it should seem proper, in carrying the vessel infrà præsidia of the French courts, for inquiry and adjudication. This has frequently been done; nor will such conduct incur damages if the neutral vessel should be ultimately discharged. In two late cases, The Grand Sachem [Del Col v. Arnold, 3 Dall. 333] and The Polly, the passports so much clamored for, were on board, and were regularly produced; but they availed nothing, for both those vessels were seized and plundered. I cannot say what might have been the case here; but I am clearly of opinion that no article of the treaty could justify the carrying away of this money, without legal adjudication. Some arguments in favour of the claimant were drawn from the law of nations; but they cannot apply where, as in this case, a treaty subsists to guide us. It was said that a proclamation of the president required that all American vessels should be provided with a sea letter. Upon inquiry I find that, by instructions from the treasury department, the different collectors were enjoined to furnish sea letters for the better identification and security of our ships, and as being valuable in several points of view. This is unquestionable, but cannot make law.

Brown, the boarding officer, was an old American ship master; he examined the papers of this vessel, and must have been satisfied of her neutral character, without which he would have made prize of her and of her cargo, which was Spanish. He would also have seized other sums of money, produced by the captain of the snow as belonging to himself. He might have taken all with equal propriety; but he knew that the vessel was free, and made all on board so. Even contraband was not liable to seizure, unless there had been proof of its being bound to the port of an enemy. The 23d article of the treaty should have taught Mr. Brown its true construction and spirit; he must abide the consequences of disregarding it. It is unfortunate for this claimant to have been connected with persons capable of acting as these privateersmen did. Owners should be careful whom they trust; otherwise, without fault, they will be exposed to frequent misfortune. I am pleased to learn that two thirds of the plundered money have been already recovered from the grasp of those who took it, and I shall at all times afford the aid of this court to pursue the remainder into whatever hands it may have fallen. At present, I adjudge and decree that the claim in

[1] [Reported by Hon. Thomas Bee, District Judge.]

this case be dismissed with costs, and that the sum of 12,000 dollars be paid by the claimant to the actor.

TUNSTALL (GRAY v.). See Case No. 5,730.

Case No. 14,238a.

TUNSTALL v. ROBINSON.

[Hempst. 229.] [1]

Superior Court, Territory of Arkansas. July, 1833.

ERROR—DE MINIMIS—PAYMENT—HOW PLEADED.

1. For the small excess of $1.90 de minimis non curat lex applies, and judgment will not be reversed.

2. Payment on a judgment cannot be proved under nul tiel record, and if a party could avail himself of it, he must plead it.

Error to Chicot circuit court.

[This was an action of debt by Thomas T. Tunstall against William P. Robinson.]

OPINION OF THE COURT. On the 16th day of December, 1830, Robinson, in an action of debt against Tunstall, recovered a judgment against him in the Chicot circuit court, for the sum of five hundred and seventy dollars and seventy-nine cents debt, and one hundred and seventy-eight dollars and thirty-six cents damages and costs of suit, to reverse which this writ of error is prosecuted. This action is founded on a judgment which Robinson in his declaration avers he obtained against Tunstall in the circuit court of Jefferson county, in the state of Illinois, on the 3d of October, 1825, for five hundred and sixty-five dollars, forty-eight cents debt, and the costs of suit, amounting to five dollars, thirty-one cents. To this declaration, Tunstall pleaded nul tiel record, upon the trial of which the court rendered the judgment now under review.

The first error assigned is "that the judgment rendered by the circuit court against Tunstall in favor of Robinson is for a greater sum of money than was due to Robinson at the time of rendering the judgment." By inspecting the copy of the judgment rendered in Illinois, it appears that it was for five hundred and sixty-five dollars, forty-eight cents debt, and also the costs of the suit, which appear from the certificate of the clerk to have been at least five dollars, thirty-one cents. The interest upon five hundred and sixty-five dollars, forty-eight cents, from the 3d day of October, 1825, to the 16th day of December, 1830, at the rate of six per cent. per annum, amounts to one hundred and seventy-six dollars, forty-eight cents; one dollar and ninety cents less than the damages given by the court. For the sum of one dollar and ninety cents, it may be admitted that the judgment exceeded the amount legally due. But for an error so trivial, we think the judgment ought not to be reversed. The maxim de minimis non curat lex is strictly applicable. The second assignment of error is "that the court erred in deciding the issue on the plea of nul tiel record, in favor of Robinson." We can perceive no material variance between the judgment set out in the declaration and the copy of the judgment duly authenticated, adduced as evidence upon the trial. The third assignment of error is "that the judgment rendered by the circuit courts is for a greater amount of debt than was shown by the supposed record evidence, adduced on the trial, to be due to Robinson."

The only question raised by the pleading for the decision of the court was whether there was such a judgment as the plaintiff had set out in his declaration, in full force and unsatisfied. This was the issue, and only issue, to be tried upon the plea of nul tiel record. The judgment of the court upon it was unquestionably correct, for it is not true that the judgment had been either reversed or satisfied or paid. If it had been in part paid or satisfied, it was competent for the defendant, by an appropriate plea, to have availed himself of it; but not having pleaded payment or satisfaction of the judgment either in full or in part, he was precluded from insisting, therefore, correctly disregarded the return of the sheriff upon the execution issued upon the judgment rendered in Illinois. The same remarks are applicable to the costs of the suit in Illinois, which it seems were paid by the plaintiff in error, but who failed to plead it.

It has been argued that there was no legal evidence before the court, of the amount of the costs adjudged by the circuit court, in the state of Illinois, and that if the execution from that court is to be relied upon to prove the amount of costs, it proves a payment to the plaintiff of eighty dollars of the judgment. We do not assent to this proposition. The execution, which appears to show the amount of costs of suit; but the payment of eighty dollars, which also appears by the same execution, was inadmissible, under the plea of nul tiel record, and was properly disregarded. Judgment affirmed.

[1] [Reported by Samuel H. Hempstead, Esq.]

Case No. 14,239.

TUNSTALL v. WORTHINGTON.

[Hempst. 662.] [1]

Circuit Court, D. Arkansas. April, 1853.

COURTS—FEDERAL JURISDICTION—CITIZENSHIP.

1. A garnishment is a suit or proceeding, in which a party has day in court; and it must therefore appear on the face of the pleadings, or by the record, that the judgment creditor and the

[1] [Reported by Samuel H. Hempstead, Esq.]

garnishee are citizens of different states, to give the court jurisdiction.

[Disapproved in Pratt v. Albright, 9 Fed. 639.] [Cited in Rollo v. Andes Ins. Co., 23 Grat. 513.]

2. Where it appears, that the judgment creditor and garnishee are citizens of the same state, the court will of its own motion dismiss the case for want of jurisdiction at any stage of the proceedings.

3. Courts of the United States, though not inferior, are nevertheless of limited jurisdiction.

In the circuit court, before PETER V. DANIEL, associate justice of the supreme court, and DANIEL RINGO, district judge.

Garnishment. The writ was issued on the 1st December, 1852, and recited the recovery of a judgment in this court by Thomas T. Tunstall against Abner Johnson, on the 15th April, 1851, for $9,584 and costs; and that the same was unsatisfied; and commanding the marshal to summon Elisha Worthington, the garnishee, to appear before the court on the first day of the next term, and answer what goods, chattels, moneys, credits, and effects he had in his hands or possession belonging to the defendant in the judgment. The writ was issued under, and conformed to a statute of Arkansas concerning garnishment. Dig. 559. In the writ, Worthington was stated to be a citizen of Arkansas, residing in the Eastern district; and in the allegations, Tunstall was stated to be a citizen of Arkansas, and Abner Johnson a citizen of Texas. The writ having been executed and returned, the plaintiff, on the 11th April, 1853, filed allegations, setting out said judgment with particularity, and averring that Worthington was indebted to Johnson, and propounding special interrogatories to the garnishee in relation thereto, and as to effects in his hands. On the 14th April, 1853, he filed his answer, denying any indebtedness to Johnson, or that he had any goods, chattels, credits, or effects in his hands belonging to Johnson. To this answer the plaintiff entered a denial on the record, and a jury was sworn to try the issue. Evidence was adduced on both sides; and after the testimony was closed, instructions were asked and discussed by counsel, and taken under advisement, until the next morning, when the court being of opinion, on inspection and consideration of the pleadings and record, that jurisdiction over the case could not be maintained, delivered the following opinion, dismissing the case, and to which the plaintiff accepted.

A. Fowler and J. M. Curran, for plaintiff.
Albert Pike, for defendant.

DANIEL, Circuit Justice. The proceeding of garnishment, as regulated by the statute of Arkansas, is anomalous, being partly legal and partly equitable. But it must be regarded as a civil suit, and not as process of execution to enforce a judgment already rendered. It may be used as a means to obtain satisfaction of a demand, in the same manner as a suit may be resorted to on a judgment of another state, with a view to coerce the payment of such judgment. In this proceeding the parties have day in court; an issue of fact may be tried by a jury, evidence adduced, judgment rendered, costs adjudged, and execution issued on the judgment. It is in every respect a suit in which the primary object is to obtain judgment against the garnishee, and certainly cannot with any plausibility be treated as process of execution, or as part of the execution process; for if so, there could be no necessity or propriety in resorting to this forum to investigate the relations of debtor and creditor.

Considering it, then, as a suit, we have, on full examination of the pleadings and record, come to the conclusion that the suit ought to be dismissed, because it is not shown by the pleadings or record that this is a controversy between citizens of different states, which we think essential to give this court jurisdiction. The courts of the United States, although not of inferior, are of limited jurisdiction; and it is too well settled to admit of question, that the citizenship of the parties must be stated, so that it may affirmatively appear that the suit is between citizens of different states. [Jackson v. Twentyman] 2 Pet. [27 U. S.] 136; [Mollan v. Torrance] 9 Wheat. [22 U. S.] 537. And the omission is fatal at any stage of the cause. Wood v. Mann [Case No. 17,952].

In the writ of garnishment it is stated that Elisha Worthington, the garnishee, is a citizen of Arkansas, and in the allegation that Thomas T. Tunstall, the plaintiff, is a citizen of Arkansas, and Abner Johnson, the judgment debtor, a citizen of Texas. It thus appears affirmatively on the face of these proceedings, that the plaintiff and defendant are both citizens of the same state. The contest is between them; and the fact that Abner Johnson is a citizen of Texas, cannot help the matter. The plaintiff, or judgment creditor, and the garnishee, must be citizens of different states; and that fact must appear by the pleadings or the record to give this court jurisdiction. Upon our own motion, we dismiss this case for want of jurisdiction. Dismissed accordingly.

TUPPER v. The ISABELLA. See Case No. 7,099–7,101.

Case No. 14,240.

TUPPER v. The ST. LAWRENCE.

[16 Leg. Int. 317.] [1]

Circuit Court, S. D. New York. Sept. 20, 1859.[2]

MARITIME LIENS—REPAIRS—STATE STATUTE—DOMESTIC VESSEL.

[Appeal from the district court of the United States for the Southern district of New York.

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[1] [Reprinted by permission.]

[2] [Affirmed in 1 Black (66 U. S.) 522.]

[This was a libel against the steamship St. Lawrence (Lewis H. Meyer and Edward Stucken, claimants) to enforce a lien, under the laws of the state, for supplies furnished by the libelant, William W. Tupper. In the district court a decree was rendered in favor of the libelant (case unreported), from which the claimants appeal.]

J. F. Williams, for libellant.

Beebe, Dean & Donohue, for contestants.

In this case the plaintiff, as libellant, filed a libel against the vessel on the 21st of April, 1856. The libel was filed to enforce a domestic lien given by the statute of this state for repairs on the ship. A decree in favor of the libellant was given in the court below, in January, 1858, for the sum of 2,250. At the time of the repairs the vessel was owned by John Graham, but subsequently passed into the hands of Meyer & Stucken, who now appeared as contestants. An appeal was taken to the circuit court.

The counsel for the appellant contended that the federal court had no jurisdiction to enforce a lien given by the state statute; that the doctrine in the case of The General Smith [4 Wheat. (17 U. S.) 438], which was, that the federal courts would enforce a lien given by state statute against a vessel, had been overruled, and that therefore the court had no jurisdiction in this case.

NELSON, Circuit Justice, held that the doctrine in the case referred to was not an opinion of the court, nor a decision, but simply a rule of law, which the court had power to change, but the United States supreme court had never done so by any decision. That the doctrine held forth in The General Smith was the law of the land until the 1st of May last, but, up to that time, it had remained in full force.

On the 1st of May last, a new rule of the supreme court went into effect, by which the federal court would not, after that time, enforce any domestic lien given by state statute. The decree of the court below was, therefore, affirmed.

This decision is an important one, as it settles a long vexed question.

[Upon an appeal by the claimants to the supreme court, the decree of this court was affirmed, with costs. 1 Black (66 U. S.) 522. [See Cases Nos. 5,673, 5,675, and 5,677.]

TURBERVILLE (WILSON v.). See Cases Nos. 17,842–17,844.

Case No. 14,241.

TURBETT v. DUNLEVY.

District Court, E. D. Pennsylvania. 1848.

CARRIERS — PASSENGERS — AUTHORITY OF MASTER OF VESSEL—PERSONAL INDIGNITIES.

The master of a vessel has a general authority over the passengers, as well as the crew; and if a passenger so demean himself as to endanger the safety or convenience of others on board, the master may control him; but it is a marine trespass for the master to shave the head of a stowaway on board his vessel, for the mere purpose of putting a mark upon him.

[See Krauskopp v. Ames, Case No. 7,931.]

[Decided by KANE, District Judge. Nowhere reported; opinion not now accessible. The above statement was taken from 1 Brightly, Dig. 802.]

TURLEY (UNITED STATES v.). See Case No. 16,546

Case No. 14,242.

TURNBULL et al. v The ENTERPRIZE.

[Bee, 345;[1] Hopk. Rep.]

District Court, D. Pennsylvania. Aug., 1785.

SHIPPING—HYPOTHECATION BEFORE VOYAGE BEGAN —RESIDENCE OF OWNERS.

A ship cannot be hypothecated according to the maritime law, before the voyage is begun, or in places where the owners reside, even for those necessaries without which the vessel cannot proceed to sea

[Cited in The Stephen Allen, Case No. 13,361; People's Ferry Co. v. Beers, 20 How. (61 U. S.) 402. Disapproved in The Richard Busteed, Case No. 11,764.]

HOPKINSON, District Judge. The bill in this cause is filed by certain merchants against the ship Enterprize, for the recovery of moneys advanced by them to the captain of the said ship, in the port of Philadelphia, to fit her out for an intended voyage; the ostensible or real owners, or some of them, being, at the time of such advancements, within the state, and known to the libellants. And it has been urged in support of the libel, that every contract of the captain, for necessaries for a ship, implies an hypothecation, and induces a lien on the ship in favour of the creditor, suable in the admiralty by the rules of civil law. And the case principally relied upon as authority for this doctrine, is cited from Cowp. p. 636.

The case referred to is a suit at common law, brought by a ropemaker, against the owners of a ship, for ropes furnished to the captain; the plaintiff having charged Harwood (the captain) and the owners of the ship for the ropes, without naming or knowing who the owners were. The fact was, that the owners, according to the custom of the county of Essex, in England, where they probably resided, had leased the ship to Harwood for a term of years, on certain conditions; and the questions were, whether, under these circumstances, Harwood was not both captain and owner, during the term? and whether the original owners ought to be responsible for debts contracted on account

[1] [Reported by Hon. Thomas Bee, District Judge.]

of the ship whilst in the possession of Harwood, under the lease? Lord Mansfield was of opinion, that neither the lease, nor the ignorance of the creditor, as to the names or persons of the owners, could exonerate them. And to shew that the owners are bound, he says—"Suppose the ship had been impounded in the admiralty, and that had happened at the end of the term, the owners could not have had their ship, without paying the debt for which she had been impounded." But this case is brought into view chiefly because Lord Mansfield, in giving his opinion, observes, that the creditor had three securities for his debt, viz. the person of the captain with whom he contracted, the specific ship, and the owners. It should be remembered, however, that this was a suit at common law: that the owners, the ship, the captain, the creditor, and the contract, were all within the realm; and there can be no doubt but that the creditor might have his action at law either against the persons of the contractors, or might attach their property, the ship, for his debt.

But this case has no reference whatever to the maritime or civil law. The doctrine of hypothecation is never once mentioned, nor is the contract of the captain at all placed upon that ground. The principal object was, to determine whether the lease of the ship did not exonerate the lessors during the term. So, in the case cited from 1 Ves., Sr., 154. This also was purely a common law process; wherein the parties and the whole transaction appear to have been infra corpus comitatus. "Certainly," says the lord chancellor, "by the maritime law the master has power to hypothecate the ship during the voyage, and from the necessity of the case; but it is different where the ship is infra corpus comitatus, and the contract made by the owners or master on land, and not arising from necessity—then, the laws of the land must prevail." And this is clearly consonant with the whole current of authorities respecting the doctrine of hypothecation, viz. that it must be made during the voyage, and from the necessity of the case. When money is borrowed on the ship, before the voyage began, the ship is not answerable in the admiralty, 1 Ld. Raym. 578. So, in 2 Ld. Raym. 982, in the case of Johnson v. Shippen, Chief Justice Holt says—"If a ship be hypothecated before a voyage begin, that is not a matter within the jurisdiction of the admiralty; for it is a contract made here, and the owners can give security to perform the contract." It appears, then, to be a settled doctrine, that a ship cannot be hypothecated, according to the maritime law, before the voyage is begun, or in places where the owners reside, even for those necessaries, without which the ship could not proceed to sea. The law means to favour the completion, not the commencement of a voyage. For this reason, the legislature of Pennsylvania hath, by a special act, given to the artificers who build or repair, and to those who furnish necessaries to fit out a ship for sea, a lien upon the vessel, suable in the admiralty, before the voyage is begun, because the maritime law does not extend to their security.

Since, then, it appears that the advance of moneys to fit out the ship Enterprize, was made before the commencement of her voyage, and not from necessity; and that the captain, the owners, or some of them, and the contractors, were all within the state at the time of the transaction; and as the suit is not brought under the act of assembly of the 27th of March, 1784, I cannot admit this case to be of admiralty jurisdiction, and, therefore, I adjudge that the bill be dismissed, and that the libellants pay the costs of suit.

Case No. 14,243.

TURNBULL et al. v. THOMAS et al.

[1 Hughes. 172.] [1]

Circuit Court, E. D. Virginia. Jan., 1875.

NOTES—SIGNATURE—PAYMENT—BONA FIDE PURCHASER—CONTRACTS—AMOUNT OF SECURITY.

1. Where the maker of a promissory note, which is in printed form, by mistake, signs his name above the printed line stating the bank at which the note is payable, *held*, that the printed line below the signature is nevertheless part of the note, and that the note is therefore negotiable, especially where it has coupons of interest attached, and is indorsed in that form, these circumstances precluding all doubt of the fact that the designation of the place of payment was on the note when it was executed.

2. Where an agreement in writing is made between parties, by which it is stipulated that the one shall secure the other by trust deed to the amount of sixty thousand dollars, and the trust deed afterwards actually mentioned thirty thousand dollars as the amount received, *held*, that the deed was a lien only for thirty thousand dollars.

3. Where agents of a manufacturer, in the course of transactions running through years, in which they make sales for him to large amounts and also make advances to him in the course of their business, have taken up notes of the manufacturer at maturity, and charged them in their account current, *held*, that the agents are not entitled to claim the benefit of a mortgage given to secure these and other notes, because these notes must be considered as having been paid at maturity by the maker.

4. Where an agent of a manufacturer who is in advance to his employer, and needs funds, and has no way of paying himself except by using notes of the manufacturer, which he is authorized to sell in the course of business, one day before the maturity of such notes passes them bona fide to one of his own creditors, who, in consideration of them, cancels a security held against the agent, *held*, that this was not a payment ot the notes by the maker of them (the employer), and that this creditor of the agent is a bona fide purchaser, without notice of any equities, if any, which may exist between an agent and his employer.

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

5. Example ot equity practice under rule 60, and section 881, Story, Eq. Pl.

This was a suit brought by Turnbull & Co. for a decree for the sale of the Mount Vernon Cotton Factory property, in the city of Alexandria, to satisfy the liens upon said property. The property was sold, and the price obtained was altogether inadequate to satisfy the various liens upon it. The contest was mainly between the lienors as to the priority of their respective liens, but there were other questions upon which these rights depended. The first lien on the property was a deed of trust from Thomas and wife to secure several notes for the deferred payments of the purchase-money. The second, a deed of trust of the same date as the first, but conceded to be subordinate to it, from Thomas to E. F. Witmer, to secure notes amounting to five thousand dollars, payable to the order of G. K. Witmer. The third lien which it is necessary to notice was a deed of trust to secure Turnbull & Co. for advances to the extent of thirty thousand dollars, and the fourth, various judgments of creditors which were docketed in Alexandria county, subsequent to the date of the deed of trust to secure Turnbull & Co. There were five notes secured by the first deed of trust held by Turnbull & Co., which had been paid to the holders at maturity by money borrowed from Turnbull & Co., and the notes after payment were assigned to Turnbull & Co. Four of the notes secured by the first deed of trust were held by W. D. Corse, to whom they were indorsed by George K. Witmer, the agent and attorney of Thomas, on the first or second day of grace of said notes, in payment of claims which Witmer owed individually to Corse, fully secured on real estate of Witmer, and which security had been released by Corse at the time of the transfer of said notes and in consideration of the same. Others of these notes were held by the First National Bank of Alexandria. These notes were all printed, with coupons attached, and made negotiable and payable at the First National Bank of Alexandria, Va., but the name of the maker was written above the printed line expressing the place of payment, and of course above the coupons. The following is a sample of the notes:

This note is secured by deed of trust to ——, dated ——, 186—, the stamp on which has been paid.

"(65 cent Revenue Stamp.) Alexandria, Va., January 22d, 1866.

"Two years after date I promise to pay to the order of James Green, value received, twelve hundred and twenty-two $^{22}/_{100}$ dollars, with interest from date, payable half-yearly, as per coupons attached hereto, signed by me.

"A. Thomas.

"Payable at the First National Bank of Alexandria, Va.

"(Coupon.)

"July 22d, 1867.

"Due James Green thirty-six $^{67}/_{100}$ dollars for half-year's interest on note No. 8, dated January 22d, 1866. A. Thomas.

"$36.67.

"(Coupon.)

"January 22d, 1868.

"Due James Green thirty-six $^{67}/_{100}$ dollars for half-year's interest on note No. 8, dated January 22d, 1866. A. Thomas.

"$36.67.

"(Indorsed) James Green."

There was a written agreement between Turnbull & Co. and Thomas, which was never executed, that Turnbull & Co. should have a lien for advances to the extent of sixty thousand dollars, but the deed carrying out that agreement specified only thirty thousand dollars. It was claimed that the first mortgage notes held by Turnbull & Co. were a lien upon the property, that they were entitled to a lien under the agreement to the extent of sixty thousand dollars, and that the notes held by Corse and the First National Bank were not negotiable; moreover, that the notes held by Corse were liable to any equities between Thomas and his agent, G. K. Witmer, and that there was an equity in favor of Thomas, in that Witmer had no right to use the notes of Thomas belonging to Thomas in payment of his own debt due to Corse, principally upon the ground that Thomas was not indebted to Witmer at the time of the transfer of the notes to Corse. Witmer's deposition was to the effect that Thomas was largely indebted to him (and the contract was a part of this case) at the time the notes matured, that he was obliged to have money on account, and that Thomas could not pay him and pay the notes too, so that he charged himself with the amount of the notes, took them up before maturity, and transferred them to Corse as above stated. Corse maintained that the notes were negotiable, that he took them bona fide for a valuable consideration before maturity, and that he took them free from any equity between the maker and his attorney, Witmer; and besides, that Thomas's indebtedness to Witmer at the time of the transfer to Corse was established, and therefore there was no equity in favor of Thomas. As against the claim of Turnbull & Co., it was maintained that the first mortgage notes held by them had been paid by Thomas at maturity, and ceased to be a lien from that time, and that the transfer of them to Turnbull & Co. did not revive the lien, that they were secured only to the extent of thirty thousand dollars as provided for in the deed. And the judgment creditors whose judgments had been docketed in Alexandria claimed that as

against their judgments Turnbull & Co. had no lien at all, because Turnbull & Co's account against Thomas showed that the balance due them was exclusively for advances made subsequent to the docketing of the judgments, and as Turnbull & Co. were not bound by covenant to make the advances, and had constructive notice of the judgments, the advances were not secured, although there was a balance due at the time the judgments were docketed in excess of the thirty thousand dollars.

Francis L. Smith, for Turnbull & Co.

H. O. Claughton and S. F. Beach, for lien creditors.

HUGHES, District Judge, held: 1st. That Turnbull & Co. were not entitled to claim the amount of the first mortgage notes held by them, because said notes were paid at maturity by the maker. 2d. That their deed of trust was security to the amount of thirty thousand dollars. 3d. That such security availed them to that extent for advances made after the judgments were docketed. 4th. That the notes secured by the first deed of trust were negotiable, and that Corse was a bona fide purchaser for valuable consideration without notice. Authorities as to the negotiability of the notes: The notes being printed, another signature above the printed line expresses the place of payment. English authorities: Sproule v. Legge, 2 Dowl. & R. 15; 1 Barn. & C. 16; 3 Starkie, 156; Hardy v. Woodroofe, 2 Starkie, 319; 1 Starkie, 468. American authorities: Tuckerman v. Hartwell, 3 Greenl. 147. As to who is a bona fide holder of negotiable paper: [Bank of Washington v. Triplett] 1 Pet. [26 U. S.] 31; 8 Conn. 505; 34 N. Y. 247; [Murray v. Lardner] 2 Wall. [69 U. S.] 110; 35 N. Y. 65; [Swift v. Tyson] 16 Pet. [41 U. S.] 1. Authorities as to Turnbull & Co.'s lien as against the judgments docketed in Alexandria county: Sherras v. Cary, 7 Cranch [11 U. S.] 34; U. S. v. Hore, 3 Cranch [7 U. S.] 73. Against it: 2 Barr [Pa. St.] 96; 13 Mich. 38; 3 Grant, Cas. 300; 17 Ohio, 371; 5 Johns. 326; 6 N. Y. 147.

NOTE. After the filing of the answer, and entering of a general replication thereto at a former term, the cause was at issue. Both parties so treated it, by taking depositions, and contesting the matters at issue before the commissioner. The result of proceedings before the commissioner was to show the defendant that an amended answer was necessary to enable him to make his defence. Leave to file such an answer was obtained from the court at the next regular term, without the defendant having been required to comply with the provisions of rule 60, making a notice to the complainant necessary. The cause was then, after more than a year's delay, subsequent to filing the amended answer, set for hearing, and at the hearing the complainant was allowed to file a general replication to the amended answer, nunc pro tunc, as a matter of form, and then the hearing was proceeded with. See Story, Eq. Pl. § 881.

Case No. 14,244.

TURNBULL et al. v. WEIR PLOW CO.

[6 Biss. 225; 1 Bal.. & A. 544; 7 O. G. 173; 7 Chi. Leg. News, 41.] [1]

Circuit Court, N. D. Illinois. Oct., 1874.

PATENTS—RECORD OF ASSIGNMENTS—SECOND ASSIGNMENT—CONFLICTING RIGHTS—CONSTRUCTION.

1. The object of the 11th section of the act of congress of 1836 [5 Stat. 121], requiring assignments of interests in patents to be recorded within three months, being for the protection of bona fide purchasers without notice of previous assignments, a conveyance by a patentee of a right under the patent is valid, as between the parties, without being recorded.

2. Where a patentee conveys all his right, title, and interest in the patent in a particular territory, and has previously parted with some interest under the patent in a portion of the same territory, the second assignment will be held to operate only upon the residuary interest of the patentee, after having made the previous assignment, even though the first assignment be not recorded until after the second.

[Applied in Regan Vapor-Engine Co. v. Pacific Gas-Engine Co., 47 Fed. 514.]

3. Where the patentee has any remaining interest in the patent upon which a second assignment can be said fairly to operate, and the second assignment purports to convey only his existing interest, it will not be construed as showing an intention on the part of the assignor to convey what he had previously conveyed.

4. Complainants, in a bill to enjoin the infringement of a patent and for an account, claim title under assignments from the patentee, executed in 1860, of the right under the patent for the counties of Warren and Henderson in Illinois. Defendant claims under an assignment from the patentee, executed in 1870, of all his right, title and interest in the patent in certain territory, including Illinois, which assignment was first recorded. *Held*, that the first assignment is operative, though not recorded until after the second, and that a plea to the bill setting up the second assignment in bar of complainant's right of action should be overruled.

[Distinguished in Regan Vapor-Engine Co. v. Pacific Gas-Engine Co., 1 C. C. A. 169, 49 Fed. 71.]

5. The provisions of the 36th section of the act of congress of 1870 [16 Stat. 203], with regard to the recording of assignments of patents, are substantially identical with those of the 11th section of the act of 1836, as construed by the courts.

This was a bill for an injunction to restrain the infringement of a patent for an improvement in cultivators, and for an account. Defendant filed a plea to a portion of the bill, and an answer to the residue. The plea was set down for hearing. The contents of the bill and of the plea are sufficiently stated in the opinion.

William Marshall, James L. High, and R. Mason, for complainants.

1. The true construction of the 11th section of the act of 1836, requiring assignments of patents to be recorded within three

[1] [Reported by Josiah H. Bissell, Esq., and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

months, is that the statute is not mandatory, but merely directory and for the protection of innocent purchasers without notice. Pitts v. Whitman [Case No. 11,196]; Brooks v. Byam [Id. 1,948]; Continental Windmill Co. v. Empire Windmill Co. [Id. 3,142]. If, therefore, the assignment to the subsequent purchaser purports to convey only a limited or special interest in the patent, as the assignment to Weir in this case, being in the nature of a quit-claim, it is itself notice to the assignee of all previous grants, against which he cannot protect himself by a prior record of his assignment. In other words, the patentee by his second grant conveys only the residuum of title, or residuary interest remaining in him after his prior grant, and the first assignment, though not recorded, will prevail as against the second. Ashcroft v. Walworth [Id. 580]. The assignee of a patent can claim no more title than his assignor could lawfully grant, and takes subject to the legal consequences of the patentee's previous acts. Pierson v. Eagle Screw Co [Id. 11,156]; McClurg v. Kingsland, 1 How. [42 U. S.] 202.

2. The same principle is to be applied here which governs in conveyances of real estate. The doctrine is well established, that a subsequent conveyance of real estate which does not purport to pass the entire fee, being limited in terms to such interest as grantor then has, operates only on his residuary title, after having given the former conveyance, even though the first conveyance be not recorded until after the second. Brown v. Jackson, 3 Wheat. [16 U. S.] 449; Hope v. Stone, 10 Minn. 141 [Gil. 114]; Marshall v. Roberts, 18 Minn. 405 [Gil. 365]; McNear v. McComber, 18 Iowa, 12; McConnel v. Reed, 4 Scam. 117; Butterfield v. Smith, 11 Ill. 485; Hamilton v. Doolittle, 37 Ill. 473. A purchaser of real estate by quit-claim is not a bona fide purchaser without notice. May v. LeClaire, 11 Wall. [78 U. S.] 217.

3. The act of 1870 can have no application, since complainant's rights were acquired long before its passage. That act, not being retrospective in its terms, cannot affect conveyances of patents made before its passage.

West & Bond, for defendants.

1. The assignments made in 1860, under which the complainants claim, were not recorded within three months as required by section 11, act of 1836, and hence are void as against Weir and his assigns, he being a subsequent bona fide purchaser and having duly recorded his assignment. The courts have held that under said section the assignment "must be recorded within the three months to defeat the right of a subsequent purchaser, without notice and for a valuable consideration. In order to guard against an outstanding title of over three months duration, the purchaser need only look to the records of the patent office." Gibson v. Cook [Case No. 5,393]; Brooks v. Byam [Id. 1,948]; Pitts v. Whitman [Id. 11,196].

2. The common law distinctions made between warrantee and quit-claim deeds of real estate ought not to be applied to the construction of assignments of patents; because they have not been made under the common law, but under acts of congress. See Act 1836, § 11; Act 1870, § 36. The act of 1836 provided that patents "shall be assignable by any instrument in writing." That of 1870 says, "by an instrument in writing." These acts make no distinction between different kinds of assignments, and do away with every formality. They must be in writing, and that is the only condition imposed.

3. The words "grant and convey," found in Weir's assignment, are not the usual words used in quit-claim deeds; they import more than mere words of quit-claim.

[4. Under registry acts, quitclaim deeds have been held effectual to convey lands, as against a prior unrecorded deed.

[5. Contemporary exposition and long-established usage under the statute should be considered. Assignments the same in form as that to Weir have been in general use for more than twenty years. See forms furnished by the patent office, under the authority of congress, as early as 1852, in use from that time to the present.

[6. The effect of holding that assignments like this one to Weir only operate as a quitclaim to convey the actual residuary interest of the assignor should be considered. Interests of great magnitude will be in jeopardy, and a door will be opened for great frauds.] [2]

7. Under the acts of congress, the decisions cited and the general practice, this assignment to Weir ought to be held to convey, not simply the actual residuary interest of the patentee without regard to the records, but all the right, title, and interest which he had as shown by the records.

8. The act of July, 1870, section 36, expressly provides that assignments of patents shall be void as against a subsequent purchaser without notice, unless recorded within three months from the date thereof. This act applies to all assignments, whether executed before or after its passage. Weir's assignment was given and recorded after the passage of this act, and several months before complainant's assignments were recorded.

DRUMMOND, Circuit Judge. The question in this case arises upon the plea of the defendant, from which, and from the bill of complaint, the following facts appear: A patent was issued to one McQuiston on the 18th of October, 1859, for an improvement

[2] [From 7 O. G. 173.]

in cultivators [No. 25,843], and re-issued on the 16th of May, 1871 [No. 4,383]. Both parties claim under this patent. The defendant claims under a conveyance from William S. Weir, who purchased from the patentee on the 18th of November, 1870, and the assignment of purchase was recorded on the 5th of December, 1870. The terms of this assignment were that the patentee granted and conveyed to William S. Weir, through whom the defendant claims, "all my right, title, and interest in and to the said letters patent in the following described territory" (within which we may concede, for the purposes of the case, was included the state of Illinois), "* * * as fully and entirely as the same would have been held and enjoyed by me if this assignment had not been made."

On the 17th and 26th of April, 1860, the patentee assigned to the parties through whom the plaintiffs claim, the exclusive right to make and to sell all machines and rights under the patent, in the territory comprising the counties of Warren and Henderson, in Illinois. These assignments were not recorded in the patent office at the time that Weir's assignment was recorded, and the question presented by defendant's plea is as to the effect of the assignment to Weir, recorded in December, 1870, as against the assignments through which plaintiffs claim, and which were not then recorded.

I think there can be no question but that, under the 11th section of the act of congress of 1836, as between the parties, the assignment by the patentee of the right under the patent would be valid without recording. In other words, the recording did not give it effect as between them. The only object of the law, I think, in requiring the assignment to be recorded, was to protect bona fide purchasers without notice of prior assignment of a right under the patent. It is contended, on the part of the defendant, that as it has been the practice for many years for rights under a patent to be conveyed by an assignment, the language of which is, "all the right, title, and interest" of the patentee in the patent, it substantially amounts to a warranty on the part of the patentee that he conveys by such language all the right which he ever had under the patent, and therefore, that when this language was used in the assignment to Weir in October, 1859, it meant all the interest which the patent originally conveyed to the patentee within the territory named. Of course the controversy turns upon what is the true construction of this assignment. Without deciding what might be the effect of an assignment of all the right, title, and interest of the patentee in a particular county, where there was no residuary interest left in the patentee, I am of the opinion, notwithstanding this alleged uniform practice as to assignments, that the true construction of such an assignment is, that where there is a residuary interest left in the assignor under the patent, within the territory mentioned, it must be construed as only conveying that residuary interest. I mean, of course, where he has previously parted with some interest under the patent in a portion of the territory. For example, in this case, so far as we know from the history of the case and what is before us in the pleadings, the patentee had conveyed all his interest in the patent in Henderson and Warren counties in 1860, but he had left and had a right to convey all his remaining interest in the state of Illinois. And when he stated that he conveyed all the interest which he had under the patent in the state of Illinois, and that the assignment was to vest in the assignee all his right under the patent in the state of Illinois as fully and entirely as the same would have been held and enjoyed by him if the assignment had not been made, we must construe it as not indicating on his part an intention to convey what he had previously conveyed to other parties, viz.: his rights under the patent in the counties of Warren and Henderson. Otherwise we must infer that he was perpetrating a fraud on the assignee by the assignment of 1870.

The question is, what is the legal effect of the language used, or what did he mean? We have nothing to guide us except the language of the contract. Did he intend, and is it necessarily the legal construction of that contract from the language used, that he intended to convey, in November, 1870, what he had previously conveyed in April, 1860? If, as I have already intimated, there was nothing on which the conveyance of 1870 could operate, then a different question would arise. But the whole state of Illinois, except the counties of Henderson and Warren, was left, upon which the conveyance could take effect. And I think that, looking simply to the contract, notwithstanding the practice which is said to have grown up under the law as to the form of these assignments, we must hold that where there was anything upon which the assignment could be said fairly to operate, we cannot construe it as showing an intention on the part of the assignor to convey what he had previously conveyed. In other words, we will not infer from language such as this, and in the absence of any proof upon the subject, that the patentee intended a fraud upon his assignee.

This is the general rule as applicable to conveyances of real estate. The question always is, did the person intend to convey,—and is that the true meaning of the language used in the instrument,—the same property and the same right that he had previously conveyed to other parties? If he did, and if that is the necessary construction of the language, then it may be fairly said that the recording law should operate upon it, as well in the case of the conveyance of lands, as the assignment of rights under a patent. But I think the result of the authorities as

to the conveyance of real estate is, that where there has been a conveyance of property which is unrecorded, and there is a conveyance afterwards of the property which is recorded, and there is anything upon which the second conveyance can operate, where it purports to transfer simply his right and title, it does not cut off the prior unrecorded deed. Perhaps the authorities go further and hold, in the case of real estate—at least such seems to be the intimation of the supreme court of the United States—that a mere quit-claim of the right and title of the grantor will not, per se, operate as against a prior unrecorded deed, which purports to convey the property.

The act of 1836 declared that a patent should be assignable, either as to the whole interest or any undivided part thereof, by any instrument in writing; and that the assignment should be recorded in the patent office within three months from the execution thereof. Now the language of the 11th section of the act of 1836, as construed by the courts, is not essentially different from the language of the 36th section of the act of 1870. The courts have construed the assignment, where it was not recorded, to be void as against parties who held by the subsequent assignment purporting to transfer, when recorded and taken in good faith, and without notice of the prior assignment or conveyance. The language of the 36th section of the act of 1870 is, that "said assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice, unless it is recorded in the patent office within three months from the date thereof." I do not understand that this language is substantially different from that of the 11th section of the act of 1836, as construed by the courts, so that I hold that we cannot construe the language of the assignment made in November, 1870, to Weir, under whom the defendant claims, as intending to convey the right and title under the patent within the counties of Warren and Henderson, which the patentee in 1860 had conveyed to another party, through whom the plaintiffs claim. The result therefore, is, that the assignment in 1860 is operative. The plea of defendant is therefore overruled.

[For another case involving this patent, see Turnbull v. Weir Plow Co., 14 Fed. 108.]

Case No. 14,245.

Ex parte TURNER.

[3 Wall. Jr., 258;[1] 20 Leg. Int. 4.]

Circuit Court, D. New Jersey. Oct. Term, 1858

REMOVAL OF CAUSES — MANDAMUS FOR REMOVAL.

1. In ejectment, under the now usual American form, in which the fictitious lease, &c., is abolished,—where the tenant in possession, who has been served as defendant, does not fall within the description of persons authorized to remove a case from the state courts to the federal, but the landlord who has not been made a party does so fall, such landlord cannot by any means that, under existing laws, can be devised, remove the case from the state court into the federal. He can get into the suit at all only by appearing voluntarily and taking defence, and when he does this he connects himself inseparably with his incapable tenant, and becomes, himself, incapable. The tenant in possession being, if sued and served, a proper and necessary party, the landlord by appearing and taking defence (which he may do and become dominus litis), cannot yet have this tenant struck off the record, and so, being now alone, exercise the right which if he had been, originally, the only defendant, he might have exercised: nor yet can he sever himself from his tenant, leaving the tenant still on the record and in state jurisdiction, while he, the landlord, comes himself and has the title tried in a federal court.

[Cited in Ex parte Girard, Case No. 5,457.]

2. If tenants in common, some of whom belong to a state in which the suit is brought, while others do not so belong, sue a party who does not so belong, such defendant it seems, cannot remove the case at all. He cannot remove it for the whole land sued for, because each of the parties suing is not a citizen of the state in which the suit is brought; and he cannot remove it for the parts claimed by those of the plaintiffs who are such citizens, because the federal court will not thus divide an action, not yet before it, into parts, for the sake of obtaining jurisdiction over one of them, nor can its process be so framed as to order a state court to send in to the federal court, a fraction only of a cause pending on the lists.

3. Whether a mandamus may issue from the circuit court to the state courts to compel it to send a cause from its jurisdiction into the federal? the point raised but not decided. No objection to such power, however, being taken at the bar.

[Cited in Stones v. Sargent, 129 Mass. 506.]

A number of persons, citizens of Connecticut, New York, Ohio and New Jersey, claiming undivided portions of a tract of land in the last named state, had brought ejectment against Boylan in a state court of New Jersey. The suit was not in the old English and fictitious form, but in the way now allowed in several states, including New Jersey, by which a writ in the name of the real plaintiff is issued against the person in possession, and the land being described with more or less precision, is claimed by the party who pretends to own it. Turner, a citizen of Ohio, who asserted ownership of the land in himself and against the parties claiming it as plaintiffs, applied to the state court of New Jersey, to be admitted to defend as landlord, showing that Boylan held under a lease from him; and alleging that this Boylan refused to defend the suit. He prayed leave, also, to be allowed to defend "separately," and that the cause might be removed under the 12th section of the judiciary act of 1789 [1 Stat. 79] to the circuit court of the United States, "so far as regards the parts claimed by such of the plaintiffs as are citizens of New Jersey." The state court granted him leave to appear and defend, but not "separately;" and refused to certify the case or any portion thereof to this court. On a motion now made by Turner for a mandamus to the state court to

[1] [Reported by John William Wallace, Esq.]

remove the action here, the question was whether, under the circumstances stated, it was the duty of that court to order a removal. The question depended on the 12th section of the act above mentioned, which enacts, "that if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state," it may be removed into the circuit court of the United States.

GRIER, Circuit Justice. The power of this court to issue a mandamus to a state court, where it has refused to certify a case under the 12th section of the judiciary act, has not here, before us, been questioned. But as such process is not specially authorized by that act, and as I am not aware of any authoritative decision of any court of the United States on the subject, I need neither affirm nor deny the power of the court to issue it.

Although the legislature of New Jersey has demolished the scaffolding of fictions formerly used by it in actions of ejectment, and has simplified the process and pleadings, this has not changed any of the principles of law which govern the action. The lessor of the imaginary plaintiff under the old form, is made the formal party plaintiff, and the tenant in possession is now served directly with process claiming the possession of the premises in question, instead of receiving notice from the fictitious casual ejector, and a copy of the declaration. As before, the lessor or reversioner under whom the tenant in possession claims title, is permitted to make himself a party, and assume the defence of their common title. But though he may thus practically become the dominus litis, it is still but as a co-defendant. The tenant in possession is still a necessary party to the action. He is the actual trespasser of whom the plaintiff demands damages and judgment for the possession; the landlord cannot surrender his tenant's rights, nor can the tenant collude with the plaintiff to oust his landlord. Neither can the refusal of the tenant to make a defence affect the case, and justify the court in expunging his name from the record without the consent of the plaintiff. The landlord may enter a plea for him and defend his title, but cannot sever him from the suit. If the plaintiff should recover, he is entitled to have a judgment and writ of possession against the tenant in possession. The tenant is therefore a proper and necessary party in an ejectment; not a naked trustee; not the nominal, casual ejector, but the actual party in possession, who cannot withdraw from the suit without consent both of the plaintiff and his co-defendant. If he be an alien, or a citizen of a different state, he may exercise his right to remove the case, under the judiciary act, to the circuit court of the United States, before his landlord becomes co-defendant. The fact that his lessor or landlord may be a citizen of the same state, cannot affect the tenant's right to remove if such landlord be not made a party co-defendant on the record. The lessor or reversioner has a right to have himself made a co-defendant, but it is not his duty. He may defend the suit for his tenant, with his tenant's consent, without putting his name on the record. He is not a necessary party, nor can the plaintiff make him such without his consent, by including him in his writ, where he is not in actual possession of the land claimed.

This ejectment having been instituted by a number of tenants in common, claiming undivided portions of the land, they might, under the old form, have made their several leases to John Doe, and in his name have recovered possession of the whole, or of such undivided part thereof as they had shown title to. Under the new form, these tenants in common may join, and each recover according to his title. The plaintiffs are citizens of four different states, but Boylan, against whom this suit was "commenced," is a citizen of New Jersey. He sustains neither of the characters required by the act to give this court jurisdiction—he is neither an "alien" nor a citizen of another state sued by a citizen of New Jersey. As we have shown, he is the proper and necessary party defendant in the suit of ejectment. [He is not a mere formal party, not a naked trustee, not the nominal casual ejector, but the trespasser from whom the plaintiffs demand damages; the actual tenant in possession from whom the plaintiffs seek to recover the possession.][2] Turner, the landlord, is permitted by the grace of the court and the law, to become a co-defendant, and defend the title for Boylan and himself. If Boylan (the tenant) will not defend, the plaintiff might be entitled to judgment against him, and a writ of possession. But, as we have said, the court will not permit him, either to get off the record as a party, or thus to trifle with the possession which he is bound to retain for his landlord. Turner may enter the plea of "not guilty" for both, and contest the plaintiff's claim: but not being able to sever himself from his co-defendant, who is in possession, he cannot remove the case to this court, with or without the consent of Boylan. [It is settled that where there is more than one party plaintiff or defendant, each must be competent to sue or to be sued in the court of the United States when the suit is brought. It is clear, therefore, that this case is not within the provisions of the act referred to. And such has heretofore been the decision in this circuit.][2] Beardsley v. Torrey [Case No. 1,190] is in point. And see Ex parte Girard [Id. 5,457].

Objection also exists in the co-tenancy of the plaintiffs, though some are of New Jersey, even if we should assume Turner, who is of Ohio, to be the sole party defendant, and

[2] [From 20 Leg. Int. 4.]

Boylan but a nominal or formal party, against whom no judgment or decree is sought. Tenants in common may join in one action; and whatever may be the power of the court below to compel them to sever, for sufficient cause shown, a power about which I speak affirmatively in the next case. Ex parte Girard [supra]. I can find no authority for this court to divide an action not yet before it, into parts, for the sake of obtaining jurisdiction over one of them, nor do I know how it could command the court to send us up a fraction of a cause pending on its lists. Mandamus refused.

Case No. 14,246.

Ex parte TURNER.

Ex parte MAYER.

[3 Woods, 603.] [1]

Circuit Court, M. D. Alabama. Feb., 1879.

HABEAS CORPUS — ACT DONE UNDER PROCESS OF FEDERAL COURT—CONTEMPT—CONFLICTING AUTHORITY.

1. When a person is in custody for an act done or omitted, in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof, he is entitled to be discharged on habeas corpus, no matter by what authority he is restrained of his liberty, nor how regular and formal the proceedings against him may be.

2. The fact that he is in custody, by virtue of the judgment of a state court, for contempt, forms no exception to this rule

3. When poll-books, ballots and other papers relating to an election have, by virtue of the process of a court of the United States, come into its possession, where they are retained to be used as evidence in prosecutions pending in that court, they cannot be taken from its custody by the order of a state court, on the ground that the law of the state places them in the keeping of the inspector of election.

4. Both the state and federal courts have the power to require the production of ballots, poll-books and other papers relating to an election, when they are necessary and proper evidence in prosecutions for offenses of which those courts respectively have jurisdiction, notwithstanding the fact that the state law places their custody with the election inspector.

5. The court which first obtains, by its process, possession of papers and documents which are proper evidence in a prosecution pending in such court, has the right to retain them until they have been used in evidence, and no other court of concurrent jurisdiction can, without its leave, take them from its custody, or require its officers to produce them before its grand jury.

6. Officers of a court of the United States, who are arrested by a state court for contempt, in refusing to obey such a requirement, are entitled to be discharged on habeas corpus.

At law.

L. W. Day, Asst. U. S. Atty., and Robert McFarland, for petitioners.

John D. Brandon and Paul L. Jones, contra.

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

BRUCE, District Judge. These cases are, by agreement, heard together. The same legal principles apply and control in each. The facts of the cases will appear in the opinion. The petitioner, George Turner, who, it appears from the evidence, was at and before the time of his arrest and imprisonment, and still is, marshal of the United States for the Southern and Middle districts of Alabama, and Charles E. Mayer, who was at and before the time of his arrest, and still is, district attorney of the United States for the Northern and Middle districts of Alabama, applied each for the writ of habeas corpus, under section No. 753 of the Revised Statutes of the United States. They both allege, in their applications for the writ, that they were illegally restrained of their liberty by one George Mason, sheriff of Dallas county, Alabama, under an order and judgment of the city court of Selma, adjudging them to be in contempt of that court, for an act done or omitted under a law of the United States, and an order, process and decree of a court thereof. The sheriff of Dallas county, Alabama, brought the bodies of George Turner and Charles E. Mayer before me, at Huntsville, Ala., in obedience to the writ, and stated, as his return thereto, as follows: "I am the sheriff of the said county, and, as such, the keeper of said jail therein, and, as such sheriff, the said George Turner is detained by me, and that the cause of his detainure is as follows, to wit: The city court of Selma, held in and for said county and state, then being in session, adjudged the said George Turner to be guilty of contempt of said court, and, for such contempt, ordered him to be imprisoned in the jail of said county for five days, and to pay a fine of fifty dollars and the costs, and to remain in jail until the said fine and costs be paid, and until certain papers therein were produced before said court, and further ordered me, at the expiration of five days, to bring said George Turner before said court, on the 22d instant, for further orders in that behalf, and, under the orders of said court, the said George Turner was committed to the jail of said county, and, therefore, to my custody as such sheriff, all which will more fully appear by a transcript of the record and proceedings of said city court of Selma, hereto annexed, and marked 'Exhibit A,' and made a part of this return." The return of the sheriff, in the case of Charles E. Mayer, is similar to that in the case of Turner, except that there was no judgment of commitment as to time.

The question is, do these cases, as made by the evidence on this hearing, fall within section 753 of the Revised Statutes of the United States? The words of the section are: "The writ of habeas corpus shall in no matter extend to a prisoner in jail, unless when he is in custody under or by color of the authority of the United States, or

is committed for trial before some court thereof, or if in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof." The question is not by what authority these petitioners are restrained of their liberty and detained in custody, but whether were they restrained of their liberty by any authority whatever, for an act done or committed in pursuance of a law of the United States, or by an order, process or decree of a court or judge thereof. Nor is the question which I am to consider on this hearing, whether the proceedings in the city court of Selma against the petitioners, for an alleged contempt of the order and process of the court, were regular or irregular, or whether they were free from error, but the question is: Are these petitioners restrained of their liberty and detained in custody for an act done or omitted in pursuance of a law of the United States, or an order, process or decree of a court or judge thereof. If it be true that they are so restrained, no matter by what authority, or by what formality or solemnity of judgment, they must be discharged. It is clear that this section 753 of the Revised Statutes of the United States, was designed for the protection of officers of the United States, for acts done by them or omitted in the execution of the laws of the United States, and in obedience to the orders and decrees of the courts thereof. The congress which enacted this law, which was approved March 2, 1833 [4 Stat. 632], recognized it as at least possible that officers of the United States, for acts done or omitted in the execution of the laws of the United States, and for acts done or omitted in obedience to the orders and decrees of its courts, might be arrested and deprived of their liberty by state authority, and this statute provides a remedy for such a state of things.

What, then, were the acts done, or omitted to be done, by these officers, which resulted in their arrest and detention by the order of the city court of Selma? That will best appear by a reference to the order made by the city court of Selma, dated August 9, 1879, which seems to be the initiatory step to the proceedings which were subsequently taken, and which resulted, as the record shows, in a judgment of contempt and the arrest of these officers. The order is in these words: "On application of the grand jury, it is ordered by the court, that the subpœnas duces tecum be forthwith issued by the clerk and register of this court, to Charles E. Mayer, George Turner, J. W. Dimmick and W. J. Bibb, to be and appear before the grand jury of this court, instanter, and that they bring with them all ballot-boxes, poll-lists, ballots, inspectors' certificates, inspectors' returns, tally-sheets, statements, and all other papers and things pertaining or relating to the election held in the county of Dallas, in the state of Alabama, on the 5th day of November, A. D. 1878, for representatives in congress for the Fourth congressional district of Alabama. (Signed) Jno. Haralson, Judge, etc. January 9, 1879." The county of Dallas is within the Middle district of Alabama, and, therefore, within the territorial jurisdiction of the circuit court of the United States for that district.

It appears from the record that certain ballot-boxes, ballots, poll-lists and inspectors' returns and other papers pertaining to the election held in Dallas county, Alabama, on the 5th day of November, 1878, were produced before the grand jury of the circuit court of the United States for the Middle district of Alabama, by the ordinary process of that court at the November term, 1878, of said court held at Montgomery. It is said that the custodians of these boxes, ballots, poll-lists, inspectors' returns and other papers, under the law of Alabama, had no right to give them up to the custody of the circuit court of the United States, and that the custody of that court is illegal and wrongful. If it be correct to say that no authority was competent to take the boxes and papers from the custody provided by the law of Alabama, and if that be the true construction of section 288 of the Code of Alabama, then by what right does the city court of Selma require the production of these papers by its process of subpœna duces tecum? But it is not important on this hearing to inquire how the ballot-boxes, ballots and papers came into the custody and control of the circuit court of the United States. The fact is they did come into such control, and that by the ordinary process of the court, and being there by means of such process, they cannot be wrested from it in the manner attempted. But it cannot be maintained that the custody of the ballots, poll-lists and papers which, by direction of the state law, is given to one of the inspectors who acted as such at the poll of election, places these papers beyond the reach and process of courts of justice, state or national, which are clothed with power and jurisdiction to indict and try offenders against suffrage and the elective franchise. There are a number of penal provisions in the Code of Alabama for the protection of suffrage; they are found in chapter 8, §§ 4279 to 4994, inclusive, and it will not be maintained that the courts of Alabama have not power to require the production of these ballots and papers when they are necessary and proper evidence in prosecutions under the law of which the courts of the state have jurisdiction. The election in question was for a representative in congress, and article 1, section 4, of the constitution of the United States provides, that "times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the congress may, at any time by law, make

or alter such regulations, except as to the places of choosing senators." The congress of the United States has provided a body of penal laws for the punishment of persons who may be convicted of crimes against the elective franchise and civil rights of citizens; they are found in sections 5506 to 5532, inclusive, of the Revised Statutes of the United States, and the circuit courts of the United States are invested with original jurisdiction to try offenders against these laws. We, then, see that the circuit court of the United States for the Middle district of Alabama has power and jurisdiction to try persons charged with crimes against suffrage at the election held for member of congress on the 5th day of November, 1878, in the county of Dallas, state of Alabama. If it has such power and jurisdiction under the law, then it has the right and power to use its process to obtain the evidence, if it can be obtained, by which its jurisdiction can be made effective. If by means of its process it obtains documents and papers which are proper matters of evidence in any suit then pending, its jurisdiction attaches at once to such documents and papers, and no court of concurrent jurisdiction can by its process reach them. If it is otherwise, then one court could destroy the jurisdiction of another court of concurrent jurisdiction, by wresting from it the means by which that jurisdiction could be made effective. This is a case when the state courts and the federal courts have concurrent jurisdiction over the same subject, and it is a principle of law well settled that when the jurisdiction of a court, and the right of a plaintiff to prosecute his suit therein, have once attached, that right cannot be arrested or taken away by proceedings in another court, unless it be some court which may have a direct supremacy or control over the court where process has first taken possession, or some superior jurisdiction in the premises. Freeman v. Howe, 24 How. [65 U. S.] 450; Buck v. Colbath, 3 Wall. [70 U. S.] 334; Peck v. Jenness, 7 How. [48 U. S.] 612; New Orleans v. Steamship Co., 20 Wall. [87 U. S.] 387. In the last case cited, the supreme court of the United States uses this language: "The circuit court, having first acquired possession of the original case, was entitled to hold it exclusively until the same was finally disposed of. It was unwarranted in law, and grossly disrespectful to the circuit court, to invoke the interposition of the state court, as to anything within the scope of the litigation already pending in the federal court." The circuit court of the United States acquired jurisdiction of the subject matter at the November term, 1878, of said court. The papers, matters and things in question here were used in evidence before the grand jury at that term of the court. True bills were found by the grand jury, at that term, against various parties, for offenses alleged to have been committed in the county of Dallas, state of Alabama, by means of fraudulent returns touching the election held in said county on the 5th day of November, 1878, and these cases are still pending and undetermined in said court.

It results from this, all of which is shown by the record and evidence upon this hearing, that the papers, matters and things in question came into the custody, control and jurisdiction of the circuit court of the United States for the Middle district of Alabama, at the November term, 1878, of said court; that they are still in such jurisdiction, to be used in evidence in causes still pending in said court. And such being the fact, they are subject to the control and jurisdiction of no other court which has only concurrent jurisdiction of the same subject matter. The jurisdiction, then, of the circuit court of the United States over the subject matter was prior in point of time, and it was neither illegal nor unlawful, but such as is authorized by the laws of congress. If this position be correct, then it was the duty of that court to defend its jurisdiction and protect it from invasion.

The order of the circuit court of the United States, made on the 13th day of January, 1879, at an adjourned term of said court, as the evidence shows, has been referred to as the source of the jurisdiction of the court over the papers in question. But that order did not, and could not, create jurisdiction, and was only directory to the officer, that the jurisdiction already acquired might be made more secure and inviolate against invasion. Will it be seriously argued that the United States marshal, at the command and order of a court of another and different jurisdiction, should despoil and destroy the jurisdiction of the court of which he is a sworn officer? Had he obeyed the order of the city court of Selma, and removed the papers, matters and things beyond and out of the jurisdiction of the circuit court of the United States for the Middle district of Alabama, without the order and authority of that court, he would have made himself justly liable to proceedings for contempt of the court, the jurisdiction of which was thus violated. The cases at bar are, to my mind, clearly within the letter and spirit of section 753 of the Revised Statutes, cited above. The authorities cited in argument are in exposition of this statute, and sustain this view of the subject. Ex parte Jenkins [Case No. 7,259]. Ex parte Robinson [Id. 11,935]. The conclusion is, that these officers were restrained of their liberty for an act omitted to be done in pursuance of a law of the United States, and an order, process and decree thereof.

It is unnecessary to go further, but I will notice one or two points made by the counsel for the state, in opposition to the discharge of the petitioners. It is insisted, and much authority is read to show, that the right of punishing for contempts, by summary conviction, is inherent in all courts of justice,

and that every court is the judge whether a contempt has been committed against it. That proposition is not controverted, but it is equally well settled, that if a court, assuming to pronounce a judgment of contempt, or any other judgment, has no jurisdiction, the judgment is coram non judice and void. The question here is, did the city court of Selma have jurisdiction over the subject matter and over the parties, at the time it assumed to pronounce the judgment? If it had no jurisdiction of the subject matter, to wit, the papers, matters and things described in the subpœna, it could not require their production at the hands of any one. It does not clearly appear, from the record, whether this judgment of contempt was based solely upon the failure of the petitioners to produce the papers, matters and things in question, though the affidavit of Turner, to the effect that he was not required to go before the grand jury, and no questions were asked him touching any violation of law, in his knowledge, within the jurisdiction of the city court of Selma, indicates that the judgment of contempt was based solely upon the failure to produce the papers, matters and things in question, and not upon the failure to appear instanter in person, in response to the subpœna. The subpœnas are for George Turner and Charles E. Mayer, and these gentlemen, like other citizens of the state of Alabama, owe duties of obedience to her laws, and the process of her courts, and the fact that they are officers of the United States will not, and does not, absolve them from the duties which they owe as citizens of the state of Alabama. It cannot be maintained, however, that the duties which they owe, of obedience to the process of the state courts, overbears and overrides their duties as officers of the United States, required, as they are by law, to attend upon the sessions of the courts of the United States, held in the district of their appointments. It appears, from the record of the proceedings of the city court of Selma, that these officers made answer in writing, under oath, to the subpœna served upon them, and informed the court of the official positions which they respectively held, and stated the facts which prevented their attendance in person and instanter upon the city court of Selma, and it appears, from the record, that these returns were before the court when judgment of contempt was pronounced against them. The facts stated by them in their respective answers are not traversed, and it will hardly be contended that the duty of these officers to attend instanter and in person upon the session of the city court of Selma is of higher obligation than their duty, under the laws of the United States, to attend upon the sessions of the courts of the United States, of which they are officers. This is a question of vital importance; it touches the very foundation of the powers and jurisdiction of the federal courts.

Courts cannot exist without officers to conduct their business, serve their process and execute their mandates. If officers of the courts of the United States can be arrested and imprisoned by process from state courts, for alleged violation of state law and authority, for acts done or omitted by them in the execution of the laws of the United States and the orders of her courts, and there is no remedy, then the courts of the United States are liable to constant obstruction in the exercise of their jurisdiction and powers, and their usefulness and efficiency, if not their very existence, is imperiled. It is true that the jurisdiction of the United States is limited and statutory, but it is also true, that wherever their jurisdiction attaches it is within the scope of that jurisdiction supreme and paramount. If that jurisdiction is invaded, or if the officers of the courts are interfered with in the discharge of their duties, the means are not wanting, nor their potentiality doubtful, to vindicate the just authority of the court in the administration of the laws of the United States.

The result of these views is, that the petitioners, George Turner and Charles E. Mayer, must be discharged from custody, and it is so ordered.

Case No. 14,247.

In re TURNER.

[1 Abb. U. S. 84; [1] Chase, 157; 6 Int. Rev. Rec. 147; 1 Am. Law T. Rep. U. S. Cts. 7.]

Circuit Court, D. Maryland. Oct. 13, 1867.

CONSTITUTIONAL LAW—CIVIL RIGHTS BILL—APPRENTICESHIP—NEGRO.

1. An indenture purporting to bind a child of negro descent apprentice, which does not contain important provisions for the security and benefit of the apprentice, which are required by the general laws of the state in indentures of white apprentices, is void, under section 1 of the civil rights bill of 1866 [14 Stat. 27].

[Cited in Slaughter House Cases, 16 Wall. (83 U. S.) 69.]

2. The civil rights bill of 1866 is constitutional, and applies to all conditions prohibited by it, whether originating in transactions before or since its enactment.

3. Colored persons, equally with white persons, are citizens of the United States. So *held*, of one who was formerly held as a slave, and was emancipated in the general abolition of slavery throughout the state, accomplished by a new state constitution.

Hearing upon a writ of habeas corpus. The petition in this case was preferred in behalf of Elizabeth Turner, by her next friend, Charles Henry Minoky. It alleged that Elizabeth Turner was the daughter of Elizabeth Minoky, formerly Elizabeth Turner; and that she was restrained of her liberty, and held in custody by Philemon T. Hambleton, of Saint Michael's, Talbot county, Maryland, in violation of the constitu-

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

tion and laws of the United States. The petition further showed that this restraint was claimed and exercised by virtue of certain alleged indentures of apprenticeship; but alleged that these indentures were not made in accordance with the laws of the state of Maryland, as applicable to the binding of white children; and, in particular, that at the time of making the alleged indentures of apprenticeship the mother of the petitioner was able, ready, and willing to support her; that the petitioner was not summoned to appear before the orphans' court of Talbot county on the day of making the said alleged indentures of apprenticeship; and that Hambleton, as master, was not bound by the alleged indentures of apprenticeship to give the petitioner any education, in reading, writing, and arithmetic; all of which requirements are made necessary by the laws of the state of Maryland in the case of the binding of white children. [The petition was filed September 20, and endorsed "Writ granted as prayed, returnable October 15, 1867." Signed, S. P. Chase, Chief Justice of the United States.] [2]

The respondent, P. T. Hambleton, made the following return to the writ: "In obedience to the command of the within writ, I herewith produce the body of Elizabeth Turner, together with a copy of the indenture of apprenticeship, showing the cause of her capture and detention, and respectfully await the action of your honor." The indentures of apprenticeship filed by the respondent, provided that Elizabeth Turner shall be taught the art or calling of a house servant; and that the master shall provide said apprentice with food, clothing, lodging, and other necessaries, and shall pay to Betsey Turner, her mother, ten dollars at the end of her sixteenth year, twelve dollars and fifty cents at another period, and fifteen dollars to the girl at the end of her term of service, on the 18th of October, 1874, she having been born October 18, 1856. They recited that the child was apprenticed "by the consent of her mother, present in court," on November 3, 1864. They provided that in the event of the death of her mother the wages should be paid to the child. It further appeared, on the argument, that the child and her mother were formerly held as his slaves by the respondent. They were emancipated by the new constitution of the state, which took effect November 1, 1864.

[Slavery had existed by the common law of Maryland since its first settlement, and under its later state constitutions, the general assembly had been prohibited from passing laws interfering with it. So the laws and institutions of that state continued until 1864, when a convention was held to frame a new constitution, which was done. A clause in the new instrument abolished slavery in Maryland, and prohibited its future existence or introduction. This constitution was submitted to the people for ratification by popular vote, which being had, it appeared that a majority of the votes cast at the regular voting places was against the adoption of it, but by counting certain votes returned as cast in their camps, some of which were not in Maryland, by certain Maryland troops then engaged in the armies of the United States in the Civil War a majority of votes appeared to have been in favor of the ratification of it. The constitution was thereupon declared by proclamation of the then governor to have been adopted, and was put in operation.] [3]

The child was bound apprentice to the respondent, November 3, 1864, two days after she became free; and the indentures were made in pursuance of a general law of the state regulating the apprenticing of children previously held as slaves, and differing in many provisions from the law governing the apprenticing of white children.

Mr. Stockbridge and Nathan M. Pusey, for petitioner.

[4] [The law of congress, called the "Civil Rights Bill," was passed since the child was indentured (April 9, 1866), and everybody told him that the law did not interfere with this case.

[Mr. Stockbridge, for the petitioner, said the return made to the writ does not traverse any of the allegations of the petition. It was manifest upon the face of the paper that the allegations were true, and that the law of the state has not been complied with. The petition and return disposes of the whole case.

[The Chief Justice: State the points upon which you claim a discharge.

[Mr. Stockbridge then read the law relating to white apprentices, to show that its various provisions had not been complied with in the indentures in this case. Under the law of congress, he said, there can be no distinction between blacks and whites, and therefore the law relating to white apprentices only is applicable. The chief justice said he desired that the whole case should be fully discussed, and would prefer that the respondent should be represented by counsel. The questions in the case, said the chief justice, are: Is this indenture in conformity with the general law of the state? Is said general law consistent with the act of congress to protect the colored people in their civil rights? Does said act of congress apply to this case? Was the passage of said act a constitutional exercise of the power of congress? The court inquired of the respondent if he desired to retain the girl, and, if so, if he had not better procure counsel?

[The respondent said he wished to retain the girl, but he did not feel sufficient inter-

[2] [From 6 Int. Rev. Rec. 147.]

[3] [From Chase, 157.]

[4] [From 6 Int. Rev. Rec. 147.]

est in the case to spend any money on it. He was satisfied to leave the case with the court. The counsel for petitioner then proceeded to argue the questions in the case. Mr. Stockbridge said the sort of apprenticeship adopted in Maryland was an evasion of the constitutional amendment abolishing slavery and involuntary servitude, and the constitution by its own powers executes itself. The civil rights bill was passed to remedy existing wrongs, and was designed to extinguish all existing institutions, and divers existing rights to hold persons to slavery in any form. Although the indentures were made in 1864, and the law was passed in 1866, it was retroactive to that extent that it would reach this case. It was not a law impairing the obligation of contracts, although there is no prohibition upon the power of congress to pass such a law. Congress is itself the judge of its power to pass such a law, and is alone the judge of the existing necessity for it. The decision of this case would affect the condition of thousands of colored minors whose term of slavery had been protracted from five to ten years by this illegal mode of apprenticing them. He quoted Chief Justice Marshall, in McCulloch v. Maryland, 4 Wheat. [17 U. S.] 316, on the powers of congress, and other authorities, and discussed other points of the case.] [4]

The respondent appeared on the hearing, in person, and stated that he desired simply to submit the case to the judgment of the court. The chief justice said that the questions in the case were so grave and important that he should prefer to be advised by the argument of counsel on the part of the claimant. He would adjourn the court until next day at nine o'clock, in order to give the claimant or any person interested in the decision of the case an opportunity to appear. If no person appeared he would then dispose of the case. The child was retained in the custody of the court until the next day, when the following opinion was filed:

CHASE, Circuit Justice. The petitioner in this case seeks relief from restraint and detention by Philemon T. Hambleton, of Talbot county, in Maryland, in alleged contravention of the constitution and laws of the United States. The facts, as they appear from the return made by Mr. Hambleton to the writ, and by his verbal statement made in court, and admitted as part of the return, are substantially as follows:

The petitioner, Elizabeth Turner, a young person of color, and her mother, were, prior to the adoption of the Maryland constitution of 1864, slaves of the respondent. That constitution went into operation on November 1, 1864, and prohibited slavery. Almost immediately thereafter many of the freed people of Talbot county were collected together under some local authority, the nature of which does not clearly appear, and the younger persons were bound as apprentices, usually, if not always, to their late masters. Among others, Elizabeth, the petitioner, was indentured to Hambleton by an indenture dated November 3, two days after the new constitution went into operation.

Upon comparing the terms of this indenture (which is claimed to have been executed under the laws of Maryland relating to negro apprentices) with those required by the law of Maryland in the indentures for the apprenticeship of white persons, the variance is manifest. The petitioner, under this indenture, is not entitled to any education; a white apprentice must be taught reading, writing, and arithmetic. The petitioner is liable to be assigned and transferred at the will of the master to any person in the same county; the white apprentice is not so liable. The authority of the master over the petitioner is described in the law as a "property and interest;" no such description is applied to authority over a white apprentice. It is unnecessary to mention other particulars.

Such is the case. I regret that I have been obliged to consider it without the benefit of any argument in support of the claim of the respondent to the writ. But I have considered it with care, and an earnest desire to reach right conclusions. For the present, I shall restrict myself to a brief statement of these conclusions, without going into the grounds of them. The time does not allow more. The following propositions, then, seem to me to be sound law, and they decide the case:

1. The first clause of the thirteenth amendment to the constitution of the United States interdicts slavery and involuntary servitude, except as a punishment for crime, and establishes freedom as the constitutional right of all persons in the United States.

2. The alleged apprenticeship in the present case is involuntary servitude, within the meaning of these words in the amendment.

3. If this were otherwise, the indenture set forth in the return does not contain important provisions for the security and benefit of the apprentice which are required by the laws of Maryland in indenture of white apprentices, and is, therefore, in contravention of that clause of the first section of the civil rights law enacted by congress on April 9, 1866, which assures to all citizens without regard to race or color, "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

4. This law having been enacted under the second clause of the thirteenth amendment, in enforcement of the first clause of the same amendment, is constitutional, and applies to all conditions prohibited by it, whether originating in transactions before or since its enactment.

[4] [From 6 Int. Rev. Rec. 147.]

5. Colored persons equally with white persons are citizens of the United States.

The petitioner, therefore, must be discharged from restraint by the respondent.

The chief justice passed the following order: Ordered by the court, this 16th day of October, A. D. 1867, that Elizabeth Turner be discharged from the custody of Philemon T. Hambleton, upon the ground that the detention and restraint complained of is in violation of the constitution and laws of the United States; and it is further ordered that the costs of this proceeding be paid by the petitioner.

Case No. 14,248.

TURNER'S CASE.

[1 Ware (83), 77; 2 Wheeler, Cr. Cas. 615.] [1]

District Court, D. Maine. June 10, 1825.

SEAMEN—CHASTISEMENT—MASTER'S RIGHT TO ARREST DESERTERS—ABUSE OF POWER.

1. The master of a vessel has a right, by the marine law, to chastise a disorderly or disobedient seaman in a moderate and reasonable manner.

2. He may retake a deserting seaman, and confine him on board the vessel; and the authority given by the statute of 1790, c. 56 [1 Story's Laws, 102; 1 Stat. 131, c. 29], to arrest deserters by a warrant from a magistrate, does not supersede the authority which he has under the general maritime law.

3. A court of admiralty will not discharge a seaman from his contract, on account of a punishment by the master, unless in a clear case of an abuse of power.

Isaac Turner, a man of color, was on Monday, the 8th, brought before the district judge of the United States for this district, by habeas corpus, to the prison-keeper of the county of Cumberland. In the petition for the habeas corpus it was stated, that Turner was shipped as a seaman, or cook, on board the brig Effort, of Salem, Captain Miller, then lying at a wharf in the port of Portland, and that he had been confined on board the brig in chains attached to the leg, for several days and nights successively, until he had finally succeeded in filing them off, and made his escape; but that he was retaken and committed to the custody of the gaoler. The prison-keeper made his return that the prisoner was in his custody by virtue of a lawful warrant from a magistrate authorized under the law of the United States, issued against Turner as a deserter from the brig, on which he was apprehended and committed to prison. It was admitted by Turner that he had been regularly shipped at Salem, as cook of the vessel; and that after the arrival of the brig at Portland, he had been absent three times successively in the evening, from the vessel; the first time, as it appeared, with leave. That on the second evening he absented himself without leave, and did not return until after breakfast on the following day; and that again, on the ensuing evening, he was absent without permission, and did not return until late in the following forenoon; when, according to the statement of the owner, who appeared to resist the application, the cook was brought on board by him with the assistance of a civil officer. It appeared by the declaration of the owner, that the captain, by his direction, then caused a chain to be fastened to the cook's leg by a blacksmith, with an iron rivet above the ankle; and that the chain, which was of sufficient length to enable him to traverse the deck, was secured by a lock to an iron ring bolted into the deck. It appeared that during the daytime, he was kept in this situation, confined to the caboose-house or galley, at his work as cook. At night, his chain was unlocked, and secured, in a place particularly fitted up for him between the decks, so as to enable him to get in and out of his berth, but at the same time so as to prevent his escape. He was kept in this situation alternately day and night for the space of from five to seven or eight days, by order of the owner; he considering it, as he alleged, more for the benefit of the cook himself, than to cause him to be committed to prison under the statute, at the expense of the cook himself, which he several times solicited. There was no proof, however, of any ill-treatment on the part of the owner or officers of the vessel, beyond what might necessarily arise or be inferred from these circumstances, except from the declaration of the cook himself that he was quite unwell during a part of the time; and that one night in particular, he suffered extreme pain from a disorder of the bowels, causing them to swell to a distressing degree, until he succeeded in rousing the mate to his relief. He was not permitted to have communication with any person on shore, from an apprehension that they might assist him in escaping. It was acknowledged by the cook that he finally contrived to file off the rivet round his leg, and made his escape from the vessel, as it appeared, during supper time; although he complained that his leg was so much galled as to prevent his escaping to any considerable distance. He was retaken within a day or two after, on the warrant which has been mentioned; and these circumstances appearing as thus stated, on the examination upon the habeas corpus, it was moved on his behalf, that he should be entirely discharged.

The ground assumed in support of this motion, in behalf of the prisoner, was that the mode of restraint and treatment practised in this instance, by direction of the owner, and protracted for such a period by the master, on board a vessel lying at one of the principal wharves in the port, was such an unauthorized exercise of the rights of

[1] [Reported by Hon. Ashur Ware, District Judge. 2 Wheeler, Cr. Cas. 615, contains only a partial report.]

the owner, and abuse of the power of the master, and involved such a violation of the mutual obligations subsisting between the parties to the contract, as to amount to a total rupture of the relation, and entitle the mariner to his absolute discharge. It was urged that it was an unwarrantable infringement of the right of personal liberty; and that the proper course to be pursued on such an occasion, was that prescribed by the statute of the United States, although other methods might be employed at sea, or in foreign ports, and especially in bringing home criminals and mutineers to justice. But in this case, it was contended to be a cruel and unusual punishment; that such a mode of securing a seaman, like a criminal, on the deck of a vessel, in chains and fetters, by the side of Long wharf, where the inhabitants of the town were daily passing and repassing, and where he was precluded from any intercourse with persons on shore to obtain relief, was a scandal in the eyes of the community; the spectacle apart, it was an evil example; and that the public sense of the country would revolt from the infliction of such an enormity on account of a simple breach of contract. That whatever the spirit of any foreign law might be, we were under a different dispensation of jurisprudence in the United States in respect to the sacredness of personal liberty; that the provision of habeas corpus was expressly intended to secure this right; and that the seaman was entitled to the peculiar protection of a court of admiralty jurisdiction.

C. S. Daveis, for petitioner.

WARE, District Judge. The ground on which the petitioner's counsel claims his discharge from the vessel, is the illegal punishment inflicted upon him, previous to his last desertion. After that desertion, he was apprehended on a warrant from a justice of the peace, in pursuance of the authority granted by the 7th section of the statute of the United States for the government of seamen in the merchant service, and it is not pretended that the imprisonment was illegal, unless the illegality of the previous punishment were such as to justify the desertion.

It is earnestly contended that the restraint on board the vessel by the authority of the master only, was without warrant of law, and in violation of the common rights of the citizen; that it was a justification of his subsequent desertion, and now entitles him to a discharge from his contract. It is certainly true that, by the common law, when a man lets himself to hire, and neglects or refuses to fulfil his engagement, he cannot be compelled to do it by any restraint put upon the freedom of his person. The law gives to the injured party only a remedy by an action for damages, and this is, in the ordinary transactions of life, considered an adequate remedy. But the contract of hire for marine service stands on reasons in many respects peculiar to itself. Though considered as a civil contract, principles are applied to it in some respects bearing a strong analogy to those holding in military service, and the service is, by the laws of some nations, considered, partially at least, as a military service. Seamen, if not bound by the general law of the sea, are by the positive institutions of several countries, to assist, at the risk of their lives, in defending the ship against pirates, and a refusal to fight is punished criminally. Such is the law of England (Abb. Shipp. 174); of France (Ord. de la Mar. Lib. 2, art. 9, § 7). The Consulate of the Sea (chapters 172, 178) requires all the seamen to provide themselves with arms for the defence of the ship, and if they do not, the master may provide them and deduct the price from their wages. The Laws of the Hanse Towns (articles 35, 36) condemn seamen who refuse to aid in defending the ship against pirates, to be whipped as cowards.

The present case presents an instance in which the remedy for a failure to fulfil the obligations of a contract has little affinity with the ordinary remedies given by the common law. A seaman who abandons the vessel is not considered merely as violating a civil obligation; he is branded as a deserter, may be apprehended on a warrant, and imprisoned, and forcibly compelled to fulfil his engagement. And this is a principle incorporated into all maritime codes. But what other contract, purely civil, can be enforced by such a process? Again, the master may compel an obedience to his orders by moderate and reasonable chastisement, on the spot, of a reluctant or disobedient seaman. But who ever heard, in any other contract for the hire of labor, of subduing obstinacy or quickening diligence, by corporal chastisement? Or who ever thought of offering, as a legal justification of a battery, that it was a necessary stimulant to the party of a more exact performance of his duty? Though the mode adopted by the master to secure the services of the cook may be revolting to the feelings of those who are in the habit of considering an action at law as the only remedy for a violation of a contract, these feelings will be considerably abated when they consider the difference of the principles applying to contracts for maritime services from those which govern ordinary contracts for the hire of labor, and the peculiar necessity of requiring a very exact compliance with the terms of the contract, for the security of property, often of great value, embarked on an uncertain and treacherous element, and singularly liable to accidents and losses. If a sudden tempest arises, the absence of a part of the crew may occasion the loss of ship and cargo, and the remedy by action would be a mere mockery of justice. The marine law, looking to these hazards, requires the seamen to be continually on board the vessel, and not to leave it but with the permission of the master, or in his absence, that of the next

officer. This is the uniform language of all the old ordinances. Consulat de la Mer, c. 166–169; Laws of Oleron, art. 5; Laws of Wisbuy, art. 4; Laws of Hanse Towns, 22, 40; 1 Valin, Comm. 549. They are particularly severe on those who spend the night on shore without leave. A seaman, says the Consulate of the Sea who sleeps on shore without the consent of the master, is guilty of perjury. Chapter 174. In the present case, Turner had twice absented himself without leave, during the night—a grave offence, as has been seen, in the eyes of the marine law. After the first absence he did not return, according to his own statement, until after breakfast. For this offence he was reprimanded by the master, and cautioned not to repeat the offence. No other correction was administered, and yet the next night he absented himself again, and did not return until he was brought back by persons sent by the captain in pursuit of him. The offence was not only here repeated on the first opportunity, but repeated without any excuse of preceding severity, and a disposition indicated of abandoning the ship altogether. What was the master to do? If will not be denied that he might justly chastise such repeated acts of disobedience and dereliction of duty. The authority of a master in maintaining subordination and discipline on board his ship, is likened to that of a parent over his child, or a master over his apprentice. Such disobedience, after being specially cautioned on the subject, it can scarcely be questioned, would justify moderate correction. Was there any thing in the mode of punishment adopted, repugnant to the general spirit and principles of the marine law? Valin, in his commentary on livre 2, tit. 6, art. 5, of the ordinance of Louis XIV., which prohibits seamen from leaving the vessel after she is laden, under a penalty of 100 sols, and of corporal punishment for a repetition of the offence, reviews the regulations of the ancient sea laws on this subject, and comes to the following conclusion: "From this it results that a seaman is always punishable who leaves the ship without permission, although the ship be not laden; but in this case he does not incur the penalty pronounced by this article. What may be done is to put him in irons, or a diet of bread and water for twenty-four hours, or he may be moderately flogged (recevoir quelques coups de garcettes), allowing on a second offence a little more rigorous punishment." If this be the law of the sea, and for this law what more respectable authority can be quoted than Valin, it will not be easy to show, from all the circumstances of this case, an excess of punishment. Every reasonable attention was paid to the comfort and accommodation of the man, consistent with his confinement. The chaining of a man to the deck of a vessel does indeed carry with it a harsh sound, and suggests to the imagination images of cruelty and suffering. But it does not appear that the mode of confinement was such as to give much bodily pain, for though some complaint of the kind is suggested now, none was made at the time, nor is there the smallest indication of a cruel and vindictive disposition on the part of the master. All appearances are directly the reverse. The only object appears to have been to secure the services of the cook on board the vessel, and prevent his being seduced to desertion by the officious and meddlesome interposition of persons on shore.

But it is argued that, admitting the right of the master thus to confine his men in proper cases, while he is in a foreign port, our statute providing for the apprehension of deserting seamen, by warrant, and their confinement in prison, supersedes the authority of the master under the marine law, at least while the vessel is lying in our own ports—that the law having fixed a mode by which the master may secure himself against the desertion of his men, he is confined to this remedy alone.

Several answers may, I think, be given to this argument. 1st. Admitting the law to be as is stated, it would not of necessity follow that Turner would be entitled to be discharged from his contract. It seems to me that there should be a clear case of abuse of authority, of punishment manifestly unjust or manifestly excessive, to justify the court in dissolving a contract deliberately entered into between the master and his men. If the punishment is illegal, it may give the seamen a right to an action against the master, for damages. But when the punishment is not clearly improper in the mode, or excessive in degree, and there is no reason to apprehend, as it is not pretended there is in this case, that it will be followed by unjustifiable harshness or cruelty on the part of the master, it does not appear to me that a proper case is presented for the interposition of the authority of the court in this form. 2d. It is not apparent that the legislature intended, in giving this remedy, to abridge the authority of the master in maintaining order and discipline among his crew, which he previously had by the marine law. 3d. The case above spoken of by the maritine law is not properly desertion, but such a leaving of the ship as does not amount to a legal desertion. And if, when Turner was brought on board after absenting himself from the ship the second night, he might legally be treated as a deserter, the master, for whose benefit the law was made, was not bound to consider him as such, but might proceed to enforce his authority and maintain the discipline of his ship's crew by the use of that discretionary power given by the general law of the sea.

On a view of all the circumstances, I do not think that the petitioner has made out a case which entitles him to be discharged from the vessel, and, as he was unquestionably a deserter when apprehended, he must be remanded to the custody of the prison-keeper.

TURNER'S CASE. See Case No. 16,778.

Case No. 14,249.

TURNER v. ALDRIDGE et al.

[1 McAll. 229.] [1]

Circuit Court, N. D. California. Aug. Term, 1857.

EJECTMENT—TITLE—TRESPASSER.

1. The general rule is, that a plaintiff in ejectment must recover upon the strength of his title; not upon the weakness of defendant's.

2. This is not an universal rule, and must be qualified by the case to which it is to be applied.

3. Where a plaintiff has documentary title, aided and accompanied by possession, and the defendant is a mere trespasser, the rule is qualified in its application. Against such defendant the plaintiff, under the decisions of the highest court in this state, is entitled to recover on prior peaceable possession alone.

[Cited in Mickey v. Stratton, Case No. 9,530.]

This is an action of ejectment, brought for the recovery of eighty-three acres of land, formerly a portion of the ancient rancho of San Antonio. The title of the plaintiff is derived under mesne conveyances, from a grant issued by Governor Sala, in 1822, to one Luis Peralta. Upon this documentary title the plaintiff relies, together with possession from that time by those claiming under the grant until within some two or three years, when the defendants entered upon the premises sued for. No evidence was given by the defendants of title, nor to any other point.

Joseph G. Baldwin and Henry P. Irving, for plaintiff.

E. R. Carpentier, for defendants.

McALLISTER, Circuit Judge (charging jury). The defendants in this case give no evidence of title, and rest their defense exclusively upon the invalidity of the title of the plaintiff, and their possession of the land. No title can be derived from their possession, as it was tortious. The land in controversy was either "vacant." or land claimed "under a foreign title." If vacant, it was land ceded to the United States by Mexico, by the treaty of Guadalupe Hidalgo. Thus viewed, it was protected from the entry of defendants by the act of congress approved March 3, 1807, entitled, "An act to prevent settlements being made on lands ceded to the United States, until authorized by law," which inhibits the entry upon, taking possession of, or settlement on any lands ceded or secured to the United States by any foreign nation, which have not been previously recognized to the person entering, &c., by the United States. 2 Stat. 445. If the land in controversy was not vacant, but claimed by plaintiff, and according to the testimony offered by defendants, claimed also by one Juan Jose, and one Victor Castro, both under Mexican titles, the entry upon it by the defendants could confer on them no rights, because, being land claimed under a foreign grant or title, it comes within the operation of another act of congress, approved March 3, 1853, entitled, "An act to provide for the survey of public lands in California, the granting of pre-exemption rights, and for other purposes." This act expressly exempts the premises sued for from all pre-emption rights, it being land claimed under a foreign grant or title. 10 Stat. 246. The defendants, therefore, allege no title; but having entered into possession of the premises in violation of law, are to be deemed trespassers and tort feasors; and the question arises, whether parties standing in that attitude can invoke successfully for their protection the rule of law relied on by their counsel in this case. That rule is, that a plaintiff in ejectment must rely on the strength of his own title, and not on the weakness of his adversary's. This is undoubtedly the general and well-settled rule; but it is not of universal application, and must be limited and qualified by the case in which it arises. Love v. Simms's Lessee, 9 Wheat. [22 U. S.] 515, 524.

This rule is to be limited and qualified in this case, if you shall find from the evidence that possession has accompanied the documentary title of the plaintiff. In Swift v. Tyson, 16 Pet. [41 U. S.] 1, the doctrine is enunciated that the decisions of the highest judicial tribunals of a state as to rights and titles having a permanent locality,—such as rights and titles to real estate and other matters immovable and interritorial in their character,—have been adopted as rules of decision in the federal courts by the 34th section of the judiciary act of 1789. In Beauregard v. City of New Orleans, 18 How. [59 U. S.] 497, the court say, "The constitution of this court requires it to follow the laws of the several states as rules of decision, wherever they properly apply; and the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the state, especially when applied to the title of lands. No other course could be adopted with any regard to propriety. Upon cases like the present, the relation of the courts of the United States to a state, is the same as that of its own tribunals. They administer the laws of the state; and to fulfill that duty, they must find them as they exist in the habits of the people and the exposition of their constituted authorities." To the exposition given by the supreme court of this state, the court will now advert. In the first year of our political existence as a state, we find the case of Ladd v. Stevenson, 1 Cal. 18. In that case, one who had been turned out of possession under the order of an officer who had no jurisdiction, was held entitled to recover on his prior peaceable possession. In Brown v. O'Connor, Id. 421, the court say, "However defective then the title of the plaintiff may be,

[1] [Reported by Cutler McAllister, Esq.]

there was testimony tending to show that he was in prior peaceable possession of the premises; and it is to be presumed that the jury found that the plaintiff had the prior and best right to the possession." In that case the plaintiff relied on what was considered defective documentary title in addition to his possession. In Hutchinson v. Perley, 4 Cal. 33, the court said, "Possession is always prima-facie evidence of title; and proof of prior possession is enough to maintain ejectment against a mere naked trespasser." In Hicks v. Davis, Id. 67, the court said, "The action is for the recovery of land upon a claim of title based upon uninterrupted prior possession for several (three) years. We have always determined that possession is prima facie evidence of title, and this principle is firmly fixed in all common-law jurisprudence. That its efficacy has been impaired by modifications and conditions by some judges in other countries, is clearly manifested by the decisions. But unlike these, I see no reason to depart from the strictest simplicity and directness in the application of the rule." In Winans v. Christy, 4 Cal. 70, the court say, This was not a case of mere "possession, but possession coupled with color of title, which must prevail except where a better title is shown in the defendants." "Neither are the plaiutiffs although they alleged in their declaration a fee-simple title, compelled to prove the same. They could properly rely upon prior possession if they choose to do so." In Bequette v. Caulfield, 4 Cal. 278, the court say, "Possession gives a right of action against a mere trespasser, even where title may be shown to exist in another."

The doctrine sustained by this unbroken current of authority in this state, is maintained by the state tribunals in Connecticut, Vermont, Ohio, Kentucky, Virginia, and Tennessee, and by a recent decision of the supreme court of New York. It has received the approval of the supreme court of the United States. In Christy v. Scott, 14 How. [55 U. S.] 282. Mr. Justice Curtis, delivering the opinion of the court, uses the following language: "But a mere intruder cannot enter upon a person actually seized, eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title." He may do so by a writ of entry, where that remedy is practiced, or by an ejectment, or he may maintain trespass.

I have, gentlemen of the jury, contrary to my usual custom, cited authorities to sustain the conclusion to which I have come, and shall embody in an instruction to you. This has been done, because it has been urged with great earnestness by counsel in this case, that the general rule which requires a plaintiff in ejectment to recover upon the strength of his own title, enables a mere trespasser to maintain his possession if he can discover defects in any of the links of the chain of testimony which establishes the title of the plaintiff whom he has disseized. Such views have been sustained, perhaps, by some judges. Such views are akin to that doctrine which formerly obtained, in semi-civilized times, in England, and has been characterized as—

"That good old rule, that simple plan,
That those should take who have the power,
And those should keep, who can."

Such is not the law which has been enunciated by the highest judicial tribunal of this state, nor by the supreme court of the United States. I therefore instruct you that, first, if you find from the evidence that the documentary title of the plaintiff has been accompanied by possession of the premises, his title, whether his documentary title be a perfect legal title or not, is sufficient to maintain this action against these defendants; and, second, if you find that the defendants entered upon the possession of plaintiff, such entry was tortious, and defendants showing no title are to be deemed trespassers; and that the rule that a plaintiff must recover upon the strength of his own title, and not upon the weakness of defendant's, is not applicable to a case like the present, but must be qualified to meet its circumstances.

Verdict—"Guilty."

TURNER (ALEXANDER v.). See Case No. 176.

Case No. 14,250.

TURNER v. ALTON.

[Nowhere reported; opinion not now accessible.]

Case No. 14,251.

TURNER v. AMERICAN BAPTIST MISSIONARY UNION.

[5 McLean, 344.] [1]

Circuit Court, D. Michigan. June Term, 1852.

PUBLIC LANDS—TREATIES WITH INDIANS—RESERVATION OF PUBLIC LANDS—PLEADING IN EQUITY—INJUNCTION TO STAY EJECTMENT SUIT.

1. A state has no power over the public lands within its limits.

2. When the state of Michigan was admitted into the Union, it assented to a compact, which inhibited the exercise of this power.

3. A treaty is the supreme law of the land, only, when the treaty-making power can carry it into effect.

4. A treaty which stipulates for the payment of money, undertakes to do that which the treaty-

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

making power cannot do, therefore the treaty is not the supreme law of the land.

5. To give it effect, the action of congress is necessary.

6. And in this action, the representatives and senators act on their own judgment and responsibility, and not on the judgment and responsibility of the treaty-making power.

7. A foreign power may be presumed to know the power of appropriating money belongs to congress.

8. No act of any part of the government can be held to be a law which has not all the sanctions to make it law.

9. A reservation of land for a specific purpose, withdraws it from general location, and from pre-emption rights.

[Cited in U. S. v. Garretson, 42 Fed. 25.]

[Cited in Hamilton v. Spokane & P. Ry. Co. (Idaho) 28 Pac. 411.]

10. Where, in a treaty, 160 acres of land was reserved to be sold, in order to pay over the proceeds of the sale to those entitled to them, is a withdrawal of the land from general appropriation.

11. A bill is not multifarious, where it does not unite titles which have no analogy to each other, whereby the defendant's litigation and costs are increased.

12. An injunction to stay an ejectment suit, until matters of equity can be examined, will not be allowed, unless judgment in the ejectment be entered.

[Cited in Heirs of Szymanski v. Zunts, 20 Fed. 363.]

Mr. Patterson, for plaintiff.

Frazer & Davidson, for defendants.

OPINION OF THE COURT. This is a case in chancery, which involves several important questions. The power of the general government over the public lands, treaty-making power with the Indians, the powers of a state, and the effect of certain reservations under the pre-emption law, &c. The complainant states that in July, 1836, he settled upon the land now claimed by him, and in the ensuing spring built a permanent residence, and has ever since continued to reside on the same. That the 7th of July, 1838, the land was proclaimed, by the president, for sale, to take place 15th of October, 1838. On 12th of October, 1838, he proved his pre-emption claim, and tendered $200 for the entire quarter section. The entire section 25 at the falls of Grand river, in the state of Michigan, had been selected by the state of Michigan. 21st June, 1838, lot No. 2 was confirmed to the state of Michigan. The 9th Feb., 1842, a law of Michigan was passed, allowing Sibley to purchase lot No. 2; that he obtained a certificate of purchase, and Sibley conveyed to complainant a part of lot No. 2, which was a part of the 160 acres mentioned in the treaty. This Indian treaty was held at Washington city, the 28th of March, 1836, in the 8th article of which it is declared, "The mission establishments upon the Grand river shall be appraised, and the value paid to the proper boards." This was amended by the senate to read as follows: "The net proceeds of the sale of the one hundred and sixty acres of land, upon the Grand river, upon which the missionary society have erected their buildings, shall be paid to the said society, in lieu of the value of their improvements." It was proved that the defendants, as a missionary society, had occupied the 160 acres for many years, had built a church and mission-house, and had made other improvements on the tract. It was also proved that the Catholics had occupied the same tract, or a part of it, and had constructed a chapel and other improvements. On this same tract the complainant had settled, and made his improvements. The defendants having commenced an action of ejectment, to recover possession of the land claimed by them, the complainant prayed for an injunction against the further prosecution of that suit, and that the court would establish his title, &c.

On the part of complainant it was contended that on the establishment of the state government, Michigan, by virtue of her sovereignty, had a right to all the lands within her limits. This argument is not now advanced for the first time. Several years ago it was broached in the senate, and in some of the state legislatures, but it was received everywhere with less favor than its advocates anticipated. It proffered so rich a boon to the new states, it was expected that they would embrace it with enthusiasm, and hail its advocates as the distinguished friends of state rights. The argument grew less cogent by the lapse of time, as the public lands passed into the hands of individuals, by purchase. Had it not been for this, no one can say that the policy would not have enlisted a powerful, if not successful party, in our political progress. Looking at the matter as a question of law, we have no hesitancy in saying the argument is groundless. The state of Michigan can exercise no power whatever over the public lands within her limits. She is expressly prohibited from doing this by a compact agreed to in the admission of the state into the Union.

A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government, can be regarded as a law, until it shall have all the sanctions required by the constitution to make it such. As well might it be contended, that an ordinary act of congress, without the signature of the

president, was a law, as that a treaty which engages to pay a sum of money, is in itself a law. And in such a case, the representatives of the people and the states, exercise their own judgments in granting or withholding the money. They act upon their own responsibility, and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required. Without a law the president is not authorized to sell the public lands, so that this treaty, though so far as the Indians were concerned, was the supreme law of the land, yet, as regards the right to the proceeds of the above tract, an act of congress is required. The treaty, in fact, appropriated the above tract of 160 acres for a particular purpose, but, to effectuate that purpose, an act of congress was passed. Under the act of 23d June, 1836 [5 Stat. 59], five entire sections of land were authorized, to be selected and located under the direction of the legislature of Michigan, in legal divisions of not less than one quarter section, from any of the unappropriated lands belonging to the United States, within the state, were granted to the state for the purpose of completing the public buildings of the said state, &c.

By virtue of this law, under the direction of the legislature of the state, the tract of 160 acres in controversy was, in part, located. This location is objected to on two grounds. 1. The land located amounted to less than a quarter section, and the above act did not authorize the entry of less than a quarter. 2. That under the treaty the land had been previously appropriated. Both of these grounds are fatal to the right of the state. Under the law, the state was bound to conform to its provision, and a less quantity than 160 acres could not be located. The other ground is clear. The part of the land entered had been specially appropriated by the treaty. The land itself was not appropriated, but its proceeds, which necessarily require a sale of the land, in the usual mode of selling public lands, by the government, at public auction, in order that the proceeds of the sale might be paid over to the proper persons. It was not, therefore, open to location by the agent of the state. The words of the act, are sufficient to show this. "Any unappropriated land belonging to the United States, could be taken, to satisfy the donation to the state. But in so far as the location interfered with the mission land, it was specially appropriated to be sold that the proceeds might be paid to the persons entitled to them." The same objection applies to the pre-emption claimed by the act of 1838 [5 Stat. 251], which continues the act of 1830 [4 Stat. 420]. That act declares that its provisions should not apply to lands which had been reserved or otherwise appropriated. It is contended that a treaty with Indian tribes, has not the same dignity or effect, as a treaty with a foreign and independent nation. This distinction is not authorized by the constitution. Since the commencement of the government, treaties have been made with the Indians, and the treaty-making power has been exercised in making them They are treaties, within the meaning of the constitution, and, as such, are the supreme laws of the land.

The objection that the bill is multifarious, arises on the demurrer. But we think it is not sustainable. The decisions on this subject are contradictory and unsatisfactory. The common sense rule in such cases is, that an individual shall not be called to maintain his title, or shall not assert it, in connection with others, to which it has no analogy, and in the investigation of which, the costs and the complexity of the case will be increased.

It is a rule of this court, in practice, not to allow an injunction, to stay a proceeding at law, until the matter in equity shall be investigated. In such cases the court require a judgment to be entered in the ejectment, as a condition to the allowance of an injunction. If this be not done, though the decision in chancery be favorable to the legal right, to gain the possession of the premises, a prosecution of the action at law may be necessary. To avoid delay in this respect, the rule has been observed.

The court overrule the demurrer, and enter a rule for answer.

[See Case No. 968.]

TURNER (BAPTIST MISSIONARY UNION v.). See Case No. 968.

Case No. 14,252.

TURNER v. BEACHAM.

[Taney, 583.] [1]

Circuit Court, D. Maryland. April Term, 1858.

ADMIRALTY—JURISDICTION—MARITIME CONTRACTS—ACTION PENDING IN STATE COURT.

1. If a contract be the ordinary one for repairs or supplies to a domestic ship, and the only matter in dispute be, to whom the credit was given, and who is liable for the amount, it will be a case for admiralty jurisdiction; and the admiralty court may determine whether the owner of the ship, or certain anticipated and contingent partners, are liable for such repairs and supplies.

2. But where there was inseparably connected with a maritime contract of this sort, and forming part of it, an agreement, by the contractor for the repairs and supplies, to become a partner in a company to be formed to purchase the vessel: *Held*, that a contract to form a partnership to purchase a vessel is not a maritime one; a court of admiralty has no right to decide whether such a contract is legally or equitably binding, nor to adjust the accounts and liabilities of the different partners.

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

3. It is a clear rule of admiralty jurisdiction, that, although the contract which the party seeks to enforce is maritime, yet, if he has connected it inseparably with another contract over which the court has no jurisdiction, and they are so blended together that the court cannot decide one with justice to both parties, without disposing of the other, he must resort to a court of law, or a court of equity, as the case may require, and the admiralty court cannot take jurisdiction of the controversy.

4. The admiralty court cannot adjust the rights and liabilities of the parties upon one portion of such a contract and leave the other to be litigated in another court.

5. If the same question, between the same parties, upon the same subject-matter, be pending in a state court, of competent jurisdiction to decide upon all the rights in controversy, the admiralty court will refuse to entertain a suit upon any portion of the matters so in litigation in the state court.

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

This was an appeal from the court of admiralty, on a proceeding in personam, instituted on the 21st of May, 1857, by Silas Beacham, the appellee [against Robert Turner]. The district court passed a decree in favor of the libellant, and an appeal was taken to this court.

J. Carson, for libellant.

B. C. Barroll, for respondent.

TANEY, Circuit Justice. This is a libel in personam, for work done and materials and equipments furnished by Beacham, for the steamboat Susquehanna, of which the libel alleges that Turner was the owner at the time. Turner, in his answer, denies the jurisdiction of the court, and sets up a partnership ownership of the steamboat, by a company, in which he, and the libellant and sundry other persons, were partners; and for which company, he avers, the work was done; and avers that the partnership account is unsettled, and a suit is now depending in a court of equity in order to adjust it. Many witnesses have been examined on both sides; and the case, as presented by the record, is exceedingly complicated. The whole transaction appears to have been conducted in such a loose and irregular manner, that it is difficult for a court to determine what the parties intended by their contracts and proceedings.

It is not necessary, however, in the view this court takes of the subject, to go into a detailed examination of these complicated and loose proceedings; a brief summary will show the character of the case as it comes before this court. Turner, the appellant, it appears, after a consultation with one or two other persons, determined to buy this steamboat, which was then lying at Havre de Grace, and to have her fitted up as an ice-boat, to be used in keeping open the navigation of the harbor of Baltimore during the winter. The plan was, that the boat should be brought to Baltimore and fitted up for the purpose for which she was intended; and should become the property of a company who should apply for a charter from the state. The price at which it was originally proposed that she should become the property of the company was $25,000; and afterwards, it appears to have been reduced to the original cost of the boat, and the expenses incurred in putting her in complete order, which it is said would amount altogether to fifteen or sixteen thousand dollars.

In pursuance of the plan formed by Turner and others, as before mentioned, he sent an agent to Havre de Grace, who purchased the boat for him for $4,000, and she was brought to Baltimore and registered as belonging to Turner, he taking the usual oath that he was the sole owner. The same agent was employed by Turner to employ workmen and mechanics to put her in order, for the purposes for which she was intended, and at the same time to solicit subscriptions for shares, in order to form the company contemplated; the mechanics who were employed to do the work were all apprised of the plan, and were required to take a certain amount of stock in the company, as a condition upon which alone they would be employed. The libellant engaged to do the blacksmith's work, and in consideration of being so employed, he agreed to take stock to the amount of $200; and his subscription was accordingly entered for that amount, by the direction of the person whom he had authorized to enter it.

It does not appear that the amount required was subscribed; but those who had subscribed met, and appointed a committee to take charge of the boat, and to obtain the contract with the city authorities for keeping open the harbor; the appellant and appellee were both present at the meeting. The boat performed two or three trips under the direction of the committee; but they failed to obtain the contract with the city, and therefore, the whole enterprise was soon after abandoned, and the boat remained unemployed. It was then found, that her value was very far below what she had cost, including the very expensive repairs which had been put upon her after she was purchased by Turner; and Turner states in his answer, that he has since filed a bill in the circuit court for the city of Baltimore, charging that she belonged to the persons who subscribed for shares, and praying for a sale of the vessel, and a settlement of the partnership accounts; that she has been sold accordingly, a receiver appointed, and that the proceedings are still pending there to adjust the partnership accounts.

In this state of things this libel was filed; and the libellant claims to recover the whole amount of his bill from the appellant, without deducting anything on account of his subscription of $200 for shares in the company. And several questions have been raised on the pleadings and evidence which

it is proper to state, in order to determine whether the case before me is within the jurisdiction of a court of admiralty.

(1) The libellant contends that the work and materials furnished by him, were furnished on the credit of Turner, who was the owner of the boat, and not on the credit of an embryo company, not then brought into existence, and which might never come into existence. (2) That he is not bound to deduct from his claim against the appellant, the two hundred dollars which he agreed to take in the stock of the proposed company, because the sum to be subscribed to purchase the boat, was never subscribed. (3) That if it had been subscribed, the libellant was not bound by his subscription, because it had been obtained by the misrepresentation of Turner as to the capacity and fitness of the boat for the purpose for which the company intended to use her; and also, because by the terms of his contract, he was to have had the whole of the blacksmith's work, and a part of this work was given to another person.

(1) On the part of Turner it is contended, that the contract was made and the work done upon the credit of the contemplated company, to which, and not to him personally, the libellant and the other mechanics who worked upon the vessel were to look for payment. (2) That the company was brought into existence, and the libellant was a partner in it, and as such took a share in its proceedings. (3) That the accounts between him and the other partners, and with the libellant, as one of the partners, are unsettled. (4) That the partnership assets are now in the custody of a court of the state, and proceedings pending there to adjust the partnership accounts; and were so pending before and when this libel was filed.

These are the questions which have arisen in the case, and present the inquiry into the jurisdiction of the court of admiralty. If the contract of the appellee had been the ordinary one for repairs or supplies to a domestic ship, and the only matter in dispute was to whom the credit was given, and who was liable for the amount, it is very clear that it would be a case for admiralty jurisdiction; and the court would, undoubtedly, be authorized to determine, whether Turner or the anticipated and contingent partners would be liable to the libellant for the money; and this question, upon the testimony, could be easily disposed of. But inseparably connected with this maritime contract, and forming a part of it, is the agreement to become a partner in a company to be formed to purchase the vessel. Now, a contract to form a partnership to purchase a vessel, or to purchase anything else, is certainly not maritime; a court of admiralty has no right to decide whether such a contract was legally or equitably binding, nor to adjust the accounts and liabilities of the different partners. These questions are altogether outside of the jurisdiction of the court; and yet the amount actually due to the libellant, by whomsoever it is to be paid, cannot be decided, until these questions are first examined and determined. And I consider it to be a clear rule of admiralty jurisdiction, that although the contract which the party seeks to enforce is maritime, yet, if he has connected it inseparably with another contract over which the court has no jurisdiction, and they are so blended together that the court cannot decide one, with justice to both parties, without disposing of the other, the party must resort to a court of law, or a court of equity, as the case may require, and the admiralty court cannot take jurisdiction of the controversy. The case of Grant v. Poillon was decided upon this ground, at the last term of the supreme court. 20 How. [61 U. S.] 162.

If the contract for repairs, and for the partnership, had been separate contracts, there would be no doubt of the jurisdiction; and so also, if the partnership had related to some collateral matter. But according to the testimony, the agreement to repair the boat and to become part-owner of her with the libellant and others, were but parts of one and the same contract, and in relation to one and the same thing, that is, the boat to be repaired; and this court cannot adjust the rights and liabilities of the parties upon one portion of the contract, and leave the other to be litigated in another court. If it has not jurisdiction over the whole contract, it could not, without great injustice, dispose of a part and compel the party to pay money on one portion of it, and leave it to another court to decide whether he had not claims against the libellant upon the partnership branch of it, which ought to have been adjusted before the account for work on the vessel was paid. Upon these grounds, the court is of opinion, that the decree of the district court must be reversed, and the case remanded, with directions to dismiss the libel for want of jurisdiction in the district court.

I have said nothing of the proceedings in the state court of equity, to which the appellant refers in his answer. They have not been filed in the case, and this court cannot, therefore, regard them as open to consideration here. Certainly, if the same question, between the same parties, upon the same subject-matter, were pending in a state court, of competent jurisdiction to decide upon all the rights in controversy, this court would refuse to entertain a suit upon any portion of the matters so in litigation in the state court.

TURNER (BELDING v.). See Case No. 1,243.

Case No. 14,253.

TURNER et al. v. The BLACK WARRIOR.

[1 McAll. 181.] [1]

Circuit Court, N. D. California. July Term, 1856.

CARRIERS BY WATER — DAMAGE TO GOODS — BILL OF LADING—BURDEN OF PROOF.

1. The bill of lading is prima facie evidence that the goods were shipped in good condition; and if not delivered in like condition, the onus lies on the carrier of proving the damage was the result of one of the causes excepted against.

[See Bearse v. Ropes, Case No. 1,192.]

2. The carrier is still liable, if the damage could have been avoided by skill and diligence.

3. So soon as the carrier has established the damage as having come within the exception of the bill of lading, the burden of proof is on the shipper to prove want of skill or diligence.

4. The weight which is due to the bill of lading as to the condition of goods, depends upon their nature and character.

5. When a chemical cause is assigned for damage to goods, evidence of experts is admissible.

6. The proofs must be limited to the averments in the answer.

This case is an appeal from a decree rendered in favor of the libelants by the district court of the United States for the Northern district of California. The libel propounds that in the year 1855, the libelants shipped on board the Black Warrior [Murphy, claimant] certain hogsheads and barrels of pure spirits, in good order, and well-conditioned, at ——, to be carried thence to San Francisco; and that, notwithstanding libelants have paid freight and primage on said spirits, they have not been delivered in good order; but, by the carelessness of the master and crew of said vessel, have been destroyed, with the exception of a small quantity remaining in one of the said barrels. The answer affirms the spirits were well stored; denies all carelessness, and avers that if any damage has accrued to them, it is owing to the unfitness and defects in the barrels and casks. To this answer, a replication was filed.

Julius K. Rose, for appellants.

Manchester & Hodges, for appellee.

McALLISTER, Circuit Judge. That damage has accrued, and the amount thereof, are not disputed in this case. The only question is, whence arose this damage? No copy of the bill of lading has been given in evidence. It is, however, admitted to be in the usual form. It admits that the spirits were shipped in good order, and this imposed on the carrier the duty of delivering them in like condition; and if not so delivered, the onus of proving the damages as the result of one of the causes excepted against in the bill of lading, rests upon the carrier. Has he done this? If he has established any such fact, he still may be made liable, if such peril could have been avoided by skill and diligence. But so soon as the carrier has established the cause of damage to have been within the exception of the bill of lading, and the shipper seeks to charge him with negligence, the onus of proving such negligence rests upon the shipper. Clark v. Barnwell, 12 How. [53 U. S.] 272, 280, 281, 287.

The first inquiry is, has the carrier established by proof, that the damage was the result of a cause with which human agency had nought to do; in other words, that it was the result of one of the causes excepted by the bill of lading? The allegation in the libel is, that the carelessness of the carrier was the cause of damage. Now, if the carrier does not prove that the damage accrued from one of the excepted causes, the law fixes upon him negligence. To elude a recovery in this case, in his answer he avers that the damages (if any) arose from the unfitness and defects of the barrels and casks. In determining this issue, the character of the articles transported, and their exterior condition, must be considered. They were not silks, inclosed with exterior and interior wrappers, the exterior of which might be in good condition, while the interior might be unsound and damaged,—a fact difficult or impracticable to be ascertained, even on inspection. Nor were the articles like spools of thread, packed in small wooden boxes lined with paper, and these small boxes again in a larger box lined, with paper between the boxes, as in the case of Clark v. Barnwell, 12 How. [53 U. S.] 279. Had the articles in this case been similar in character to those, the acknowledgment in the bill of lading would not have been satisfactory evidence of their condition. These were hogsheads and barrels, and their unfitness and defects were attempted to be established by proof that they were not bound with iron, and that some of the hoops upon them were molded. To this there was opposing testimony, by persons who had inspected them, which established the fact they were equally good as the average casks and barrels ordinarily used for the transportation of spirits. The district judge,—who, it seems, had submitted to his personal inspection some of these casks,—from a view of them, and from the whole testimony, came to the conclusion that the fact of the defect in the casks was not made out. I do not think that conclusion should be disturbed, particularly where, as in this case, the carrier has admitted the articles were in good condition, in the bill of lading, and the character of the article and of the defects alleged, is such as was capable of ready detection on even casual inspection. Under such circumstances, the acknowledgment of the master, fortified as it is by the parol testimony of persons who have inspected the articles, authorizes the conclusion that the carrier has not established the defense

[1] [Reported by Cutler McAllister, Esq.]

set up on this ground. Here this case might end.

But a second ground of defense has been taken in the argument of counsel, no foundation for which is laid by any averment in the answer. That ground is, that there was an evaporation of the spirits, a chemical cause, the work of natural laws, which produced the damage, and is a cause excepted against in the bill of lading. We have seen that the onus of proof on this point is with the carrier. It is not until he has established the fact, that the necessity of proving negligence is imposed upon the opposite party. In this case, no attempt has been made to prove the probability of evaporation. The question is a scientific one; and if the intention of the party had been to rely upon it, he should have procured the testimony of experts in relation to it. In Rich v. Lambert, 12 How. [53 U. S.] 347, the respondent rested his defense on the ground that the cotton thread (in that case) had been damaged by the dampness of the hold of the vessel solely, and he proved the fact. The court say, all the witnesses concur in the conclusion that the damage was occasioned by the humidity of the ship's hold, producing mold and mildew. In the case at bar no one witness has sustained this theory. The argument is, that if the barrels were good and well stowed, the inference is that the damage was occasioned by partial evaporation, which disabled the barrels to resist external pressure, and therefore they must have leaked. Now, this is a theory. No evidence has been given to establish it as a fact; no evidence to determine what given quantity in a certain-sized barrel will evaporate in a given time, or how much will evaporate before the barrel will probably leak. No one witness, an expert or one practically acquainted with the business, has given his conclusions upon this subject. Perhaps the reason is that it is an afterthought, for nothing of the kind is averred in the answer. It states that if any damage occurred it arose from the carelessness of libelants, viz., the shipping of the barrels in bad order, not in condition to be shipped. The single issue raised is the fitness of the barrels. The bill alleges the articles were in good order; the answer avers they were "unfit to be shipped." This question has been decided against the respondent; and he seeks to evade a recovery on a distinct ground from that taken in the answer. In that he attributed the damage to the act of the respondent; he now attributes it to an inevitable cause—evaporation. He cannot allege one cause and prove another. In Rich v. Lambert, 12 How. [53 U. S.] 356, the court say, "The libelants charge the damage to the goods to have been occasioned by the improper storage of the cargo. This is denied in the answer; and, as the recovery must be had, if at all, according to the allegations in the pleadings, it is incumbent on the libelants to maintain this ground by proof." Again, they say, "To permit the libelant to recover upon this ground (not stated in the bill) would be a departure from that upon which they have chosen to place their right of action in the pleadings." Id. 369. Mutatis mutandis, it may be said that to permit the respondent to rest his defense on the ground that the damage was the result of a natural cause, would be a departure from the ground on which he placed his defense in his pleading.

In view of all the testimony, and of the law applicable to it, the conclusion to which I am arrived is, that the decree of the court below must be affirmed. It is therefore ordered that a decree be entered affirming in all respects the decree of the court below.

Case No. 14,254.

TURNER v. EDWARDS.

[2 Woods, 435.] [1]

Circuit Court, N. D. Georgia. Sept. Term, 1875.

LIMITATION OF ACTIONS—ESTOPPEL.

A. pleaded to an action at law a matter which the court held to be a good defense, whereupon the suit was dismissed; but it was afterwards decided in another suit between other parties, by the court of last resort, that the defense so set up was not good. *Held*, that in a second action brought against A. for the same cause, he was not estopped by reason of his plea in the former case from setting up the statute of limitations as a defense, even though the bar of the statute had intervened since the dismissal of the first action.

At law. This cause was heard on plaintiff's motion for new trial.

E. N. Broyles, for the motion.

A. M. Speer and J. D. Stewart, contra.

[Before WOODS, Circuit Judge, and ERSKINE, District Judge.]

WOODS, Circuit Judge. The case is as follows: The constitution of Georgia of 1868 (section 18, par. 1) declares that "no court or officer shall have, nor shall the general assembly give, jurisdiction or authority to try or give judgment on, or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof." An act of the legislature of Georgia, passed March 16, 1869, declared (section 6): "That all actions upon contracts, express or implied, or upon any debt or liability whatsoever, due the public or a corporation or a private individual or individuals, which accrued prior to the 1st day of June, 1865, and are not now barred, shall be brought by January 1, 1870, or both the right and the right of action to enforce it shall be forever barred." On the 26th of March, 1867, the plaintiff sued the defendant in the superior court of Henry county, Georgia, on a promissory note of the defendant, dated April 15, 1861, for $625. The defend-

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

ant pleaded that the consideration of the note was the purchase price of a slave, and when the case was put on trial at the October term, 1869, he testified to the truth of his plea. Thereupon the court decided that it was without jurisdiction to proceed further, and the plaintiff dismissed his case. Afterwards at the December term, 1871, the supreme court of the United States, in the case of White v. Hart, 13 Wall. [80 U. S.] 647, decided that the clause in the constitution of Georgia, above quoted, had no effect on a contract made previous to its adoption, even though the consideration of the contract was a slave. At the time of the dismissal of the suit in the state court, the plaintiff was a citizen of Georgia. In September, 1870, he removed to the state of Texas and became a citizen of that state, and on April 17, 1872, he brought suit against the defendant in this court, on the same note. To this action the defendant pleaded the limitation of the act of March 16, 1869, above mentioned.

The plaintiff claimed that under the circumstances stated, the defendant was estopped from setting up the bar of that statute. The court refused to take this view, and the verdict went for the defendant. Solely upon the ground of the alleged error of the court in so refusing, the plaintiff now moves for a new trial.

We think there is no estoppel here. By setting up the plea of want of jurisdiction in the state court to give judgment on a note, the consideration of which was a slave, the defendant was doing what he had a right to do. That the consideration of the note was a slave was true; in addition to this fact the defendant simply stated in his plea the provision of the constitution of the state, which he conceived deprived the court of jurisdiction to try the case. There was no fraud in making this plea; and in afterwards setting up the bar of the statute to the suit, on the same note, the defendant was not "alleging or denying a fact contrary to his own previous action, allegation or denial;" nor "saying that to be false which by his means had once been accredited for the truth, and by his representations had led others to act." "The very meaning of estoppel is, when an admission is intended to lead, and does lead, the man with whom the party is dealing into a line of conduct which must be prejudicial to his interest, unless the party estopped be cut off from the power of retraction." Herm. Estop. 3, 8. The conduct of the plaintiff does not bring him within any of the definitions of estoppel. He has only exercised his own legal rights, first, in pleading want of jurisdiction to the action in the state court, and second, in pleading the statute of limitations in this court. The plaintiff has at all times been at liberty to resort to his legal remedies. If he has been misled or injured, it is not by any fraudulent or unconscionable conduct of the defendant, but by the mistake of the state court in sustaining a plea insufficient in law. If the plaintiff was not satisfied with the decision of the state court, he had his remedy, and should have pursued it.

The question raised in this case has been substantially decided by the supreme court of this state in the case of Harris v. Gray, 49 Ga. 585, and in that opinion we concur. See, also, Hudson v. Carey, 11 Serg. & R. 10.

Motion overruled.

TURNER (FENDALL v.) See Case No. 4,727.

TURNER (FLETCHER v.). See Case No. 4,867.

Case No. 14,255.

TURNER v. FOXALL.

[2 Cranch, C. C. 324.] [1]

Circuit Court, District of Columbia. May Term, 1822.

SLANDER—SPECIAL DAMAGE—TRIAL—PLEADING AT LAW—BAD COUNTS IN DECLARATION—ARREST OF JUDGMENT.

1. In an action of slander, if the declaration contain some good, and some bad, counts, the court will refuse a general instruction to the jury that the plaintiff cannot recover without proof of the facts stated in the good counts; the question whether the other counts are, or are not, good, being properly a question arising upon a motion in arrest of judgment.

2. Words, spoken in relation to the credit of a holder of shares in the joint stock of a boat, are actionable if special damage thereby be alleged in the declaration; but the averment of such special damage is not sufficient to support the action without the averment of a colloquium respecting the plaintiff as a shareholder in the boat, and that is was a business requiring credit.

3. In mitigation of damages, the defendant may give evidence of the general reputation of the plaintiff's want of punctuality in payment of his debts.

[Cited in Duval v. Davey, 32 Ohio St. 611.]

4. If one of the counts be bad, and the verdict be general, the judgment must be arrested.

5. Handwriting cannot be proved by comparing the paper in dispute with other papers acknowledged to be genuine.

6. If a witness upon his cross-examination has sworn falsely, in the opinion of the jury, upon an immaterial point, it is competent for them to give their verdict upon his testimony in chief upon other points corroborated by other testimony.

7. After the jury has retired to consider of their verdict the court will not instruct them upon any matter at the motion of either of the parties. If the jury asks instruction in matter of law the court will give it.

8. A motion in arrest of judgment, and for a new trial, may be made at the same time, but the motion in arrest will be first heard.

This was an action of slander, for words spoken of the plaintiff [Samuel Turner]. The declaration contained four counts.

1. The first count avers that the plaintiff at the time, &c., was engaged with a certain

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

John Eveleth, and others, in the building of a boat for passage and transportation, as a shareholder therein, and always ready, able, and willing to pay his share of the capital stock in the said business and boat, and was in good credit, and always able and willing to pay all his just debts. That [Henry Foxall] the defendant knowing the premises, intending to bring the plaintiff into discredit and disgrace with the persons concerned in building the boat, and to exclude the plaintiff from any further share in the boat, and to deprive him of the share which he then held, &c., in a certain conversation which the defendant had with the said John Eveleth, of and concerning the plaintiff as a person concerned in the said boat, and as a stockholder therein, and of and concerning the plaintiff's interest therein, &c., and of and concerning the plaintiff's circumstances and character, spoke, in the hearing of the said John Eveleth, the words following, of and concerning the plaintiff, and his share and interest in the boat and business, and of the plaintiff as a shareholder therein, and of the sum which he was to pay towards the stock thereof, and of and concerning his character and circumstances, namely, "He will never pay his part. If he had eight times eight thousand dollars, it would not pay his debts."

2. The second count, after stating a similar colloquium, charges the following words addressed to the said John Eveleth, namely, "Did you ever know him (the plaintiff) speak except in a low whisper calculated to deceive? He (the plaintiff) will lie, and cheat his creditors."

3. The third count, avers that in another conversation with Eveleth concerning the plaintiff, his character, circumstances, integrity, solvency, ability, and willingness to pay his debts, the defendant said to the said Eveleth, the following words of and concerning the plaintiff as aforesaid; "If he had eight times eight thousand dollars it would not pay his debts."

4. The fourth count, after stating another colloquium like that in the third count, with Eveleth, charges that the defendant said, "Did you ever hear him speak except in a low whisper calculated to deceive? He is a deceptive fellow. He will lie, and cheat his creditors. He is a ly'ng cur. He is a lying puppy." By means of the speaking of which several false, scandalous, and malicious words, the said plaintiff became and was much injured in his good name, &c., and hath been deprived of his credit, and was by means thereof so far injured in the good esteem and opinion of the citizens of the District of Columbia, and of the said John Eveleth, that he was wholly excluded by the said John from all share in the said boat and the stock and shares thereof, and refused to be allowed to take any further interest therein, and was thereby deprived of the profits of the said undertaking, boat, and stock, of great value, to wit, of the value of $1,500; and is otherwise greatly injured, &c., to his damage $5,000. Upon the trial on the general issue, at December term, 1818, in Washington,

Mr. Key and Mr. Caldwell, for defendant, contended that none of the words charged in the declaration were actionable per se, and moved the court to instruct the jury, that if they should be of opinion from the evidence that the plaintiff sustained no special damage by not being permitted to participate more largely in the stock of the boat, the plaintiff cannot recover. They contended that the words spoken of the pecuniary credit of a man are only actionable when spoken of a trader. Morris v. Langdale, 2 Bos. & P. 284; Ludwell v. Hole, Ld. Raym. 1417.

Mr. Wiley and Mr. Jones, contra. The plaintiff, so far as he was concerned in the boat, was a trader. It is not necessary to prove him to be a merchant. 4 Har. & McH. 537, 540. The question whether the words are actionable per se should be reserved for a motion in arrest of judgment, and is not to be decided upon the trial.

THE COURT (nem. con.) refused to give the instruction.

THRUSTON, Circuit Judge, thought the words actionable as having been spoken of the plaintiff in regard of his holding the stock in the boat.

CRANCH, Chief Judge, and MORSELL, Circuit Judge, were of opinion that if the jury should be satisfied that the plaintiff was, in consequence of the words spoken, prevented from increasing his share in the stock, it was sufficient to support the action.

MORSELL, Circuit Judge, was also of opinion that the words were not actionable without proof of the special damage.

CRANCH, Chief Judge, was inclined to the same opinion, but not being called upon for any opinion upon that point, gave none.

THE COURT (nem. con.) permitted the defendant, in mitigation of damages, to give evidence that the plaintiff was generally reputed to be not punctual in the payment of his debts.

The jury found a general verdict for the plaintiff, with $1,000 damages.

Mr. Key, for defendant, moved in arrest of judgment, and for a new trial.

Mr. Jones, for plaintiff, objected that both motions could not be made at the same time.

Mr. Key answered that the practice of this court was to hear the motion in arrest first, and if that should be overruled, then to hear the motion for a new trial.

Upon the motion in arrest of judgment.

Mr. Redin and Mr. Caldwell, for defendant, contended,

1. That the words were not actionable per se, for they neither charge the plaintiff with a crime, nor a contagious disease. Holt v. Scholefield, 6 Term R. 694; Holt, Libels, 189. 222.

2. The words are not charged as having been spoken of the plaintiff in regard to any office, or as being a trader, or as being con-

cerned in any trade or occupation by which he made a living, or profit, or any other business which could be injured by words affecting his credit. Morris v. Langdale, 2 Bos. & P. 287; Todd v. Hastings, 2 Saund. 307; Davies v. Jones, T. Raym. 62; Brown v. Hook, 1 Brownl. & G. 5; Viccarye v. Barns, Styles, 213, 217; Savile v. Jardine, 2 H. Bl. 532; Holt, Libels, 222.

The third and fourth counts have no colloquium respecting the plaintiff as a shareholder in the boat, and as the special damage was incurred by him only in that character the plaintiff cannot recover on those counts; and he cannot recover upon the first and second counts, because the special damage alleged, is not stated in those counts; and because the plaintiff has not averred that he made gain, or got a living by the boat.

3. The special damage is not sufficiently laid. He avers that he was excluded from all share in the boat, &c. If he was wrongfully excluded by Eveleth he had his remedy by action against him, and therefore cannot recover in this action for that injury. Morris v. Langdale, 2 Bos. & P. 288; Vicars v. Wilcocks, 8 East, 1. As to the refusal to permit the plaintiff to increase his share in the boat, no request is averred, and without a request he could sustain no damage. Wallis v. Scott, 1 Strange, 89; Com. Dig. tit. "Pleader," C; Bach v. Owen, 5 Term R. 409; Peck v. Methold, 3 Bulst. 298; Devenly v. Welbore, Cro. Eliz. 85; Birks v. Trippet, 1 Saund. 33. If either count is bad, the judgment must be arrested; for the verdict is general, and non constat that the jury has not found the damages upon the bad count. 6 Bac. Abr. (Guillim) 219; 8 Went. 287; 1 Har. Ent. 669; Bull. N. P. 7. As to what is to be considered as special damage. 1 Saund. 243, in a note.

Mr. Ashton and Mr. Jones, contrà. The English law of slander is not applicable to this country. Words tending to scandalize and bring the plaintiff into disrepute are here actionable per se; and if special damages upon one set of words only is proved to the value of ten cents only, it justifies the jury as to all the damages they may find for other words not actionable. If there be one good count the judgment cannot be arrested. Neal v. Lewis, 2 Bay, 204. It was not necessary to prove that the plaintiff was a merchant to make actionable the words spoken of his credit. In this country every man depends more or less on his credit, and words injuring his credit are actionable per se. The damages stated in the conclusion of the declaration are applicable to all the counts. The court must presume that every thing was proved which it was necessary to prove, in order to sustain the verdict. The loss of the use of the plaintiff's share in the boat is a sufficient special damage. After verdict a request will be presumed, if it were necessary to sustain the verdict. 1 Sellon, 499, 500. The colloquium in the first and second counts and the averment of special damages apply to the third and fourth counts, and will support the verdict on those counts, although the words in the third and fourth counts are not actionable per se. Words, spoken of a person in any business, and which may injure him in such business, are actionable without proof of special damage. It is not necessary to aver that the plaintiff may gain or got his living by such business. It was a business which required capital, and therefore required credit. It was not necessary therefore to aver special damage. The exclusion of the plaintiff from the share in the boat was not a tortious act, for which he could maintain an action.

Mr. Key, in reply. The words, to be actionable, must be applicable to his business, and must tend to injure him in his business. Words spoken of a man's pecuniary credit are not actionable unless he gets his living by a business requiring pecuniary credit. The colloquium in the first and second counts cannot be transferred to the third and fourth. There is nothing to connect them. The special damage therefore cannot refer to these counts. 1 Chit. 397; 2 Chit. 261, in note; Craft v. Boite, 1 Saund. 246, in note; Morris v. Langdale, 2 Bos. & P. 287; Vicars v. Wilcocks, 8 East, 1; 1 Chit. 389.

THE COURT (THRUSTON, Circuit Judge, contrà), arrested the judgment, on the ground that the third and fourth counts were bad for want of a colloquium averring a trade or business requiring credit. The plaintiff, by leave of court, filed a new declaration. The cause was afterwards, at April term, 1821, transferred to Alexandria county to be tried, upon the defendant's suggestion and affidavit that he could not have a fair trial in Washington. At November term, 1821, at Alexandria, the jury found a verdict for the plaintiff and $1,000 damages, and a new trial was granted on the prayer of the defendant, upon payment of the costs. The cause came on for trial again in Alexandria, at May term, 1822. The defendant attempted to prove that the plaintiff's witness, John Eveleth, had perjured himself, in this cause, by swearing that he did not write a certain letter, purporting to be a letter from one Benjamin F. Clarke, dated at Baltimore, May 15, 1821, to Mr. Foxall, inquiring about the reputation of the person who had built a mud-machine for the corporation of Georgetown, who was in fact the same John Eveleth; and in order to prove the letter to be in the handwriting of Eveleth, the defendant produced another letter which the witness, Eveleth, admitted to be in his handwriting, and called Daniel Kurty, as a witness skilled in handwriting, and asked him to examine them and say whether the one handwriting was not like the other.

The plaintiff's counsel objected to this kind of evidence, and THE COURT (THRUSTON, Circuit Judge, absent), said that the evidence was not proper. It was mere comparison of handwriting, which is not evidence. Phillips, in his treatise on Evidence (page 371), says,

"It is an established rule of evidence that handwriting cannot be proved by comparing the paper in dispute with any other papers acknowledged to be genuine." After the argument of counsel was closed and before the jury retired from the bar to consider of their verdict, they proposed to the court the following written question: "Should the jury believe that the defendant is guilty of the slander, and also believe that the witness wrote the letter from Baltimore, can they find damages on his, and other evidence?"

To which THE COURT (THRUSTON, Circuit Judge, absent) gave the following answer: "The jury are the sole judges of the credibility of the witnesses, and to decide upon the whole evidence whether the defendant is guilty of uttering and publishing the slanderous words charged in the declaration." This opinion was given without any argument or observation from the counsel in the cause. The defendant's counsel were not present. After they came in, and after the jury had retired to their room, Mr. Key, one of the defendant's counsel, prayed the court to add to their instruction to the jury. the following words: "But the jury cannot find the defendant guilty of speaking the words, unless there is credible testimony of that fact; and if they believe that the only witness, proving the words to be spoken, has committed perjury, in his evidence, they cannot find for the plaintiff."

THE COURT refused to make this addition to the instruction which they had given to the jury; and MORSELL, Circuit Judge, said that the testimony of a witness, who may have sworn falsely upon his cross-examination upon a collateral immaterial point, may, if corroborated by other evidence, be received by the jury, and a verdict may be found upon his and such other corroborating evidence.

This was not denied by CRANCH, Chief Judge, as being the opinion of the court; but THE COURT said they would not send the instruction asked by the defendant's counsel after the jury had retired, nor any other instruction than the one given. The jury again found a verdict for the plaintiff with $1,000 damages.

Mr. Key and Mr. Taylor, for defendant, moved for a new trial, and as reasons therefor, alleged, (1) That the court refused to instruct the jury, after they had retired to consider of their verdict, as requested by the defendant's counsel. (2) That one of the jurors, after they had been permitted to separate, under a charge, from the court, not to hold any conversation on the subject with any person, did hold a conversation with one of the plaintiff's witnesses upon the subject of Eveleth's credibility.

1. The court, instead of instructing the jury as they did, should have instructed them that if they believed that Eveleth had perjured himself in respect to the letter, they could not find their verdict for the plaintiff upon his testimony, although corroborated in regard to the point in issue. King v. Atwood, McNally, 197; Eveleth was perjured in this cause. Falsus in uno, falsus in omnibus, 4 Inst. 279; The St. Nicholas, 1 Wheat. [14 U. S.] 430; Gilb. Ev. 136; 3 Caines, 12.

2. Upon the misbehavior of the juror, he read the affidavit of a witness who heard the juror say that be believed Eveleth, the witness, was perjured in relation to the letter of Benjamin F. Clarke, but that he had founded his verdict for the plaintiff on the said Eveleth's testimony. Trials per Pais, 12; Knight v. Inhabitants of Freeport, 13 Mass. 220.

Mr. Jones and Mr. Swann, contrà. Here have been three verdicts against the defendant, and the statute of Virginia of the 19th of December, 1792 (section 34) forbids the court to grant to the same party more than two new trials.

1. If the witness swore falsely in an immaterial point it only goes to his credit, of which the jury is to judge. They may, especially if corroborated, believe him upon other points.

2. If the court had given the instruction asked by the defendant's counsel after the jury had retired, it would have, in effect, been an exclusion of the testimony of the witness. The alleged false swearing was upon a point wholly immaterial to the issue, and the witness could never have been convicted of perjury upon that false swearing. Rex v. Teal, 11 East, 308, 309.

Mr. Key, in reply. The court is not limited to any number of new trials. Goodwin v. Gibbons, 4 Burrows, 2108; Tindal v. Brown, 1 Term R. 171. The point, upon which the false swearing was, was a material point; because the character of Eveleth was in issue, and the letter was written to obtain something in support of it.

THE COURT (THRUSTON, Circuit Judge, absent, but being of the same opinion) refused the new trial, because the defendant had, in effect, had the full benefit of two new trials. Each trial had been full and fair, and three verdicts had been rendered against him. Because the court was not satisfied that any of the jurors had been guilty of any improper conduct; and because the court was still of opinion that the jury, if from the corroborating evidence they were satisfied upon the whole evidence that the defendant was guilty of speaking the words as laid in the declaration, did right in giving their verdict for the plaintiff, although they may have believed that the witness wilfully swore falsely in regard to the letter.

Case No. 14,256.

TURNER v. GREEN et al.

[2 Cranch, C. C. 202.] [1]

Circuit Court, District of Columbia. June Term, 1820.

PROMISSORY NOTE—EVIDENCE—SUBSCRIBING WITNESS—ADMISSIONS.

1. The making of a promissory note can only be proved by the subscribing witness, if there be one.

2. Evidence of the confession of the maker that he owes part of it, is not sufficient on the money counts.

Assumpsit upon a promissory note, and the common money counts.

Mr. Marbury, for plaintiff, offers to prove the handwriting of the defendants [Green & Johnson], the makers of the note, by other testimony than that of the subscribing witness, without accounting for his absence.

But THE COURT (nem. con.) rejected the evidence. He then offered to prove that the defendant Johnson confessed a balance of $300 due on the note, and promised to pay it; and contended that this was good evidence on the count for money had and received.

But THE COURT (CRANCH, Chief Judge, doubting) rejected the evidence.

THE COURT offered to save the point, and directed the jury to find a verdict for the plaintiff, subject to the opinion of the court on the question of evidence, but Mr. Marbury refused to pay the jury fee; and THE COURT instructed the jury that there was no evidence before them to support the action.

[See Case No. 14,261.]

Case No. 14,257.

TURNER v. HAND.

[3 Wall., Jr., 88.] [2]

Circuit Court, D. New Jersey. Oct. Term, 1855.

WILL—FORGERY—HANDWRITING—TESTATOR'S DECLARATIONS AND SANITY—DEPOSITIONS IN OTHER SUITS.

1. Proof of forgery derived from knowledge of handwriting, though very strong indeed, ought not to control positive, and unimpeached evidence of an actual execution.

2. Strong evidence of the forgery of a will being given, the declarations of alleged testator, after the alleged making of the will, as to the mode in which he had disposed of his property, are evidence, such declarations being offered as a fact or circumstance tending to prove fraud and forgery, by showing that the alleged testator had no knowledge of the existence of such an instrument. But such evidence is not generally admissible; is dangerous in its effect on a jury, and ought to be controlled by the charge and powers of the court.

[Cited in brief in Eddey's Appeal, 109 Pa. St. 420, 1 Atl. 425.]

3. The deposition of a witness, deceased, taken in the prerogative court on a caveat against a will, may be read in an ejectment, where the plaintiff in ejectment claims title under the person who was an executor of the will and propounded it for probate, and where the defendant is one of several caveators; but the record of the court is not evidence to show what the decision was on the validity of the will.

4. On a question of a testator's mental capacity, the court should look to his substantial business acts more than to his conversations, or occasional doings not connected with business. The fact that he is eccentric, excitable, passionate and very nervous;—is on certain subjects believed by many to be insane, through excited feeling—that he believes in spiritualism, the book of Mormon, or in Fourierism; may talk very much like a fool; have visions and believe in them, is not enough to show a want of sound and disposing mind and memory, provided he attends constantly to his business, and manages it with capacity, care and skill; and in other practical respects appears to be of sound mind.

[Cited in Dale v. Dale, 36 N. J. Eq. 280; Eddey's Appeal, 109 Pa. St. 420, 1 Atl. 426; Kingsbury v. Whitaker, 32 La. Ann. 1055.]

This was an ejectment, in which the plaintiff claimed title under one Boylan, whose title depended on the fact whether a certain paper of several leaves, signed on each leaf, and dated January 12th, 1852, was the will of Jonathan Meeker, a man of large fortune in New Jersey, who died in 1853, at the age of seventy-six. The defendant's positions were, (1) that the will was a forgery; (2) that if not actually a forgery, the testator when signing it, had not been of sound and disposing mind. The execution of the instrument having been formally proved by one Mrs. Hoyt and her three daughters, who with her husband, now deceased, professed to be the subscribing witnesses; the defendant thus attempted to prove it an absolute forgery. One Clark had known Meeker for forty years; lived in the next house to him; had seen him write for thirty years; was as familiar with Meeker's handwriting as with his own. "My opinion is he never made one of those signatures. It is plain to me he never wrote them. There is a peculiarity in them not his." Valentine had known Meeker and his writing from his youth up; did not believe the signatures to be his; never had had but one opinion from the time that he first saw them, and that was that the signatures were forged. Bonnell had frequently seen Meeker write; thought the signatures not genuine; thought them in a better handwriting than Meeker's. Wilcox, a justice of the peace, had done business with Meeker for thirty years; had seen him write very often, and did not believe the signatures to be his. Ball, a constable, had known Meeker intimately for fifty years; was in the office of Meeker, who was a magistrate, for thirty-six years, and as constable did his business; was very familiar with his handwriting, and did not believe any one of the signatures to be his; believed every one of them forged. Day, who had had considerable dealings with Meeker, and so was familiar with his handwriting, also believed the signatures forged. Wood had

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

[2] [Reported by John William Wallace, Esq.]

seen Meeker write frequently of late years, and did not believe the signatures genuine, they having, in his opinion, been written by some hand less tremulous than Meeker's. Runnion, a lawyer, had been frequently employed professionally by Meeker; had often seen him write; had seen him write with all sorts of pens; no signature of his that the witness had ever seen was like any one of those on the paper alleged to be his will. They were all of a hand less steady; and "my opinion is that the signatures are not his." Crane, a Methodist clergyman, had seen him write; had examined the paper several times, carefully; "I do not believe it genuine," he said; "I do not believe any one of the signatures to be his handwriting." Tully, another Methodist clergyman, very intimately acquainted with Meeker, had examined the paper twice before, and had made up his mind as his "deliberate opinion, that Squire Meeker never wrote those signatures." Townley, familiar, &c., thought "the signatures resembled his, but were not his." Crain, familiar, &c., thought them not like any of his of late years, and therefore a forgery. Magee thought the signatures did resemble his, but were not his, being all of them smoother and better than any which the witness had ever seen of his. All these witnesses were intelligent, credible and unimpeached. The paper alleged to be Meeker's will, left the property which was the subject of this ejectment to one Boylan, no relation, and who with Meeker's widow, were sole executors. It did not leave anything, or but a small amount, to a nephew of Meeker's, Jonathan Meeker Muir, hereafter mentioned; nor did it found or endow any Methodist institute, also spoken of hereafter; though it left $1,000 to a Methodist church. His widow was left with a small sum, and his blood relations generally were cut off.

First Point of Evidence. The defendant's counsel now proposed to ask of witnesses this question: "What conversation had you with Jonathan Meeker, before and since February 12th, 1852 (the date of the alleged will), respecting the disposition of his property by will;" the purpose of the question being to give in evidence the declarations of Meeker, both before and after the date of the alleged will, as to the dispositions he had made of his property, and the evidence being offered as a fact or circumstance tending to prove that the testator was ignorant of the existence of any will such as was contained in the paper offered in evidence; that this paper, containing dispositions was wholly incongruous with his often expressed testamentary intentions; and so in connection with other facts proved and to be proved, to sustain generally the issue of fraud and forgery.

Mr. Bradley, against the admission of this testimony, relied much upon the English case of Provis v. Reed, 5 Bing. 435 (15 E. C. L. 658). In that case where the question was as to the due execution of a paper purporting to be a will, proof was offered that the so-called testator had said, "Tom Reed (the defendant in the case) has been trying to get my property; but neither he nor his, shall have it. * * * My land goes to my own family. Peggy! (one of the defendants) remember the land is yours. If I don't live to make my will, when I am dead, see that you are righted." The evidence was rejected. Park, J., says: "The evidence of declarations of the testator incompatible with the validity of the will, was properly rejected. When the legislature has taken such care to prevent fraud in wills, and when it is considered how easily declarations may be extorted by artful persons after the intellect of a testator has been impaired by time, it would be most mischievous and a violation of all established principles to allow such declarations to be received in evidence." Of this opinion was the rest of the court. The American case of Jackson v. Kniffen, 2 Johns. 31, in the supreme court of New York, when Kent was chief justice of it, and Livingston and Thompson, justices, is to the same effect; and parol evidence of the declarations of the testator, that he had executed his will under duress and now revoked the same, though these declarations were made in the moment of expected dissolution, and under circumstances of such solemnity that they would have been received on a question of life and death, in a court of criminal jurisprudence, the majority of the supreme court of New York, after full consideration declared them inadmissible: Spencer, J., alone and "with diffidence" dissenting.

GRIER, Circuit Justice. Testimony of the sort proposed is, generally speaking, not admissible; but when you have strong proof that the paper offered as a will is a forgery, and the issue is fraud and forgery, I think it is competent, as tending to prove the issue. It is, however, a somewhat dangerous kind of evidence; and a court must hold a tight rein over it, in charging the jury as to its legal effect, in relation to the positive and unimpeached evidence of execution. Question allowed.

The evidence being ruled admissible, it appeared that Meeker had told Valentine, about the time of the alleged disposition, and also not very long before he died, that he had left a certain ten acres described for the site of a Methodist seminary or institute, and $5,000 for the erection of a building, and $5,000 to endow it; that he had left to his nephew, J. M. Muir, other property worth $10,000. He had told Corey also, that he had left money for the Methodist seminary, but none for the church. To him he had always spoken highly of his family connections, especially of his nephew, Muir, of whom he said that except his own wife, he was nearest to him in his affections, and that he leaned on him as he got old for coun-

sel and for help. Of Boylan he said that he was a "d——d scoundrel, and he would not trust him with a dog's dinner." He told Clark that he had left money for the seminary, though none for the church, because the church society would not come up to his views; that he had left land worth $10,000 to his nephew, Muir; and that Muir and his wife were his executors; that he had kept a will by him for forty years. To Lewis he had said, after the execution of his alleged will, "Do you know Boylan? I would not trust him for one cent. He is the devilishest rascal in the world;" and said that one Hoyt, hereafter spoken of, and Boylan were attempting "to come some game over him," and that he did not mean they should; that he would once have trusted Boylan, and have made a man of him if he had done right, but not now. "He always told me that Muir was to be his chief heir." To Lowe he said, that he had made his will, and had left $10,000 for building and endowing a seminary; $5,000 for each; and getting out a map, showed him the location of the site for it; said that his executors were his wife, Muir, his nephew, and James and Isaac Meeker, that it was the last will he should ever make, as he was old and feeble; spoke of Muir as a very smart man, who had done more for him than all his relations, and to him especially always expressed himself kindly and affectionately; "his blood relations," said this witness, "were a great hobby with him, and he gave as a reason why he would leave me nothing, that I had no Meeker blood in me." Of Boylan he said that he was a d——d rascal, who, while professing to be his friend in a quarrel he had with the town council of Newark, was in fact against him and working for the other side. To Wilcox, whom he met in the street, after February, 1852, he offered to show his will. "It is of no interest I guess, to me," said Wilcox, "since I don't believe you have left me anything." "No," replied Meeker, "I haven't left you anything; for you have no Meeker blood in you. I have left it to my nephews." To Johnson he stated that he had left $10,000 for the erection and endowment of the seminary; and that Boylan was a d——d cheat, who would rob him of all his property if he could; that he had paid him to attend to his business, but that he did not attend to it at all. To Searles, that Boylan was "a nasty, good for nothing, dirty, little puppy"; that he had cheated him out of a place in Newark, and would do the same again if he got a chance. To Runnion, who advised him to have Boylan attend to some business for him, he said, "I won't; he is a villain, a d——d rascal. I have no confidence in him." When Brewer said he did not know Mr. Boylan, "you need not want to know him," replied Meeker, "he is a dishonest man." To Tully, the Methodist clergyman already mentioned, and very intimately acquainted with him, and seeing him frequently, Meeker, "at every interview in the latter part of his life, uniformly expressed a determination to have the Meeker Institute accomplished. It seemed to be one of the hobbies of his old age."

It would be tedious and of no use to go through all the testimony in the case. Many other unimpeached witnesses were examined for the plaintiff, all of whom testified to the same effect as those whose names have been stated.

On the side of the defendant, it appeared, contrary to what Meeker had stated to the persons last named, as to the disposition of his property; that to Dr. Lord, a physician of character, who had known him very well in the last few years of his life, he spoke disrespectfully of all his relations; said that they wished to rob him; that he had done a great deal for them. Dr. Lord had seen Meeker often at Boylan's office, and had heard him speak of Boylan as "my friend Boylan." He frequently spoke of the Methodist or Meeker Institute, and of his intention to endow it, until the latter part of his life, when he said that he had abandoned the project. He said this in an interview very shortly before his death. To Law he said, that one Whitehead had been his lawyer, but that Boylan was so now; that Boylan had treated him well, and he would remember him for it: to J. A. Johnson, that he meant "to make a man of Boylan, but did not mean that he should know it, as it would make him too saucy;" that his nephew, Muir, did not know how to manage a farm. "He was always complaining," said this witness, "that his relations would not take care of themselves, and that he had helped them until he was tired." To Fort, a Methodist clergyman, who resided about five hundred yards from him, and visited him as a spiritual adviser in his last illness, he said that he had given a legacy of $1,000 each, to two churches, a Presbyterian and Methodist; that his connections were Presbyterian, he himself a Methodist in his opinions; and described the mode of raising the legacies essentially as found in the paper in controversy. Of Boylan he spoke respectfully; called him "my friend Boylan;" said Boylan was doing business for him; wished the witness to become acquainted with Boylan, and offered to give to him a letter of introduction. To Mrs. Trimble he spoke in the kindest terms of Mrs. Boylan; said that she had always treated him most kindly, and that he meant to do something for her husband.

On the matter of the signatures, several witnesses, not the subscribing witnesses, but acquainted with Meeker's handwriting, were examined, all of whom gave their opinions, derived from such knowledge, that the signatures were genuine; most of them thought them his; others thought them like his, and without any great difference from his ordinary signatures; a "little firmer," perhaps,

than in most cases, but no great difference; "a little better than common, perhaps, but his," &c.

The history of the execution of the will, was as follows: Meeker, being aged seventy-six, and in such a state of health and mind as is hereafter mentioned—a feeble bodily health, confessedly—had gone on a cold winter's afternoon, ten or twelve miles from his own house in New Providence, to one Hoyt's, a person of some social condition, with whom he had but recently become acquainted. Hoyt, it appeared, was a garrulous, foolish, lying person, but one whose moral character was not otherwise open to impeachment. Meeker's going so far from home alone, at his time of life, and in feeble health, on so cold an evening, had attracted remark from more than one person along the way who met him, and one of whom had remonstrated with him at the exposure. He went on, however, and reached Hoyt's. Neither Hoyt nor any of his family were related to Meeker, nor they or their relations or friends, beneficiaries under the will, or acquainted otherwise than by name with most of those persons.

The history of the execution of the will was given by a subscribing witness, one of Mr. Hoyt's daughters, essentially as follows: "Mr. Meeker was an acquaintance of father's. He had visited at our house; had dined and taken supper there several times, for some two or three years, perhaps more, before the time I am about to speak of. He executed a paper at our house, which he said was his will. It was in January, 1852, I think on a Monday. He came in a sleigh, with two horses, alone, about dark, about dusk; before tea. He took tea with us. It was a cold, snowy, stormy night. He said he was afraid the storm would spoil his new blue horse-blankets; wind was high. A servant received him at the front door. I saw him first in the dining room. The family were there. The family consisted of my father, mother, two sisters, myself, my aunt and grandmother. I can't recollect whether grandmother was there or not. Father was not at home when Mr. Meeker arrived; he had gone to New York that day, and did not return, I think, until after tea. When father had got his tea, Meeker asked him to go into an adjoining room. After being absent a half hour or more, they came back. Mr. Meeker had a paper in his hand, which he said he wished to execute. He sat down by the table and requested pens and ink to be brought, and that some one of us would witness the will. Before the old man signed it, there was a long discussion about its contents; he read it over loud to us. I think the first thing he remarked on was what he had given his wife. Some one said it was a mere pittance. He said it was more than he had given her in other wills, and was very liberal; that she already had more property of her own than she needed; that he had given her money for signing papers, which she had laid up. Father said that she had been as economical as he, and had enabled him to grow rich, and ought to have more. What brought father's remark out, was Mr. Meeker's saying that the provision in this will was very liberal. I remember a legacy to some one named Muir. He said that Muir would be expecting more than he got; for he had always been hanging about him; he gave as a reason for not giving him more, that Muir had over-reached him. I recollect a provision for a niece who was in an insane hospital; and a legacy to a colored girl named Violet. (Both these provisions were in the paper in question.) He remarked that he had given his brother nothing, because he had enough already, having only one child, a daughter. Father said that he had given too much to Mr. Boylan. There was a good deal of discussion about him. He said that 'Boylan' was a young man of considerable promise, and he would give him a lift: and that he liked 'Mrs. Boylan,' and urged us to become acquainted with her. Meeker brought the will ready drawn: he said it was drawn by a lawyer in New York. I don't remember his name. When father made a suggestion about Mr. Boylan, the old man said that he had made up his mind before he came and didn't want to be dictated to. I remember one or two bequests to churches; one to a Methodist church, I think. I remember no more except that there were bequests to some of his friends; their names I don't remember. I knew none of them. Father said, jestingly, that he ought to have left us something. He said we had enough already. I remember his saying that he had intended to leave something for a public school, but that he had changed his mind; that they would be ungrateful and would not care for him enough to put a gravestone over him; that he did not wish the people of New Providence to know it, for that if they knew he had left them nothing, they would be mad enough to ride him on a rail. After the pens and ink were brought, he requested my father to write something at the end, which he did. After my father had written what he requested, Meeker wrote his own name. He asked for a seal. I cut the seal paper at his request. He put his finger on it and declared it to be his last will and testament for the purposes therein mentioned. He asked me to witness it; I made some apology and declined. My father proposed to go for some one out of the family; also proposed to take it to a lawyer in Elizabethtown, whom he named, and have it witnessed there. Father said he would rather have nothing to do with the will. The old man objected, said he wanted it executed at our house to keep it a secret; that he wanted a private will; that his relations were always talking about the disposition of his property, and that he was determined to make a will they should know nothing about; that he knew we were not

acquainted with any of his relations, except Mr. Meeker at Elizabethtown. He then asked my sister Anna to witness it. Father and mother both objected, and mother proposed that father should go for Mr. Brown, a neighbor; and I think that father set off, or made some movement to go, but desisted because the old man seemed so vexed about it. It was snowing and cold. He said that any young lady might consider it an honor to be asked to witness his will. After that my sisters signed it. He then asked me again to sign it. He said he had a fancy to my name, that it was the name of his wife. I finally did sign. Father witnessed it. He is now dead. I remember that Mr. Meeker signed his name on several leaves; he said it was the custom, or his fancy. He said afterwards that he wished to have no mistake. He tried several pens to get one to suit him. There were gold pens and quill pens on the stand. I do not know which he used. But he said he could write better than any of us; that he would have to take pains, so many ladies looking on. The will was executed between seven and nine o'clock in the evening. After father, mother, I and my sisters had all signed, it was put under a cover, an envelope, and the old man put it in his pocket-book. All the time that I remained in the dining room, Mr. Meeker was talking about the dispositions which he had made in it of his property. I retired before him. I do not know when he and father retired; I left them, and I think, the rest of the family in the dining room. I saw no more of the will, until two or three weeks after it was executed; when I saw it in an envelope in a drawer in my father's desk, where he kept money and his private papers; and several times afterwards. I saw it whenever I happened to see the drawer opened. I often assisted my father to arrange his papers, and he opened the drawer when he wanted money. It was endorsed 'Jonathan Meeker's will.' There was something written on it about its being opened ten days after the decease (an endorsement which was on the paper in question). The day my father went to the funeral, he proposed to take the will with him and give it to Mrs. Meeker. Mother told him not to do so. Father said he would be glad to get it out of his hands, and that as Mrs. Meeker was one of the executors, she ought to have it. Mother said that as he had taken charge of the document he should do as he was directed, and keep it till the tenth day. Ten or eleven days after Mr. Meeker's death, my father took out the will, broke the seal of the envelope, and requested me to write to Mrs. Meeker, to say that he was going to deposit the will with the surrogate at Newark. I went with him for the ride. I recollect hearing the will read when taken out of the envelope. I recognized it as the one read over at our house by the testator. I have no doubt whatever of its being the identical paper now shown to me, nor that the seal paper is the one which I cut, and the signatures the respective signatures of Mr. Meeker, my father, mother, my sisters and me."

This account was confirmed with slight circumstantial additions and variations by the mother and two other sisters; the father, the remaining subscribing witness, being dead. The narrative of all these ladies was given with great apparent candor, and was not affected unfavorably by long and severe cross-examination. One of the witnesses stated that the signatures were made with a gold pen.

Second point of evidence. The defendant's counsel now proposed to read the depositions of certain deceased witnesses, which had been taken in the prerogative court, in a suit there upon a caveat to this will, it being shown by the record of that suit, that Boylan, who in this suit was grantor, had in that one, as executor of the will, propounded it for probate; and that the defendants here were among the caveators there. The plaintiff's counsel objected to such depositions being read, as the question in the prerogative court regarded personal property and not the realty, and as the record showed that in that suit there were other persons caveators, who are not parties at all in this one.

GRIER, Circuit Justice. The parties were substantially the same, and the issue was the very same, st.: "Is this the last will and testament of Jonathan Meeker?" The record of the prerogative court may be considered in evidence for the purpose of the offer; but not to show what the decision there was as to the validity of the will. Depositions read.

The prerogative court had decided against the genuineness, a fact not allowed to be given in evidence, but one of common knowledge about the place of trial.

In respect to the mental capacity or sound disposing mind and memory of Meeker, the testimony was not perhaps entirely consistent. It showed clearly that he was very eccentric, nervous and excitable; and that he was a man of violent passions and prejudices. A few years before his death, the town authorities of Newark, without his consent, and in violation probably of law, had taken some of his property for a public park; a matter on which he became almost maniacal. "When he got talking on that subject, he became wild," said one witness; "incoherent," said another. "You might as well touch a keg of gun-powder as say 'park' to him," was the testimony of a third. "He became perfectly crazy on the park business; wished to raise an army and make a revolution," said a fourth, who thought him "failing in mind and body, and not fit to attend to any business." Boylan, whose name has been so frequently mentioned, was Meeker's attorney and counsel about the park business; which Meeker, by his will directed should be carried to the courts of last re-

sort. So, too, it appeared that "he was restless and wild about all railroads." "His conversation was frequently incoherent and foolish." He became, at one time, very vehement against the court of chancery; always calling it a court of iniquity. In the time of President Jackson, he had been a great admirer of that gentleman, until, having sent to him a plan for a bank of the United States, without receiving from the president any answer, he became highly offended, and his views of the Jackson policy underwent a complete change. He often adverted with great feeling to the president's breach of decorum in not replying to his letter. At a later date, and not very long before making his will, he told one Love, "of a vision he had had when awake, of a great white throne, on which there were many fine ladies; of all of whom his wife was the prettiest. He (Meeker) was king and she was queen." "He was in earnest," added the witness. About the same time, "he would try to play on Pan's pipes." "He acted strangely,' said the witness. "I thought him failing every way, that his mind had failed with his body." On another occasion, "he took out a promissory note for $1,000, and offered to give it to me," said another witness. "I thougnt him partially deranged on that day." "Towards the close of his life—both before and after he made his will—he had many visionary notions about property; when near seventy-five years old, and failing visibly in body, he talked about his building factories, and having water-powers; he said he wanted to make money—wanted to get rich, and thought he could become so by making spools out of dog-wood."

On the other hand, it appeared that Meeker was naturally "a shrewd, rough man"—"eccentric, but strong minded"—"might have been a superior person, if well educated"—that although he talked very foolishly and wildly, had visions, &c., he acted with sagacity. Hoyt, at one time, wanted to borrow money of him, and used some address to get it without mortgage, but did not; nor did he give the man the $1,000 note which he offered to him. "During all the time near which he made his will," said an intelligent witness, "he was about attending to business. Sometimes he did well enough; generally well enough in ordinary matters. When calm, he knew perfectly what he was doing, and was capable of understanding his relations in life; but when he became excited, he seemed to lose his faculties. The park was the exciting matter; he would become so excited about it, that he hardly knew what he said. But he was not alone in his views about the conduct of the town authorities of Newark, in their mode of obtaining ground for the park. It was an exciting public topic. Town meetings were held to condemn the council; the papers of the day are full of it. No one else behaved, however, like Meeker, who, on that subject, in my opinion, could not be called sane. On other matters, and especially on matters of property, he acted with sagacity enough."

The testimony as to his conduct on the evening when he came to Hoyt's, and there executed the paper in question, has been given. The witnesses to the will testified in substance that, so far as they could judge, he was a man naturally of a sharp, strong mind, strong will, very positive about his own affairs, but was not excited nor agitated about anything specially on the evening that he was there. He slept there that night, breakfasted there the next morning, and afterwards drove away with Hoyt, the father. His moral character was summed up by one witness. "He was tedious in conversation; dogmatical and arbitrary in all his views; selfish, lying, avaricious, domineering and dictatorial; he hated a poor man, despised his superiors; abused everybody, and spoke well of everybody at different times, according to his humor."

After argument the jury was thus charged by—

GRIER, Circuit Justice. The issue is whether this paper of 12th of January, 1852, purporting to be the will of Meeker, is his will or not. It is an issue of fact, and one to be resolved by the jury on their own responsibility.

I need not, perhaps, remind you, that in order to perform the duty which you have sworn to perform, in rendering a true verdict, in this case, it will be your duty to apply the principles of law involved in it, and weigh the testimony which was had before, with cool, calm and unprejudiced minds. Let no pressure of public opinion—no rumor which may have come to your ears of the supposed decision of any other tribunal, have the slightest effect or influence on this case. There is no greater evil in the administration of justice than that men's liberty or property should become the sport of mere popular impulse or public prejudice.

There is another principle that never should be forgotten by jurors and judges, and one which I know by experience, we are sometimes tempted to overlook—viz.: That we are performing a duty entrusted to us by the law, not exercising an irresponsible power. The rights of property depend upon the law, and not on the caprice or discretion of a court or jury. The law gives to every man the right of disposing of his property by deed or by will. And if the instrument by which this disposition is executed be in due form of law, by a man of sound and disposing mind and memory, without fraud or coercion practiced on him, neither court nor jury have a right to set it aside, on the supposition they could make a more just and equitable disposition of his property. The law has not committed to us the power of disposing of men's property as we please. That courts and juries are sometimes tempt-

ed to forget this principle my experience has amply shown me. I have seen it in the jury box—I have seen it on the bench—I have felt it—I have had to struggle against the feeling. We easily believe what we wish to be true. We are prone to be satisfied with light proof, or any fallacy in favor of a preconceived opinion, prejudice or feeling. When we suffer ourselves to be thus tempted, we act as tyrants, not as judges.

The question for your decision then, is, did Meeker sign, seal and publish this instrument as his last will and testament? If the testator in the right use of his faculties has executed the instrument in due form of law, it is not in the power of court or jury or both together to treat it as null and void, and make a different disposition of his property to suit our notions of justice or propriety. A rich old man may marry a young wife or a handsome and obliging housekeeper, or maid servant—he may disinherit his own children and leave them beggars. You and I may think his conduct oppressive and unjust in the highest sense; yet if it be his will, we have no power to set it aside. It is true a will may be so outrageous, so contrary to the known desires and wishes of a testator, so absurd on its face, as to indicate or even demonstrate the want of sanity in a testator who could be guilty of signing such an instrument. But it must be a very extreme case to justify the rejection of a will on this account. It would be a very dangerous practice if courts were to allow the parol declarations of a testator to be given in evidence to a jury in order to set aside a legally attested will. Why does the law require certain solemnities in order to a valid testamentary disposition of property? It is because of the fraud and perjuries which would be a necessary consequence of suffering a man's property to be the sport of loose conversations. Old men who have the misfortune to be rich and childless are often so situated, that it becomes necessary to their peace and comfort, that they should conceal their intentions entirely from the wide circle of collateral relatives, beggars for the church, and others of like character. His parol declarations may be, and often are made, directly contrary to his real and secret intentions, and for the very purpose of concealing, not of testifying his mind or intention. Hence many judges have wholly refused to suffer such evidence to go before a jury for any purpose whatever, as tending to introduce the very evils which the statute of wills was made to guard against. Our titles to land should not depend on hearsay, for next to mere opinions, the testimony of conversations is a species of evidence the least to be relied on. (1) It cannot be contradicted; the witness may give the widest stretch to his fancy or imagination, and he cannot be convicted of perjury. (2) Very few persons can recollect or repeat verbatim what they have heard another say. A witness gives his own version, in his own words, of general impressions, rightly or wrongly received. (3) The witness may recollect a part of a conversation, and yet that part may be an entire misrepresentation of the whole. (4) He may omit very small, but very material words, such as "if," "not," &c., which entirely alter the whole complexion and meaning of the conversation—make absolute what was conditional, and positive or affirmative that which was negative. I must say, after long experience, that I always deeply regret to see rights of property, or men's lives, or liberty, to depend in any measure upon testimony of this nature.

You may then very naturally inquire if such be the law with regard to wills, and such are the dangers to the rights of property from admitting the declarations of testators to be given in evidence to affect their written will proved in due form of law, why has the court permitted such testimony to be laid before the jury? It is right, therefore, that the court should explain to you on what principle this was done, that you may give this evidence its proper weight and application, and not be led into error by an improper appreciation of it. While it is undoubtedly true that parol declarations of a testator made before or after executing his will, ought not to be received as a ground for altering or annulling it, yet cases may arise where such declarations, in connection with other circumstances, may be taken into consideration, as for example, where there is strong evidence of conspiracy and of fraud practiced on the testator, or that the instrument is forged and false.

In order to elucidate this principle, let us suppose a case. A will is produced in court, regularly proved according to law, yet notwithstanding the legal proof, it may possibly never have been seen by the testator, never have been signed and sealed by him, and, consequently, does not contain his will as to the disposition of his property. Suppose it to have been made (as has sometimes been the case in Ireland and other places) by some person personating the testator, and simple, and perhaps honest people, have thus been prevailed upon to attest it. In such a case, the signatures may be so palpable a forgery as at once to detect the fraud to any judge of handwriting. Again, suppose the will disinherits a child, a grandchild, or other relative, who has been the favored and beloved companion of the testator's life, whom he had uniformly pointed out, and always, and invariably, through his whole life, declared his intention of making his heir, and in whose favor a prior will was duly executed. Suppose the devisee in this supposed will was some worthless fellow, unknown to the testator, or, if known, despised or abhorred by him. Suppose the witnesses to be of the same character, low and degraded, with whom the testator never associated. Would

not such facts, if clearly proved, condemn such instrument in the mind of every rational man? Would not the moral impossibility that the testator could ever have made such a disposition of his property, be sufficient to outweigh the positive testimony of such witnesses? It is easy to forge the handwriting of almost any man, so that it may be almost impossible for the best judges to discriminate between the false and the true, and it is too true, that persons may be found willing, for a sufficient consideration, to swear to any statement of facts. Fraud can be generally proved only by circumstantial evidence. A number of distinct facts, clearly proved, may be so utterly inconsistent with the truth of the instrument, as most satisfactorily to establish the fraud. The fact that the testator had uniformly, through his whole life, declared that he intended a certain relative to be his heir, that he made his will in his favor, may be an important link in the chain of circumstances from which fraud, perjury, conspiracy, and forgery, may be clearly proved.

It was for this reason, that when the defendants opened their case, and proposed to prove fraud and forgery by a chain of similar circumstances, the court permitted this testimony of the declarations and conversations of the testator to be given in evidence.

Let us now proceed to a more particular examination of this case. In doing so, it is not our intention to examine or compare the immense body of testimony, relevant or irrelevant, with which this case has been encumbered. But we think it our duty to notice some of the leading facts of the case, hypothetically, and to point out to you the weight and effect these should have on your verdict, accordingly as you may find them to exist.

How, then, shall we take up this immense mass of testimony, to avoid confusion of ideas, and give to the testimony its due weight and effect? 1st. For this purpose, you will first examine the testimony in support of the will. Is it sufficient in law, and credible, so that standing alone, the will ought to be established without hesitation? 2d. What is the defence set up against this paper? Is it so clearly established by evidence, as to convince our minds that the testimony given in support of the will is false, and that there is a chain of undoubted circumstances, which makes it morally impossible for the jury to believe the witnesses to the will, or that this paper contains the true will or intentions of the testator?

You must remember, that the burthen of proof is on the party who alleges fraud. That fraud, though proved by circumstances, can never be presumed—for fraud is a crime. It is not enough to show suspicious circumstances. Suspicion is not proof. It does not require a great deal of ingenuity to cast suspicion of fraud upon any transaction. There is a very great and sometimes grievous error into which not only the public mind, but that of jurors and judges too, are apt to fall; and which leads to false judgments, and sometimes to great oppression. I would, therefore, specially call the attention of the jury to it, and caution them to beware of it. It is this: The law abhors fraud. Every honest mind hates it, and even those who practice it themselves, will join in the denunciation of it. It makes them feel virtuous for the time, and they are the most ready, from the arguments of conscience, from judging of others by themselves, to believe it true, and inveigh most loudly against it. When the clamor of fraud is raised in a community, or when it is confidently charged by counsel in a court, we are prone to see all facts through a false medium, which magnifies the importance of every fact from which suspicion of fraud may be raised, and ignores the plainest inference against it. In the midst of our virtuous indignation against fraud, we first assume it has been committed, and then seek for arguments to confirm, not our judgments, but our prejudice. "Trifles, light as air," then become "strong as proofs of holy writ." Circumstances which to an unprejudiced mind are just as compatible with innocence as guilt; which at best could only raise a suspicion, are set down as conclusive evidence of crime. Those who sit in judgment over men's rights, whether as courts or jurors, should beware of this natural weakness to which we are almost all of us subject. We all fancy ourselves wiser than perhaps others are willing to give us credit for. This feeling is gratified by what we believe to be superior sagacity. Rogues may be cunning, but they can't deceive us. Under this satisfactory belief, we become over-astute, and often see that which is not to be seen. We suffer our imaginations to take the rein from our judgments, and rush headlong in this chase after the fox called fraud. Circumstances which should avail for the proof of fraud, are such only as are inconsistent with a contrary view of the transaction, and lead irresistibly to that conclusion.

We have before us a will proven by five witnesses, all present at its execution, and all agreeing in every material circumstance which can affect its validity. You must bear in mind, that the best possible evidence of the execution of any instrument of writing, is that of the subscribing witnesses and other persons present, who swear that they saw it signed. They swear to facts, and not to opinions, and if they are credible witnesses, whose character for veracity stands unimpeached, it is the only safe and reliable evidence of the execution of such instrument. One witness, Hoyt, although a man of some pretensions to respectability as regards his family, station in society, and connections, is proved to have been a talking, babbling man, whose statements of facts are not much to be relied on; and if the fact of the execution of this will depend-

ed on his testimony alone, the jury might well consider it insufficient to satisfy their minds as to any doubtful matter. But the material portions of his testimony are completely corroborated by the testimony of four witnesses, whose characters are wholly unimpeached. Their standing, their education, their manners, are of the best in society. They relate facts and circumstances which it was impossible for them to know if not true. They have been put on the stand, face to face with the jury. They have undergone a most stringent and searching cross-examination by most able and ingenious counsel. This forms the best possible criterion to judge of the value of testimony. It is hard even for the most experienced and hardened villain to stand such a test. You have seen their conduct, manners, and countenances. You have heard their answers. Were they such as to give confidence in their candor and truthfulness? Have they contradicted themselves or one another in material facts? They make wrong guesses as to length of time; they may have differed with the house servants as to some immaterial circumstances—whether tea was over, &c. Such discrepancies will always occur in the testimony of the best men, when cross-examined as to a thousand minute collateral circumstances. If such small matters should discredit a witness, we should have little or no reliable testimony in a court of justice. Each one of these witnesses testifies distinctly, that Meeker did execute this paper, and did, in their presence, publish it as his last will and testament—that he was in the full use of all his faculties; of sound and disposing mind and memory. They relate his conversations at the time, which prove not only the fact of his sanity at the time, but that this paper contains the disposition which he then intended to make of his property, and is the identical paper which they saw executed. These witnesses have either sworn what is true, or they have conspired together to commit the grossest perjury. Any other hypothesis is sheer fancy and imagination, conjured up by the ingenuity of counsel to avoid the direct accusation of a crime, which the charge of fraud relied upon in their defence, indirectly asserts.

In order to establish this charge the testimony of defendant must be sufficient to convince your minds by satisfactory evidence. That these four ladies of unimpeachable characters were morally capable of conspiring together to commit perjury in order to sustain a forgery; and that, too, of an instrument which is of no benefit to them, but to enrich a person who was a total stranger to them—this may almost be said to be a moral miracle. But supposing them morally capable of such a conspiracy, you must be convinced also that these ladies were capable of concocting and arranging a false story so perfectly, that the most scrutinizing cross-examination of counsel cannot convict them of their guilt; and of being able to narrate this story with all its circumstances, with all appearance of artless simplicity and truth, and without a blush or tremor—a task which the most practised, astute and abandoned knaves in the community would be incapable of performing. The evidence to establish such a belief must be facts clearly and indisputably proven, which when arrayed together form a chain of circumstances incompatible with any other solution than the falsehood of this testimony.

Opinions with regard to handwriting are the weakest and least reliable of all evidence as against direct proof of the execution of an instrument. Generally, when the jury have acknowledged signatures for comparison, they can judge as well of the character of the disputed signature as if they had seen the party write an hundred or a thousand times. It is but an opinion formed from comparison simply. The witness compares with his remembered original—the juror has actual original before his eye. Tell a man that a person's name, with which he is acquainted, has been forged, and nine cases out of ten, he will be astute enough to fancy he discovers some marks of it. If it be a good forgery, very few men are able to detect it; and hence other witnesses not prepared beforehand to pronounce it such, will very truly say they would take it to be his signature. But there may possibly be such glaring marks of forgery on the face of an instrument as to condemn it, especially if proved by witnesses of doubtful character, and connected with other suspicious circumstances as to the persons and place where it had its origin, and these marks may be so strong, and circumstances so convincing, that a paper may be pronounced a forgery in the face of the testimony of witnesses whose previous character cannot be otherwise impeached. You have the paper before you and numerous acknowledged signatures of the testator, and you must judge whether there is such evidence of forgery on the face of it, as either of itself, or in connection with clearly established facts, to entirely destroy the credibility of the testimony to its execution. Is there any thing in this will so surprising and so unnatural, and so inconsistent with the known desires and intentions of the testator, as to make it impossible to believe it the work of the testator? Had he ever any certain, consistent and continued plan and determination for disposing of his estate from which he never deviated? Has he taken more from his heirs in this will than in some others? If his declarations, permitted to be given in evidence in this case, do not prove that, they prove nothing. So, too, one single declaration acknowledging the provisions here made as his will, entirely annuls them, and corroborates the will. If it be true that the testator was continually changing his will;

continually talking about it, and boring his friends and acquaintances to write new ones for him; if in the midst of his avarice and stinginess, he was trying to get services and attentions from his friends and relations for nothing, by means of promises, and exciting hopes of being remembered in his will; talking loosely, telling lies; if his declarations of intentions were sometimes consonant with the provisions of one will, and sometimes of another; if you believe that he had the slightest motive to keep people in the dark as to the real contents of his will; if he was trying to curry favor to his other plans in life, or satisfying his vanity by magnificent prospects for charitable purposes, to be executed after his death, while he was too stingy to part with a dollar in his lifetime; if he had one great passion of his life, to wit, the defeating what he and many others very justly considered a high-handed and oppressive seizure of his property for no great public use, but rather for the convenience of the people of Newark, or some of them; if this will conforms to his expressed intentions on that subject of his ruling passion; then all his declarations tending to impeach this will, amount to nothing. They rather strengthen than impugn the paper in question.

It is not the intention of the court to dwell upon, or even notice the thousand and one minor issues with regard to facts, which if unexplained, tend at the farthest only to cast some suspicion upon the conduct of that chattering busybody, Hoyt, the witness who is impeached. Those who charge fraud are bound to prove it by circumstances or evidence which will lead our minds to certain and definite conclusions. All the facts must point to one focus, making it bright as day. If the supposed facts are capable of being reconciled with innocence, or if they cross the path of each other, pointing to different hypotheses, and proving and centering on no one conclusion, they cannot be relied on as proving anything.

To give force and application to the suspicious acts alleged by counsel, they have at one time to assume the hypothesis that Hoyt, with little or no acquaintance with Boylan, or without any combination or conspiracy, or even suggestion or promise from him, had volunteered to commit a forgery and to seduce his innocent and respectable wife and daughters to commit perjury in support of it; and this, too, in the hopes that Boylan might perchance reward him for his fraud. Hoyt has been proved to have been a blattering busybody—not to be trusted in money matters, or in his narrations of fact; but I do not know of any proof, that he was so arrant a fool, or so heartless a villain, as to execute such a piece of gratuitous villany; and it lies upon those who allege it to prove it beyond a doubt by clear and indisputable evidence. Casting a cloud of suspicion on a man, by ingenious insinuations of how he might possibly have been guilty—the noise and confusion of loud and clamorous charges of fraud—will not amount to proof.

Another hypothesis is, that Boylan and Hoyt conspired together and had this forgery executed and perjuries prepared. This supposition differs from the other, in that it alleges some motive for a conspiracy between parties who may have agreed, although there is no evidence of that, to divide the spoil obtained by their mutual villany. But it carries with it also this evident difficulty, that while Hoyt's unfortunate character was such that you might impute any act of dishonesty to him with some probability of credence, the hypothesis compels the party making it, to furnish clear and distinct evidence that Boylan, a man of fair standing in the honorable profession of the law, has committed a base forgery, and conspired to defraud the heirs of Meeker out of their property. Have you any clear, distinct or reliable evidence to establish the commission?

The dictum of an ecclesiastical judge which has been read to you, may be law in courts where the clergy execute the laws. But it never can be received in a common law court. You are called upon to decide an issue of fact. The defendants have undertaken to prove this will a forgery; you have to try that issue and find it true or false. You are not called upon to choose between two wills, and to say which must be admitted to probate. An ecclesiastical court may assume like cadis or sultans to dispose of rights of property on principles of compromise and convenience, without troubling themselves to find out the truth as to a contested instrument. But juries in a common law court exercise no such irresponsible power to dispose of men's property by such compromises to save themselves trouble of investigation. They are sworn to give a true verdict, a verdict according to law—to say the truth on the issue. If the instrument in dispute, which conveys a title to valuable property to the plaintiff, be a true one, the jury are bound to find a verdict for him. If, on the contrary, it has been proved to be a forgery, they must say so, however it may affect the reputation of the parties or pretended and false witnesses. There is no middle way, no shuffling off the responsibility, "that jurymen may dine."

I come now to the second point: Was the testator at the time of executing this will of sound and disposing mind and memory? This point, of course, is not necessary for you to consider if you believe the will to have been a forgery.

The general rule of law on this subject is as follows: "Every man is presumed to possess a sound mind till the contrary be shown; and it is incumbent on the party alleging insanity to establish the fact. If general insanity be proved, it is presumed to continue till a recovery be shown; and the

party alleging a restoration must prove his allegation. Insanity at the time of making an alleged will must be proved in order to render the instrument void." Grabill v. Barr, 5 Pa. St. 441. The same rule is stated in the remarks of the late Justice Washington, in Stevens v. Vancleve [Case No. 13,412], in our own court. He must have memory. A man in whom this faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease. He may not be able, at all times, to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had been before asked and answered; and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of; and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. More especially, in such a reduced state of mind and memory, he may be able to recollect and to understand the disposition of his property which he had made by a former will, when the same is distinctly read over to him. The question is not so much what was the degree of memory possessed by the testator, as this—Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligent form: Were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged, at the time when he executed his will?

Now, although we have the opinion of certain witnesses that Meeker was a monomaniac on a certain subject, yet when it comes to be explained, it furnishes no evidence that he was insane, nor does it contradict in the least the idea that he enjoyed the use of his faculties, and was of sufficient understanding to manage his concerns and transact his business with his usual shrewdness to the day of his death. Witnesses often use phrases with very indistinct notion of their meaning, and give opinions without any facts to justify them. It is in evidence that the testator was of strong mind, but very eccentric, obstinate and opinionated; but no witness has shown facts from which a loss of a sound and disposing mind and memory could be inferred. His mind was greatly excited on a particular subject—his park property—he was very stingy and set a high value on his rights of property. But it is no evidence of any mental delusion that he thought this seizure of his property without his consent, a high-handed exercise of power—an outrage on his rights—unconstitutional—worse tyranny than the tax on tea which caused the Revolution. That it became his hobby; made him very troublesome, and a bore to all his acquaintances and friends, is of no importance at all, in the matter trying before you, if he retained his memory and his usual shrewdness in the management of all his other concerns. Many a man has some hobby, and may ride it very much to the annoyance of others, and yet be perfectly capable of managing his own affairs, and disposing of his property by deed or will. He may believe in spiritualism, the book of Mormon, Fourierism, or any other of the absurdities of the day which infest the brains of fanatics. He may talk very much like a fool, as you or I may think, on these subjects, and unduly magnify their importance. He may profess an absurd fondness for music, and play the Pandean pipes, behave like a fool occasionally; may tell his dreams and call them visions, and may believe in them; he may be addicted to telling lies about his will, yet, gentlemen, we could not on these accounts pronounce him unfit to manage his affairs, or dispose of his property in his lifetime; and could not avoid his deeds nor condemn him to a lunatic hospital, as a fit tenant for such an institution. So all that is proved makes it no reason for regarding him as not of disposing mind and memory, and to set aside his will. He appears to have been shrewd enough not to lend his money or sell his property on doubtful security, notwithstanding the arts of Hoyt to prevail upon him to do so.

There are cases indeed where an improper influence is brought to bear on the mind of one whose mental capacity is naturally weak, or where the mind is impaired by age, intemperance or disease, but where testamentary acts which might otherwise perhaps be good, will be set aside. The persons in such a case have been imposed on; they have no will, and the instrument to which their signatures have been obtained, may be said not to contain their will, but that of those who procured it to be executed. But I am bound to say to you, that there is no evidence in this case which would justify a verdict against this will on that account.

Verdict in favor of the will.

TURNER (HODGSON v.). See Case No. 6,570.

TURNER (HUBBARD v.). See Case No. 6,819.

Case No. 14,258.

TURNER et al. v. INDIANAPOLIS, B. & W. RY. CO. et al.

[8 Biss. 315.] [1]

Circuit Court, D. Indiana and S. D. Illinois. Oct., 1878.

RAILROADS — CLAIMS OF OPERATIVES AND SUPPLY MEN—RECEIVER.

1. The court can require the receiver of a railroad to pay the claims of operatives and supply-men, owing at the time of his appointment, and even to hold the property subject to them; not as a lien on the road but in the exercise of the equitable discretion of the court.

[Cited in Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 196.]

[See Atkins v. Petersburg R. Co., Case No. 604.]

[Cited in Manchester Locomotive Works v. Truesdale, 44 Minn. 118, 46 N. W. 303.]

2. In fixing a time within which such claims will be allowed and ordered paid, the court will adopt by analogy the rule of the state statutes in relation to liens on railroads for work done, and supplies and materials furnished.

[Bill in equity by Malcolm C. Turner and others against the Indianapolis, Bloomington & Western Railway Company and others.]

Shortly after the federal courts in this circuit took possession, by receivers, of railroads in foreclosure proceedings, a policy was adopted of requiring the payment by them of what were called "back" claims for materials, labor and supplies, out of the income, and sometimes, in case of sales of the railroad property under decree, out of the proceeds. This had been the practice in this court for several years. In the present case this policy was attacked, and the court was requested to reconsider its rulings.

J. D. Campbell, R. E. Williams, Ashbel Green, J. Augustus Johnson, G. W. Parker, Charles W. Fairbanks, and Benjamin Harrison, for different mortgagees.

John M. Butler, Samuel M. Harrington, A. J. Gallagher, and W. A. Ketchum, for labor, supply, and material claims.

DRUMMOND, Circuit Judge. I will state some of the reasons which have caused the court to adopt the practice which exists in this circuit, in relation to materials and supplies which have been furnished railways, and labor performed on them, when they are placed in the hands of receivers by the court.

The question is important, because there have been within a few years numerous railways in this circuit operated by receivers, the annual income of which is many millions of dollars. It will be borne in mind that in all cases where a foreclosure has been sought by the bondholders, the mortgages provide that the after-acquired property shall be bound by the mortgage, and it has been decided by the supreme court that such a contract overrides any judgment obtained against the railway company and execution issued, even as to personal property coming into possession of the company before judgment and execution. The railways do not come within the control of the court until after default on the bonds or coupons, and generally after absolute insolvency. There are, therefore, when application is made to the court for the appointment of a receiver, in all cases large balances due to operatives, and for supplies and materials furnished. There are also contracts running with other railways, upon which balances are due, and which contracts must often be continued in force in order to preserve the security of the mortgagees. The receiver takes the road with the benefits accruing from such contracts, and uses any supplies or materials which are on hand and not paid for. It therefore early became a question in this species of litigation what rule should be adopted by the court as to such claims against railway companies. A very simple way to dispose of the question was to take the railway at the time it came into the possession of the court, pay for all work done and supplies furnished thereafter, and refuse to pay any debts so incurred before. But that seemed impracticable. It was not like an ordinary mortgage on a farm or a house. A railway is matter of public concern. It is one of the great instruments of modern commerce between states and nations. The public as well as private interests require its continual operation. To refuse to pay anything whatever for past services or supplies or materials has never, it is believed, been attempted by any court, or even demanded by any mortgagee. The receiver goes into the possession of the railroad with all its appliances and instrumentalities, with its men at work on the track or running the trains, with its coal, oil, tools and other means of operating the road. The mortgagees have come into court asking it to assume possession of the road to protect their interests. Are the interests of all others, operatives and supply-men who happen to have claims against it at the time to be absolutely ignored in the case of insolvent companies? I think not. The appointment of a receiver is, to a great extent, a matter of discretion in the court, and it has been thought that the court might require the receiver to pay certain of these claims, and even to hold the property subject to them; not as a lien on the road, but in the exercise of the equitable discretion of the court in dealing with property which is of a peculiar character, and under circumstances of which the past history of litigation affords no example or precedent.

What should be included within the claims to be paid has also been the subject of consideration, and the practice has been to allow all to be paid that could be fairly regarded as a part of the actual operating ex-

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

penses of the road, whether for labor or supplies, in their various forms. It being conceded that some claims for past services should be paid, the next point to be determined was, what limitation, if any, as to time should be placed upon such payment. It was found in many cases that those who had control of the railways, instead of paying the current operating expenses of the companies would postpone the payment of the same, sometimes for many months, in favor of the interest due on the mortgages, which they would discharge, in the hope, apparently, that a more favorable time in the business of the roads would enable them to make up the deficiency. It was in view of this and similar considerations growing out of the actual condition of affairs, and of the absolute necessity of fixing some reasonable time within which such claims should be allowed, that the court adopted, as by analogy, the rule of the statute of Illinois, in relation to liens on railroads for work done, and supplies and materials furnished. During the discussions which have taken place on this subject, the allowance of these "back" claims has been sometimes called a lien, but, in point of fact, it never has been, nor can it be, justly so considered, but, as already stated, as an exercise of the equitable power of the court in the premises.

It is but fair to say, in the numerous cases which have come before the court, its rulings upon this subject have been generally acquiesced in by the counsel of the mortgagees. The magnitude of the claims in this case is such as perhaps to cause hesitation in following the rule which has been heretofore established, and makes it desirable to obtain from the supreme court a decision which shall announce some just principle that may be a guide in these and similar cases. While it has been generally admitted that the court had a discretionary power in the direction indicated, to disburse the earnings of the road, it has been insisted that these claims should not be considered binding on the property in case of foreclosure and sale. The view that has been taken of that branch of the subject has been this: In general, when the mortgagees have come before the court to ask for the appointment of a receiver, the property has been in a very dilapidated condition, the rails nearly worn out, the ties needing replacement, the rolling stock, station houses and bridges, repairs—the whole property being in a condition to render the transit of persons and merchandise dangerous. The practice has therefore been, instead of immediately directing the receiver to pay for labor or supplies or materials previously furnished, to expend the receipts in repairs of the road, in the purchase of new iron or of steel, and of rolling stock, and in the construction and repair of side tracks, bridges, station houses, etc., thus adding to the security of the mortgagees by enhancing the value of the property. It has been thought that under the same equitable discretion which has been heretofore referred to, this gave the operatives and material-men a just claim upon the property itself. It has not unfrequently happened that railroads which were comparatively worthless when they came into possession of the court, have become under its administration valuable property.

It is for these and other like reasons that the court in the appointment of receivers in all cases of railroads in this circuit has required them, either at the time of such appointment, or as being so understood then, by subsequent order, to pay for labor performed, or supplies or materials furnished during the time indicated. The court has always treated this kind of property as including in the security given to the mortgagees not only real and personal estate in the ordinary sense, but franchises and intangible property.

The experience of the court which, it may be said, has been obtained by the management for many years of immense amounts of this kind of property, has satisfied it that practically, it would be well nigh impossible, looking at things as they actually exist, to operate the roads by receivers without some allowance for claims of the character mentioned, existing at the time of their appointment, and that the limitation already stated is not an unreasonable one, in view of all circumstances.

[See Cases No. 14,259 and 14,260.]

NOTE. The conclusions and practice of the court stated in this opinion were substantially sustained, subsequently, by the supreme court of the United States in Fosdick v. Schall, 99 U. S. 235.

Case No. 14,259.

TURNER et al. v. INDIANAPOLIS, B. & W. RY. CO. et al.

[8 Biss. 380.] [1]

Circuit Court, D. Indiana and S. D. Illinois. Dec., 1878.

COURTS — FEDERAL JURISDICTION — REMOVAL OF CAUSES — DECREES — AMENDMENTS — MASTER'S SALE—ADVANCE BID—DEPOSIT.

1. Where a cause has been removed from a state court to the federal court, and a motion to remand for want of jurisdiction, has been overruled by the circuit justice then presiding, if the cause subsequently comes before the circuit judge, he will not review the question of jurisdiction. That is considered as settled if there is no appeal.

2. The fact that proof of the publication notice to a defendant in chancery was not made in the state court, prior to the order of removal of the cause to the federal court, does not prevent the latter court having jurisdiction over such defend-

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ant, if the publication was actually made according to the state statute.

3. If a defendant voluntarily files an answer, the court acquires jurisdiction over him, whether any replication is put in to the answer or not; and the rights of such defendant, which were in question, are considered adjudicated by a decree in the case.

4. Though the court cannot change the essential parts of a decree after the term at which it was entered, yet it has the power subsequently to amend the decree as to the mode of its execution, the manner of a sale, the time of publication of such sale, and the distribution of the proceeds arising therefrom.

5. By the original decree for the sale of a railroad, it was provided, that the purchasers should pay enough in money, to liquidate certain judgments, taxes, and other claims, if they should be allowed; and, by an amendment to the decree entered at a subsequent term, it was provided that the property should be sold subject to the judgments, taxes, claims, etc., in the hands of the purchasers. *Held*, that the court had the power to make such amendment.

6. In order to set aside a master's sale in foreclosure proceedings on account of the inadequacy of the bid, it is not sufficient to show that the property has not realized its full value; the price must be so inadequate as to show that it is not the result of fair dealing and an honest purchase.

7. Where parties desire to have the sale set aside for inadequacy of the bid, they must show that some person, who is responsible, will make an advance bid.

8. There is no redemption from the sale of railroad property under foreclosure proceedings in the federal courts in this circuit.

9. It is proper practice for the court to require each bidder, at a master's sale of large railroad interests, to make a deposit of $50,000.

10. Where the amount of claims to be allowed against a railroad, depends upon a long course of litigation, it is proper for the court to order the property sold, to be subject to such claims as finally adjudicated.

11. Where the property was bid in by a certain committee acting as agents of the bondholders of the railroad, it is not necessary that it should be shown further, who are their principals.

12. Assignee in bankruptcy, if made a party to a suit, must come in and assert his rights, or he will be barred by decree on default as any other party.

Under a decree of the circuit court for the Southern district of Illinois and the district of Indiana, made in the summer of 1877, and an amendment made to that decree in May, 1878, in both of these courts, the main line of the Indianapolis, Bloomington & Western Railway Company was sold by the master in chancery of each court. The road extends from Indianapolis, in the state of Indiana, to Pekin on the Illinois river, in the state of Illinois. It was sold by a decree of the circuit court of the two districts as one piece of property, by the masters jointly, and was purchased by a committee of the bondholders. The sale took place on the 30th day of October, 1878. [See Case No. 14,258.] After the sale, exceptions were filed by various persons, and also by the company, which were disposed of in the following opinion.

R. E. Williams, for Thomas, trustee.

N. A. Cowdry and G. W. Kretzinger, for Turners' assignee.

J. D. Campbell, for purchasers.

DRUMMOND, Circuit Judge. The first exception is that the court had no jurisdiction of the case, and therefore the decree was void. Under the circumstances, I can scarcely consider this an open question. The cases were originally brought in the state courts of Illinois and Indiana, and were transferred, under the act of congress of 1875 [18 Stat. 470], to the circuit courts of the United States for the Southern district of Illinois and the district of Indiana. A motion was made in the circuit court for the Southern district of Illinois, to remand the case to the state court, on the ground that the federal court had no jurisdiction. The question was argued before Davis and Treat, JJ., fully considered and decided by them; the court holding that it had jurisdiction of the case, under the act of congress of 1875. An order was accordingly made, denying the motion to remand. A like order was made in the district of Indiana. I do not think, therefore, it would be proper for me, whatever my own view of the question of law might be, to change the ruling of the court. If erroneous, the parties have their remedy by an appeal to the supreme court of the United States.

The second exception is, that the issues raised in the original bill were not determined by the court; as there was a chattel mortgage to one Thomas as trustee, and no effort was made by publication, subpœna, or otherwise, to bring him within the jurisdiction of the court. The facts were substantially these: He was made a party to the cross bill, filed by the Farmers' Loan and Trust Co., of New York, the original bill having been filed by the Turners. The law of Illinois, where the proceeding took place, and which is to decide this question is, that a non-resident who is not served with process in a chancery proceeding, can be brought into court on an affidavit and publication. An affidavit was accordingly filed and publication in pursuance of the statute was made in a newspaper. Before the proof of publication was filed in the state court, where the case was pending, it was transferred to the circuit court of the United States, and it is said that the proof of publication was not even made before the order of transfer. I am not prepared to admit that would destroy the legal effect of what had taken place in relation to the affidavit and publication. It seems to me, on the contrary, if the law of the state was observed, a party would be brought into court under the circumstances of the case, although the proof of publication was not actually made. It might be a very doubtful matter, whether or not the fact of the transfer would vitiate the notice. On the contrary, it would seem, in a case properly transferable, all the conditions which the

state law has imposed on the case before the transfer, are to be observed; and if anything should occur to prevent the consummation of the act, which the law of the state contemplated, the transfer would not render it nugatory. However, whether that be so or not, it is clear, from what has appeared since these exceptions were argued, that Thomas, the trustee, was a party to the proceeding in the circuit court of Illinois. He appeared by answer filed. He was, therefore, a party to the litigation and he cannot now object that the court had no jurisdiction over him as trustee of the chattel mortgage.

It is said that a replication was not filed. That would not prevent the court from exercising jurisdiction over him as trustee, or impair the effect of the adjudication of the court. If no replication was filed, that must be considered as waived. Inasmuch as the cross bill of the trust company was filed for the express purpose of determining the respective rights of the parties before the court, some of whom were Thomas, trustee of the chattel mortgage, and the New York company, the trustee representing the bonds for which the mortgages on the main line were given, it must be considered, that when the court adjudicated upon that question and determined that the bondholders, under their mortgages, had a prior and better right, that it also decided the other question although nothing is said in the decree as to the rights of Thomas, the trustee of the chattel mortgage. He claimed a prior right under the chattel mortgage. The other parties claimed a prior right under their real estate mortgages. The court decided that the bondholders, and the mortgages which were given to secure the bonds, had a prior right. That was the main question before the court, which was decided and, of necessity, the rights of Thomas as trustee, were also adjudicated. Therefore, the issues raised by the pleadings in the original bill and cross bill, as to the claim of Thomas for a prior lien, were adjudicated. The second exception must be overruled.

The third exception is, that the court had no authority to amend its decree after the term of the court. The facts were that the original decree was entered on the 18th of July, 1877, and the amendment was made in May, 1878. I admit the rule which denies the power of the court over a decree after the term when it was rendered. It cannot change or alter the essential parts of the decree. But what was the order made by the court in May, 1878? It is termed a further direction for the execution of the decree theretofore entered. The original decree provided that the property should be sold on a certain number of days publication. That was changed by the amendment. The original decree provided for the distribution of the funds arising from the sale in a particular manner. That was changed by the amendment of May, 1878. But these things did not affect the substance of the decree. Of the right of the court to make that order, I cannot doubt. We will, therefore, pass on to the question about which there seems to be serious controversy.

The thirteenth article of the original decree provided that the sale should be made subject to judgments for right of way, to the taxes which were a lien upon the property, and also, to a certain contract of lease for box freight cars which had been made with the receiver by a man named Adams.

The fourteenth article of the original decree provided,—after declaring that $50,000 should be offered as a deposit, and after the purchase, $50,000 more should be advanced, out of which two sums certain costs should be paid,—that on the delivery of the deed, so much more of the purchase money should be paid into court, in cash, or certificates of receiver's debts, as should be necessary to pay that portion of the receiver's debts made in the operation of the main line of railway, not theretofore directed to be assumed by the purchaser, with such other claims as should be allowed by the court; meaning what were called the back claims, many of which were pending and undecided, and in which, it was understood that under certain circumstances, the decision of the court might be reviewed by the supreme court of the United States.

It will be seen, therefore, that under the original decree, the sale was to be made subject to certain claims, and, that the purchasers had to provide money enough to pay all the claims, which might be allowed by the court, on appeal to the supreme court of the United States. What is the change made in these respects by the amendment? It recites, "that the sale shall be made subject to the judgments for right of way, to the taxes, to the lease made with Adams by the receiver, and also, subject to certain debts which might be due from the receiver, and also, to such claims as might be allowed by the court on appeal to the supreme court of the United States." The only effect was, that whereas, by the original decree, the creditors were required to bid enough to pay these claims and some of the debts of the receiver; in the amendment, it was provided that the sale should be made subject to them, so that they remained as a burden upon the property. That is the only change made which it is material to consider. Was that such a change in the original decree as the court had the power to make? I think it was. It was, so to speak, simply changing the amount of money which was required to be bid for the property. Undoubtedly, it would have been better and much more satisfactory if the court, before it had ordered a sale under the original decree, could have informed the parties, who might purchase the property,

what was the precise amount of liens upon it. But that, in the nature of the case, was impossible unless we had waited, before the property was sold, until the final determination of these various claims by the supreme court of the United States, which might have involved the retention of the property, by the court, for several years. Therefore, it was thought best, by the court and by the parties who are interested in the property, that it should be sold and that the purchaser should pay enough to meet all the claims then definitely ascertained, and that the property should be subject to those adjudicated hereafter. By the original decree and the amendment, the character of the claims, in either event, remains unchanged.

The fourth exception is, that the bid of one million dollars, for which the mortgaged premises were struck off and sold by the masters, was inadequate. And the reason alleged why so small a bid was made, is, because of the limited time the bidding was kept open. The property was offered for sale by the masters at 10 o'clock on the morning of the day specified. The advertisement was read, and the bid received. After waiting considerable time, there being quite a number of persons present, and no other bid being received, the property was struck off to the purchasers at that price. This was a matter, to a very great extent, discretionary with the masters. Undoubtedly, if the masters had any reason to suppose that there would soon be an additional and higher bid, they should have kept the bid open and allowed it to have been received. But, if it was clear, from all the attending circumstances that no additional or higher bid would then be made, I do not see that it was incumbent on them to hold the bid open for an indefinite time—an hour, or even half an hour, or any particular time—in order to allow persons afterwards to come in and bid off the property. The sale was advertised the time required by the court. All parties in interest, and especially those who were parties to the suit, are presumed to have been notified of the time and place of sale, and, if they desired the property to bring its value or near it, they had every opportunity of being present, and prepared to bid such a price as would come up to their ideas of its value.

It is clear from the affidavits, which have been introduced, that there was nothing to indicate that an additional bid would be made for the property. It was, accordingly, struck off to the purchasers. It is true, perhaps, that under some aspects of the case, the bid might be considered a small one. That is to say, it might not be regarded as the value of the property; but we have to take into consideration the circumstances connected with the sale. The incumbrances on the property were to a considerable extent indefinite and unknown to the purchasers, and subject to which they had to make their bid. It was believed that the amounts were very large. A great difference exists among counsel as to the amount which may be allowed. So that it is impossible for the court to disregard this consideration. Then, I think the court ought not to be unmindful of the position of the purchasers themselves. They represent those who have a superior right in equity to this property. They are a committee of the bondholders, most of whom have agreed to the arrangement made under which they have bid this amount for the property; all who are not parties have the option of participating in this arrangement. It is made for the benefit of all. Who has the prior right to the property now? They are not an outside third party who may have purchased it for less than its value, but they are the equitable owners of the property. Besides, it is not because parties may think that property, which has been sold under the order of a court, has not realized its full value, that the court will set the sale aside. The price must be so inadequate as to show that it is not the result of fair dealing and an honest purchase. Now, it cannot be pretended that anything of that kind has occurred here.

Again, the practice of this court has been, where parties come into court and claim that property has been sold at an undervalua tion, to require some person of responsibility to make an advance bid such as will authorize the court to order a re-sale. Although this offer has been made in the exceptions, no person has come in, of whom the court can take judicial notice and said that he would give such an advance upon the price as would justify the court in re-selling the property. To be sure, it was stated that a certain capitalist had offered to give $500,000 more. I know nothing of him. I cannot take the statements of counsel made in this general way. One of the counsel, himself, says he would make an advance of $50,000 on the bid that has been offered. I know nothing about his responsibility. I do not know whether he can make good his statement to the court or not. I, therefore, would not be justified in setting aside the sale on that ground and hold them as the responsible parties who will make such an advance upon the bid as to warrant the court in ordering a re-sale. The fourth exception will therefore be overruled.

The fifth exception is, that after a decision made in this court that the right of redemption did not apply to railroads, there was not sufficient opportunity for the parties in interest to make arrangements to bid in the property at the sale. If that decision was correct, of course the parties were presumed to know the law. In point of fact, the decision in the case of Brine v.

Hartford Fire Ins. Co., 96 U. S. 627, was contrary to the practice of the circuit court of the United States for the district of Illinois for many years. A practice which had been accepted and acquiesced in by the bar, in all cases of foreclosure. After this practice had thus continued, an exception was taken to it, and the supreme court of the United States held, in the case cited, that in cases of foreclosures of mortgages on real estate, the law of Illinois was a rule of property in the circuit court of the United States, and as that law gave the right of redemption, the sale must be made in the circuit court of the United States, subject to redemption. Of course the question immediately came up, whether this law applied to railroads, and with a view of taking the opinion of the court upon that question, it was brought before the circuit court of this circuit. It was recently argued, at Chicago, before Judges Harlan, Gresham and Blodgett, and the court held that, the rule in the case of Brine v. Hartford Fire Ins. Co., supra, did not apply to the sale of railroads under decrees of the circuit court of the United States. This being the law of this circuit till changed by the supreme court of the United States, I cannot admit the claim set up in the exception, and therefore the fifth exception will be overruled.

The sixth exception is, that the terms of sale were unusually onerous; as it was required that the person making the bid should deposit $50,000 with the masters, and, if the bid was accepted, the successful bidder should forthwith pay to the masters an additional sum of $50,000, making, in all, $100,000. And, it is said, the premises would have sold for more if these conditions had not been annexed to the sale. As these conditions were imposed by the court, it is rather an attack upon the judgment of the court. It must be remembered that this was a very large property. It was a railroad over 200 miles in length with its rolling stock, franchises and interests of all kinds. There were very large claims which had to be met immediately, including costs and expenses. And it seemed as though such a sum was indispensably necessary in order to meet these claims. It must be recollected, too, that the litigation had been protracted for a number of years; that parties had been performing services without any compensation year after year, lawyers, masters, clerks, etc. And after so long a time and after the performance of so much service, it was thought some provision must be made for its payment, and accordingly $100,000 was not thought inadequate. The language of the original decree was, "that the masters in chancery are hereby authorized and directed to require a deposit to be made by each and every bidder at such sale of $50,000, as security." That was to prevent, what are termed, "straw bids" and prevent delays. It sometimes happens that men who are dissatisfied with the decrees and orders of the court and who claim an interest in the property bid for the purpose of delay, and, when called upon to make their bids good, are unable to do so. The court wanted to prevent anything of that kind and in order to require responsible parties to bid, it was decreed that each bidder must show his responsibility by depositing the sum of $50,000, and then after this deposit was made, $50,000 additional was required to be deposited by the successful bidder by another article in the original decree, for the same reason. I cannot think that these conditions were onerous or unusual. The sixth exception will, therefore, be overruled.

The seventh exception is, that the masters were unable to inform the purchasers of the amount of claims or debts subject to which the property was sold; and that restrained bidders. The main fact is undoubtedly true. It was impossible for the masters to state precisely the amount of claims upon this property; because, that amount may depend in a very great degree upon the decision of the supreme court of the United States. And to obtain that decision, it would have been necessary to suspend the sale for several years. That was something, therefore, which grew out of the necessity of the case and which could not be avoided.

The eighth exception is substantially like the seventh. They, therefore, will both be overruled.

The ninth exception is, a pledge made by Thomas, the trustee of the chattel mortgage, that if the court will again offer the premises for sale, they shall sell for more than a million dollars, and the costs of making the sale. I have already spoken of that and have said that there has been no offer made in such a way that the court can take judicial notice of it and order a re-sale of the property. This promise or pledge has not been made good, and the ninth exception will be overruled.

The tenth exception is simply a reference by Thomas to the orders and decrees of the court which need not be further mentioned.

The eleventh exception, which has been added since the original exceptions were filed, is, that there is a certain committee acting as agents of the bondholders of the railway company; that there was no provision on the subject in the decree under which the sale was made; that the members of the committee are the parties who bid at the sale, and that the report of the masters does not show who were the principals for whom this property was purchased, and does not state what interest each of the parties interested in the purchase has. I do not know why that is necessary. These purchasers come forward and claim they are a committee of the bondholders. The court may take judicial notice of the fact that they represent the owners of the property. All that the court can require of them is

that they shall comply with its orders. They have, so far, complied and shown their ability so to do. Indeed, perhaps in most of the sales which take place, certainly in many, under the decree of the court, the parties who are the nominal purchasers, are often agents representing others. And they are not disclosed until the deed is demanded of the court and, sometimes, not even then. The eleventh exception will be overruled.

I think this disposes of all the exceptions which have been made except what relates to the bankruptcy of the Turners. The original bill was filed by them. Thereupon, a cross bill was filed by the Farmers' Loan and Trust Company which, as the court found, was the main actor and rightful one, in the litigation as having a prior lien with authority to control it. The court sustained the prior equities of the company as the representative of the bondholders.

After the first cross bill was filed by the Farmers' Loan and Trust Company, the Turners went into bankruptcy and the assignee in bankruptcy was made a party upon the record. Undoubtedly, by the bankruptcy of the Turners, they ceased to have any authority over their property or any litigation then pending. But they had been the actors, originally, in the litigation, and a cross bill had been filed against them by the Farmers' Loan and Trust Company. Under that state of facts, there was an informality or irregularity in one respect in the decree. A default was taken against the Turners as though they were legally in esse interested in the litigation, contrary to the fact. But, is the assignee to be heard now and has he the right to say that the decree of the court did not bind him? I think not. If the assignee chose to lay by and do nothing, although made a party, then all that can be said is, that it is a mere irregularity in entering the decree; appearing there in court, made a party to the proceeding in court, it was his right to take the necessary steps to protect the interests of the bankrupts. If he did not choose to do so, certainly it would be unjust that the rights of others should be destroyed or even impaired because of his neglect. While, therefore, there may be an informality in the decree, still I cannot see that it affects the rights of the Farmers' Loan and Trust Company, the general validity of the sale, or the decree, and, therefore, that objection will be overruled like the others.

In disposing of the various objections that have been taken to this sale, it may be proper to add, in conclusion, that both Thomas and the assignee are parties to the decree, or they are not. If they are, they are necessarily bound by it. If they are not, their rights can be protected by a proper proceeding in a proper court.

For these reasons, the sale must be confirmed.

[See Case No. 14,260.]

Case No. 14,260.

TURNER et al. v. INDIANAPOLIS, B. & W. RY. CO. et al.

[8 Biss. 527; 8 Reporter, 453; 4 Cin. Law Bul. 569; 11 Chi. Leg. News, 375.] [1]

Circuit Court, D. Indiana. May 23, 1879.

RAILROADS — JUDGMENT AGAINST RECEIVER — APPEAL BOND.

1. A receiver of a railroad appointed in foreclosure proceedings is the agent of the bondholders and the trustees, and a judgment rendered against him by a court of competent jurisdiction, is binding upon the interests of the bondholders.

2. A receiver is liable for damage to engines rented by him, arising from omission to make necessary repairs.

3. Where a party by appealing ties up a fund in court, the bond should provide for payment of interest during the pendency of the appeal.

[See Calhoun v. St. Louis & S. E. Ry. Co., 14 Fed. 11.]

[This was a proceeding by Malcolm C. Turner and others against the Indianapolis, Bloomington & Western Railway Company and others. See Cases Nos. 14,258 and 14,259.]

John M. Butler, for petitioner.

J. D. Campbell, for bondholders.

DRUMMOND, Circuit Judge. The main line of the Indianapolis, Bloomington & Western Railway was sold, and a large sum of money has been paid into court, and this is an application made by the Rogers Locomotive & Machine Works for the payment of a portion of that sum, and the question is whether the court ought to allow the claim.

The facts of the case which give rise to this question seem to be substantially these: There was a bill in equity pending in the state court, growing out of the floating indebtedness of the railway company, and a cross-bill was filed by the Farmers' Loan & Trust Company as the mortgage trustee of a large indebtedness due from the company on the bonds and coupons. At the time this suit was pending in the state court, application was made to the court, by the receiver appointed in that court, setting forth that there was a controversy between the Rogers Locomotive & Machine Works and himself, in relation to a claim of the former against him, as receiver, and the court directed a suit to be brought in the state court to settle it, and an action of replevin was accordingly brought. It consisted of two branches: one was as to the right of the Rogers Locomotive & Machine Works to the possession of certain locomotives which were in possession of the railway company; and the other was in relation to the claim for damages, and rental for their use during a certain time.

It is important to consider the aspect of the case as it existed at that time. There was a

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 8 Reporter, 453, and 4 Cin. Law Bul. 569, contain only partial reports.]

bill in chancery pending in the state court, with a cross-bill, to foreclose the deed of trust and sell the property to meet the indebtedness of the company due upon the bonds. There was a suit pending in the state court authorized to be brought by the Rogers Locomotive & Machine Works against the receiver, for the purpose of settling the controversy between him and that company. This being the status of the two cases, they were both removed to the federal court, the replevin case in the first instance, and afterwards the chancery suit. Having both come into the federal court, they were subject to all the rights which had been acquired by the parties respectively in the state court, and consequently, unless changed or modified by the order of the federal court, the action of replevin in the circuit court of the United States, was subject to the order which had been made by the state court authorizing the suit to be brought there, and the case in chancery was also subject to the order which had been made in the state court in relation to the replevin suit. Therefore, we cannot disconnect the two suits, in considering the question which arises in this case. There were two cases, but the suit at law grew out of the suit in chancery, and was in some respects auxiliary to it, so that when it came into the federal court it was, as in the state court, connected with the case in chancery, and when the order was made by consent in the federal court to refer it to the master in chancery, it must be considered as a part of it. When the property was removed from the state to the federal court, the receiver of the state court exercised the same control over it as in the state court, and he was recognized by the federal court as the receiver of the property, and became its receiver; and I cannot doubt that the federal court had the right to make the order which was made, and that this order was binding on the equities and legal rights of all parties in relation to the subject-matter of controversy in the replevin suit. Undoubtedly the court had jurisdiction of the case, and had the right to pass upon and settle the controversy, and to adopt this mode of settlement with the consent of all parties. The receiver represented all parties, the trustee, and all claimants who had claims upon the property, and was the receiver for the interest of all. That being so, what was the legal consequence growing out of the settlement of the controversy between the Rogers Locomotive & Machine Works and the receiver, by the circuit court of the United States? When this matter was referred to the master, and he made his report, and the court entered judgment, it bound all parties. It bound the parties connected with the chancery suit in the same manner, it seems to me, as it bound the parties in the suit at law, because, as I have said, this latter was an emanation of the chancery suit. Perhaps the chancellor might have control over the suit analogous to that which he would have if an issue out of chancery had been directed by the court; if not for all purposes and to every extent, certainly to some extent; but there has never been any interference by the court in the chancery suit with the replevin suit. I agree, however, that it can be only binding in relation to all matters that were legitimately before the court in the replevin suit, and which were properly settled by the judgment in that suit, and consequently, the question is, whether the controversy was of such a character as to be binding, as to the point in question, upon the bondholders and the trustee, and I cannot see why it is not. The rental was a claim against the receiver, as such, for the use of certain locomotives during the time he was using them in the operation of the road, and constitutes a just claim against him, and against the court which was operating the road. Why, then, is not the receiver and the court bound for the amount which was found by the court in the replevin suit for the use and rental of the locomotives during the time mentioned? I know of no good reason. It was certainly just as much a part of the operating expenses of the road as labor or material and supplies, and there being a controversy as to what should be the amount paid for the rental, submitted and determined as stated, it seems to me that the decision of the court and its judgment must, at present, be considered final and conclusive on the subject.

Then, as to the other question, whether the receiver is liable, and whether the damage sustained in the use of the engines by him constitutes a just charge as for the operation of the road. Perhaps that part of the case is not so clear as the other, but still I think in principle it is not distinguishable. The locomotives were used by the receiver in the operation of the road, and the rental is part of the expenditure for the use of the various engines. Compensation is claimed because in the use there has been an omission to make the proper and necessary repairs. Now, the use of the locomotives constitutes one claim, and for that just compensation should be paid. If there has been any act omitted to be done, which the receiver ought to have done, namely, if he has omitted making the necessary repairs, then that would seem to constitute another and as just a claim against the receiver as for the use of the locomotives. It would necessarily be an important element in the value of the engines to the Rogers Locomotive & Machine Works and I think that it is reasonable, and that the receiver should be held accountable as an officer of the court, and for which the income of the road and proceeds of the property should be liable. It is difficult to discriminate between a claim of this kind and one for supplies and materials, or labor, or for the rental of "rolling stock," such as locomotives and cars. The counsel insists that it is simply a non-compliance with a contract on the part of the receiver. Whether

there was a wrongful act by the receiver does not, perhaps clearly appear; but suppose it were so, and that the receiver, by his own wrong, as by negligence, omitted to make the necessary repairs, and take the proper care of the locomotives in operating the road, ought he not to be liable?

I am aware that the case of Davenport v. Alabama & C. R. Co. [Case No. 3,588] seems to go the length of holding, if I understand it, that neither the receiver nor the property in possession of the court is liable for the negligence of the receiver, or that of his employés. The view that has been taken in this circuit has been somewhat different. We have often held that the receiver is liable for the negligence of his employés, and we have required him to pay out of the income of the road the damages which parties have sustained by his negligence, or that of his employés. The operation of a railroad by a court through a receiver is something out of the routine duty of courts and receivers. There must be exceptional rules applicable to such receivers. The receiver holds the property for preservation, and it may be questionable whether the receiver should be himself personally responsible in damages for the negligence of his employés, and whether public policy does not require that the receiver, as the organ of the court merely, should be answerable under his contract as operator of the road. The rules upon this subject have not been very clearly and satisfactorily settled, and therefore we should proceed with some caution in cases of this kind; but I feel no hesitation in holding in this case, the fact being that the receiver did not make the necessary and proper repairs of these engines, and having suffered them to be damaged and injured, that he ought to make compensation, and therefore I shall allow that claim as well as the other. The money is in court, to which this applicant has a just claim, and whether or not this judgment is valid is a question we must consider, on this application, as settled.

It is true an appeal has been taken to the supreme court of the United States from this judgment. It may be reversed, but until reversed we must regard it as a binding judgment. It was competent for the parties affected to supersede it by giving the necessary bond. They have not chosen to do so, but have only filed, as I understand, the ordinary bond for costs. Therefore, the judgment is left in full force, and we have to treat it as res adjudicata in this court. There is a way, perhaps, in which these parties can avail themselves of any error, either in the order which the court will now make, or in rendering judgment in the replevin suit, and that is by appealing from the order of this court, and giving the necessary security.

The fund is in court, and cannot be taken out except by its order; and in requiring a supersedeas bond, of course the court would take into consideration the fact that the fund was here subject to the order of the court at any time whenever, if the case should go to the supreme court, the rights and equities of the parties are determined; and if this order should be affirmed, then the money in court, with any security that may be given, would meet the claim which the Rogers Locomotive & Machine Works may have, so that I shall direct the money to be paid over, and if the other party desires to appeal from the order which I make, of course it can do so, upon giving the necessary security, which would have to be enough to cover interest during the time the case might be pending in the supreme court, costs and other incidental expenses and damages.

TURNER (INGERSOLL v.). See 7 Fed. 859.

Case No. 14,261.

TURNER v. JOHNSON et al.

[2 Cranch, C. C. 287; [1] 1 Fish. Pat. Rep. 4.]

Circuit Court, District of Columbia. April Term, 1822.

PATENTS—IMPROVEMENTS—NOTES—FAILURE OF CONSIDERATION.

If a person who has made an improvement upon a machine, already patented by another, take out a patent for the whole improved machine, the patent is void; and if knowingly sold as a valid patent, the vendor cannot recover upon a note given for the purchase-money.

Assumpsit, on a promissory note for five hundred dollars [given as part consideration for the purchase of a right to certain letters patent].[2] [See Case No. 14,256.]

Mr. Wiley, for plaintiff [Robert Turner].

Key & Dunlop, for defendants [Johnson & Green].

THE COURT (nem. con.) instructed the jury, at the prayer of the defendants' counsel, "that if they believed from the evidence that the plaintiff sold to the defendant a patent right including an original invention which was known to the plaintiff to have been previously patented to another, together with his, the plaintiff's improvement on such original invention, for which improvement only the plaintiff was entitled to a patent, and that the defendant bought such patent right ignorant of the original invention having been previously patented to another, and with a belief that he would have an exclusive right to the whole machine, and that the note in question was given as part consideration of such purchase, then it was a fraud on the defendants, and the note void in law."

Verdict for defendant.

TURNER (LLOYD v.). See Case No. 8,436.

TURNER (McLAUGHLIN v.). See Case No. 8,875.

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

[2] [From 1 Fish. Pat. Rep. 4.]

Case No. 14,262.

TURNER v. NEWMAN.

[3 Biss. 307; [1] 4 Chi. Leg. News, 361.]

Circuit Court, N. D. Illinois. July Term, 1872.

PRACTICE — PROCEEDINGS TO RESTORE RECORDS.

The proceedings to restore records in the United States courts must conform to the act of congress, and not to the state statute.

Petition to restore the record of a judgment heretofore rendered in this court in favor of the petitioner against the defendant, praying a summons, and that the case proceed in the manner provided by the statute of the state of Illinois, approved April 9, 1872 (2 Gross, 317), commonly called the "Burnt Records Act."

Paddock & Ide, for plaintiff.

D. S. Pride, for defendant.

BLODGETT, District Judge. The plaintiff claims that by the 5th section of the act of congress, approved June 1, 1872 [17 Stat. 196], entitled "An act to further the administration of justice," he is entitled to proceed in conformity with the state statute. That section provides "That the practice, pleadings, forms and modes of proceeding in other than equity and admiralty causes, in the circuit and district courts of the United States, shall conform as near as may be, to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in the courts of record of the state in which such courts are held, any rule of court to the contrary notwithstanding: provided, that nothing herein contained shall alter the rules of evidence under the laws of the United States as practiced in the courts thereof."

We do not think the restoration of the records of this court is by the act just quoted brought within the provisions of the state law on that subject. By act of congress, approved March 3, 1871 (16 Stat. 474), provision is made for the restoration of the records of the federal courts in all cases when the same shall be lost or destroyed. And by the act of congress, approved March 18, 1872 (17 Stat. 41), the method of proceeding under that statute is further regulated and defined.

It seems clear to us that it was not the intention of congress, by the fifth section of the act of June 1st, to repeal or abrogate the act of March 3, 1871, and its amendment. The proceeding to restore records does not come within the general term of practice or pleadings in the courts, which obviously has reference to the mode of commencing and trying causes, but it is a special proceeding sui generis, and to be governed by the statute authorizing it. The act of March 3d applies to all cases in law, equity, and admiralty, while the conformity act of June 1st only applies to proceedings at law, so that if the construction contended for in this case was to prevail, we should have one mode of procedure in cases at law governed by the state statute, and another, in equity and admiralty cases, governed by act of congress.

For these reasons we consider that proceedings to restore records in this court must conform to the act of congress, and that the state statute does not control, although we admit that the state statute is in many respects much more simple and easy of application than the act of congress.

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

TURNER (PIERCE v.). See Cases Nos. 11,148 and 11,149.

TURNER v. The SKYLARK. See Case No. 12,929.

TURNER (SMITH v.). See Case No. 13,119.

TURNER (TAYLOE v.). See Case No. 13,770.

Case No. 14,262a.

TURNER v. UNITED STATES.

[2 Hayw. & H. 343.] [1]

Circuit Court, District of Columbia. Oct. 23, 1860.

CRIMINAL LAW — EVIDENCE — RES GESTÆ — LARCENY OF BANK NOTE.

Anything that is said and done by the prisoner and the prosecuting witness at the time of the larceny is directly connected with the transaction, and is not in any sense collateral to the issue. It was intended to explain the motives and intent of the prisoner. The evidence ought to have been submitted to the jury, as they were the proper judges of its weight and credit, and the effect they would give to it.

In error to the criminal court. The jury brought in a verdict of guilty. On a trial of this case the following bill of exceptions was presented and signed by J. Hartley Crawford, judge of the criminal court, viz.: On the trial of this cause the United States, to maintain the issue on their part, joined, gave evidence by one A. H. Crogier that on Sunday, the 25th day of April, 1860, in the afternoon, he was with some acquaintance in the bar-room of the National Hotel in the city of Washington talking and drinking, when by some means, he does not know how, whether by introduction or not, he got into conversation with the prisoner at the bar [Henry Turner], who until then was a stranger to him, and in the course of the conversation they took two or three drinks together; in the course of that conversation the prisoner told witness he was a gambler by profession and had his room close by, for which he paid $1,200 a year rent; that he gave elegant suppers every night, and so on, and after a while invited him, the witness, to go with him to his room, where he would give him a glass of such liquor as he could not get in any public place in the city. This

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

was near six o'clock in the evening. He accepted the invitation, and they went out together and went to the prisoner's room, where they got some liquor and drank, and the prisoner asked witness if he had any Virginia money, saying he had use for a small sum and would give him gold for it; witness said yes he had a little and took out of his waistcoat pocket a hundred dollar note and some small change, and handed the note to the prisoner who took it, looked at it, and put it in his pocket. After a while witness asked prisoner for the gold and prisoner refused to give it to him; witness then asked him for his note and he refused to give him that, and witness asked him why, and he replied: "Because it is a counterfeit." Witness then said: "Counterfeit or not, I have eleven mates to it. I know where I got them from and can have it made good, for I got them in Richmond from the cashier of the Commonwealth Bank." That some words passed between them and the prisoner arose and went to get his hat, and witness asked him what he was going to do, to which he replied: he was going to have him arrested for passing counterfeit money. Thereupon witness left the room, went to the National Hotel, and there stated what had passed; was there advised to have prisoner arrested, and then did go to a justice, procure a warrant, and cause the prisoner to be arrested. On his cross examination the witness said he had not with him at the time the eleven notes he spoke of, that he had previously deposited them with Dr. Jones, the proprietor of the National Hotel, who counted them when he received them and put them in the safe at the hotel, and he did not take them out until after the said $100 note had been got from him by the prisoner, and afterwards he had got them from Dr. Jones; that the prisoner had stated to him that he had a whole roll of notes at the time and he saw them, and saw him take this note from them; but this was not true, and the prisoner thereupon called Dr. Jones, the person spoken of by the said witness, for the purpose of contradicting him, and also for the purpose of showing that in point of fact the witness had with him at the time a large roll of similar notes, and thereby increasing the just ground of suspicion in the mind of the prisoner; that witness was circulating counterfeiting money, and that the note so withheld by him was counterfeit, and for other purposes pertinent to the issue, and offered to prove by Dr. Jones that he never saw the witness until the afternoon of the day of the alleged theft, when witness came to him and said that being drunk the night before he had come with a friend and deposited with one of the clerks at the hotel a large sum of money; which was put in an envelope with his name on it, and locked up in the safe, and asked Dr. Jones to give it to him, and Dr. Jones having ascertained the facts to be so, did take out the money and gave it to the witness; that witness then went into the bar-room, where he remained with others till toward night; that he afterwards heard that Turner had got some money from him and saw the witness, but witness did not tell him of it, or of any of the facts, and he did not advise him to have him arrested; that the next day witness came to him again, and showed him the roll of money and told him it was the same he had got from him the day before, except a $100 note, which he said Turner had got, and that it was of the same description as the others then shown to him, which he thinks were ten or eleven one hundred dollar Virginia notes, and witness there deposited the money in the safe at the National Hotel. To all which offered evidence the United States attorney objects, and the court sustains the objection and will not permit the same to be given, and the defendant, by his counsel, excepts thereto, and prays the court to sign this, his bill of exceptions, which is done accordingly.

Robert Ould, U. S. Dist. Atty., for the United States.

Before DUNLOP, Chief Judge, and MORSELL and MERRICK, Circuit Judges.

DUNLOP, Chief Judge. We have examined the bill of exceptions in the record in this case. The testimony of Dr. Jones, with the exception of the words, "heard that Turner had got some money from him," and offered by the prisoner Turner on his trial, and included by the ruling of the criminal court, as set forth in the exception, we all think was pertinent to the issue on trial before the jury, and competent and proper to be submitted to their consideration in determining the felonious intent charged against the accused. It all relates to what was said and done by the accused and Crogier, at the time of the alleged larceny, and is directly connected with that transaction. No part of the offered evidence, with the above exception so rejected, is in any just sense collateral to the issue on trial: It intended to impeach the accuracy and credit of the prosecuting witness, as to certain facts connected with the alleged larceny, and to explain the motives and intent of the prisoner Turner. The jury were the proper judges of its weight and credit, and the effect they would give to it, and it ought to have been submitted to them. We reverse the judgment of the criminal court, and remand the cause, with directions to that court to award a venire facias de novo.

TURNER (UNITED STATES v.). See Cases Nos. 16,547–16,549.

TURNER (VIRGINIA v.). See Cases Nos. 16,970 and 16,971.

Case No. 14,263.

TURNER v. WADDINGTON.

[3 Wash. C. C. 126.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1811.

AUTHENTICATION OF RECORDS — DEBT ON JUDGMENT—PLEADING.

Upon the plea of nul tiel record to debt, on a judgment in another state, the seal of the court must be annexed to the record itself; and it is not sufficient, that it is annexed to the certificate of the judge of the court, authenticating the attestation of the clerk who certifies the record.

[Cited in Carpenter v. Ritchie (Wash.) 28 Pac. 382; Howe v. Nickerson, 14 Allen, 405; Kirschner v. State, 9 Wis. 145.]

Debt on a judgment recovered in a court in the state of Massachusetts; plea, no such record. The record produced, has only the attestation of the clerk, without the seal of the court annexed. But annexed to the record, is the certificate of the judge of the court, with the seal of the court attached to it, stating that the attestation of the clerk is in due form. This was objected to.

BY THE COURT. The seal ought to have been annexed to the record, of which the certificate of the judge is no part. Juror withdrawn by consent.

Case No. 14,264.

TURNER v. WHITE.

[4 Cranch, C. C. 465.] [2]

Circuit Court, District of Columbia. May Term, 1834.

PLEADING AT LAW—DEBT ON SINGLE BILL—PLEA OF PAYMENT.

1. A single bill may be declared upon according to its legal effect.

2. Upon the plea of "payment," it is not necessary to produce in evidence the single bill.

3. The plea admits its execution, and that it is truly stated in the declaration.

Debt on a single bill, in the following words: "On demand we bind ourselves, our heirs, &c., to pay to Richard Turner, his heirs, &c., $651. Witness our hands and seals," &c. "George White (Seal)." The declaration was in the name of John Pratt, and John Pratt, Junior, executors of Richard Turner, with a profert of the letters testamentary, by which it appeared that a certificate was "granted to John Pratt, Senior, and John Pratt, Junior, for obtaining a probate" of the will, "in due form."

Mr. Hewitt, for defendant, objected that the letters testamentary did not support the averment that John Pratt, and John Pratt, Junior, were executors of Richard Turner.

The COURT (THRUSTON, Circuit Judge, contra) overruled the objection.

Mr. Hewitt then objected to the admission of the single bill in evidence to support the averment that the defendant "acknowledged himself to be bound" to the plaintiff's testator in the sum of $651.

But THE COURT (nem. con.) overruled the objection; being of opinion that the single bill was well set out according to its legal effect.

And CRANCH, Chief Judge, said, that on an issue upon the plea of payment, it is not necessary for the plaintiff to produce the single bill in evidence; as the plea admits its execution, and that it is such an instrument as is averred in the declaration, or appears on oyer.

Case No. 14,265.

TURNER v. WILLIAMS.

[18 Int. Rev. Rec. 6.]

Circuit Court, S. D. Ohio. 1873.

INTERNAL REVENUE—DISTILLERS—ESTIMATES FROM SURVEY—EQUITABLE CLAIMS FOR ABATEMENT OF TAX.

This was an action brought [by Silas W. Turner] to recover money paid to Robert Williams, Jr., as collector of the Third district of Ohio, upon a second assessment made against plaintiff as a distiller. The plaintiff, for the month of September, 1868, made return as having mashed 1,167 44-100 bushels of grain, and produced 2,795 gallons proof spirits; that by reason of bursting one of the fermenting tubs, 10,907 gallons of mash, the product of 247 37-100 bushels of grain, was lost; that the surveyed capacity of plaintiff's distillery was 300 bushels of grain per day, and was capable of producing therefrom 900 gallons of spirits, or three gallons of spirits to the bushel; that having made return of his actual yield, exceeding eighty per cent. of his producing capacity, he was assessed and paid the assessment therefor. Subsequently he was reassessed for the difference between his return and the amount that he was estimated upon his survey to be able to produce from the amount of grain mashed without deduction for the material lost by the bursting of the fermenting tub. These facts being substantially set out in the petition the defendant demurred.

Warner M. Bateman, U. S. Atty., for defendant.

Bruce Wilson, for plaintiff.

THE COURT held, following the decision of the supreme court in the case of Stevenson v Beggs [17 Wall. (84 U. S.) 182], that the distiller was liable for the amount of spirits which the survey under the 10th section of the act of July 20, 1868 [15 Stat. 129], ascertained him to be able to produce from the material used, irrespective of the

[1] [Originally published from the MS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

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

amount which he may have in fact produced; nor could he be permitted to show a loss of material occurring subsequently to the beginning of the process by mashing for the production of spirits; that his only remedy was an appeal to the commissioner of internal revenue, who was vested by law with the authority to allow any equitable claims for abatement; that under the policy of the revenue laws no such power was possessed by the courts.

TURNER (WILSON v.). See Case No. 17,845.

TURNER v. WRIGHT. See Case No. 16,778.

TURPIN (SAWYER v.). See Cases Nos. 12,409 and 12,410.

TURRALL, The THOMAS. See Case No. 13,932.

Case No. 14,266.

TURRELL v. CAMMERRER.

[3 Fish. Pat Cas. 462.] [1]

Circuit Court, D. Ohio. Nov., 1868.

PLEADING IN EQUITY—INFRINGEMENT OF PATENT.

It is not necessary to specify particulars of infringement in a bill in equity. A general averment that the defendant has infringed the letters patent is sufficient to put him upon his answer.

[Cited in Thatcher Heating Co. v. Carbon Stove Co., Case No. 13,864; American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. 805.]

In equity.

This was a special demurrer to bill in equity, charging the defendant [David Cammerrer] with the infringement of three letters patent relating to beer coolers. The charge of the bill recited the grant of the patents and the title, and made profert of the patents, but contained no description of the several inventions. The charge of infringement was made as follows: "Yet the said defendant, well knowing the premises and the rights secured to your orator [George B. Turrell], as aforesaid, but contriving to injure your orator and deprive him of the benefits and advantages which might, and otherwise would, accrue unto him from said inventions, after the issuing of the said letters patent, and before and after the assignment thereof to your orator, and before the commencement of this suit, as your orator is informed and believes, made, constructed, used, and vended to others to be used, beer coolers containing said inventions and improvements, in the said Southern district of Ohio, and in other parts of the United States, and sold the same by agents and otherwise. And your orator further shows unto your honors, that such making and using and selling have been and are without the license or consent and against the will of your orator, and in violation of his rights, and in infringement of the aforesaid letters patent, and that said unlawful acts and infringements have been committed by said defendants with a full knowledge of the rights of your orator, and in defiance thereof." The defendant demurred specially as follows: "The said David Cammerrer, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill set forth to be true, in manner and form as the same are therein alleged, says he is advised that there is no matter or thing in the said bill contained sufficient in law to call this defendant to answer in this court; and therefore this defendant demurs to the said bill, and for cause of demurrer says that the said bill in no manner specifies wherein the alleged infringement consists, and that the said bill does not set forth the particular or particulars of the alleged infringement with the due precision and certainty to enable the court to judge of the alleged infringement, and that the said bill contains not any matter or thing entitling the complainant to any relief against this defendant. Wherefore, for divers other errors and imperfections in the said bill appearing, this defendant demurs thereto, and humbly prays judgment of this honorable court whether he shall be compelled to put in any farther answer to the said bill, and that he may be here dismissed with his reasonable costs in this behalf most wrongfully sustained."

S. S. Fisher, for complainant.
R. B. Warden, for defendant.

LEAVITT, District Judge. The question before the court arises upon a demurrer to a bill filed by the complainant for the infringement of letters patent [No. 32,845]. It is objected that the bill does not state facts enough to enable the court to base a decree upon it, and it is insisted that, before the defendant can be called upon to answer, the complainant shall be required to set forth the precise infringement complained of by some adequate description of the patented invention, and of the infringing machine or process. This he has never been required by the practice of this court to do. The general allegation of the bill that the defendant has infringed the letters patent has been sufficient to put him upon his answer. It would obviously be a very inconvenient practice to require the complainant to set out at length in his bill the details of his invention and of the defendant's manufacture. The bill would be very voluminous, and not necessarily more clear or explicit. The defendant is, by the general averment, put in possession of the allegation that he has infringed the complainant's patent. This he may deny by answer. The burden of proof is then upon the complainant to prove infringement, and to show wherein it con-

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

sists. If he fails to do this he is not entitled to relief.

The demurrer concedes the facts, and the only question is, whether there are facts enough averred to require an answer from the defendant. The practice is so well settled, both here and elsewhere, that I should feel a great reluctance to disturb it, at this late day, in any event; but I am clearly of opinion that the general charge of infringement is all that is necessary to require the bill, and that particulars of infringement need not be specified. Demurrer overruled.

TURRELL v. SNYDER. See Case No. 14,269.

Case No. 14,267.

TURRELL v. SPAETH et al.

[2 Ban. & A. 185;[1] 8 O. G. 986.]

Circuit Court, D. New Jersey. Nov., 1875.

PATENTS—EVIDENCE OF INFRINGEMENT.

Where, upon the taking of proof to establish complainant's prima facie case, it has been shown that defendant, during the time between the granting of the patent and the filing of the bill, had on hand a considerable number of each of the parts constituting the elements of complainant's patented combination, it is proper that the defendant and other witnesses should be compelled to state whether he had used any of the parts in the construction of articles substantially like the patented article, and to answer all other questions tending to show the subsequent use of any of the parts.

[Cited in Maynard v. Pawling, 3 Fed. 713; Roberts v. Walley, 14 Fed. 168; Schneider v. Pountney, 21 Fed. 404.]

In equity.

Charles F. Blake, for complainant.

J. Van Santvoord, for defendants.

NIXON, District Judge. This suit is for the infringement of reissued letters patent [No. 6,369], dated April 6, 1875, for improvement in skates, of which the complainant [George B. Turrell] became the owner by assignment on the 13th of April, 1875. The bill was filed July 6, 1875, charging the defendants with infringement, and praying for an injunction and for an account of the gains and profits made by the defendants, and of the damages sustained by the complainant from the said infringement.

The complainant is taking testimony to prove his prima facie case, and has issued a subpœna duces tecum, to one of the defendants, Edward Spaeth, requiring him to produce before the examiner "all books, papers and documents whatever, that will show the number of skates made or delivered by the defendants, or their employees, since the 6th day of April, 1875."

The defendants complain that this is not an honest inquiry into their acts, to sustain the charge of infringement, but an attempt, by an abuse of the process of the court, to ascertain the nature, extent and direction of their business affairs. While they express themselves willing to make a full exhibit of all their manufacture and sale of skates from the date of the last reissue of the patent, to the commencement of this suit, they protest that the complainant is not entitled, at this stage of the proceedings, and before a decree against them for infringement, to compel an exposure of their business matters since the last-named date. They have accordingly applied for, and obtained, a rule upon the complainant, to show cause before the court, (1) Why the subpœna duces tecum, should not be modified by inserting the clause, "and until the commencement of this suit" after the words and figures, "6th day of April, 1875," and (2) "why the defendants should not be excused from disclosing to the complainant, in the complainant's prima facie case, what defendants have or have not done since the commencement of this action."

The counsel for the complainant justifies the questions propounded, and the call for the books exhibiting the amount and character of the business of the defendants since the filing of the bill, on the ground that the complainant's patent is for a combination; that it already appears in evidence, that the defendants have a contract to manufacture the skates, which are sworn to be an infringement of the complainant's patent, and to deliver them to persons who are not licensees of the patentee; that a number of such skates are yet to be made and delivered under said contract; that it further appears that the defendants are accustomed to make large quantities of the parts of skates interchangeable, and to put them together afterwards; that it is admitted in their testimony that some of these parts were manufactured before the commencement of the suit, and the object of the present inquiry is to ascertain whether the other parts of the skates have not been manufactured since, and whether the parts made before filing the bill have not since been united to form skates, so that what was done after the reissue and before the suit has been contributory to the infringement. The reissued patent, owned by the complainant and for the infringement of which the suit is brought, is undoubtedly for a combination. In the specification, the inventor states that the nature of his invention consists in the combination, with a skate and the lateral acting clamps, of mechanism that operates to move the clamps towards each other with sufficient force to cause them to grasp the sole and hold the skate to the boot or shoe. The first claim of the reissue is for "the combination, in a skate, of clamps for grasping the sole, a plate or rest for the foot, and mechanism for moving and holding the clamps." The second is

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

for "the clamps for grasping the heel and the clamps for grasping the sole, combined with mechanism operating and holding both sets of clamps, substantially as specified." The law is well settled that such a patent is not infringed by the use of some of the parts which make up the combination, the other parts being omitted, unless the place of the discarded constituents is supplied by something substantially equivalent. As was remarked by Mr. Justice Nelson, in delivering the opinion of the supreme court in Vance v. Campbell, 1 Black [66 U. S.] 429, "unless the combination is maintained, the whole of the invention fails. The combination is an entirety; if one of the elements is given up, the thing claimed disappears." Hence, also, it was held in Gould v. Rees, 15 Wall. [82 U. S.] 194, that "where the defendant in constructing his machine omits entirely one of the ingredients of the plaintiff's combination without substituting any other, he does not infringe; and if he substitutes another in the place of the one omitted, which is new or which performs a substantially different function, or if it is old, but was not known at the date of the plaintiff's invention as a proper substitute for the omitted ingredient, then he does not infringe."

The complainant seeks to establish his prima facie case of infringement by putting one of the defendants on the stand as a witness, and proving by him what the defendants have done. He calls his attention to Ex. No. 1, and asks whether he has made skates substantially like that. The witness admits that he has, and that the defendants have a contract to furnish such skates to the firm of Peck & Snyder. He is then requested to produce the contract, which he properly declines to do, alleging as a reason that he does not wish to disclose to rivals the price which they were to receive, nor the number to be manufactured; but he again admits that it was a contract to deliver skates very nearly like Exhibit No. 1 of complainant. The sole pertinent inquiry now is the fact of the infringement, and that fact will not be made any more evident by producing the contract, than it has been, by the admissions of the defendant. The extent of the infringement is a different question, and will only arise, if at all, upon a reference for an account, after a decree for the complainant. He then continues the defendants' examination as follows: Q. 23. Do you keep books of account, which show how many skates, like Exhibit 1, you make: the deliveries of such skates, and the dates of such deliveries? A. Yes. Q. 24. Will you produce those books of account at the next adjournment? (Objected to because complainant has no right to compel the witness to produce his books at this stage of the suit, and because he has not served any subpœna duces tecum upon him, and he has no right to such subpœna.) A. I decline throwing our books open to the complainant. Q. 25. In manufacturing skates under your contract, has it been your practice to make considerable numbers of each of the different parts of the skates and to keep them until such time as you may desire to put them together? A. We always have made those parts at the commencement of the year, as that is work we keep boys on to fill up time when we are doing nothing else. Q. 26. During the period of time between the reissue of the patent and the filing of the bill, did you have on hand a considerable number of each of the parts constituting the clamping mechanism like that in Exhibit No. 1? A. Yes. We always do have such parts in the factory. Q. 27. Since that time have you used any of the parts that you then had in store, in the construction of skates, substantially like complainant's Ex. No. 1? (Objected to as immaterial and irrelevant to any issue in this suit, and because the question ought to be limited to the time of commencement of this suit; and counsel instructs witness not to state what he has done since that time.)

The design of these questions is apparent. They are put on the theory that, in a patent for a combination, he is an infringer who makes and sells only one or two of the parts of which the combination is composed, if done with the intent that the purchaser shall unite them with the other parts, procured either from the same or other sources, and at the same or at different times. That seems to be the principle decided in Wallace v. Holmes [Case No. 17,100], on which the counsel for the complainant relies, in support of his right to ask the question, and to call for the books of the defendants, exhibiting their business since the commencement of the suit. In that case—where there was a patent for a new and useful improvement in lamps, which consisted of an improved burner in combination with a chimney, and the proof was that the defendants had manufactured and sold the burners alone, leaving the purchaser to supply the chimney, without which the burner was useless—the late Judge Woodruff held, that the manufacture and sale of the burner by the defendants, without the chimney, was an infringement of the patent. "It cannot be," he says, "that, where a useful machine is patented as a combination of parts, two or more can engage in its construction and sale, and protect themselves by showing that, though united in an effort to produce the same machine, and sell it, and bring it into extensive use, each makes and sells one part only, which is useless without the others, and still another person, in precise conformity with the purpose in view, puts them together for use. If it were so, such patents would, indeed, be of little value. In such case all are tort-feasors, engaged in a common purpose to infringe the patent, and actually, by their concerted action, producing that result." * * * "Each is liable for all the damages."

Without thereby intending to intimate an

ultimate opinion in regard to that case, or in regard to its relevancy to the pending one, I propose to adopt its spirit in the order which I shall make on the present motion.

Let the subpœna duces tecum be modified, as the defendants request, by inserting the clause, "and until the commencement of this suit" after the words and figures, "6th day of April, 1878," but, at the same time, let the defendant and any other witnesses answer question 27 and all other questions tending to show the subsequent use of any of the parts of skates, like Ex. No. 1, which defendants had on hand when the suit was commenced.

This order is made upon the supposition that the answer to question 27 will serve the purpose of complainant as to present proof. If the evidence as to the fact of what the defendants have done since the commencement of the suit. in the matter of uniting the constituents of the combination, should not be satisfactory to the complainant, and it is supposed that the book of the defendants will shed more light on the subject, the court will hear an application hereafter, on notice to defendants, in regard to the exhibition of the books of account.

[For subsequent proceedings, see Cases Nos. 14,268 and 14,269.]

Case No. 14,268.

TURRELL v. SPAETH et al.

[2 Ban. & A. 315;[1] 9 O. G. 1163.]

Circuit Court, D. New Jersey. May 15, 1876.

PRACTICE IN EQUITY—ELECTION—PATENTS—BILL QUIA TIMET—SUIT FOR ACCOUNT.

1. A motion, that the complainant in two suits against the same defendants, for the infringement of the same letters patent, be compelled to elect which he will prosecute, and that the other suit be discontinued, denied.

2. Whether a patentee, learning that unauthorized parties are engaged in manufacturing some of the parts or elements of the patented combination, and are entering into contracts for the subsequent delivery of the completed article, is entitled to file his bill, in the nature of a bill quia timet, for an injunction to restrain such parties against apprehended violation of his patent rights; and afterward, when he ascertains that the infringement has become complete, by the use of all the constituents of the combination, commence a new suit for an account and damages in consequence of the said infringement, quære.

In equity.

Charles F. Blake, for complainant.

J. Van Santvoord, for defendants.

NIXON, District Judge. A bill of complaint was filed in this district, July 3, 1875, by George B. Turrell against Edward Spaeth and Charles Guelicker, alleging the infringement of reissued letters patent No. 6,369, from the date of said reissue, to wit: April 6, 1875. An answer was duly put in, and the complainant closed his prima facie case in taking the testimony. [Case No. 14,267.] A second suit in equity was then commenced, November 22, 1875, in the same court, between the same parties, for an alleged infringement of the same reissued patent, since the filing of the first complaint.

A motion is now made by the solicitor of the defendants, for an order of the court requiring the complainant, within tweny days after service upon him of a copy of such order, to notify the defendants' solicitor, which of said suits he elects to prosecute, and authorizing the defendants to enter a rule discontinuing the other suit, on the payment of costs to the defendants, to be taxed —asking the court, in the meantime, for an order staying all proceedings in both suits until such election has been made, notification given, and costs paid in the discontinued suit. There is no doubt that authoriy exists in the court to make such an order, when the rules of equity and the circumstances of the case demand it, and I should not hesitate to exercise such authority where the second suit seemed vexatious and oppressive, and gave to the complainant no relief which could not be obtained in the first suit. This is not inconsistent with the principle laid down in Wheeler v. McCormick [Case No. 17,498], on which the counsel for complainant relies; for there the proceedings were in different districts, although pending between the same parties, and for infringing the same patents, and Judge Woodruff overruled the plea in abatement because they were in different jurisdictions, and because it did not appear that the complainant could have as complete and effectual remedy in the first as in the second suit. But facts have already appeared in the progress of the first case, which render it probable that, if the complainant is entitled to relief at all, he will not be able to receive that full measure which he deems indispensable for his complete protection, without instituting new proceedings, and this does not necessarily involve the abandonment of the original suit.

The patent, the infringement of which is alleged, is for a combination. Cannot a case be imagined where the patentee of a combination—learning that unauthorized parties are engaged in manufacturing some of the parts or elements of the combination, and are entering into contracts for the subsequent delivery of the completed article—is entitled to file his bill, in the nature of a bill quia timet, for an injunction to restrain such parties against apprehended violation of his patent rights? And afterward, when he ascertains that the infringement has become complete by the use of all the constituents of the combination, may he not commence a new suit for an account and damages in consequence of the said infringement?

Without intending now to determine these

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questions, I think the substantial interest of both parties can be best promoted by refusing this motion, and at the same time requiring the solicitor of the complainant to enter into a stipulation, if the solicitor of the defendants shall ask it, that the testimony taken in the one case, so far as it is relevant, be used in the other, and that both cases be set down for hearing at the same time, thus avoiding, so far as practicable, vexation and multiplication of costs, and it is ordered accordingly.

The question of costs, in both suits, is reserved until the final hearing.

[At a final hearing of the cause, a decree was entered in favor of the complainant for an injunction and account. Case No. 14,269.]

Case No. 14,269.

TURRELL v. SPAETH.

SAME v SNYDER.

[3 Ban. & A. 458; 14 O. G. 377; Merw. Pat. Inv. 252.] [1]

Circuit Court, D. New Jersey. Sept. 24, 1878.

PATENTS—IMPROVEMENT—USE OF ORIGINAL DEVICE.

1. It does not follow that, because a device is an improvement on the patented device, a party has the right to manufacture and sell it without the patentee's assent.

[Cited in Norton v. Jensen, 49 Fed. 863.]

2. Although the patented device without the improvement of the infringer added to it, is of little practical value to the owner or to the world, yet, if there be anything new in it, the owner is entitled to damages for, and protection against, its unauthorized use.

3. Gill v. Wells, 22 Wall. [89 U. S.] 24, cited and commented on.

4. Reissued letters patent, No. 7,151, granted to G. B. Turrell, assignee, May 30th, 1876, for improvement in skates, *held* valid.

[Cited in Turrell v. Bradford, 15 Fed. 809.]

[This was a bill in equity by George B. Turrell against Edward Spaeth, and by same plaintiff against Washington I. Snyder, for an injunction to restrain the infringement of reissued letters patent No. 7,151, granted May 30, 1876; the original letters patent No. 28,495 having been granted to J. Lovatt May 29, 1860. For prior reports, see Cases Nos. 14,267 and 14,268.]

Charles F. Blake, for complainant.

J. Van Santvoord, for defendant.

NIXON, District Judge. The fastening of skates to the feet by the use of clamps is an old device, known in the art long before the date of the Lovatt invention. Hence Lovatt, in his original patent, disclaimed, broadly, the moving of clamps in skates by adjusting-screws, but confined himself in his single claim to a combination of movable V-slotted blocks, with clamps and a screw-rod, arranged substantially in the manner and for the purposes set forth in the specifications. The instrumentalities were old but the arrangements and results were new.

The complainant insists that Lovatt was the first to fasten skates to the feet with adjustable mechanism. Movable clamps had been used to hold the skate to the sole and heel of the boot, and were retained in position by bolts and nuts, the mechanism for the toe and heel being separate and acting independently one of the other. But here, by the use of a single adjustable screw operating upon the lateral clamps, these clamps are caused to grasp the sole and heel of the boot with all the force necessary and requisite for firmly holding the skate to the foot.

After a careful consideration of the case, as shown in the testimony, exhibits, and arguments of counsel, I am of the opinion that Lovatt is entitled to the credit of the invention claimed by him. He took an important step in the right direction. He brought out the true principle of clamp-fastening in skates, although he did not employ the most efficient instrumentalities for embodying and exhibiting the principle. The defendant's skate is superior to the Lovatt skate. The popular demand for an article is, in the long run, the best test of utility, and it is not surprising that the skates manufactured and sold by the defendant have substantially driven from the market all those made under the Lovatt patent. But it does not follow because the defendant's skate is an improvement upon the complainant's, that he has the right to manufacture and sell it without the complainant's assent. One cannot thus build upon another man's foundation. It may be that the invention of Lovatt, without the improvement of Day added to it, is of little practical value to the owner of the patent or to the world. Nevertheless, if there be anything new in it, the owner is entitled to damages for, and protection against, its unauthorized use.

These general observations bring me to consider two questions: (1) Whether the mechanism of the defendant's skate infringes the complainant's patent. (2) Whether the claims of the reissue, on which the suit is brought, can be supported by what is contained in the specifications, drawings, or model of the original patent.

1. The complainant's patent, in its latest reissue, contains four distinct claims, each for a combination. The first is for laterally-sliding clamps for grasping the sole, a plate or rest for the foot, and mechanism for moving and holding the clamps. The second is for sole and heel clamps, so combined with mechanism for moving and holding the same that one set of clamps acts as a resistance in closing the other set. The third is for certain devices, as laterally-moving

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 252, contains only a partial report.]

clamps, pins, and inclined slats, actuated by mechanism for operating and holding the clamps. The fourth is for a foot-rest, laterally-moving clamps, mechanism for moving and holding the same, by converting a direct forward movement into a lateral movement, and clamps for the heel. In the reissue each of these combinations is limited by reference to the mechanical devices as substantially set forth in the schedule to the patent. The claims, therefore, must not be construed broadly, as for every possible mechanical means which may be used for moving and holding skate-clamps, but as for the means specified, and every equivalent means for effecting the object. The defendant's skate—complainant's Exhibit A—is similar to the Lovatt skate in this respect, that the sole and heel clamps are moved by one operation. Are the devices in the defendant's skate, producing this result, the equivalents of the devices set forth in the Lovatt patent? The experts of the parties, as usual, are as wide as the poles asunder. Mr. Serrell says that they are precisely alike in principle, and Mr. Faber Du Faur thinks they are diametrically different. Assuming that such difference of view arises from the different mediums through which they look at the question, and turning from their testimony, let us look at the skate manufactured by the defendant (Exhibit A), and see what conclusions are reached from what we find there. We have a clamp-skate, in which are combined the clamp and certain moving and holding mechanism, the essential constituents of the Lovatt invention, and it seems to me that the principle of operation is the same in both structures. There are differences, but they are differences of form—the substitution of known equivalents for those used in the complainant's patent. The backward and forward movement which imparts to the clamps the lateral grasping of the heel and toe, produced by the longitudinal motion of the screw in the one case, is produced by the lever and the eccentrically pivoted cam in the other. Any respectable mechanic, without invention, could make such a substitution, and, if allowable, all patents for combinations would be practically useless.

2. The only remaining question is, whether the invention disclosed in the original patent of the complainant will sustain the four claims of the last reissue. The single claim of the original was for a combination of instrumentalities. These instrumentalities were movable V-slotted blocks, sole and heel clamps, and a screw-rod, arranged in the manner set forth in the specifications and drawings. All of the subdivisions of the combination in the several claims of the reissue are found in the schedule and drawings of the original patent. It does not appear that anything new has been added, or that any matter essential to, or characteristic of, the invention, has been omitted. So far from such a reissue being condemned by Gill v. Wells, 22 Wall. [89 U. S.] 24, as was maintained by the counsel of the defendant, it would seem that the learned judge who delivered the opinion of the majority of the court in that case, meant to allow it. He says: "Cases arise where a patentee, having invented a new and useful combination consisting of several ingredients which in combination compose an organized machine, also claims to have invented new and useful combinations of fewer numbers of the ingredients, and in such cases the law is well settled that if the several combinations are new and useful, and will severally produce new and useful results, the inventor is entitled to a patent for the several combinations, provided that he complies with the requirements of the patent act and files in the patent office a written description of each of the alleged new and useful combinations, and of the manner of making, constructing, and using the same. He may give the description of the several combinations in one specification, and in that event he can secure the full benefit of the exclusive right to each of the several inventions by separate claims referring back to the description in the specification; and if by inadvertence, accident, or mistake, he should fail to claim any one of the described combinations, he may surrender the original patent and have a reissue not only for the combination or combinations claimed in the original, but for any which were so omitted in the claims of the original patent."

A decree will, therefore, be entered in favor of the complainant for an injunction and an account.

As the case of Turrell v. Snyder involves the same questions, and was submitted and argued upon the same testimony, a like decree is ordered in that case.

Case No. 14,270.

TURRILL et al. v. ILLINOIS CENT. R. CO.

[3 Biss. 66; 3 Fish. Pat. Cas. 330.] [1]

Circuit Court, N. D. Illinois. Nov., 1867.

PATENTS—UTILITY—ANTICIPATION—NEW RESULT—REPAIRING RAILROAD BARS.

1. Letters patent granted to Joseph D. Cawood, September 9, 1856, for an "improvement in repairing railroad bars," examined and sustained, as being both new and useful.

2. The use by the defendants of the invention patented is evidence of its utility.

3. Combinations of similar elements, which could not be successfully used to produce the effect produced by the patented machine, do not anticipate the patent.

4. A modification of the parts of a combination by which a new result is obtained may be the subject of letters patent.

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

This was an action on the case by Samuel H. Turrill and Charles Wormley, tried by the court (DAVIS, Circuit Justice, and DRUMMOND, District Judge) without a jury, to recover damages for the infringement of letters patent [No. 15,687], granted September 9, 1856, to Joseph D. Cawood for an "improvement in repairing railroad bars," of which patent the plaintiffs were the assignees. The disclaimer and claim of the patent was as follows: "I do not claim the anvil bar or its recesses, but I claim the movable press-block D, having its edge formed to the side of the rail G, in combination with another block D, with its edge of a similar but reversed form, the movable block to be operated by two cams, or in any other convenient manner, for the purpose of pressing between them a T or otherwise shaped rail, thereby facilitating the difficult operation of welding or renewing the ends of such rails after they have been damaged, in the manner described and for the purpose set forth." The facts and process are elaborately stated in the case of Turrill v. Railroad Co., 1 Wall. [68 U. S.] 491, and are also further stated in the opinion of the court.

Beckwith & Kales, E. W. Stoughton, and B. R. Curtis, for plaintiffs.

J. N. Jewett, S. D. Cozzens, and J. H. B. Latrobe, for defendant.

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

DRUMMOND, District Judge. This is an action at law against the defendants for a violation of a patent of the plaintiffs, which they hold as assignees of Joseph D. Cawood, and which was issued to him September 9th, 1856, for a new and useful improvement on the common anvil or swage-block, for the purpose of welding up and reforming the ends of railroad rails when they have become injured by wear. The questions of law and fact have by agreement been submitted to the court, and we have had all the assistance in their investigation which the very able arguments of counsel on both sides could furnish. The patent has already come before the supreme court for examination, and a construction has been given to the specifications by that court, which is a guide to us on this occasion. Turrill v. Michigan Southern & N. I. R. Co., 1 Wall. [68 U. S.] 491.

The specifications set forth the manner of constructing the machine. There is a bed-sill on which there is an anvil or swage-block of iron. There are dies across the face of the shape of the side of the rail. There is a raised solid block, making a part of the anvil. There is then a movable press-block operated back and forth by eccentric cams. The sides of the raised block and the movable press-block are made to fit and receive the rail, so that when they are pressed together by the motion of the press-block, they, in conjunction with the anvil beneath, hold the rail firmly for the purpose of welding and reforming the ends of the rails. The machine and its mode of operation are particularly described, the foregoing being a mere sketch.

The supreme court say in the case just referred to: "Obviously it is not a claim for any kind of movable press-block, combined and operating in any way with any kind of fixed block to accomplish any purpose or effect any kind of result. * * * The invention was of such a movable press-block as is described, having its edge formed to the side of the rail in combination with such other block as is described, with its edge of similar, but reversed form, arranged as described, and combined and operating in the particular way described, for the special purpose of effecting the described result."

With this construction of the patent before us, the inquiry is, whether any of the machines introduced by the defendants are substantially the same as that of the plaintiffs. The infringement is admitted, but it is insisted that the machine of the plaintiffs, in all essential particulars, is identical with several machines previously well known, viz., the bayonet machine, as used in the United States armory at Springfield, Massachusetts, for the construction of bayonets, the angle-iron machine, as used at Cincinnati, for the construction of the frames of locomotive engines; and the machine described in the English patent of William Church, issued in 1846. The bayonet machine was one form of a common vise, operated by a treadle and elastic spring, the jaws of the vise having dies cut in them of the contour of that part of the bayonet and socket which they were to hold while the welding or hammering process was going on. If the machine of the plaintiffs was no more than this, then the patent would fail. We are inclined to agree with the defendants' witnesses, that as soon as the jaws of a vise are cut to the form of any instrument to be held, the idea would naturally be suggested that they might be changed to suit any shape. But the Cawood machine is something more than a vise with jaws shaped to receive the thing to be held. It has what is, in some respects, similar to the jaws of a vise adjusted to the thing, but there was a modification of some of the elements of the bayonet machine, so as to change the mode of operation and to produce a new result. And to properly appreciate the difference, we must regard its adaptation of means to ends, and ascertain whether there is not something new, in this respect, in the patented machine. We think there is, and to hold otherwise would very much limit the field of discovery confessedly within some of the elements and combinations of the bayonet machine. The angle-iron machine bears a stronger analogy to the Cawood machine. In the angle-iron machine there is the main

anvil beneath, and above, a fixed anvil, and at the side of the latter, and upon the lower anvil, is a movable press-block. The sides of the fixed anvil were rounded, and the two bars of iron were flattened or brought to any desired shape, and welded together by means of the fixed anvil and the press-block, the result of the hammering under these circumstances, being the welding of the iron, so as to produce the angle-iron, with a fillet, as it was termed, at the angle, thereby strengthening the iron to be used for the frame work of the locomotive. The press-block in this machine was moved towards the fixed anvil by a cam, but back by hand, or other force in that way applied. Now, it is clear that this machine cannot be successfully used to produce the effect caused by the operation of the Cawood machine. In the latter the structure at the side of the anvil and press-block is different and adjusted to the rail. The rail in the act of hammering and welding is held by the press-block and raised solid block, and at the same time supported by the main anvil. The forming process is effected differently. In the angle-iron machine the relation of the parts of the machine to the thing to be constructed was not the same. The fixed anvil performed a different function, and the anvil beneath took no part directly in the working of the iron. The angle-iron machine would not effectually perform the function of mending rails. A change was made in that machine. There was a modification of some of the various parts, and in consequence of that, the other result is obtained. It may be said that the change here is not very great, and that the plaintiffs' patent has somewhat narrow ground to stand on; but not more so, we think, than many patents that have been sustained by the courts. A slight change, sometimes, of a known machine, or in some of its parts, will effect surprising results, and to protect a party who, by inventing such change, has produced a new and useful result, was certainly one of the objects of the patent laws. The English patent of William Church, though in one part it described a machine for holding railroad rails during a certain working process therein set forth, it is clear does not contain in substance the machine of Cawood, applying it to Church's specifications. There are jaws to hold the rail in Church's machine, and there is what has been termed the press-block, but it is manifest, we think, that it would not be a practical machine for producing the results effected by Cawood's; besides, there is no evidence before us that Church's machine has ever been used for any practical purpose having a bearing on the machine of the plaintiffs, nor, indeed, for any practical purpose whatever.

The question in this case is mainly one of fact, and we have not gone into details as to the differences between the three machines relied on by the defendants, and the Cawood machine, but have only referred to them in a general way. And we have rather given our conclusions than the reasoning upon which they are founded. We have had the benefit of the testimony of several eminent experts, but, as is not uncommon in difficult cases, they do not agree in their opinions as to what are matters of form, and what matters of substance, and we have been obliged to draw our own inferences, aided by them and the arguments of counsel, chiefly from an inspection of the machines and the models which have been produced before us. And applying the construction of the plaintiffs' patent, as given by the supreme court to the three machines introduced by defendants, we think they are not substantially the same as the machine of the plaintiffs, and, therefore, that the Cawood patent is valid.

By stipulation between the parties, it seems there were repaired, between August 20, 1860, and June 20, 1861, three thousand and forty-one bars of railroad iron, the average length of weld being 17.4 inches per bar. There is great conflict in the evidence as to the utility and value of the Cawood machine, as designed and used by the inventor, but we think the weight of the testimony is that it is both useful and valuable, and, indeed, under the circumstances, the defendants having made use of it so long, can hardly question it. On the whole, we have fixed the actual damages sustained by the plaintiffs for the infringement of their machine by the defendants during the time above-mentioned, at the sum of twelve hundred and ninety-two dollars.

Judgment accordingly.

[In a subsequent case against the same defendant and others the court reaffirmed the patent. Case No. 14,271.]

Case No. 14,271.

TURRILL v. ILLINOIS CENT. R. CO. et al.

[3 Biss. 72; [1] 3 Chi. Leg. News, 337.]

Circuit Court, N. D. Illinois. July, 1871.

PATENTS—COMBINATIONS—SWAGE-BLOCK.

1. The Cawood patent for an improvement in anvil or swage-block for welding railroad bars construed and *held* valid.

2. The effect of removing the whole or a part of the anvil considered.

These were five bills filed by Samuel H. Turrill, as assignee of the Cawood patent [against the Illinois Central Railroad Company, the Chicago, Burlington & Quincy Railroad Company, the Michigan Southern & Northern Indiana Railroad Company, the Chicago & Alton Railroad Company, and the Pittsburg, Ft. Wayne & Chicago Railway Company], for an accounting, and damages for an alleged infringement of the patent.

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

West & Bond, B. R. Curtis, and E. W. Stoughton, for complainant.

J. N. Jewett, for defendants.

DRUMMOND, Circuit Judge. This controversy grows out of an alleged infringement by the defendants of a patent [No. 15,687] granted to Joseph D. Cawood, on the 9th of September, 1856, for an improvement in the common anvil, or swage-block, for the purpose of welding up and reforming the ends of railroad bars when they have become injured from unequal wear, and of which the plaintiff is the assignee. This patent has been before the supreme court of the United States, and has, to some extent, at least, been construed (Turrill v. Michigan Southern & N. I. R. Co., 1 Wall. [68 U. S.] 491), in which case the specifications and claim are set forth. It has also been before this court [Case No. 14,270]. In this last case the law and facts were submitted to the court, and the patent was held valid, though attacked by the angle-iron machine, the bayonet machine, and the Church machine. The court was then of the opinion that there was nothing in these old machines to prevent the operation of the patent of Cawood, as construed by the supreme court. It was admitted, in view of the previous machines, that the Cawood patent could not have a broad construction, but must be limited to such a movable press-block as was described, or its equivalent, in combination with such other block as was described, or its equivalent, united and operated as described, and for the purpose described. In order to understand this definition, it is necessary to refer to the specifications. The movable press-block described is put upon and connected with various other parts of the machine. There is, first, a bed-sill of the proper size. Upon this is placed an anvil of cast-iron. There is a raised solid block forming a part of the anvil, with its side shaped to the side of the rail, which is to be placed in it. Then upon the face of the anvil, and next to the raised block, with its side shaped as above, is put the movable press-block. It is attached to the anvil. It is worked by eccentric cams. It has its side next to the raised block, shaped also to hold the rail; the latter thus has the raised block on one side, and the press block on the other. This is the kind of press-block described, and this is the kind of other block described. It operates in this way: The piece of iron is prepared and heated; the rail is also heated in the fire, and is then swung round; the movable block brought against the rail, which is thus between the two as in the jaws of a vise, and there firmly held, with the crown of the rail above and resting on the blocks, until the welding or reforming process is completed. The purpose effected is the reparation of the rail. Now, it is clear that no true construction of this patent can be given, without connecting the claim as made, with the machine, and its purpose and mode of operation. Therefore, while it is essential that the various parts claimed should be constructed so as to accomplish the purpose, it is also essential that the parts claimed should be connected with parts not specifically mentioned in the claim; for example with something to support the jaws of the vise as well as the blows given in the act of reparation of the rail. It is clear, therefore, the jaws as described and constructed cannot be separated from other parts mentioned in the specifications. If they are, they cease to be such a movable press-block and such other block described, which are the blocks covered by the patent. It follows, therefore, that what gives support to the blocks is an essential part of the machine, and that it is not precisely correct to say that the only function of the Cawood machine is to hold the rail while being mended. That is only a part of its function. We must go further, and add, it must be done substantially in the way described, and so as to accomplish the purpose mentioned. It was, therefore, supposed by the court, in the case of Turrill v. Illinois Cent. R. Co. [Case No. 14,270], viewing the machine as having its own peculiar form and mode of operation, that there was something in it which might be the subject of a patent, notwithstanding the angle-iron, bayonet, and Church machines. A writ of error was taken out, and finally abandoned, and the judgment of this court affirmed. These questions have been re-argued in this case; but, under the circumstances, it could scarcely be expected that the opinion of the court would be changed. Cawood does not, in terms, in his claim, make the support to the jaws a part of his claim, but it necessarily follows, from the two things, that he does claim in combination, in the manner described and set forth by him, that it is an essential part of the invention. One of the blocks is a raised part of the anvil; the other is attached to it and movable backward and forward, so as to let in and firmly clasp the rail. If we were to remove the part beneath, we should deprive the machine of one of its essential parts, and without which it would not be the machine described.

Some question has been made whether Cawood intended that the rail, in process of reparation, should rest as well upon the anvil as be clasped in the jaws of the blocks. There is nothing distinctly stated in the specifications to that effect, but there can be no doubt, I think, when fairly considering them in connection with the drawings, that such was supposed by him to be one of the incidents or results, and, perhaps, a necessary one to the successful operation of the machine. It would seem that in this way the rail would be more solidly planted, and, therefore, better prepared to receive the blow given in the act of repairing. It is insisted, on the part of the defense, that for the rail to rest on the anvil in the work of reparation is a positive injury, instead of a benefit, partic-

ularly in the case of what is called the "fish rail." The argument is that if the rest of the rail on the anvil is an element of the Cawood patent, then, whenever that ceases to be the fact, there is no infringement. And it seems that in several machines used by some of the defendants a part of the anvil has been chipped off beneath the rail, so that it no longer rests on the anvil. This, it is argued, deprives them of all that is new in the Cawood machine, and prevents them from being an infringement.

While I think the specifications treat the resting the rail upon the anvil as a part of its mode of operation, I do not consider that one of the elements or indispensable parts of the machine, nor, do I think, if enough of the anvil be removed to prevent the rail from resting on it, for that reason alone, it ceases to be the Cawood machine. And yet, it is clear, if the whole bottom support is removed, an essential part of the Cawood machine is gone, and there is nothing left, in effect, but a common vise. There might be instances between these two supposed cases where it would be difficult to determine whether the machine was a substantial equivalent of one of the old or of the Cawood machines. It would appear to be better, in order to accomplish the purpose Cawood had in view, that the rail should rest on the anvil, but it might not, and still it would possess, in many respects, the peculiar advantages of the Cawood machine; one of them, obviously, being the firmness of support given to the rail while in the act of being repaired. The fact that the machine, as intended by Cawood, has been used, and, by some of the defendants, several years, without special complaint, strengthens this view of the case. But even if what is added or taken away by the defendants is an improvement of the Cawood machine, it is still the machine so long as its essential characteristics remain the same.

On the whole, then, there is nothing in this case to prevent the operation of the Cawood patent, when fairly construed, and therefore it will be held valid. The main argument has been upon the validity of the patent. I shall refer the case to a master, with directions to report what machines used by the defendants infringe the patent of the Cawood machine, within the rules and principles here stated; also, what damages the plaintiff has sustained by such use. I adopt this practice in the present case for the reason that while the rules laid down dispose of most of the questions which relate to infringement, there are others of some difficulty which I leave to be disposed of at the coming in of the master's report upon exceptions or otherwise.

The above opinion applies not only to Mr. Turrill's suit against the Illinois Central Railroad Company, but also to four other suits against the following companies: The Chicago, Burlington and Quincy R. R. Co.; the Michigan Southern and Northern Indiana R. R. Co.; the Chicago and Alton R. R. Co.; the Pittsburgh, Ft. Wayne and Chicago Railway Co.; all being founded upon essentially the same state of facts, and involving the same principles. These five cases were, by agreement of counsel, heard together, and in accordance with the above opinion were referred to Henry W. Bishop, Esq., master in chancery. The master, on the 7th of November, 1872, reported that the defendants used seven machines which infringed the plaintiff's patent, and reported the damages as against the several defendants at a total of $1,549,732.68.

To this report the defendants filed thirty-two exceptions, which came on to be heard before DAVIS, Circuit Justice, and DRUMMOND, Circuit Judge, in July, 1873, when the report was sustained except as to the Bain machine, and reference made to the master for the proper reduction. [See Case No. 14,272 and note.] The master, on the 22nd of October, 1873, reported that the Illinois Central and the Michigan Southern and Northern Indiana R. R. Co. were the only ones which used the Bain machine, and allowed them deductions of $114,489.68 and $103,927.53, respectively, making the total amount against the five companies $1,331,315.47. To this report the several railroad companies filed further exceptions. [Case unreported.]

Case No. 14,272.

TURRILL v. ILLINOIS CENT. R. CO. et al.

[5 Biss. 344;[1] 6 Chi. Leg. News, 49.]

Circuit Court, N. D. Illinois. July 26, 1873.[2]

PATENTS—REFERENCE TO ASCERTAIN DAMAGES—WHAT TO BE CONSIDERED — INFRINGEMENT — BASIS FOR ESTIMATING DAMAGES—EXCEPTIONS.

1. Where a patent has been sustained by the court, the master, on a reference to ascertain and report the amount of damages caused by the infringement, should not go into the general question of infringment, nor consider the general scope and extent of the patent: he should simply examine and decide as to the extent of the infringement as to the particular machine used by the defendants.

2. The principles as to the validity of the patent having been decided by the court, the master's duty is simply to apply them to the machines actually used.

3. It is not his duty to go through the history of the machines offered in evidence, but only to compare them together.

4. Where there has been a constant effort to approach as near as possible to the machine patented, such conduct of the defendants may be considered in deciding the question of infringement.

5. The Bain patent, for a machine for mending rails, is not an infringement of the Cawood machine.

6. Where at the time of the use by the defendants of the Cawood machine there was no other method of repairing rails than a common anvil

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

[2] [Reversed in part in 94 U. S. 695.]

or swage-block, a comparison of these two methods is the proper basis for estimating the damages.

7. It is not competent to show that it was unprofitable to repair rails by the Cawood machine, or that it would have been better to re-roll them, or otherwise dispose of them; it must be presumed that the defendants' interests were promoted by their use of the machine, and they can not be permitted to show that they pursued the wrong policy.

8. The proper basis for estimating the damages caused by the infringement is the cost of repairing the rails on the Cawood machine as compared with the cost by other known methods. The rule in Mowry v. Whitney, 14 Wall. [81 U. S.] 620, followed.

9. It seems, that the difference in cost of the respective machines is a proper element in estimating the amount of profits arising from their use.

10. Where exceptions did not point out wherein the master erred, and the counsel do not direct the attention of the court to the evidence establishing the alleged error, such exceptions will be overruled.

11. Where railroad companies had consolidated and enlarged their charters, the master should ascertain to what extent each company had infringed.

These were five bills in equity against the Illinois Central and four other railroads [the Chicago, Burlington & Quincy Railroad Company, the Michigan Southern & Northern Indiana Railroad Company, the Chicago & Alton Railroad Company, and the Pittsburg, Ft. Wayne & Chicago Railway Company], brought by Samuel H. Turrill, assignee of Joseph D. Cawood, for an infringement of the patent issued September 9th, 1856, for a new and useful improvement on the common anvil or swage-block for the purpose of welding up and reforming the ends of railroad rails. These cases were by consent of counsel heard and submitted together. This patent has already been before the supreme court of the United States (Turrill v. Michigan Southern & N. I. R. Co., 1 Wall. [68 U. S.] 491) and also twice before this court [Cases Nos. 14,270 and 14,271], and the validity of the patent was sustained. By the interlocutory decree of July 18th, 1871 [Case No. 14,271] this court affirmed the validity of the patent, and referred the cases to the master to ascertain and report which, if any, of the machines used by the defendant infringed the patent, and what damages the patentee had sustained by said infringement. The master, on the 7th of November, 1872, reported that all of the seven machines used by defendants (the Illinois Central, the Etheridge, the Whitcomb or Cleveland block, the Michigan Southern, the bayonet vise, the Beebe & Smith, and Bain's reversible rolls) infringed the plaintiff's patent within the rules and principles as laid down by the court, and that the only other appliances used by defendants for the purpose of repairing railroad rails was the common anvil or swage-block. On the coming in of this report, the several defendants filed thirty exceptions to the report; which exceptions are sufficiently stated in the opinion.

B. F. Ayer and Walter Curtis, for plaintiff.

George Gifford, J. N. Jewett, George Payson, and R. Biddle Roberts, for defendants, who cited Mowry v. Whitney, 14 Wall. [81 U. S.] 620; Jones v. Morehead, 1 Wall. [68 U. S.] 155; Livingston v. Woodworth, 15 How. [56 U. S.] 546; Seymour v. McCormick, 16 How. [57 U. S.] 480.

Before DAVIS, Circuit Justice, and DRUMMOND, Circuit Judge.

DRUMMOND, Circuit Judge. The exceptions made to the master's report in these cases are numerous, but they may all be considered under a few general heads.

The first seven exceptions refer to the fact that the master assumed that the patent had already been construed by the court, and that he declined to go into the general state of the art in order to determine whether the defendant's machines infringed the patent, and also refused to consider the general scope and extent of the patent.

These exceptions must all be overruled. The patent has been construed by the supreme court of the United States and by this court. The supreme court had declared the principles which are to govern in comparing the machine of the plaintiff with others alleged to be infringed, and this court, in the case of Turrill v. Illinois Cent. R. Co. [Case No. 14,270], had decided the plaintiff's patent to be valid, and that certain machines used by the defendants violated the plaintiff's patent. In these cases in which the master has made his report, and which are the subject of the exceptions, the court in July, 1871, found that the plaintiff was entitled to the relief he asked against the defendants. That is, that the patent is valid and that the defendants had infringed. It appeared that various expedients had been resorted to by some of the defendants in order to evade the patent. The court held that the anvil was an essential part of the machine to support the jaws, while they held the rail in the act of reparation, but that the clipping out of or removal of a portion of the anvil immediately beneath the rail, so as to prevent its contact with the anvil, did not of itself destroy the identity of the machine. At the same time it was conceded that if the anvil was so far cut off or removed as to cease to support the rail in receiving the blows of the hammer, an indispensable part of the machine was gone, It was because of the difficulty of ascertaining the extent to which the alterations had been made in all the machines used by the defendants, and because of the imperfect condition of the evidence as to one of the machines, that the court directed the master to report what machines, used by the defendants, infringed. It would have been, therefore, obviously out of place for the master to go into the general state of the art either as to the construction of the patent

or the infringement. All that he had to do was to decide as to the extent of the infringement, and as to the particuar machines used by the defendants. And we say this without intending to deny the right of the master, in case the evidence before him presented the patent under any other aspect not previously considered by the court, to report the facts for its instructions.

The eighth and ninth exceptions are that the master refused to receive or consider evidence tending to show that some of the defendants' machines were in principle the same as some in use prior to the invention of the Cawood machine, and that he compared only the defendants' machines with Cawood's in order to determine whether or not they infringed.

We think these two exceptions must be overruled. The principles upon which the validity of the patent for the Cawood machine was to be ascertained had already been decided by the court. The master had only to apply them to the Cawood and the other machines used by the defendants, a matter conceded to be not free from difficulty, mainly on account of the efforts made by the defendants to evade the patent as they supposed it was or ought to be construed by the court. As already stated, it is not the duty of the master to go through with the history of the machines offered in evidence, in order to decide whether the defendants' machines infringed the plaintiff's. It was sufficient to compare them together to reach a conclusion on the subject. Any other rule would cause him to go over the ground already examined by the court.

The 10th, 11th, 12th, 13th, 14th, and 15th exceptions refer to the machines used by the defendants, and which the master has reported infringed the plaintiff's machines.

These exceptions will be overruled. In some of the machines it may be admitted it is a question of some nicety, as in the Beebe & Smith, the bayonet vise, and the Michigan Southern. It is insisted the master should not have reported these as infringing the Cawood machine, because, among other reasons, of the different construction of the jaws and the want of the anvil support. Stress is placed on a remark of the court in the case of Turrill v. Illinois Cent. R. Co. [supra], to the effect that when the jaws of a vise are cut to the shape of any instrument to be held, it would suggest the idea at once that they might be changed to the form of any other instrument or object. But this remark was made with regard to the Cawood machine in its finished state, and treating the jaws as a vise. It was certainly a fact that the common anvil or swage-block had long been used for repairing rails, and in comparing the old machine with the new, the difference in the operation and in the time, expense, and labor, could not be lost sight of. And as connected with this the anvil as a support to the jaws while holding the rail, in receiving the blows of the hammer, was considered essential. Now, it is true, in some of these machines, the jaws are more elongated than in the Cawood machine, and in some the rail, in the act of hammering, does not actually come in contact with the anvil, or what takes the place of the anvil, but in all there is something more than a mere vise, and that seems borrowed from the Cawood machine. And we think in deciding on the question of infringement, the conduct of the defendants in relation to their machines may be considered. There seems to have been a constant effort to approach as near as possible to the plaintiff's machine, and yet not close enough to infringe. And in overruling these exceptions, we think that while it may be true that the same rules should be applicable as in comparing the Cawood machine with other and prior machines, to test the validity of the patent, yet that on the question of infringement the comparison should be made directly between the plaintiff's and the defendants' machines.

The sixteenth exception will be sustained. That is made because the master found the Bain machine infringed the Cawood machine. We do not agree with the master in this. Cawood's patent does not include any machine by which a rail may be held in the act of reparation, but its own special method. Any other person was at liberty to devise a different method of holding the rail. This we think Bain has done by his machine. There are no jaws like those of the Cawood machine. There is no hammer used. The whole operation is performed by placing the rail between four rollers, two vertical, which sustain and press the rail, and two horizontal, one each side, to hold it. It is a rolling process—all the rollers moving as the rail advances or recedes in the act of reparation. The elemental idea of the Bain machine seems to us to be different from that of the plaintiff's machine. All the other machines found by the master to infringe, may be said to be the emanations or suggestions of the Cawood machine. This cannot be affirmed of the Bain machine. It is, as to this, an independent creation.

The 17th 18th, 19th, 20th, 21st, 22d, 23d, 24th, and 25th exceptions relate to the finding by the master, that the old swage-block and the Cawood machine are the only two instruments by which the rail could be repaired, and that the comparison must be between them, to the rejection of evidence showing that it was unprofitable to mend rails in the Cawood machine, and that it was better to re-roll them, or dispose of them in some other way.

These exceptions will all be overruled. We do not understand that up to the time of the invention and construction of the Cawood machine there was any other known method of repairing the rails than the common anvil or swage-block. The master reports

that the only appliance previously used by the defendants was the common anvil or swage-block, and his statement is not contradicted. If, then, the rails were repaired on the Cawood machine substantially in the same way, and the same result reached as when repaired on the common anvil, these were the only implements of comparison. As long as the defendants used the Cawood machine, these were the only things that could be compared. It was competent always for the defendants, at any time, to make some other disposition of their damaged rails—to cut off the shattered ends, or to re-roll them, or sell them for old iron. As long as they mended them by the method of the Cawood machine, it must be presumed that it was done because the interests of the defendants were thereby promoted, and it cannot be permitted to the defendants to show that they pursued a wrong policy, and that they could have disposed of their rails much more profitably. This would strike at most of the patented devices of the time, they being constantly liable to be superseded by improvements, the progress in art and the teachings of experience. Because it may have been ascertained that the use of rails mended on the common anvil, or on the Cawood machine, is attended with risk, the defendants could hardly be permitted to set off any possible damages they might sustain from breakage. We think, therefore, the master was correct in comparing the common anvil and the Cawood machine, and the costs of doing the work on them.

And this brings up the objections made to the rule adopted by the master in estimating the profits of the defendants by the use of the plaintiff's machine. We admit that if at the time of their use there appeared to be any other methods of repairing the rails, then the damages of the plaintiff might be the difference between the least expensive of these methods and that of the plaintiff's machine, because that would be the advantage which the defendants derived by using the plaintiff's machine over any other appliance then open to them and by which the rails could be mended equally well. But as we understand the rule laid down by the supreme court in Mowry v. Whitney, 14 Wall. [81 U. S.] 620, on the facts found by the master, his rule of profits was correct.

The 26th, 27th, 28th, 29th, and 30th exceptions relate to omissions of the master to find the difference in the cost of the machines and their use. We think that these may be proper elements to enter into the amount of profits in using the different machines; but the exceptions fail to point out wherein the master has erred, and the counsel have not in the argument directed our attention to the evidence which establishes the error of the master in this respect, nor has the evidence been brought before us. We therefore do not judicially know the cost of the various machines reported by the master to infringe, nor the expense of using them. We think, in order that these exceptions should be available to the defendants, the evidence showing the error of the master should be specifically pointed out, at least in the argument. That has not been done, and therefore they will be overruled. And we may add that, so far as we can judge from our inspection of the machines, with the exception of the Bain machine, the difference in the cost of the infringing machines, as compared with the Cawood machine, could not be very great.

The exception, which is special on the part of the Chicago and Fort Wayne Railway Company, is, we think, well taken, and must be sustained. In view of the history of this company and the legislation affecting it, the master ought to have found how far and to what extent the old company and the new infringed, and if there was a difference, a discrimination should have been made—the more so as the new company may not be responsible for the debts of its predecessor.

It is objected in the argument that the master has not drawn correct conclusions from the evidence as to the cost of labor and fuel in mending the rail on the anvil and on the Cawood machine. The evidence proving the error of the master has not been pointed out to us, and it would be necessary to examine critically the whole of the testimony in this branch of the case in order to determine—something we could hardly be expected to do on such a general objection as this; but as the case will have to be sent back to the master, he can be directed to reexamine the evidence and correct any conclusions he has made, if he thinks the evidence justifies it.

NOTE. In cases of infringements of patents in actions at law, the measure of damages is precisely what is lost to the plaintiff, and not what the defendant has earned. Cowing v. Rumsey [Case No. 3,296]. Under this rule the complainant is entitled to the value of the saving made by a defendant through the wrongful use of the patented process. Tilghman v. Mitchell [Id. 14,041]. Consult also Suffolk Co. v. Hayden, 3 Wall [70 U. S.] 315, and a thorough collection of cases in Sedg. Dam. (6th Ed.) 726, and note 4.

[Appeals were taken by all the defendants in these cases. The cases were heard together in the supreme court, which decided that the Cawood patent was not infringed by the machines called the Beebe & Smith, the bayonet vise, and the Michigan Southern machine. This decision resulted in a reversal of the decree below in two of the five cases, viz. the cases against the Illinois Central Railroad and against the Michigan Southern & Northern Indiana Railroad. These two cases were remanded for further proceedings. As to the other three cases, the decree was affirmed. 94 U. S. 695. Subsequently in the case against the Michigan Southern & Northern Indiana Railroad the report of the master was affirmed. 20 Fed. 912. This last case was affirmed by the supreme court. 110 U. S. 301, 4 Sup. Ct. 5.]

Case No. 14,273.

TURTON v. UNION PAC. R. CO.

[3 Dill. 366.] [1]

Circuit Court. D. Nebraska. 1875.

FEDERAL JURISDICTION OVER THE UNION PACIFIC RAILROAD COMPANY BY REMOVAL FROM THE STATE COURT, UNDER THE ACT OF JULY 27, 1868. 15 STAT. 227.

Under the legislation of congress, the Union Pacific Railroad Company, sued in a state court for negligence, on making application in due form, stating, inter alia, that it has a defense to the action arising under a law of the United States, viz. under the charter of the company, may remove the suit to the circuit court of the United States, and on such removal the cause may be fully tried on the merits.

This action was originally commenced in one of the state courts of Nebraska, by [George J. Turton] the plaintiff, a citizen of that state, against the defendant, to recover damages alleged to have been sustained by the plaintiff, caused by the negligence of the defendant in operating its road. Answer in denial filed in the state court. Afterwards the defendant filed its petition in the state court for the removal of the cause into this court, stating, inter alia, therein, that it was a corporation created and organized under and by virtue of a law of the United States, approved July 1, 1862, and that it is not a banking corporation, and that it has a defense to and in the said action arising under a law of the United States, to-wit: under the act last mentioned. Surety was accepted, and the cause ordered to be removed by the state court. In the circuit court the plaintiff filed a plea to the jurisdiction of the court, which the defendant denied. The plea was submitted on an agreed statement of facts, which admitted that no defense is claimed to exist or is sought to be made under any other law of the United States than the charter of the defendant. 12 Stat. 489.

Mr. Marlow, for plaintiff.

Mr. Poppleton, for defendant.

MILLER, Circuit Justice. I am of opinion that the cause was properly removed into this court under the act of congress relating to the removal of suits against federal corporations, and that it may be fully tried here upon its merits. Plea to the jurisdiction overruled. Judgment accordingly.

See Rev. St. § 640.

TUSCARAWAS COUNTY (STEUBENVILLE & I. R. CO. v.). See Case No. 13,388.

TUSCUMBIA, COURTLAND & DECATUR R. CO. (KING v.). See Case No. 7,808.

TUSKA (UNITED STATES v.). See Case No. 16,550.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

Case No. 14,274.

The TUSKER.

[1 Spr. 71.] [1]

District Court, D. Massachusetts. Dec., 1843.

SHIPPING—CARRIERS—BILL OF LADING—ERROR IN —LIABILITY OF OFFICERS.

1. If through the negligence of the mate of a vessel, in taking account of cargo, a loss to the owner has necessarily resulted, he may be responsible therefor.

[Cited in The T. F. Whiton, Case No. 13,849.]

2. But if a mate by mistake, give drayage receipts for a greater quantity of merchandize than has been received, and a bill of lading is given for the amount of such receipts, the master is not bound to deliver to the shipper more than was actually received.

[Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 139.]

3. If the master, having it in his power to prove the error in the bill of lading, voluntarily and without notice to the mate, pay to the consignee, who is acting only for the shipper, the difference between the amount delivered to him, and that stated in the bill of lading, the mate is not liable therefor.

In admiralty.

Edward Blake, for libellant.

A. H. Fiske, for claimant.

SPRAGUE, District Judge. This is a libel for wages. The answer alleges that the libellant as mate of this brig, had the sole charge of taking on board a cargo at New Orleans,—and that through carelessness, he gave drayage receipts for 109 barrels of pork and received only 101. That the master being misled by such receipts, signed bills of lading for 109 barrels, and on arriving at Boston having only 101 to deliver, paid to the consignee the value of the other eight barrels embraced in the bill of lading, and insists that the amount so paid should be deducted from the libellant's wages. There are two insurmountable objections to this defence; First, it is not proved that the mate signed receipts for too many barrels,—second, if he had, and the error in the bill of lading was occasioned thereby, still he would not be bound to refund the amount paid to the consignee. There had been no transfer of the bill of lading, or of the property. It still belonged to the shipper, and the consignee was merely his agent. The bill of lading consists of two parts, a receipt and a promise. It acknowledges that certain goods have been shipped and engages to deliver them. The receipt may be contradicted by parol. The master had it in his power to show that only 101 barrels were shipped. And the shipper had no claim whatever for more than that quantity. The master voluntarily paid the consignee for eight barrels for which he had no claim, and without any notice to the mate; this certainly cannot bind the mate to refund. If through the negligence of the libel-

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

lant, a loss had necessarily resulted, he might have been responsible therefor, but it does not appear that any loss has necessarily resulted from the error in the bill of lading.

Decree for the amount of wages without deduction.

See Sutton v. Kettell [Case No. 13,647].

Case No. 14,275.

TUTHILL v. BABCOCK et al.

[2 Woodb. & M. 298.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1846.

EQUITY—FRAUD IN SALE—BILL TO RESCIND—COVENANT NOT TO SUE.

1. Besides the points settled in Smith v. Babcock [Case No. 13,009], the additional ones adjudged here were, that if a party himself, in the bill to rescind a contract for fraud in the sale, one ground of which is falsehood as to the quantity of timber on a township, makes an examination of the land before the purchase, but does not go into details, and confides for those in the false statements of the person negotiating with him, and of his agents, that party is not precluded from a rescinding of the sale for fraud, however he might be for a mistake.

[Cited in Converse v. Blumrich, 14 Mich. 123; Crislip v. Cain, 19 W. Va. 474.]

2. His right to rescind is in such case strengthened, if there was falsehood as to other material matters in the trade, not offered to be examined; nor is he barred from his remedy against some of the men in interest, (who received his money and notes,) by an agreement in the nature of a covenant not to sue some, on certain conditions, which have been complied with.

[See Babcock v. Terry, Case No. 702.]

3. A covenant not to sue one joint obligor is no bar to a suit against other obligors.

This was a bill in equity, similar in character to that in favor of William Smith against the same defendants [S. Babcock and others], and was instituted to set aside a sale made to the plaintiff [N. Tuthill, Jr.], on the same occasion of two thirtieths of the same township. Before the pleadings, an arrangement was made, dismissing the bill as to all the respondents, except Cross and Noble. Their answers were much like the final answers put in by them to Smith's bill, and it was agreed that the evidence taken in that cause might be used in this. The case was argued at the present term, after the close of Smith's Case [Case No. 13,009], by the same counsel as in that, except Loring and Rogers.

WOODBURY, Circuit Justice. In this case I have come to the same conclusion in respect to Cross and Noble, as in the bill in favor of Smith against these defendants. There is no essential difference in the facts, or the law, except as connected with Tuthill's visiting the premises before the sale was completed, and the declarations he made there and after his return, and the information which was there communicated to him. That Tuthill went there is certain, and that one of his objects was to examine, so as to form some judgment in respect to the quantity of timber, compared with the certificates, and Cross's representations and proposed guarantees, is also certain. But, at the same time, it appears that he had other objects, such as inspecting the records, and learning something of Cross's responsibility. It furthermore appears, that he was in the hands of Cross and his agents most of the time while in Maine, conveying letters from Chalmers, a concealed employee of Cross, while professing to be a mere associate with Tuthill in the purchase; was recommended by him to Cross's certificate-makers, who had been guilty of such gross exaggerations; and actually fell into the company and guidance of his pilot, who has since testified to a hundred millions less timber in fact than those that were before with him on the land certified to, and sixty millions less than he himself had once previously represented. Tuthill was conducted probably over such parts of the town as might be most likely to subserve the interest of those who had formerly hired the pilot, leaving the examination by Tuthill necessarily imperfect, in so short a time as two days, spent on so large a tract, and deceptive, as far as it went; doubtless, from much reliance being placed on what was stated to him by persons in Cross's interest, and acting with a view to sustain Cross. Again he placed himself in Cross's company and associations, on his return to Portland. Now, although here were some apparent means to detect the exaggerations as to the timber, yet almost all the fountains of inquiry were tainted. He was constantly liable to be misled, and manifestly did not make that full examination himself, and that uninfluenced one, on which his judgment must alone or principally have relied. His examination may have been some depended on, concerning the general appearance and actual existence of such a township, and some as to the title, and quantity of pine, but as to this last, not in full; and though it may have corrected his previous impressions concerning the quantity, so as with the increasing dullness of such lands in the market, he declined to give nine dollars an acre, and finally concluded the bargain at only six, yet it is obvious, that he had not ascertained the whole truth in respect to them, or he would not have given so much as six dollars. It is obvious, likewise, that he was not in a situation, with such advisers as Chalmers, and such guides as Russell, to ascertain all the truth as to the timber, without spending much more time; and that he was still likely, by their deceits, in connection with what was said by Cross, and others in his interest, and by their superior knowledge of the timber, to rely on them in part, and thus to over-estimate the amount. Cross is liable for assertions as to matters more within his knowledge, though Tuthill should

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

attempt to make some inquiries concerning the correctness of them. See Mason v. Crosby [Case No. 9,234]; Lord Kenyon in Pasley v. Freeman, 3 Durn. & E. [Term R.] 51; Bull. N. P. 31; Esp. N. P. 629; 2 Esp. 572; Risney v. Selby, 1 Salk. 211. But besides this, his means of correcting any opinion as to Cross's representations about the goodness of the stream in the winter and spring, or about his great wealth, were likely to be wholly frustrated among those who were so deeply in Cross's interests; and who, as to his riches, had, by artful rumors and newspaper publications, become so strongly impressed with their great amount. It seems that his high reputation for wealth was, at that time, still prevalent with most people, and his counsel do not date his actual insolvency till a year or more after; and Tuthill, becoming satisfied as to Cross's large property, would naturally forbear to make his examinations so full and critical, as if supposing Cross to be irresponsible, and instead of pushing his inquiries beyond general points, would be more likely to rely on Cross's warranties and guaranties. Nor had Tuthill then, or at any time before the trade, any means offered to detect other concealments of Cross, concerning what had transpired as to the Second Boston Company, or the employment of Chalmers, as Cross's agent. His suspicions on those subjects had not been excited, and, consequently, any impositions in respect to them were not likely to be examined, nor was any offer made to give to him the means of setting matters right concerning them. It seems to me then, however doubtful it may be, whether Tuthill could recover here, on the ground of a mere mistake in the quantity of timber, under the form of this bill, and under his means of judging as to the quantity, there can be little serious doubt of the justice as well as law of his having the contract set aside for the false representations practised, and the material concealments made; and most of which, in other matters than the timber, he had no particular means of detecting, and on which he, in common with the other purchasers, could not but strongly rely. See Warner v. Daniels [Case No. 17,181]; 1 Younge, 407; 3 Yerg. 178; 2 Term R. 429; Breese, 331; Litt. Sel. Cas. 218. The detail of all these will be seen in the Case of Smith, where treating of Cross's liability, and are as to Cross's wealth, his title to all the land, the character of the stream the year round, and the concealments as to the failure of the Second Boston Company, and Chalmers' agency for Cross. The rights of Tuthill then, in this case, are the same against Cross and Noble as were Smith's, and a decree will be entered in conformity to this.

Since the pleadings and evidence in this case have been closed and published, it is stated that the contract made by Miller, and some other of his associates, with the First Boston Company, and which is annexed to Miller's deposition, is considered by Cross as a release to them, and his counsel ask leave to plead it now, as operating like a release to Cross; and the counsel of the company urge leave to plead the same as a release in respect to them, in the other bill by Smith. On examining that agreement, it appears to be in form a mere covenant not to sue further a portion of the defendants, provided, on a special and new survey of the land, the quantity of timber should turn out to be less than seventy millions of good pine, and those defendants would surrender the notes on receiving a pro rata payment, according to the reduced quantity. This survey has been had, and those notes surrendered, and a discontinuance entered as to those defendants. Now it is a well settled principle, that a covenant not to sue one joint promisor or obligor is not a release even of that one, and cannot be so pleaded. See cases cited in Ferson v. Sanger [Case No. 4,752]. For otherwise it would defeat the very object of the parties in resorting to a covenant, rather than a release, which was not to sue one, but to continue to sue the rest. It would also defeat the justice of the case, where, as here, the consideration for the covenant emanated only from those to whom the covenant is given, and extended, as here, only to the amount of the claims against them or their pro rata share, instead of the claims against the others likewise, or the whole. But much more is the covenant not to be perverted here from its original design, and to be made broader or more comprehensive than was intended by the parties to it, or the reasons for it, because the liabilities here were for separate notes and portions of money, though all were united in one bill, as the notes grew out of one transaction or sale. There would, then, be no use in allowing a special plea of a release to be made after so long delay, when, if made, it would operate merely as a further delay, without the party making it being at all able, either in point of law or equity, to sustain it by the instrument to which he refers.

TUTHILL (HOE v.). See Case No. 6,573.

Case No. 14,275a.

TUTT v. IDE.

[3 Blatchf. 255, note.] [1]

Circuit Court, N. D. New York. Sept. 1, 1859.

NEW TRIAL.

On a motion, made by the defendants for a new trial.

NELSON, Circuit Justice. I am entirely satisfied with the opinion of Judge Hall in Tutt v. Ide [Case No. 14,275b], delivered on the decision of the demurrer to the declaration, and which he followed on the trial of the issue of

[1] [Reported by Samuel Blatchford, Esq., and here repr.nted by permission.]

fact, and must, therefore, deny the motion for a new trial, and give judgment for the plaintiffs upon the verdict. The opinion in the case of Converse v. Coit [unreported], delivered by me in the state court, and referred to on the argument, turned upon a different question from the one involved in this case.

Case No. 14,275b.

TUTT et al. v. IDE et al.

[3 Blatchf. 249.] [1]

Circuit Court, D. New York. Feb. 2, 1855.

ASSUMPSIT—MONEY PAID UNDER DURESS—CARRIERS.

1. The case of Astley v. Reynolds, 2 Strange, 915, which decides, that where money is extorted by duress of goods, assumpsit will lie for it, has not been overruled by the courts of New York, and is followed in England.

2. The general rule is, that an action for money had and received lies, whenever money has been received by the defendant, which, ex æquo et bono, belongs to the plaintiff.

3. The cases examined, as to recovering back money paid on compulsion.

4. Where A., a common carrier, agreed with B. to convey goods, at a specified rate for freight, and then refused, at the place of destination, to deliver the goods, except on payment of freight at a higher rate, and B., in order to obtain possession of the goods, paid to A. the sum demanded, *held*, that the payment was not voluntary, and that the excess beyond the agreed freight might be recovered back.

[Cited in Brown v. Pierce, 7 Wall. (74 U. S.) 216; Swift v. U. S., 111 U. S. 29, 4 Sup. Ct. 247.]

[Cited in Adams v. Schiffer, 11 Colo. 15, 17 Pac. 29; Simmons v. Trumbo, 9 W. Va. 367; West Virginia Transp. Co. v. Sweetzer, 25 W. Va. 452; White Pine Co. Bank v. Sadler (Nev.) 6 Pac. 944.]

This was a demurrer to the third count of a declaration. The count alleged that the defendants [John S. Ide and others], as common carriers of goods between Boston and St. Louis, agreed with the plaintiffs [Thomas E. Tutt and others] to receive at Boston and convey to St. Louis, for the price of $1 25 per hundred pounds, all goods which the plaintiffs should deliver to them at Boston during the month of July, 1852, and deliver the same to the plaintiffs at St. Louis within a reasonable time; that, during the month of July, 1852, the plaintiffs delivered to the defendants, and the defendants received, at Boston, 1,216 cases of boots and shoes, of the weight of 89,173 pounds, to be conveyed to St. Louis under the said agreement, at the rate of $1 25 freight per hundred pounds; that the defendants conveyed the goods to St. Louis, but refused to deliver them to the plaintiffs on payment of freight at that rate; that the plaintiffs demanded such goods, and offered to pay for their conveyance at that rate, but the defendants claimed that the goods were subject to freight and charges to the amount of $2,202 57, and refused to deliver the goods without being paid that amount; and that the plaintiffs, in order to obtain possession of the 1,216 cases, were obliged to pay, and did, by compulsion and against their will, pay said sum of $2,202 57, being $1,087 91 more than the sum for which the defendants had so agreed to convey and deliver the goods. To this count there was a general demurrer and joinder.

John H. Reynolds, for plaintiffs.
Nicholas Hill, Jr., for defendants.

HALL, District Judge. It was insisted by the defendants, upon the argument, that the plaintiffs paid the excess which they seek to recover back, without legal coercion,—not by mistake, but with a full knowledge of the facts; and that the payment was therefore voluntary, and could not be recovered back. On the other hand, the plaintiffs insisted that the payment was compulsory, and that they were entitled to recover back the excess, beyond the sum due under the contract, which was paid by them to obtain possession of their goods.

It was conceded by the counsel for the defendants, that the case of Astley v. Reynolds, 2 Strange, 915. was in point as an authority for the plaintiffs; but he insisted that that case had been overruled by the courts of this state, and that the rule of law in this state was well established, and was directly opposed to the doctrines of that case. The earliest case cited to sustain this position is that of Hall v. Schultz, 4 Johns. 240. The case of Astley v. Reynolds, and also the case of Knibbs v. Hall, 1 Esp. 84, in which the principle of the case of Astley v. Reynolds was said to have been overruled, were referred to in that case. But Spencer, J., in delivering the opinion of the court, without adverting to the case of Bates v. New York Ins. Co., 3 Johns. Cas. 238, which will be hereafter referred to, and "without undertaking to pronounce between the cases cited" (Astley v. Reynolds and Knibbs v. Hall), declared that the case then before him differed materially from both. In the case then under consideration, the defendants had purchased the lands of the plaintiff on execution, under a verbal agreement to convey them to him on the repayment of the amount advanced, with interest, and a reasonable compensation for the defendants' trouble. Afterwards, when the plaintiff applied to have the agreement reduced to writing, they required him to execute an agreement in which the compensation for their trouble was fixed at $300, which was deemed extortionate and unjust. The agreement was executed, and the $300 subsequently paid, and the conveyance to the plaintiff made; and he then brought his ac-

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

tion to recover back the $300. In concluding his opinion, Mr. Justice Spencer said: "On the ground that there existed no legal right on the part of the plaintiff to demand or enforce a conveyance, that he must be considered in the light of any other purchaser, and that the defendants might make their own terms, and that the plaintiff has voluntarily and with his eyes open, fixed the compensation claimed by the defendants, and paid them the money, he can have no claim to call on the court to aid him in getting rid of what he conceives an unconscientious advantage. But, if there did exist a legal remedy to enforce a reconveyance, as the measure of the defendants' claim to compensation rested in arbitrary discretion, the plaintiff, by voluntarily acceding to the terms proposed by the defendants, has lost any right to call on a jury to relieve him from an allowance deliberately fixed by himself." It is, I think, quite clear that this case of Hall v. Shultz does not overrule the case of Astley v. Reynolds or the case of Bates v. New York Ins. Co., above referred to; and I think the same remark applies to the cases, cited by the defendants' counsel, of Ripley v. Gelston, 9 Johns. 201; Clarke v. Dutcher, 9 Cow. 681; Supervisors of Onondaga v. Briggs, 2 Denio, 39, 40; Wyman v. Farnsworth, 3 Barb. 371; and Elliott v. Swartwout, 10 Pet. [35 U. S.] 137.

The manuscript opinion of Mr. Justice Nelson in the case of Converse v. Coit [Case No. 3,145] appears to favor, if it does not directly sanction, the position assumed by the defendants. But, on looking into the bill of exceptions in that case, it appears that the flour on which the excessive charges for freight were demanded and paid had been delivered two or three days prior to such payment; and that there was no formal demand made of the flour, and no refusal to deliver it up, and no threat made of detaining the flour because of a refusal to pay. The question now raised was not presented in that case, and, therefore, the decision therein is not an authority for the position assumed by the defendants in this case.

The case of Astley v. Reynolds was decided by the king's bench in Michaelmas term (5 Geo. 2), 1732. It is admitted that, if that case is to be followed, the question presented by the demurrer must be decided in favor of the plaintiffs. But, it is contended, as before stated, that Astley v. Reynolds has been overruled by the supreme court of this state in the cases before cited. Those cases have been fully considered, and, having reached the conclusion that they have not expressly overruled the case in 2 Strange, I now propose to refer to other cases in the courts of this and other states and in England, which are supposed to bear directly upon this question.

In Bates v. New York Ins. Co., 3 Johns. Cas. 238, decided in 1802, the plaintiff had purchased, from one Norman Butler, fifty shares of the stock of the defendants, subject to some future calls. Those calls were paid by the plaintiff, and he became entitled to a transfer of the stock upon the books of the company. The defendants refused to transfer this stock to the plaintiff until the plaintiff paid a debt due to them from Butler, the original owner of the shares. This the plaintiff paid. He afterwards brought his action to recover it back; and the court held, after a verdict taken subject to the opinion of the court upon the facts stated, that the plaintiff was not liable for the payment of $465 of the amount paid by him to procure the transfer, and that he was therefore entitled to recover back that amount, in an action for money had and received. Thompson, J., delivered the opinion of the court, and referred with approbation to Astley v. Reynolds and to Irving v. Wilson, 4 Term R. 485, and also to Munt v. Stokes, Id. 561, in which he said the principles of the case of Astley v. Reynolds were fully recognized and adopted. In Fleetwood v. City of New York, 2 Sandf. 479, Mr. Justice Sandford refers with approbation to the case of Chase v. Dwinal, 7 Greenl. 134, and says: "There are cases of duress of personal property, in which payments for its relief are deemed involuntary, and the money may be recovered back. Most of these cases have arisen upon seizures of goods under revenue or excise laws, and by public officers acting under process or warrant of law. The principle has been extended, occasionally, to cases where bailees or others, who came into the possession of goods lawfully, have exacted more than was due, before they would relinquish such possession. It is founded upon the movable and perishable character of the property, and the uncertainty of a personal remedy against the wrong-doer." The general rule undoubtedly is, that this action for money had and received, being an equitable action, lies whenever money has been received by the defendant, which, ex æquo et bono, belongs to the plaintiff. Buel v. Boughton, 2 Denio, 91. In the case of Chase v. Dwinal, 7 Greenl. 134, it was held, that money paid to liberate a raft of lumber detained in order to exact an illegal toll, might be recovered back. Weston, J., in delivering the opinion of the court, refers to the remark of Spencer, J., in Hall v. Shultz, that Astley v. Reynolds had been overruled by Lord Kenyon in Knibbs v. Hall, and says: "There" (in Knibbs v. Hall) "the plaintiff had paid, as he insisted, five guineas more rent than could have been rightfully claimed of him, to avoid a distress which was threatened. Lord Kenyon held this to be a voluntary payment and not upon compulsion, as the party might have protected himself from a wrongful distress by replevin. His lordship does not advert to the case of Astley v. Reynolds, and subsequently, in Cartwright v. Rowley, 2 Esp. 723, he

refers, with approbation, to an action within his recollection, for money had and received, brought against the steward of a manor, to recover money paid for producing at a trial some deeds and court rolls, for which he had charged extravagantly. It was urged that the payment was voluntary; but, it appearing that the party could not do without the deeds, and that the money was paid through the urgency of the case, the action was sustained." In Chase v. Taylor, 4 Har. & J. 54, it was held, that money improperly demanded as a condition of the release of a ship pledged to the party receiving the money, might be recovered back, in an action for money had and received. The cases of Alston v. Durant, 2 Strob. 257, and Richardson v. Duncan, 3 N. H. 508, are also strongly confirmatory of the case of Astley v. Reynolds; and other cases of a similar character are to be found in the reports of the different states.

In respect to the English cases, it may be observed, that the decision in Astley v. Reynolds, made in the king's bench sitting in banco, ought not to be considered as overruled by a nisi prius decision, though made by a judge of such distinguished ability and learning as Lord Kenyon. But the case of Astley v. Reynolds and not that of Knibbs v. Hall has, since the decision of Lord Kenyon, been followed in England. In 1827, in Snaw v. Woodcock, 7 Barn. & C. 73, it was held by Lord Chief Justice Tenterden, and Justices Bayley, Holroyd and Littledale, of the king's bench, that a payment made in order to obtain possession of goods or property to which a party was entitled, and of which he could not otherwise obtain possession at the time, was a compulsory and not a voluntary payment, and might be recovered back. In 1844, in the case of Parker v. Great Western Railway Co., 7 Man. & G. 253, it was held by the court of common pleas in England, Chief Justice Tindal delivering the judgment of the court, that money paid by the plaintiff to a common carrier, to obtain possession of the plaintiff's goods, beyond the amount to which the carrier was entitled, might be recovered back; such payment not being considered as a voluntary payment. And this doctrine I understand to have been again acted upon in the court of exchequer in Parker v. Bristol & Exeter Railway Co., 7 Eng. Law & Eq. 528, in the year 1851.

I am entirely satisfied, as well upon the authority of these cases, as upon principle, that the payment alleged in the count demurred to, cannot be held to have been a voluntary payment. The demurrer is, therefore, overruled.

NOTE. The case was subsequently tried, on issues of fact, before HALL, District Judge, and a jury, when a verdict was found for the plaintiffs, the court ruling, as to the law, in accordance with this opinion. For a motion before NELSON, Circuit Justice, made by the defendants, for a new trial, see [Case No. 14,275a].

Case No. 14,276.

TUTTLE v. ALBANY & R. IRON & STEEL CO.

[10 Ben. 449.] [1]

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

DEMURRAGE—BILL OF LADING—DISCHARGE OF CARGO.

The bill of lading of a cargo of coal shipped on a canal-boat contained the following clause: "In case the consignee discharges cargo or any part thereof, he is to charge the master not to exceed twelve and a half cents per ton for the same and to have four full working days after due notice of the arrival of the boat at the dock of the consignee." It also provided for $10 a day demurrage thereafter. The boat arrived at the dock of the consignee and was reported. Other boats were waiting to be discharged by the consignee. The master was told that he might discharge his cargo, for which he was assigned dock-room, but he was also told that, if he wished the consignee to discharge his boat, he must wait his turn. He waited and was discharged in seven days from his reporting. He was then paid his freight and gave a receipt in full of all demands. Thereafter he filed a libel against the consignee to recover three days' demurrage. *Held*, that the discharge by the consignee was, on the evidence, an accommodation to the master and not an exercise of the right to discharge under the bill of lading, and that the consignee was not liable.

[This was a libel in personam by Ebenezer B. Tuttle to compel the payment of demurrage by the Albany & Rensselaer Iron & Steel Company, as consignee, for the detention of a canal boat.]

W. R. Beebe, for libellant.

Holbrook & Smith, for respondent.

CHOATE, District Judge. This is a suit to recover demurrage for detaining the libellant's canal-boat beyond the time allowed by the bill of lading for discharging her cargo of coal. The bill of lading, which was dated September 8th, 1875, acknowledged the shipment of the cargo at Watkins, N. Y., "to be delivered as addressed without delay, in like good order as received, subject to the following conditions: * * * In case the consignee discharges cargo, or any part thereof, he is to charge the master not to exceed twelve and a half cents per ton for the same, and to have four full working days after due notice of the arrival of the boat at the dock of the consignee, in which to discharge cargo, and to pay the master for any time (exclusive of Sundays and all legal holidays) the boat is detained by said consignee for discharging after the expiration of said three days, at the rate of ten dollars per day. The master to furnish men to attend guy on boat while unloading." The consignee named was the defendant, the Albany and Rensselaer Iron and Steel Company, Troy. The boat arrived at defendant's dock in Troy and the master reported his arrival to the defendant on the 15th of September at seven o'clock in the evening. The discharge of the cargo was

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

commenced on the 23rd of September and finished on the 24th at 4 p. m. The cargo was discharged by respondent's servants and by the use of their derricks. There is some conflict of evidence as to what took place between the master and the defendant's agents on his arrival and reporting in respect to the discharge of his cargo. His testimony is that he was only told that he must wait his turn to discharge; that after the discharge, when he received his freight money, he demanded his demurrage, which was refused, but that he was told that his taking his freight would make no difference about the demurrage. He signed a receipt in full of all demands. It is shown, I think, by the testimony of the employees of the company, in connection with the receipt, that on his arrival he was assigned dock-room, where he was told that he might discharge his cargo, and that he was also told that if he wished the company to discharge him he must wait his turn, and in that case that they would pay no demurrage, and that he declined to discharge himself and voluntarily waited his turn. And it is not proved that when he received his freight he claimed demurrage. It was shown that there were a large number of boats waiting to be discharged by the company; that the company had derricks arranged for discharging boats which they discharged; that there was plenty of dock-room for libellant to discharge, but no derrick that was not in use by the company. The cause of the accumulation of boats at that time was that there had been a break in the canal. He now claims three days' demurrage, amounting to thirty dollars. The question turns on the proper construction of the bill of lading and the effect on the rights of the libellant of what took place between him and the company in reference to the discharge of the cargo.

The fair construction of the bill of lading is that, if the company should elect to discharge the cargo, instead of leaving the master to discharge it himself, the demurrage should be paid. The bill of lading imposed on the master the obligation to discharge. It modified that obligation only so far as it gave the company the privilege of discharging, if they saw fit to do so. What took place was not an election on their part to discharge the cargo, except for the master and as an accommodation to him. The acts of the master in taking his freight money and receipting for all demands in full, seem to show that he so understood the agreement. The boat was not detained by the consignee, therefore, within the meaning of the contract, but by the master himself. At any rate, it was competent for the parties to vary the contract as to demurrage, and it is evident from the testimony that the captain was contented to do so in the circumstances in which he found himself placed. From the evidence it is not unlikely that he concluded that the loss of two or three days was of less consequence to him than the greater trouble and expense involved in discharging his cargo without being able to use the facilities which the company had for doing the work.

Libel dismissed with costs.

TUTTLE (GOODALL v.). See Case No. 5,533.

TUTTLE (ROBINSON v.). See Case No. 11,968.

TUTTLE (SMITH v.). See Case No. 13,120.

Case No. 14,277.

TUTTLE v. TRUAX.

[1 N. B. R. 601 (Quarto, 169).] [1]

District Court, D. Minnesota. 1868.

BANKRUPTCY—MORTGAGE—ILLEGAL PREFERENCE—PRE-EXISTING DEBT.

Where a creditor, knowing of the embarrassment of his debtor, takes a mortgage to secure a preëxisting debt, and also a credit given at the time of the execution of the mortgage, the mortgage, being void in part as to the preëxisting debt, must be held to be void as to the whole.

[Cited in Scammon v. Cole, Case No. 12,433; Rison v. Knapp, Id. 11,861; Walbrun v. Babbitt, 16 Wall. (83 U. S.) 581.]

[Cited in Cook v. Whipple, 55 N. Y. 156.]

[This was a proceeding in bankruptcy by C. D. Tuttle against D. W. Truax, as assignee.]

NELSON, District Judge. The main point involved in this case is, did the mortgagee have reasonable cause to believe the debtor insolvent at the time the mortgage was executed? The insolvency of the debtor is, in our opinion, clearly established by the evidence. Two witnesses have been examined; the petitioner, in his own behalf, and the bankrupt, on behalf of the respondent. The circumstances attending this transaction are as follows: Some time in November, the debtor was negotiating a contract with Messrs. Gould & Little, for the latter to go into the pineries and get logs for him, to be delivered the following spring, and to consummate the contract, it became necessary for him to make provision to furnish them, as they might want, $1,500 worth of supplies. Petitioner was dealing in the kind of supplies they wanted, and the debtor applied to him for them, stating for whom, and for what, they were wanted, and that he wanted to get them on a credit of eight months. The petitioner was willing to accommodate him, but demanded security; and a chattel mortgage, upon the logs and lumber the debtor then had at his mill, was finally agreed upon as the security. The debtor at that time was owing petitioner a balance on book account

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of about $1,000; and petitioner insisted that the note and mortgage should be made to include and cover this also, and he assented. The petitioner at this time knew that there was a prior mortgage upon the same property he took as security; also that the mill was mortgaged, and that the debtor was unable to pay his employees at the mill; although he now claims that only within two days after the execution of the mortgage, he first learned the condition of the debtor. He heard he was threatened with proceedings in bankruptcy, and on finding that the lumber embraced in his mortgage was being hauled away from the yard, he took possession of the property. The 35th section of the bankrupt act [of 1867 (14 Stat. 534)], relating to fraudulent transfers, &c., declares that "if such a transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be primâ facie evidence of fraud." While we may concede that the bankrupt, being largely engaged in the manufacture of lumber, was necessarily compelled in the course of his business to borrow money by mortgage of his property, we think the evidence brings this case within the purview of the 35th section. This conveyance was given to secure a pre-existing debt admittedly incurred outside of his ordinary business. This fact, therefore, was primâ facie, and if uncontrolled, sufficient evidence to establish reasonable knowledge on the part of the mortgagee of the debtor's insolvency. 2 Allen, 20, 491. He was put upon inquiry, and should have taken steps to ascertain the condition of the debtor, or at least his general reputation as to solvency in the place where he resided. 4 Gray, 111, 574. He has made no effort to rebut this presumption of fraud, and the mortgage, being void in part as to the pre-existing debt, is void as to the whole. 2 Cush. 160; [Shawhan v. Wherritt] 7 How. [48 U. S.] 627; In re Black [Case No. 1,457]. Prayer of petition denied.

T. V. ARROWSMITH, The. See Case No. 5,337.

Case No. 14,278.

The TWEED.

[Cited in The Blohm, Case No. 1,556. Nowhere reported; opinion not now accessible.]

TWELVE BARRELS OF DISTILLED SPIRITS (UNITED STATES v.). See Case No. 16,551.

TWELVE BARRELS OF PARRAFINE OIL (UNITED STATES v.). See Case No. 16,552.

TWELVE CASKS OF CUDBEAR (UNITED STATES v.). See Case No. 16,553.

Case No. 14,279.

TWELVE HUNDRED AND NINE QUARTER CASKS, ETC., OF WINE.

[2 Ben. 249; [1] 7 Int. Rev. Rec. 114.]

District Court, S. D. New York. March, 1868.

FORFEITURE — CUSTOMS — UNDERVALUATION — BURDEN OF PROOF — EVIDENCE — APPRAISEMENT.

1. Under the act of March 3, 1863 (12 Stat. 737), the invoice of goods imported, which are procured otherwise than by purchase, must state their actual market value at the time and place, when and where, they are procured or manufactured.

2. Actual market value is the price at which the owner or the manufacturer of goods holds them for sale, in the ordinary course of trade.

3. Where, in an action to forfeit, for undervaluation, certain importations of sherry wine, from Cadiz, which had been invoiced at $16 a quarter cask of 40 gallons, it appeared that agents in New York received, and sent to the manufacturers at Cadiz, orders for the wines, and delivered them on the wharf in New York, free of duty, at $1.10 a gallon, effecting insurance on them in New York at the higher value. *Held*, that if the jury were satisfied that this course of business was adopted for the purpose of concealing the real prices of the wines at Cadiz, they would be authorized to find that the sales upon such orders were sales at Cadiz prices, and that such sales might be considered in determining what was the actual market value at Cadiz, and the jury might consider the rate of insurance in determining that question; but if they found that this course of business was not adopted for that purpose, then such sales were not to be considered, because they would then be sales at New York prices, and, in the latter case, the rate of insurance was immaterial.

[Followed in U. S. v. Doherty, 27 Fed. 737.]

4. If the jury found that the invoice value was below the market value at Cadiz, they must then consider whether that undervaluation was either made "with intent to defraud the revenue," as is said in the act of May 28, 1830 (4 Stat. 409), or made "knowingly," as is said in the act of March 3, 1863 (12 Stat. 737). There is no real difference in meaning between these two expressions.

5. Evidence given to show the value of certain wine, previously sent to this country by the same manufacturers, and not under seizure in this case, was only to be considered in determining the question of intent.

6. Evidence as to the cost of manufacturing a part of the wines, called "Burgundy Port," might be considered by the jury in determining its market value in Cadiz, no evidence of sales in Cadiz of wines of a similar quality having been given: but that similar evidence as to the cost of manufacture of the sherries, was not to be considered on the question of the market value of the sherries.

7. The jury must be satisfied, before they could forfeit the wines, that there was a guilty knowledge, on the part of the manufacturers, that the wines were undervalued; and that "guilty knowledge" means no more than "knowledge."

8. The record of the appraisement and reappraisement of these wines at the custom house in New York, previous to their seizure, was to be taken into consideration on the question of the market value of the wines at Cadiz, but was not the highest evidence on that question.

9. Where letters purporting to contain propositions for the purchase of wines, were received by

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the manufacturers abroad, and in reply they named their prices for wines for export for cash: *Held*, that if the manufacturers believed that the letters contained regular mercantile propositions, and answered the letters and gave the prices on that supposition, the jury might infer that they would have sold the same wines to any body at the same prices, and that there was a market value thus made and fixed by them; that it was a question for the jury whether the manufacturers believed that the letters contained real proposals or not: and that, if they did so believe, it made no difference whether the proposals in the letters were in fact real or not.

10. The appraisement and reappraisement of goods imported is not conclusive as to their market value, upon either the government or the claimants.

11. The policy of the law allows the seizure, under certain circumstances, of the books and papers of parties suspected of being concerned in frauds upon the revenue, and also sanctions the employment of informers, and gives them a share of the proceeds of property seized, and that policy should not be inveighed against, to influence the minds of the jury.

12. Where probable cause is shown for the forfeiture of imported goods, the burden of proof is upon the claimants to show their innocence.

This was an action to forfeit the wines above named for undervaluation. The wines were imported into New York from Cadiz, in Spain, where they were manufactured by the firm of Lacave & Echecopar, and were called "Crown Sherry," except a small portion of Burgundy port in one invoice. There were several invoices of the wines, by different vessels, and the value stated in the several invoices was $16 a quarter cask (except two casks marked P. & A., invoiced at $30 and $22), being the same value which had been stated in a series of previous invoices. The invoices were all sworn to by one of the firm of Lacave & Echecopar. As they were presented, they were passed through the custom house, but finally, in consequence of information brought to the authorities, the appraisers advanced the price of one invoice $4 a quarter cask, for the purpose of securing a reappraisement. On the reappraisement, the wine was again valued at the invoice value. Notwithstanding this, the government seized the wines, and the information in this case was filed to forfeit them. The government claimed, and gave evidence tending to sustain its claims, that the wines were sold by Lacave & Echecopar at a higher rate than the invoice value, that the system of selling them which was adopted, was a plan to cover up the real value of the wine; that they were insured at much higher rates in New York; and that certain previous transactions with Simon De Visser, Lenau & Co., and one Barnard of Boston, showed higher prices paid for similar wines. They furnished evidence, also, of experts, who gave a higher value to the wine. The claimants gave evidence to show, that their agents in New York, George Miln, and Galway & Casado, made all the sales of the wine in New York, and guaranteed the sales; and they claimed that those sales, which were made at $1.10 a gallon, deliverable in New York, duty paid, were not evidence of the market value of the wines in Cadiz. They claimed, also, that the reappraisement was conclusive upon the question of value; that the claimants and another firm, that of Bensusan & Co., had offered to sell this wine at the same rate, in Cadiz, on orders sent them by letters from one Samuel D. Jones, which, as it appeared, were actually written and sent by Farwell, an officer of the customs, and a witness in the case for the government; that the wines which were claimed to have been sold at higher values were wines of a different quality from this Crown sherry; and that this was a wine manufactured exclusively by Lacave & Echecopar, and sent by them entirely to the United States. They gave, also, evidence of the cost of manufacture of a small quantity of the wine called "Burgundy Port," as to which no sales were proved.

The case occupied twenty-two days in the trial before the jury.

At the close of the evidence, the counsel for the government requested the court to charge the jury as follows:

1st. That, upon the evidence given by the claimants, the probable cause of condemnation had not been relieved, and the jury must find a verdict for the United States.

2d. That the sales upon orders, at $1.10, deliverable upon the wharf in New York, were sales at Cadiz prices.

3d. That the sales upon orders, at $1.10, deliverable on the wharf in New York, are evidence from which the jury might find the actual market price in Cadiz, by deducting therefrom freight, insurance, duties, and other custom-house charges, and the expense of bringing the wine to the place of delivery.

4th. That if the jury should find, upon all the evidence, that the course of business adopted by the claimants, of selling their wines at the price of $1.10, deliverable on the wharf in New York, was a mode of business adopted for the purpose of concealing the real prices of the wines at Cadiz, the jury must then find that sales upon such orders were sales at Cadiz prices, to be ascertained by deducting from said price of $1.10 the expenses of freight, insurance, duties, and other charges upon the same, from the time of shipping them at Cadiz to their delivery in New York.

5th. That the sales of wine at $1.10, deliverable on the wharf in New York, were, upon the evidence, not sales by George Miln, as a commission merchant, nor by Lacave & Echecopar, as New York importers or merchants, but were direct sales by them as foreign manufacturers.

6th. That if the wines under seizure were entered by means of invoices not truly expressing the actual market value of the wines at the time when, and in the country where, they were manufactured, with the

knowledge on the part of the consignor or of the consignee that the invoices did not contain such actual market value, the goods were forfeited, and the jury must find for the United States.

7th. That if the jury should find, upon all the evidence, that the invoices did not contain such actual market value as aforesaid, and were made up by Lacave & Echecopar with intent to evade the payment of any part of the duties by law chargeable thereon, the goods were forfeited, and the jury must find for the United States.

8th. That the market value to which the manufacturer of wine is required to conform the valuation of his invoice, is of wine of the same grade and quality, as a general article of production and commerce in Spain, and that a manufacturer cannot escape the obligation to conform his invoice to that general market value, by the pretence or the fact that he does not offer his particular brand of wine in the market of Spain, but sends it in exportation; but, in such case, the valuation in the invoice should be conformed to the market value in Spain of the same grade or quality of wine.

9th. That, upon the evidence, the sales of seventeen quarters and thirty octaves of wine to M. Lenau & Co., and the three sales of wine to Simon De Visser, were actual sales in Cadiz by Lacave & Echecopar, at the several prices paid therefor by the purchasers.

The counsel for the claimants requested the court to charge the jury as follows:

1st. There are two questions of fact to be considered: (1) Were these wines undervalued by Lacave & Echecopar? (2) Had they a guilty knowledge that they were undervalued? Before these goods can be condemned, both of these questions must be answered in the affirmative. There must be a guilty undervaluation.

2d. The presumption is that the officers of the government have done their duty, and that these merchants have acted with truth and honesty. These presumptions are to be displaced by the evidence, if at all.

3d. The law requires the actual market value in Cadiz to be stated in the invoice, and the jury must disregard all evidence of sales and prices and profits here, or elsewhere, except in Spain.

4th. The law requires certain evidence of market value to be furnished by Lacave & Echecopar: (1) Their own written statement of the market value, on the invoice, which, until disproved, is to be taken to be true. (2) The official certificate of the American consul at Cadiz, which, until disproved, is to be taken to be true. (3) These are, in contemplation of law, of a very solemn and important character, being required by law to be made at the time of shipment and at the place where the value is to be ascertained, and the consul is to be presumed to have performed his duty as to investigating and certifying as to the value of the wines, the character of Lacave & Echecopar, and the correctness of their statement on the invoices.

5th. The appraisers, having found the invoice value of these sherries correct, the fact is conclusive, and the jury must return a verdict for the claimants.

6th. If the court shall decline so to charge, then the court is requested to charge, that the certificate of the appraisers here, on the invoices, that the value is correct, is to be taken to be true till it be disproved, and the jury are to presume that the appraisers made the examination which the law imposed upon them as a duty under their official oaths.

7th. The record of the appraisement and the reappraisement has been put in evidence, and the appraisers themselves, including the merchant appraiser, and some of the witnesses examined before them, have also been put on the stand, and their evidence, confirming the result of the appraisement, is evidence of the highest character as to the actual market value, and, until disproved, must be taken to be true.

8th. The actual cost of producing these wines, including a fair manufacturer's profit, is to be considered as evidence tending to show the market value in Cadiz. If there were no direct evidence as to that market value, then the cost of production, with a fair profit, would be good evidence of market value; and, if there be any doubt on the direct evidence, then the proof of cost, with a profit, would tend to remove that doubt.

9th. The proof establishes, that the wines delivered, and to be delivered, in the city of New York, to Wellington & Cox, and others, upon orders communicated to Lacave & Echecopar, were so delivered and to be delivered upon sales actually made here by Miln, or by Galway & Casado, as the factor or factors of the said Lacave & Echecopar, and not upon sales thereof made in Cadiz, by reason whereof the prices, to be paid for said sherries in New York, cannot by the jury be considered, in determining the actual market value thereof in Spain.

10th. It appears, from the evidence, that all sales of wines made in pursuance of the aforesaid orders, were so made by Miln and by Galway & Casado, respectively, in said city of New York, as the factor and factors of the said Lacave & Echecopar, and at the risk of such factor or factors, as guarantors of the proceeds of such sales, and that no titles to such wines passed to the persons giving such orders, until the arrival and delivery thereof in New York by the said factor or factors, who, before making such delivery, were entitled to exact from the purchasers payment thereof, according to the terms and conditions of sales; by reason whereof, the prices to be paid upon such sales must, by the jury, be disregarded, in ascertaining the market value of said wines in Cadiz.

11th. The said Lacave & Echecopar acted

in the double capacity of manufacturers of the said wines, and also as merchants and shippers for the exportation and sale thereof, and were under no obligation to sell any part of the same in the market of Cadiz and might lawfully there make contracts for the sale and delivery of said wines in the city of New York, at such prices, payable in said city, and for such profits, as they could obtain, however much these might be beyond the actual market value of the said wines in Cadiz; and neither such prices nor profits payable in New York, can by the jury be considered, for the purpose of arriving at the actual market value of said wines in Spain.

12th. The revenue laws of the United States do not assume to dictate under what conditions a foreign manufacturer shall dispose of his property, nor to what countries it shall be shipped. It was perfectly proper for the claimants in this case, if they saw fit, to refuse to sell their wines in Spain, but it was nevertheless their duty to state, in their invoices, the actual market value thereof in Spain, and it is the duty of the jury to determine, from all the evidence, whether that invoice value was correct and true.

13th. If the court shall hold, that the communication to Lacave & Echecopar of orders for wines given by Wellington & Cox and others, and the assent thereto by the former as to prices, constituted agreements in Cadiz, between them and the persons giving such orders, for the sale of the wines mentioned therein, then the court is requested to charge, that, inasmuch as such wines were, by the terms of such orders and agreements, to be delivered to said persons in New York at a certain price per gallon, free of all duties, charges, and risks, the sum there to be paid, being home and not foreign value, cannot, by the jury, be regarded, in determining the actual market value of said wines in Cadiz.

14th. The government insists, that said orders for a price payable in New York, were not in reality sales here, but were, in fact, sales made in Cadiz, and at Cadiz prices, and that such sales were, therefore, intended as frauds upon the revenue laws of the United States, and to cover up and conceal the actual market value of said wines in Cadiz. On this point, the court is requested to instruct the jury, that fraud must be proven and cannot be presumed, and that, from the evidence, it appears, that all risks concerning the said wines, and all expenses and duties payable thereon, from the time the same left Cadiz until they were delivered, in New York, to the persons giving said orders, were borne and paid, not by the said persons, but by Lacave & Echecopar, who, in consideration thereof, might lawfully charge and receive such profits as they could obtain beyond the actual market value of said wines in Cadiz, by reason whereof the jury must, in determining the market value thereof at that place, entirely disregard the prices paid therefor in said city of New York.

15th. If the court shall decline to give the instruction last above prayed, then the court is requested to charge the jury that, before they can find that the sales or contracts of sale, under said orders, were shams or covers for the purpose of defrauding the revenue, as above suggested, they must be satisfied, from the evidence, that such sales or contracts were, in fact, made upon the understanding, between the said Lacave & Echecopar and the persons giving such orders, that the wines so ordered were to be the property of, and at the risk of, the persons ordering the same, from the time they were delivered on board, in Cadiz, until they should arrive in the city of New York, and must also be satisfied, from the evidence, that the agreements to deliver the said wines in New York at $1.10 per gallon, free of all duties and charges, were shams and fraudulent covers for the unlawful purpose aforesaid.

16th. The court is also requested to charge, that the jury cannot, for the purpose of determining whether the said sales or contracts were mere shams or covers for the fraudulent purpose aforesaid, consider, as evidence, the prices agreed to be paid for said wines in the city of New York, such fact being, upon that issue, wholly immaterial.

17th. It being admitted, by the government and the claimants, that all the wines under seizure left Spain for New York the property of Lacave & Echecopar, who obtained them by manufacture, the invoices accompanying the same are required by law to contain the actual market value of the merchandise at the time and place of manufacture.

18th. It is the duty of the jury to ascertain, first, the time and place of manufacture; next, the market value of the wines under seizure, as an article of commerce, at such time and place; and, then, whether the prices stated in the invoices presented at the custom house conform to such market value.

19th. If the jury find that the prices stated in the invoices do conform to the market value of the merchandise as an article of commerce, at the time and in the country of manufacture, then it is immaterial what may be the ultimate actual receipts of the shippers upon sales of the wines delivered in New York, free of all costs and charges; because, the revenue law only contemplates, in respect to invoice value, transactions of purchase and sale in the markets of Spain.

20th. If the jury find that any of the wines under seizure, or similar wines of Lacave & Echecopar, were not sold in the markets of the place of manufacture, or subjects of general commerce there, then they are at liberty to consider the value, at the same time and place, of the wines of other houses or

manufacturers, of similar grade, quality, and character, in order to ascertain the correctness of the invoices in controversy, and, if there be no such similar wines, then the sum which it cost Lacave & Echecopar to produce the wines under seizure, with a fair manufacturer's profit added.

21st. If the jury believe, that the parcels of wine marked P. & A. 1 and P. & A. 2, were invoiced at their real value in the actual markets of the place, and at the time, of manufacture, then neither they nor the invoice containing them is liable to condemnation; and the statement of higher prices sent to Miln is of no consequence in this case, unless the jury shall believe that the prives mentioned are not mere pro forma prices on which to effect sales in New York, but the actual market prices in Cadiz.

22d. Until the jury find that the wines under seizure were invoiced at less than their actual market value at the time and place of their manufacture, they cannot take into consideration any evidence in the case respecting, (1) the Mansanilla octave; (2) the Barnard cask of sherry; or (3) the De Visser transaction.

23d. In respect to the Lenau transaction, Booraem, who purchased the wine in New York, having testified that he is perfectly familiar with the Crown sherry, and that the latter is unlike the wine referred to, which he purchased of Lenau, it is the duty of the jury to compare the evidence of Booraem with the testimony of Escoura (whose attention was not called to the Lenau wine), and determine whether the two wines are the same; and, if the jury find they are not, or if they find that said wines were sent to New York on consignment, and not upon a sale in Cadiz at the risk of the buyer, then this transaction must be entirely excluded from consideration.

24th. If the house of Lacave & Echecopar believed that the letters purporting to be signed by Samuel D. Jones contained a regular mercantile proposition for a purchase of their Crown sherry wines, and if the house of Lacave & Echecopar answered this proposition, and fixed certain prices as those for which they would sell the same for export, then the jury are at liberty to infer that they would have sold the same wines to any body at the prices named, and also to infer that there was a market value thus made and fixed by the house of Lacave & Echecopar itself, and that such market value was as low as the price thus fixed, after deducting therefrom the cost of removing said wines from Cadiz, and placing them on board vessels in that port, for transportation to New York.

25th. The court is also requested to charge, that substantially the same remarks and instructions as last above given are also applicable to the letters to and from the house of J. Bensusan & Co., and to the prices named by them for the said wine.

26th. The court is also requested to charge the jury, that there is affirmative evidence in the cause, that the houses of Lacave & Echecopar and of J. Bensusan & Co., when they respectively answered the propositions contained in said letters, believed that the same were real proposals for the purchase of wines by a person desirous of buying the same for exportation to Canada, and no proof whatever to the contrary.

27th. If the houses of Lacave & Echecopar, and of J. Bensusan & Co., supposed, in answering the letters purporting to be signed by Samuel D. Jones, that they were written by a person who wished to become a customer in the ordinary way of trade, and if, in reply, they named their prices for cash for export for considerable quantities of said wines, it does not detract a particle from the value of the evidence, as evidence of market value in Cadiz, that neither Jones nor Farwell, in fact, intended to buy, and that the letters written in the name of said Jones were, in fact, written to obtain evidence to be used for the United States; because, the test to be applied is the state of mind of Lacave & Echecopar, and of J. Bensusan, at the times respectively when they wrote the letters stating prices, in reply to those purporting to come from the said Jones.

28th. Who and what the witnesses Henshaw and Marshall are, and the general credit to be given to their testimony, on your view of their examination and cross-examination, is left entirely to you; for, of all this you are the exclusive judges.

29th. If the jury shall find, under instructions from the court in matters of law, or in any other way, that the invoice valuations of the wines under seizure did not conform to the value of such wines in the actual markets of the country of production, as required by the revenue laws of the United States, still they cannot return a verdict for the government, unless they shall also find that such discrepancy was not the result of honest error on their part, in respect to matters of law or fact, but was made knowingly, with guilty knowledge, with design to evade the payment of duty which they knew was legally chargeable on the merchandise.

30th. The court is requested to charge the jury, that they cannot, for the purpose of ascertaining the market value, in Cadiz, of these wines, consider the sum for which they were insured in the city of New York, by the direction of Lacave & Echecopar.

31st. The court is also requested to charge, that the De Visser transaction, the Mansanilla and Barnard transactions, and the other transactions proven, in which duties were to be paid by those in this country to whom the wines were sent, having been introduced in evidence by the government for the purpose of showing intent, are entitled to little or no weight for that purpose, because La-

cave & Echecopar had no motive to undervalue the said wines.

Wm. M. Evarts, W. G. Choate, and Ethan Allen, for the Government.

E. W. Stoughton, E. C. Benedict, and Webster & Craig, for claimants.

BLATCHFORD, District Judge (charging jury). Gentlemen of the Jury: The commendable attention and unwearied patience which you have manifested throughout this trial, the first steps in which were taken thirty-five days ago, and on which we have bestowed consideration now for twenty-two days, are commensurate with the zeal, and care, and distinguished ability with which the case has been presented to you by the learned counsel upon both sides, and with the importance of it to the parties, and with the magnitude of the principles involved in it. It concerns 1,826½ quarter casks of wine, amounting in the aggregate, to 73,060 gallons, and the value of which, to day, in this market, at the rate of $1.10 in gold per gallon (allowing for a premium upon the gold) is about the sum of $112,000. This statement measures merely the pecuniary value involved in this controversy. It is a measure of that pecuniary value, because, if the goods seized are forfeited, the owners lose that amount; but it is far from being a measure of the principles involved in the controversy. They reach and extend (as you have been advised by the counsel upon both sides, in the course of this case, and as appears somewhat in the evidence) to other importations, and to other seizures of the same character of goods. Now, as you recollect, the mass of the wine in this case is invoiced at the rate of $16 per quarter cask, the only exception, I believe, being the case of the two quarter casks called the Paris & Allen, or the P. & A. wine, one of which was invoiced at $22, and the other at $30 per quarter cask. The invoices which are alleged on the part of the government to have been false and fraudulent, were all of them sworn to by one of the persons, who, it is admitted on both sides in this case, were the owners of the wine—one of the firm of Lacave & Echecopar. Therefore, the case, although involving such a large amount of property, becomes very simple in that aspect of it, and is no more complicated in respect to the ownership, the entry and the rate of valuation in the invoices, than if it covered only a single invoice of one quarter cask of wine, valued at $16.

On the part of the government, it is claimed in this case, that there has been a systematic series of undervaluations of these wines by the manufacturers of them, an intentional and wilful undervaluation, resorted to because of the ad valorem system of duties provided by law in regard to the wines; and the government claims that it was resorted to with full knowledge on the part of the owners, Lacave & Echecopar, of what the law required, and of the values which they ought to state in their invoices. The government claims that the invoices are below the actual market value of the wines in Cadiz. Throughout the observations which I may make to you, I shall speak of value in Cadiz: for, although the law speaks of value in the principal markets of Spain, yet it is conceded, on both sides, for the purposes of this trial, that actual market value in Cadiz is the proper test, because Cadiz is the principal market for these wines, and it does not appear that there is any other port from which these wines are exported, or in which they are largely dealt in, in the manufactured and completed state in which they are found ready for shipment. On the part of the claimants it is contended, that these wines are not valued in the invoices at a price under the actual market value, but that they are valued at a price fully up to the actual market value in Cadiz. That is the issue between these parties, and, subject to the observations in regard to the law, which I shall make to you, the question is wholly one of fact for you to determine. I shall make no comments upon the evidence, but shall leave the decision of the questions of fact involved entirely to your unbiased judgment, satisfied that the close attention which you have paid, throughout the trial of the cause, to the testimony as given, and to the elaborate arguments of the counsel on both sides, has fitted your minds for a proper consideration of the questions of fact which you are to decide.

The information is founded upon three statutes of the United States—the act of March 2, 1799 (1 Stat. 637), the act of May 28, 1830 (4 Stat. 409), and the act of March 3, 1863 (12 Stat. 737). But the counts under the act of 1799 may be laid entirely out of view. The 66th section of the act of 1799 covers only the case where property ought to be invoiced at its actual cost, which, under the law as it now stands, is only where the property is imported by the purchaser of it. Therefore, the case is presented for your consideration as if the counts under the act of 1799 were not in the information, and as if the information were founded solely on the other two statutes,—the fourth section of the act of 1830, and the first section of the act of 1863. The provisions of these two statutes I will now state to you. So far as they apply to this case, they are very simple.

By the fourth section of the act of 1830, it is provided that if an invoice be made up with an intent, by a false valuation, or false extension, or otherwise, to evade or defraud the revenue, the goods contained in the entry made on such invoice shall be forfeited to the United States. The other statute counted upon is the first section of the act of March 3, 1863, which provides, that if any owner of any merchandise shall knowingly make, or attempt to make, any entry thereof by means of any false invoice, or of any in-

voice which shall not contain a true statement of all the particulars required by that section, the merchandise shall be forfeited. The only material and substantial apparent difference between these two statutes is, that the one speaks of making up an invoice with "intent to evade or defraud" the revenue, and the other speaks of "knowingly" making an entry by means of a false invoice. "Intent to evade or defraud" is the wording in the one case; "knowingly" in the other. I shall have occasion further on in my remarks, to call your attention to those two expressions in the two statutes. The act of 1863, as I have just read to you, defines the offence to be, knowingly entering or attempting to enter goods upon a false invoice, or upon an invoice which does not contain a true statement of all the particulars required by that act. What are the particulars required? So far as they apply to the present case, they are these: If the merchandise is obtained in any other manner than by purchase (and, in the present case, there is no dispute in regard to the fact that the merchandise was not obtained by purchase, for Lacave & Echecopar did not purchase any of the wines that are under seizure, in the state in which they are now found as an article of merchandise), the invoice must state the actual market value thereof, at the time and place when and where the same was procured or manufactured. On the other hand, if the merchandise is obtained by purchase, the invoice must contain a true and full statement of the time when and the place where the same was purchased, and the actual cost thereof, and of all the charges thereon, that is, the actual cost thereof to the person who so purchases it in a condition ready for shipment, and undertakes to enter it in that condition. These two provisions are very plain and simple. If the merchandise is obtained in any other manner than by purchase, the invoice must state the actual market value thereof at the time and place when and where the same was procured or manufactured. But, if the merchandise was obtained by purchase, then the invoice must contain a true and full statement of the time when and the place where the same was purchased, and the actual cost thereof, and of all the charges thereon. The policy of these provisions of the law has been somewhat commented upon and stated to you by the counsel for the government. It must at once be apparent to you why this system was adopted. It appears first in our statutes in 1823. Prior to that time there was no such distinction between goods purchased and goods not purchased; but congress, in its wisdom, probably because of the course and exigencies of trade at that time, introduced this distinction into the revenue laws. The reasons were manifestly these: Every ad valorem system of revenue must be made, as far as possible, uniform in its operation, or it will be oppressive and unjust. Merchandise, as a matter of course, will be shipped to this country by the man who manufactures it, and like merchandise will be shipped here by the man who purchases it. If the manufacturer is allowed to invoice his merchandise at what it costs him to make it, and the purchaser is compelled to invoice his goods at what it costs him to buy them, inasmuch as the purchaser must pay for the goods not only what it costs the manufacturer to make them, but the profit of the manufacturer in addition, an unfair discrimination is made against the purchaser, enabling the manufacturer to undersell him in the market here, and in the end surely drive him out. This is a principle which is easy to be understood, and commends itself to the good sense of every one. Hence the rule referred to, and which finds its expression in the language which I have cited from the act of 1863. In the case of a purchaser of goods, the cost to him to buy the goods abroad, is assumed, as a general rule, by the law, to indicate the actual market value of what he buys, it being presumed that he buys at the ordinary actual market value; and to put the purchaser upon the same footing with the manufacturer, to make no unjust discrimination against the purchaser, and in favor of the manufacturer, and to enable the government to collect substantially the same amount of duty, at the same ad valorem rate, on the same quantity of the same description of merchandise, whether shipped here for account of the purchaser of it or for account of its manufacturer, the law requires the manufacturer to invoice his goods, when he imports them and enters them here as his own, at their actual market value in the principal markets of the country where they were manufactured, no matter what their cost to him, no matter whether they cost more or less than such actual market value—in substance and effect, it requires the manufacturer to invoice them at what the purchaser would have to pay for them, and invoice them at. That is the theory of the law, and the object of the law; and its language endeavors to carry out that theory and object, as far as it is possible for human legislation to carry out a principle.

It being, therefore, the admitted duty of Lacave & Echecopar, as the manufacturers of these wines, to invoice them at their actual market value at Cadiz, the place of their manufacture, at the time of their manufacture, the question next presented for consideration is—what is the meaning of the words "actual market value," in the statute? It has already appeared, in the course of the remarks addressed to you by the counsel in this case, that the language of the acts of congress on this subject is somewhat variant in the actual words used. Some of the statutes use the expression "market value," some use the expression "fair market value," some use the expression "actual market value." But there is no substantial difference, nor has there ever been, in meaning, in these various expressions. The statute which

says "fair market value," means "actual market value"; and the statute which says, "actual market value," means "fair market value." The only other possible meaning of the word "actual," is that which I suggested early in the trial, namely, value in the actual market, as contra-distinguished from a hypothetical, or notional, or ideal value, which may be affixed to an article in a particular case, for a particular reason. In other words, the common sense of every man must be applied to this expression, as it is to all the other transactions of life. Whatever men in the ordinary dealings of society, between man and man, would consider to be the fair actual market value of property, that is its actual market value, within the meaning of the revenue laws. But, independently of this, we have the authority of the supreme court of the United States, as to the meaning of the words "actual market value." In a case which came before that court (Cliquot's Champagne, 3 Wall. [70 U. S.] 114), brought up from California, in regard to the seizure of some champagne wine, the district court, on the trial of the cause, gave an exposition of the meaning of the words "actual market value," in the statute of 1863; and the supreme court say, that the charge of the district judge embraced all the points in the case, and is satisfactory to the supreme court, and they concur in it. According to that decision, the meaning of the words "actual market value," is the price at which the owner or the manufacturer of goods holds them for sale; the price at which he freely offers them in the market; such price as he is willing to receive for them if they are sold in the ordinary course of trade. The particular language of the district judge in that case (which was so emphatically sanctioned by the supreme court) was, in substance and almost in words, what I have just stated to you.

That being the law, the next question is—what is the evidence as to actual market value? Both sides have gone into evidence as to whether the price of $16, stated in these invoices as the actual market value of these wines in Cadiz, and sworn to by Mr. Lacave, in his oath upon the back of each one of these invoices, to have been the actual market value of the wines in Cadiz, was really the actual market value. The government claims to have shown that the market value in Cadiz at the time was largely in excess of the value so stated by Mr. Lacave in the invoices, while the claimants insist that the evidence shows that the price of $16 is fully up to the market value, and, in fact, according to their views of the case, is a little in excess of it. The issue, therefore, reduces itself to one of fact, so far as the question of market value is concerned.

It is necessary, now, that I should call your attention to one or two legal propositions that are involved in the consideration of some portions of the evidence. The counsel for the government claim, on their side, that they have four lines of evidence upon this question of market value: (1) The sales on orders, deliverable on the wharf in New York, at $1.10 per gallon. (2) The sales to Lenau, which are claimed to have been at 75 cents per gallon, and the price named by Lacave & Echecopar to Melchers, which the counsel for the government claim is shown, by the evidence, to have been 75 cents per gallon, and for Crown sherry. (3) The insurance of the wines at 70 cents per gallon, by direction of Lacave & Echecopar. (4) The testimony of the experts on the part of the government, Mr. Marshall and Mr. Henshaw, and other testimony, if there be any of that character. On the part of the claimants, the principal evidence, so far as I now recall it, on the question of market value, is: (1) The letters of Lacave & Echecopar to Mr. Jones, and the offer contained in those letters. (2) The like correspondence on the part of Mr. Bensusan with Mr. Jones, and his offer of wines to Mr. Jones, wines which the claimants say were, substantially and in fact, Crown sherry. (3) The expert testimony of Mr. Bensusan, Mr. Escoura, Mr. Lenau, and perhaps some others, as to the actual market value of the Crown sherry in Cadiz. These represent, I think, substantially, the classes and ranges of evidence claimed by the respective parties in this case to be applicable to this subject.

In regard to the sales on orders received here by Mr. Miln, and transmitted by him to Spain, the wine being sent back in response, delivered here on the wharf, and paid for at the rate of $1.10 per gallon in gold, you have heard the views of the respective counsel; but, in order to enable you to apply the facts, it is necessary for me to state to you what the law is upon the subject. It is this: If you shall find, upon all the evidence in regard to the transactions respecting wines ordered in this way, and delivered here on the wharf at the price of $1.10 gold, per gallon, that the course of business adopted by the claimants, of selling their wines at that price, and thus deliverable on the wharf in New York, was a mode of business adopted for the purpose of concealing the real prices of the wines at Cadiz, then you will be authorized to find that sales upon such orders were sales at Cadiz prices; and, in such event, the prices, which, from the evidence, you shall ascertain to be such Cadiz prices (by deducting from the $1.10 the expenses of freight, insurance, duties, and whatever other charges upon the same are shown to be properly deductible, from the time of the shipment of the wines in Cadiz to their delivery in New York), may be properly taken into consideration by you in ascertaining the actual market value of the wines in Cadiz at the time. But if, on the other hand, you shall find, upon all the evidence, that the course of busi-

ness adopted by the claimants, of selling these wines on orders, at $1.10, deliverable upon the wharf in New York, was not adopted for the purpose of concealing the real prices of the wines in Cadiz, then you will throw entirely out of consideration every thing in regard to the price of $1.10, because it will then have nothing to do with the case. It will then be the price here in the New York market, and will not be a Cadiz price.

With that single observation in regard to the law applicable to the $1.10 transactions, showing to you under what circumstances you are at liberty to consider the evidence as to the $1.10 price as bearing upon the question of market value, and under what circumstances you are not to consider it as bearing upon that question, I shall leave the entire evidence in the case to you, without any comment upon it, for your decision and determination, as bearing upon the question of actual market value. If you shall find, as matter of fact, that the invoice value was as high as the actual market value, then there is an end of the case, and you must find a verdict for the claimants; but, if you shall find that the invoice value was lower than the actual market value, then you will have to proceed to the consideration of another question—whether, under the act of 1830, that undervaluation was made with intent to defraud the revenue; and whether, under the act of 1863, it was made knowingly or unknowingly. Upon the question of knowledge or intent, I have stated to you the verbal difference in language between the two statutes —the one requiring an intent to evade or defraud the revenue, and the other requiring that the party should knowingly make, or attempt to make, an entry by means of a false invoice. That, however, is merely a verbal difference. There is no real difference in the meaning of the two expressions, as has been decided by the supreme court of the United States. In the case of Cliquot's Champagne [supra], to which I have already referred, respecting the champagne wine, which went up from California, on the trial before the district court, the court was requested, by the counsel for the claimants, to charge the jury, "that the word 'knowingly,' in the first section of the act of March 3, 1863, means, in connection with the language which accompanies and surrounds it, 'fraudulently.'" The district judge refused to give that instruction, and held that such was not the law, and his charge on that subject was approved by the supreme court, to which the case went, and which affirmed the judgment, in these words: "The court below was pressed to instruct the jury that 'knowingly' is used in the statute as the synonyme of 'fraudulently.' The instruction given was eminently just, and we have nothing to add to it." We have seen what the instruction was that was refused. Now, what were the instructions that were given? I shall read them to you as the instruction of this court upon this subject: "With regard to the question of intent, I am asked to charge you that you should be convinced that these goods, if invoiced below their market value, were invoiced fraudulently below their market value. The previous statutes passed by congress had introduced, in many instances, the word 'fraudulently,' had defined the offence to be, making a false invoice 'with intent to defraud' the revenue, or evade the payment of duties." The learned judge here refers to the passage read to you from the act of 1830. He proceeds: "This statute," the statute of 1863, "apparently, ex industria, omits these expressions, and substitutes the words 'if the owner,' &c., 'shall knowingly make an entry by means of any false invoice,' &c. I do not feel at liberty, when the legislature had left out the word 'fraudulent,' and inserted the word 'knowingly,' to reinstate the word 'fraudulent.' At the same time, I am bound to say, that I cannot conceive any case where an entry could be knowingly made by means of a false invoice unless it were fraudulently made. I do not tell you, in terms, that you are obliged to find that the entry was made fraudulently, but you are obliged to find that it was made knowingly, by means of a false invoice; and, for myself, I cannot imagine any case where it could be knowingly done, without being fraudulently done. What, then, shall we understand by this word 'knowingly,' as here employed? It is that, in making out this invoice, and in swearing before the consul that such was the actual market value of the goods, the claimant knew better, and that he was swearing falsely. He forfeits these goods, if you believe that he knew this invoice did not express their market value, their actual market value."

One of the earliest statutes of the United States uses language which is the true exposition of these laws upon this point. The eighty-fourth section of the act of March 2, 1799 (1 Stat. 694), in speaking of the forfeiture of goods under certain circumstances, provides, on the question of intent, that they shall not be forfeited where it is shown that the transaction took place "by mistake or accident, and not from any intention to defraud the revenue." That is the true distinction. Where an undervaluation is shown, unless it is shown to have occurred by mistake or accident, it follows inevitably that the undervaluation must have been made with intent to defraud the revenue. On that subject, I quote the words of a very learned judge, who adorned the bench for many years, and was particularly conversant with this class of cases,—Judge Hopkinson, of the Pennsylvania district,—and who, in a prosecution of a similar kind (U. S. v. Twenty-Five Cases of Cloths [Case No. 16,563]), gave the same view of the law that I have now given to you. He says: "Supposing that you shall find that these goods are undervalued in the invoices, how are you to decide upon the fraudulent intent or design? In doing this, you will be

influenced by the extent of the undervaluation. Is it enough to have been a temptation to fraud? Could it, on a large business, afford a great profit? Does it run generally through all the invoices, or is it only an occasional undervaluation, that might have happened by accident, by mistake, without any design?" That shows the view of this learned judge as to the true test of this question of intent. Was it by accident or mistake, on the one hand, or by design on the other? If it was by design or intent, then it was not by accident or mistake. If it was by accident or mistake, then it was not with intent or design.

On this question of knowledge and intent, and only upon this question, there comes into this case the evidence which has been introduced on the part of the government, whatever you may think it to be, growing out of the letter of Lacave & Echecopar to the United States consul at Cadiz, in March, 1864, the correspondence with Mr. Miln, comprising the letters and invoices about the price of the P. & A. wine, and the transactions, which have been commented upon on both sides, with Mr. Lenau and Mr. De Visser, and the one or two instances of wine sent to Mr. Barnard, in Boston, and perhaps some other matters that I have not borne in mind. But all those other instances, whatever they may be (whether the true view of them is as claimed by the government, or as claimed by the defence), in regard to wine not under seizure, have nothing to do with this case, unless you shall find that there is an undervaluation, and shall come to the question of intent or knowledge.

It now becomes my duty, and, although a rather tedious one to you, it is, nevertheless, a duty that I owe to the case and to the parties, to go over, patiently and carefully, the requests to charge that have been made by the counsel on both sides. There are nine requests on the part of the government, and thirty-one on the part of the claimants. I must ask you to bear with me, because it is a part of your duty, and of mine. As we have tried this case so far with patience and care, it is important that, in its closing hours at least, there should be no error or prejudice to either side, through negligence or haste.

The counsel for the government ask me to charge the jury: "(1) That, upon the evidence given by the claimants, the probable cause of condemnation has not been relieved, and the jury will find a verdict for the United States." Upon that I charge you, that the whole question is one for the jury, and one which I shall not take away from you.

The government also asks me to charge: "(2) That the sales upon orders, at $1.10, deliverable upon the wharf in New York, are sales at Cadiz prices." That is a question for the jury, under the exposition of the law upon that subject, which I have stated to you, and I shall not take it from the jury.

"(3) That the sales upon orders, at $1.10, deliverable on the wharf in New York, are evidence upon which the jury may find the actual market price in Cadiz, by deducting therefrom freight, insurance, duties, and other custom house charges, and the expense of bringing the wine to the place of delivery." On that subject I have already charged you fully.

I have also charged you substantially in accordance with the fourth proposition on the part of the government, which relates to this question of $1.10.

The fifth proposition on the part of the government also relates to the question of $1.10, and is covered by what I have already stated to you on the subject.

The sixth proposition is this, and I charge you that it is law: "(6) That if the wines under seizure were entered by means of invoices not truly expressing the market value of the wines at the time when, and in the country where, they were manufactured, with knowledge upon the part of the consignor, or of the consignee, that the invoices did not contain such actual market value, the goods are forfeited, and the jury must find for the United States."

So, also, I charge you that the seventh proposition on the part of the government is correct: "(7) That if the jury find, upon all the evidence, that the invoices do not contain such actual market value as aforesaid, and were made up by Lacave & Echecopar with intent to evade the payment of any part of the duties by law chargeable thereon, the goods are forefeited, and the jury will find for the United States."

The eighth proposition, also, I charge you is correct: "(8) That the market value to which the manufacturer of wine is required to conform the valuation of his invoice, is of wine of the same grade and quality, as a general article of production and commerce in Spain, and that a manufacturer cannot escape the obligation to conform his invoice to that general market value, by the pretence or the fact that he does not offer his particular brand of wine in the market of Spain, but sends it in exportation; but, in such case, the valuation in the invoice should be conformed to the market value in Spain of the same grade or quality of wine." The only observation that I have to add upon that subject is in reference to that small portion of this wine, small in proportion to the rest, which has been called, throughout this trial, "Burgundy Port." Some evidence has been given, on the part of the government, in regard to the market value of that wine, and some evidence on the part of the claimants. Among the evidence given on the part of the claimants, and admitted by the court, in regard to the value of Burgundy port in Spain, is the evidence as to its cost, and as to a fair manufacturer's profit on that cost, and as to what the sum total of the cost and manufacturer's profit is, with reference to

the $16. And, upon that subject I charge you, that you have a right to consider that evidence in regard to Burgundy port, in arriving at the determination of the actual market value of the Burgundy port in the market of Cadiz. But similar evidence was excluded by the court, and is not to be taken into consideration by you, upon the question of the actual market value of the sherries; and, under the word "sherries" I include not only the Crown sherries, but the Madeiras and the P. & A. wines, and whatever else there may be in the case, except the Burgundy port, which latter includes the wine called "pure juice." As to this Burgundy port, it is not sherry. It is all invoiced at $16. It is sometimes marked "pure juice" on the margin of the invoices, and sometimes "Burgundy Port," but, in all cases, whether it is marked as "pure juice" on the margin, or "Burgundy Port" on the margin, it is, in the body of the invoice, called "common Spanish red wine." It will be for the jury to judge, on the evidence, as to what this wine is, what is its quality, body, market value, appreciable worth, identity, and character.

The last proposition on the part of the government is: "(9) That, upon the evidence, the sales of the seventeen quarters and thirty octaves of wine, to M. Lenau & Co., and the three sales of wine to Simon De Visser, were actual sales in Cadiz, by Lacave & Echecopar, at the several prices paid therefor by the purchasers." On that subject I charge you, that it is a question entirely for you, and for your consideration only upon the question of knowledge or intent, after you shall have arrived at the conclusion, if you do arrive at it, that the wines are in fact invoiced at less than their actual market value.

I now take up the requests on the part of the claimants. The first proposition is correct, and I charge you in accordance with it: "(1) There are two questions of fact to be considered: 1st. Were these wines undervalued by Lacave & Echecopar? 2d. Had they a guilty knowledge that they were undervalued? Before these goods can be condemned, both of these questions must be answered in the affirmative. There must be a guilty undervaluation." On that subject I will read to you what was said by the supreme court of the United States, in the same champagne case from California: "The term knowingly, in the act of 1863, in the connection here under consideration, refers to the guilty knowledge of the owner, consignee, or agent by whom the entry is made, or attempted to be made. The offence to be punished consists of three particulars: (1) The making, or attempting to make, an entry by the owner, consignee or agent. (2) The use, by such owner, consignee, or agent, of the forbidden means. (3) Guilty knowledge on the part of such owner, consignee, or agent. This, we think, is the proper construction." Now, the supreme court have given no definition, nor does the request to charge, which I have complied with give any definition of the words "guilty knowledge." But "guilty knowledge," under the circumstances of the case, means no more than "knowledge." If the party knew better, if he knew that the invoice value was lower than the real value, or if he put in a lower value with the intent to evade or defraud the revenue, then his knowledge and intent were guilty.

The second request on the part of the claimants has, in my judgment, nothing to do with this case, and I decline to give it.

The third request is correct; and I charge you in accordance with it, subject to the remarks I have heretofore made in respect to the question of $1.10: "(3) The law requires the actual market value in Cadiz to be stated in the invoice, and the jury must disregard all evidence of sales and prices and profits here, or elsewhere, except in Spain." That is true. All prices, everywhere, except in Spain, are to be disregarded, and it is only in case you find that the $1.10 was really a price in Spain, that it is to be taken into consideration. Otherwise, it is to be thrown out of view; and, therefore, in any event, the prices that you are to consider are to be prices in Spain, and you are not to consider the $1.10 price at all, unless you find that it is a price in Spain.

As to the fourth, fifth, sixth, and seventh requests of the claimants, they relate to the official papers in this case, the certificates of the consul, the appraisements, the reappraisements, and the acts of the custom house officers, and I decline to charge as requested by these prayers. But I charge that you may take into consideration, as a part of the evidence in the case upon the question of market value, as it shall affect either side, the invoice, the entry, the certificate of the consul, the oath of Mr. Lacave, the oath of Mr. Miln on the entry, the appraisement by the appraisers, the certificate of the appraisers on the invoice as to the value, the examination made by the appraisers, the testimony given before the appraisers, and the entire record of the appraisement and of the reappraisement, every thing there is in the official papers respecting the appraisement and the reappraisement. You may take all this into consideration, as a part of the evidence, on the question of fact as to the market value of the wines in Cadiz.

In regard to the eighth request to charge, I decline to charge as there requested. I have already stated to you, in respect to the question of Burgundy port, all that there is on that subject in the eighth request, that is, in my judgment, relevant to the case.

I decline to charge as requested in the ninth, tenth, and eleventh prayers of the claimants.

The twelfth prayer is correct, and I charge you in accordance with it, subject to the remarks I have already made in regard to the

question of the $1.10: "(12) That the revenue laws of the United States do not assume to dictate under what conditions a foreign manufacturer shall dispose of his property, nor to what countries it shall be shipped. It was perfectly proper for the claimants in this case, if they saw fit, to refuse to sell their wines in Spain, but it was nevertheless their duty to state, in their invoices, the actual market value thereof in Spain, and it is the duty of the jury to determine, from all the evidence, if that invoice value was correct and true." That is a sound proposition, subject to the remarks I have made in regard to the $1.10 price, and to the question whether it was a cover or not.

I decline to charge in accordance with the thirteenth, fourteenth, fifteenth, and sixteenth prayers.

The seventeenth prayer is correct, and I charge you in accordance with it: "(17) It being admitted by the government and the claimants that all the wines under seizure left Spain for New York the property of Lacave & Echecopar, who obtained them by manufacture, the invoices accompanying the same are required by law to contain the actual market value of the merchandise at the time and place of manufacture."

I also charge you in accordance with the eighteenth prayer: "(18) That it is the duty of the jury to ascertain, first, the time and place of manufacture; next, the market value of the wines under seizure, as an article of commerce, at such time and place; and, then, whether the prices stated in the invoices presented at the custom house conform to such market value."

The nineteenth proposition comes back again to the $1.10, and I charge you that it is correct, subject to the remarks I have already made on the subject: "(19) That if the jury find that the prices stated in the invoices do conform to the market value of the merchandise as an article of commerce at the time and in the country of manufacture, then it is immaterial what may be the ultimate actual receipts of the shippers, upon sales of the wines delivered in New York free of all costs and charges; because, the revenue law only contemplates, in respect to invoice value, transactions of purchase and sale in the market of Spain." That, as I have stated before, is true; and, unless the $1.10 price shall be found by you, upon your view of all the facts in regard to it—the $1.10 upon order sales—to be referable to the market of Spain, then it has nothing to do with the case, and how much money went back to the pockets of Lacave & Echecopar is immaterial.

The twentieth proposition is also correct, and I charge you in accordance with it: "(20) That if the jury find that any of the wines under seizure, or similar wines of Lacave & Echecopar, were not sold in the market of the place of manufacture, or subjects of general commerce there, then they are at liberty to consider the value, at the same time and place, of the wines of other houses or manufacturers, of similar grade, quality, and character, in order to ascertain the correctness of the invoices in controversy; and, if there be no such similar wines, then the sum which it cost Lacave & Echecopar to produce the wines under seizure, with a fair manufacturer's profit added." That comes back again to what we have had so often, in the course of this trial, that, if there is no evidence as to the market value of these wines, or of wines of a similar grade and quality, derived from actual sales of them, or transactions in regard to them, then you are at liberty to resort to the cost, with a fair manufacturer's profit added, but only in such case.

The twenty-first proposition is correct, and I charge in accordance with it: "(21) That, if the jury believe that the parcels of wine marked P. & A. 1 and P. & A. 2 were invoiced at their real value in the actual markets of the place, and at the time, of manufacture, then neither they, nor the invoice containing them, is liable to condemnation; and the statement of higher prices sent to Miln is of no consequence in this case, unless the jury shall believe that the prices mentioned are not mere pro forma prices on which to effect sales in New York, but the actual market price in Cadiz." It is only as evidence of actual market price in Cadiz that that transaction, that letter, that statement, that paper or invoice, whatever it may be, is introduced into the case by the government; and, if it shall be thought by you, upon all the facts, not to indicate anything in regard to the actual market value in Cadiz, it has nothing to do with the case.

The twenty-second proposition is also correct, and I charge you in accordance with it: "(22) That, until the jury find that the wines under seizure were invoiced at less than their actual market value at the time and place of their manufacture, they cannot take into consideration any evidence in the case respecting (1) the Mansanilla octave; (2) the Barnard cask of sherry; or (3) the De Visser transaction." I have already stated to you that these three things only bear upon the question of knowledge and intent, after you shall have found that there was, in fact, an undervaluation.

The twenty-third proposition is incorrect, and I decline to charge it.

The twenty-fourth proposition is correct, and I charge you accordingly: "(24) If the house of Lacave & Echecopar believed that the letters, purporting to be signed by Samuel D. Jones, contained a regular mercantile proposition for a purchase of their Crown sherry wines, and if the house of Lacave & Echecopar answered this proposition, and fixed certain prices as those for which they would sell the same for export, then you are at liberty to infer that they would have sold the same wines to any body

at the prices named, and also to infer that there was a market value thus made and fixed by the house of Lacave & Echecopar itself, and that such market value was as low as the price thus fixed, after deducting therefrom the cost of removing said wines from Cadiz, and placing them on board vessels in that port, for transportation to New York."

The twenty-fifth proposition is also correct: "(25) The court is also requested to charge that substantially the same remarks and instruction as last above given, are also applicable to the letters to and from the house of J. Bensusan & Co., and to the prices named by them for the said wine." The substance of the last two propositions is, that if Lacave & Echecopar and Bensusan & Co. believed that these were real bonâ fide applications, and if their offers were real and bonâ fide, then you are to take them into consideration as part of the evidence on market value.

The twenty-sixth proposition I decline to charge, as it is a question of fact solely for the jury. That is, it is a question of fact for you, whether the houses of Lacave & Echecopar, and of J. Bensusan & Co., when they respectively answered the propositions contained in these letters, believed that the same were real proposals for the purchase of wines by a person desirous of buying them for exportation to Canada. That is a question of fact for you. I am asked to charge you one way or the other on it, as a question of law, which I decline to do.

The twenty-seventh proposition is correct, and I charge you in accordance with it: "(27) If the house of Lacave & Echecopar, and of J. Bensusan & Co., supposed, in answering the letters purporting to be signed by Samuel D. Jones, that they were written by a person who wished to become a customer, in the ordinary way of trade, and if, in reply, they named their prices for cash, for export, for considerable quantities of said wines, it does not detract a particle from the value of the evidence, as evidence of market value in Cadiz, that neither Jones nor Farwell, in fact, intended to buy, and that the letters written in the name of said Jones were, in fact, written to obtain evidence to be used for the United States; because, the test to be applied is the state of mind of Lacave & Echecopar, and of J. Bensusan & Co., at the times respectively when they wrote the letters stating prices, in reply to those purporting to come from the said Jones."

The twenty-eighth proposition is, that the evidence of the witnesses Henshaw and Marshall, and the general credit to be given to their testimony, on your view of their examination and cross-examination, is left entirely to you, and of all this you are the exclusive judges. That, undoubtedly, is true, and I charge you in accordance with it.

The twenty-ninth proposition is correct: "(29) That, if the jury shall find, under instructions from the court in matters of law, or in any other way, that the invoice valuations of the wines under seizure did not conform to the value of such wines in the actual markets of the country of production, as required by the revenue laws of the United States, still they cannot return a verdict for the government, unless they shall also find that such discrepancy was not the result of honest error on the part of the manufacturers, in respect to matters of law or fact, but was made knowingly, with guilty knowledge, with design to evade the payment of duty which they knew was legally chargeable on the merchandise." I have already charged you substantially to that effect, and have explained the meaning of the words, "knowledge," "guilty knowledge," "design to evade the payment of duty," "honest error," and all the other expressions used in the request.

The thirtieth request is: "(30) That the jury cannot, for the purpose of ascertaining the market value in Cadiz of these wines, consider the sum for which they were insured in the city of New York, by the direction of Lacave & Echecopar." I charge you upon that subject, that, if you shall find, upon the evidence, that this $1.10 price, on order sales, was a mode of business adopted for the purpose of concealing the real prices of the wines at Cadiz, and therefore shall find that the $1.10 was a Cadiz price, less the proper deductions, then you may take into consideration, for the purpose of ascertaining the market value, this question of insurance, but not otherwise. If you find that the $1.10 on these order sales was not a Cadiz price, but was entirely a New York price, then the insurance has nothing to do with the case; otherwise, it has. And, on the subject of insurance, you will recollect the views that were presented to you by the counsel on both sides, in case you shall, under the instructions of the court, find it to be a proper element in the case.

The thirty-first request I decline to charge. It is substantially to the effect (and I state it because it is necessary to make some remarks upon one expression in it), that the De Visser transaction, the Mansanilla and Barnard transactions, and other transactions in which duties were to be paid by persons in this country upon wines sent, having been introduced in evidence by the government for the purpose of showing intent, are entitled to little or no weight for that purpose, because Lacave & Echecopar had no motive to undervalue the wines. Now, gentlemen, this is a question wholly for you; and, upon this question of motive, which has been argued to you by the counsel for the claimants and by the counsel for the government, as affecting these wines involved in the De Visser, the Barnard, the Lenau and other transactions, the language of the statute of the United States (the act of 1830)

is, that these things are not allowed to be done with the intent to evade or defraud the revenue. It is just as much an offence against the law for a man to violate it with an intent to evade the revenue in any way as it is to do so with an intent to defraud the revenue. But the question of motive is one entirely of fact for you to consider, upon all the evidence in the case.

That disposes of the requests to charge on both sides, and now it is my duty to call your attention to two or three other points in the case, and then I will commit it to your consideration.

It was urged to the court, early in the trial, and overruled by the court, and it has been urged, in summing up, to you, by the counsel for the claimants, with very great earnestness, that great weight is to be given to the fact of the appraisement and reappraisement of these wines, by the custom house, at the price of $16. The court was asked to lay down the law to be, that this appraisement was conclusive; that it ended the question between these parties; that it not merely went to establish the proper rate of duty, but that it condoned any offence; that it was a pardon of any offence that had been committed; that it was a flat bar to any prosecution by the government to forfeit these goods for any fraud that had been committed. Now, gentlemen, such is not the law. The law has been held the other way ever since the earliest revenue law was enacted, time and time again, by all the courts that have ever considered the question, and, according to my apprehension, there is not a decision the other way. The cases on this subject all draw this distinction—and it is one as perfectly appreciable by you as it is by a lawyer—that this appraisement and reappraisement, and all this machinery which you have seen spread out upon the papers here, is for the purpose of getting at the duty, and for no other object. It is to find out the duty. It is a mode of litigation between the parties, the government on the one side and the importer on the other, to find out how much duty is to be paid on the goods; and, when that machinery is carried through by appraisement and reappraisement, and the duties are paid, and the merchandise is delivered, that transaction is settled, so far as the duties are concerned, and the government, afterwards, even though they find that there has been a mistake, cannot recover from any one, by a lien on the goods or by a suit against the individual, any more duty. It is conclusive upon that subject, but only upon that subject. It is not conclusive if a fraud has been committed. It does not condone or pardon any fraud that has been committed by any false invoice, or any knowing, intentional, wilful undervaluation. A forfeiture for fraud can be enforced after appraisement, reappraisement, payment of duty, and delivery of the goods. The appraisement system is for all cases, and ordinarily presupposes an honest invoice, but a mistaken one, and a payment of too little duty. This subject came up before the same learned judge (Judge Hopkinson), in the case from which I have already cited, in 1840 (U. S. v. Twenty-Five Cases of Cloths), on a seizure of twenty-five cases of cloth. The same ground was taken there, first to the court, as a question of law, and then to the jury, and the judge disposed of it in this way. He says "To invoice the goods below their actual value and cost, and to enter them by that invoice, with design to evade the duties, is, per se, an offence which forfeits them, whether the invoice was afterwards instrumental in the estimation of the duties for that purpose or not. The evidence must follow the issue, and must depend upon the fact to be proved. When the question is whether an importer has paid the duties legally chargeable upon his goods"—and that is not the question in a case of seizure—"it may be enough for him to say, I have paid all that the officers of the government appointed to ascertain them declared to be due, and the question should rest. But, when the inquiry is whether he has been guilty of a specific fraud or not, it would be extraordinary if the acts or opinions of men in reference to another subject, should be conclusive, either for his condemnation or acquittal." And such is the law. If it had so happened in this case, upon appraisement and reappraisement, that these goods here invoiced at $16 the quarter cask, had been appraised at $25, then, upon the theory of the claimants, the government could have insisted that that was conclusive evidence against the claimants, and that the claimants could not be permitted, on this trial, to show that the value was not $25, but was really no greater than $16. The law says, that this appraisement and reappraisement are not conclusive on either side. If they are higher than the invoice, they do not bind the claimant upon the question of seizure. If they are equal to or lower than the invoice, they do not bind the government. This is fair for both sides. But, still farther on in the same case, when Judge Hopkinson came to charge the jury, the matter was pressed on his attention again, and the learned judge says: "It is contended that, as these goods were appraised at the custom house in New York at the invoice prices, that, as they were passed through that custom house on that appraisement, paid the duties according to that appraisement, and were thereupon delivered to the importers, they are now exempted from all further inquiry into their cost or value, not only in relation to the amount of duties legally chargeable on them, but on a prosecution for fraud in making up those invoices, and on any or every other account; that the very fraud by which it is alleged, in this prosecution, the passing of the goods through the custom house was obtained, that is, the false invoices, cannot now be inquired into. I can by no means

assent to this doctrine, which, in my judgment, would be to offer a premium for successful fraud, and punishment only to the unskilful. I adhere, on reflection, to the opinion I gave on the trial. I will add but a remark. It is said these officers are the appointed agents of the government, and that the government is bound by their acts. The answer is plain. The government does not claim any right or privilege for itself that every citizen does not possess. Suppose one of you should appoint an agent to sell your house or goods, with even more clear and full powers than those given to the appraiser by the acts of congress. Your agent makes a sale, but it is afterward proved that he has been grossly defrauded by the purchaser, by false representations, by the suppression of the truth, by that which constitutes fraud in the law. Would you suppose you are bound by such a transaction—that the cheat is safe, and may retain your property only by saying that it was delivered to him by your agent?"

I have deemed it my duty, gentlemen, to make these remarks, because of the very earnest manner in which considerations growing out of the appraisement and re-appraisement at $16, were pressed upon your attention. So, also, a great many remarks were made, in summing up and in the course of the trial, in reference to the laws on the subject of the seizure of goods, the employment of informers, and the seizure of books and papers, none of which questions have any thing to do with this case; and the fact that they have nothing to do with this case is manifest from the fact that, in the thirty-one prayers for instruction, upon the part of the claimants, there is not one which touches any one of these subjects. They have nothing to do with the case. From the year 1793 to the present time—a period of seventy-five years—the law has stood, that the collector, and other officers of the revenue, on mere suspicion, may enter into a vessel and search it, and seize the goods and hold them on suspicion of fraud upon the revenue. So, in the act of 1799, section sixty-six, if the collector suspects that goods are not invoiced properly, he may take possession of them. By section sixty-seven, on suspicion of fraud, he may open the goods. By section sixty-eight, he may search suspected places for goods. That has been the policy of the law from the commencement. Fraud could never be prevented or detected but for this high power, which is the prerogative of the sovereign authority of the government, and which is for your protection, and for my protection, and for the protection of every man who wishes to do an honest business, and not to be driven out of it by parties who may commit frauds upon the government. So, also, ever since the act of 1799, the system of informers has been sanctioned; and, by section ninety-one of the act, one-fourth of the proceeds of a seizure is given to the informer. That law still remains in force, and various laws enacted since, both in regard to customs and internal revenue, all sanction the employment of informers, and give them a share of the proceeds of the property seized. And, more recently, by other acts, additional powers, which must have been conferred for good purposes and from good motives, and, as we must presume, upon sufficient cause, were conferred in certain cases, and under certain restrictions, to seize the books and papers of parties suspected of being concerned in frauds upon the revenue. Therefore, gentlemen, that is the policy of the law, and, it is not to be inveighed against, to influence your minds. It is a part of the law which you are called upon to administer; and, to address to you considerations based upon prejudice against the informer in a case, or prejudice against the seizure of goods, or of books and papers, is to ask you to take into consideration things which, under your oaths, and under the law as given to you by the court, you have no right to consider, which have no relevancy to the case, and which you have no right to permit in any manner to influence your judgment. You are to consider and decide this case fairly, upon the evidence addressed to the true merits and issues in the cause, which I have explained to you as clearly as it is in my power to do.

There is but one more remark I have to make to you, and that is in reference to the question of the burden of proof. It has been the law upon that subject since the year 1799, enacted by a congress and sanctioned by a president who had to do with the formation of the constitution, and with the creation of our present system of government, and it has remained the law on that subject until the present time, and it was asserted and affirmed no longer ago than December, 1865, by the supreme court of the United States, in the case of Cliquot's Champagne, which I have already cited, where the court say: "It is argued that the rule relating to probable cause and the onus probandi, prescribed in the seventy-first section of the act of 1799, is confined to prosecutions under that act, and has no application to those under the act of 1863, which is silent upon the subject. It would be a singular result, if, in a prosecution upon an information containing counts upon this and later statutes in pari materia, the rule should apply to a part of the counts and not to others. The seventieth and seventy-first sections must be construed together. They both look to future and further legislation. In all the changes which the revenue laws have undergone, neither has been repealed. The authority to seize out of the district of the seizing officer, and this rule of onus probandi, have always been regarded as permanent features of the revenue system of the country." And they affirm the charge of the learned district judge, and his refusal to charge as requested by the claimants in

that case, that the burden of proof was not upon the claimants, but was upon the prosecution. Now the law upon that subject is this—that where probable cause is shown for the prosecution (and, in this case and in all cases it is for the court to decide whether probable cause is shown for the prosecution, and the court decides that there is such probable cause by throwing the claimants upon their defence, as it did in this case),—where probable cause is shown for the prosecution, the burden of proof is thrown upon the claimants to dispel the suspicion, and to explain the circumstances which seem to render it probable there has been a knowing undervaluation. The government, in this case, having established probable cause, it is for the claimants to show their innocence, and dispel and clear up the suspicion which the government, in the beginning, raised against them. Under this rule, it is for you to say, whether the claimants have made out their defence, and have shown that these wines were invoiced at a value as high as their actual market value in Cadiz at the time they were manufactured, or that the failure to so invoice them was the result of accident or mistake, and not of knowledge or intent. If they have not shown that, you will find for the United States, and, if they have shown that, you will find for the claimants.

As I stated before, there are two counts in this information for your consideration—one under the fourth section of the act of 1830, which requires that the offence shall have been committed with intent to evade or defraud the revenue, and the other under the first section of the act of 1863, which requires that the party shall have knowingly made, or attempted to make, an entry by a false invoice, or other false paper. Under the act of 1830, you must find, in order to find against the claimants and in favor of the government, that the invoices were made up with intent, by false valuations, to defraud the government, and, unless, under that act, you so find, the goods cannot be forfeited. Under the act of 1863, the goods cannot be forfeited, unless you find that the entry, or attempt to make the entry, was done knowingly. You can find for the government under either statute, that is, under the counts of the libel under either statute. You may find under the law of 1830, or under the law of 1863. If you find against the claimants under either, the goods are to be forfeited. You must find in favor of the claimants under both, to find a verdict in their favor.

With these observations, I leave the case to your patient and attentive consideration.

The jury then retired. After being in consultation for twenty-four hours, they came again into court, and, upon stating their inability to agree upon a verdict, were discharged.

TWELVE HUNDRED AND NINE QUARTER CASKS OF SHERRY (UNITED STATES v.). See Case No. 14,279.

Case No. 14,280.

TWELVE HUNDRED AND SIXTY-FIVE VITRIFIED STONE-WARE SEWER PIPES.

[5 Ben. 402;[1] 15 Int. Rev. Rec. 26.]

District Court, S. D. New York. Nov., 1871.[2]

SHIPPING—DELIVERY OF CARGO—BREAKAGE FROM INHERENT DEFECT—TENDER OF FREIGHT.

Stone-ware pipes were shipped on a vessel, under a bill of lading, excepting dangers of the seas and navigation, but containing no exception of loss by breakage. They were in good order when received, were stowed properly and handled carefully in loading and discharging, but some of them came to pieces while being discharged, from the development of cracks existing when the pipes were put on board, or caused while on board by the perils of the sea, the ship having met with bad weather. The consignee tendered the freight on the sound pipes delivered, which was refused, and freight was demanded on the whole, at the rate per ton specified in the bill of lading, and a libel was filed against the goods, to recover the freight. *Held*, that, as the goods were properly stowed with reference to their character and their apparent condition, the vessel was not liable for the breakage, and was entitled to retain all the goods till the full freight was paid.

In admiralty.

Beebe, Donohue & Cooke, for libellants.

E. Seymour, for claimant.

BLATCHFORD, District Judge. The libel alleges, that, in December, 1867, the bark H. L. Routh, owned by the libellants, was lying in the port of Glasgow, in Scotland, bound for the port of New York, and up for general freight; that J. & R. Young shipped on board of her the property libelled in this action, to be transported by her from Glasgow to New York, and delivered at the latter port to William Nelson, Jr., under a bill of lading, a copy of which is annexed to and made part of the libel. The bill of lading recites, that the property is shipped "in good order and well conditioned," and contracts for its delivery "in the like good order and well conditioned," excepting, among other things, dangers of the seas and navigation, the consignee, Nelson, "paying freight for the said goods," at a rate per ton specified in the bill of lading. The libel avers, that the bark, having taken the property on board, and having well and carefully stowed the same, sailed for the port of New York with the same on board, and arrived there safely with the same on board, and discharged the same with notice to the consignee, the same being in as good condition as when received on board, the exceptions in the bill of lading, and the necessary breaking of the goods, from their nature and character, only excepted, and then and there tendered and offered to deliver the same to the consignee on the payment of the freight reserved in the bill of lading, but which he declined and refused to pay; and that the freight due is $886 76.

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

[2] [Reversed in Case No. 10,536.]

The consignee named in the bill of lading is the claimant of the goods. His answer denies that the property safely arrived at the port of New York, and that it was well and carefully stowed, and that whatever damage to it there was was caused by any of the dangers of the seas excepted against in the bill of lading, and that the property was discharged from the vessel in good order and condition within such exceptions, and that it was all of it discharged, and that it was discharged in a proper and careful manner, and that it or any part of it was discharged after notice to the claimant, and that the libellants tendered or offered to deliver it, or any part of it, to the claimant, or to permit him to receive or remove it, or any part of it, on his paying freight therefor, as per the bill of lading, and that he refused to receive it or remove it, or any part of it, or so much of it as could or would be discharged, or as had been discharged on the pier at the time of the notice, or to pay the freight therefor, as per the bill of lading. The answer also avers, that, when the claimant was notified that the bark would discharge the property at pier No. 19, East river, he attended, ready and willing to receive it and pay freight for it, as per the bill of lading, on its discharge, and remove it, but, on arriving there, found that only a small part of it had been discharged and was on the wharf; that, on his attempting to take possession of and remove the same, upon tendering and offering to pay to the libellants the freight for the same, as per bill of lading, and have the freight due on the same ascertained, he tendered and offered to the libellants the money for the payment of said freight, as per bill of lading, ton by ton, which they refused to receive, and they refused to permit him to remove the goods already discharged, although requested, and refused to deliver to him the goods already discharged, or any part of the goods on board of the bark not discharged, or to discharge the same, unless and until he paid the full amount of the freight named in the bill of lading, before the goods were discharged or he could remove the discharged goods; that, thereupon, he offered to secure the libellants for the freight money, and tendered and offered to them the amount of freight named in the bill of lading, on the goods being discharged, which they refused to receive or do; that he then and there tendered and offered to pay to the libellants the freight on the goods already discharged, and also on all of the goods that should be discharged, by the ton, for each and every ton as discharged per the bill of lading, which they refused to receive or do; that they refused to deliver to him the goods, or any part of them, unless and until he first paid the whole freight named in the bill of lading before the goods were discharged; and that, when the libel was filed, all of the goods had not been discharged.

The goods, after being libelled, were bonded in this suit, and delivered to the claimant. It is to be noted, that the answer sets up no recoupment or any damage to or breakage of the goods, and that the bill of lading contains no exception as to loss by breakage, other than such as may be covered by the exception as to the dangers of the seas and navigation. The goods in question were stone-ware pipes and rings of a brittle character, transported loose, and not in boxes or packages, or otherwise protected.

The evidence satisfactorily shows, that the goods were properly stowed; that the vessel met with bad weather on her passage; that the goods were in apparent good order when put on board; that such goods are liable, through transportation in ships at sea, to come out of the vessel broken, through the development of cracks which, in fact, existed in them when put on board, but would not attract notice; that some of the goods in this case came to pieces, when handled in the hold of the vessel, for the purpose of being discharged; that the broken pieces, as well as the unbroken goods, were discharged on the wharf; that the goods were handled properly and with care, in being loaded and discharged; and that none were broken through carelessness in discharging them, although some came to pieces while being moved from the vessel or the wharf to a place of deposit, through the development, as seems probable, either of cracks existing when they were put on board of the vessel, or of cracks caused on board by the perils of the sea. Although there was not in the bill of lading any exception of loss by breakage, yet the vessel is not liable for losses caused by inherent defects in the goods, or by their brittle nature, provided they were in apparent good order when put on board, and were properly stowed with reference to their character and their apparent condition. That was the case here; and, in such case, the consignee must bear the loss, as well as pay the freight, not only on the goods delivered in an unbroken condition, but on all put on board under the bill of lading. Clark v. Barnwell, 12 How. [53 U. S.] 272, 282, 283.

In the present case, the claim on the part of the consignee seems to be that he is not bound to pay freight on any goods except such as were delivered to him in an unbroken condition. That is the meaning of the averments in the answer as to the offer of the claimant to pay freight for the goods, or for the goods discharged, as per the bill of lading, and ton by ton as per the bill of lading, as discharged per the bill of lading. The evidence shows this clearly, and that the whole effort of the claimant was to get the unbroken pipes and rings, and pay freight only on them. He, in fact, never offered to pay freight on the goods as discharged, but his only offer really was to pay freight on unbroken pipes and rings, ton by ton, as they should be discharged unbroken. He sought

to make the vessel insurers, under the bill of lading, against the breakage of the goods on the voyage. On this state of facts, the libellants had a right, having been guilty of no fault or negligence in loading, stowing, transporting or discharging the goods, to retain all the goods until the full freight named in the bill of lading was paid, provided they discharged everything named in the bill of lading. They did that, and, after all the goods had been discharged, and were upon the wharf, awaiting the payment of the freight and their removal by the claimant, the suit was brought. The claimant had full notice of the place and of the fact of the discharge of his goods, and saw some of them on the wharf unbroken, while others were on the wharf at the same time broken, and saw that they were in process of being discharged.

[There must be an order joining the executors of Dunham, who has died since this suit was commenced, as co-libelants with Carey in the place and stead of Dunham.] [3]

There must be a decree for the libellants, with costs, for the amount of the freight, computed in the manner prescribed by the bill of lading, namely, £128. 18s. 8d. sterling, converted into United States currency at bankers' rate of exchange on London in New York, at the date of the entry of the vessel at the custom house at New York, on her arrival at New York, on the voyage in question. The amount will be ascertained by a commissioner, on a reference.

[Upon an appeal to the circuit court, this decree was reversed. Case No. 10,536.]

TWELVE THOUSAND THREE HUNDRED AND FORTY-SEVEN BAGS OF SUGAR (UNITED STATES v.). See Cases Nos. 16,555 and 16,556.

TWENTY BARRELS OF DISTILLED SPIRITS (UNITED STATES v.). See Cases Nos. 16,557 and 16,558.

TWENTY CASES OF MATCHES (UNITED STATES v.). See Case No. 16,559.

TWENTY-EIGHT BAGS OF COTTON, PROCEEDS OF (PEABODY v.). See Case No. 10,869.

Case No. 14,281.

TWENTY-EIGHT CASES OF WINE.

[2 Ben. 63; [1] 7 Int. Rev. Rec. 4; 1 Am. Law T. Rep. U. S. Cts. 15.]

District Court, S. D. New York. Dec., 1867.

CUSTOMS DUTIES—FORFEITURE—UNDERVALUATION—REAPPRAISEMENT—EVIDENCE.

1. Revenue laws are not penal in the sense that requires them to be construed with great strictness in favor of defendants

2. There cannot be a reappraisement, on appeal, of imported goods, unless there has been an entry of the goods.

3. Therefore, where, on the trial of an action to forfeit goods for alleged undervaluation, no invoice or entry of the goods was proved, but it appeared that papers purporting to be an invoice and entry had been in the possession of the district attorney, but had disappeared, and it also appeared that the goods had been appraised at the custom house, but the papers on such appraisement had also disappeared, and that an appeal was taken from that appraisement, on which appeal a reappraisement was had, the papers on which were proved. *Held*, that it was not error for the court to tell the jury that they had a right to presume, from the evidence, that there was an entry of the goods

This was a motion for a new trial on the ground of alleged misdirection by the court to the jury. [Case tried Dec. 30, 1867.] [2] The case was a libel of information on a seizure for fraudulent undervaluation in the invoice of twenty-eight casks of wine, imported in the ship Emma, from Rotterdam [shipped at Rotterdam October 24, 1864, and invoiced at Markhammer September 26, 1864].[2] No entry or invoice was put in evidence. It appeared that two papers, purporting to be an entry and an invoice in the case, had been in the possession of the district attorney, but had disappeared, and, on proper search, could not be found either in his office or in the custom house. It also appeared, that an appraisement of the wine, in the usual manner, had been made in the custom house, but that the papers on such appraisement had also disappeared, and could not be found. An appeal was taken from that appraisement, and a reappraisement was made by the general appraiser and a merchant appraiser, January 10th, 1865, with the aid of experts as witnesses. The official papers on such reappraisement were put in evidence. The invoice value was 1,870.56 florins, the appraised value 2,364.07 florins, and the reappraised value 2,282.27 florins. The chief clerk in the general appraiser's office testified, that he made up such official reappraisement papers from the original invoice which he had before him at the time, and that such invoice came to him as a part of the papers on the appeal from the appraisement. One of the claimants testified, that the claimants Meyer & Baer received the wine and unloaded it and put it in their cellar; that he visited the custom house in relation to the wine; and that he presumed it was entered at the custom house, although he was on his way from Europe when the wine arrived. The forfeiture of the goods was claimed under the sixty-sixth section of the act of March 2, 1799 (1 Stat. 677), the fourth section of the act of May 28, 1830 (4 Stat. 410), and the first section of the act of March 3, 1863 (12 Stat. 738). The sixty-sixth section of the act of March 2, 1799, provides for the forfeiture of goods entered on a fraudulent invoice, and makes an entry a prerequisite to a forfeiture. The fourth section of the act of May 28, 1830, is to the same effect in substance. The first section of the act of

[3] [From 15 Int. Rev. Rec. 26.]

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

[2] [From 7 Int. Rev. Rec. 4.]

March 3, 1863, provides for the forfeiture of goods entered or attempted to be entered by means of any false or fraudulent paper. Therefore, in the present case, it was necessary there should have been an entry, or an attempt at an entry, of the goods. The court charged the jury that they had a right, from the evidence, to presume that there was an entry, although there was no direct evidence of one. The jury found a verdict for the government, condemning the goods, and the claimants now moved for a new trial, on the ground that the court erred in such instruction in regard to the entry.

B. K. Phelps, for the United States.
M. V. B. Wilcoxson, for claimants.

BLATCHFORD, District Judge. By the revenue laws, it is necessary that an invoice should be presented to the collector at the time of entry. In this case, an invoice was found in the possession of the custom house, and, although it was not produced, its loss and contents were proved. The fact that the officials had an invoice of the goods might not, of itself have been sufficient evidence on which to presume an entry, even though an appraisement of the goods had been shown. For an appraisement may be had as well of goods which are not entered or invoiced, as of those which are. But no reappraisement on appeal can take place unless there is a previous entry, followed by an appraisement. The fact of reappraisement is, therefore, prima facie evidence of an entry, sufficient to throw the burden of proof on the claimant to show that there was no entry, and to warrant the jury in finding in favor of the presumption that there was an entry, if no opposing evidence is offered. 1 Greenl. Ev. §§ 33, 34. The officers of the customs would have failed in their duty if they had allowed a reappraisement, on an appeal by the importer, unless he had previously made an entry of the goods. It is a presumption of law, that all public officers perform their proper official duties until the contrary is proved; and, where a reappraisement is to be made only upon its appearing to the collector that there has been a previous entry of goods, the fact that the reappraisement has taken place, is prima facie evidence that the previous entry was made. Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448, 458; Turner v. Yates, 16 How. [57 U. S.] 14, 26.

I think that the instruction to the jury was correct, and that the motion for a new trial must be denied. Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good, and they should be so construed as to carry out the intention of the legislature in passing them, and most effectually accomplish these objects. Cliquot's Champagne, 3 Wall. [70 U. S.] 114, 145. In the present case, it was perfectly open to the claimants to rebut the prima facie evidence of an entry, by showing that none had been made, but they offered no evidence of the kind. The jury, on a submission of the question to them, found that there was an undervaluation in the invoice, and that it was fraudulent, and I see no reason to disturb the verdict. Motion denied.

TWENTY-EIGHT CASKS OF WINE (UNITED STATES v.). See Case No. 14,281.

TWENTY-EIGHT PACKAGES OF PINS (UNITED STATES v.). See Case No. 16,561.

TWENTY-FIVE BARRELS OF ALCOHOL (UNITED STATES v.). See Case No. 16,562.

TWENTY-FIVE CASES OF CLOTHS (UNITED STATES v.). See Case No. 16,563.

TWENTY-FIVE CASES OF SILKS (HARTSHORN v.). See Case No. 6,168a.

TWENTY-FIVE THOUSAND DOLLARS (TAYLOR v.). See Case No. 13,807.

Case No. 14,282.

TWENTY-FIVE THOUSAND GALLONS OF DISTILLED SPIRITS.

[1 Ben. 367.] [1]

District Court, S. D. New York. Aug., 1867.[2]

FORFEITURE — INTERNAL REVENUE — INFORMER'S RIGHT—OPENING A DECREE.

1. Where a proceeding was commenced to forfeit property under the internal revenue laws, and the claimant consented to its condemnation, the value of certain portions being paid into court and those portions released, and a decree of forfeiture against the whole was entered, and that decree was set aside by the court, on application of the claimant, and he came in to defend, but, at a subsequent date, a decree of forfeiture was again entered, under which the property in custody was sold, and its proceeds, together with the amount previously paid in, were held for distribution, and the informer claimed to be entitled to share according to the provisions of the law existing at the time he gave the information: *Held*, that, under the revenue laws, the right of the informer becomes vested only when the money representing the forfeited property is paid over and is ready for distribution. Until then his right is liable to be divested by the act of the government.

2. Section 9 of the act of July 13, 1866 [14 Stat. 101], as to the time when the informer's right becomes vested, is merely declaratory of the law.

3. The court had the right to set aside the first decree, without the informer's consent.

[Cited in Wheaton v. U. S., Case No. 17,487.]

4. The money paid into court was never ready for distribution until the second decree of forfeiture.

5. The amount of the informer's share must be determined by the law as it stood at the time

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

[2] [Affirmed in Case No. 16,564.]

of the final decree of forfeiture, and not as it stood at the time of the first decree.

This suit was commenced March 3d, 1866, by information praying the forfeiture of certain property for a violation of the internal revenue laws. On the same day, James A. Dorman put in a claim to the property, and consented in open court to the condemnation of the distilled spirits proceeded against, and to the appointment of appraisers of the other property libelled, with a view to the payment into court of its appraised value in lieu of its sale on condemnation, its forfeiture being also consented to, and an order to that effect was entered. The report of the appraisers, filed on the 6th of March, 1866, appraised the value of all the property, except the distilled spirits, at $18,000. Among this property was 5,000 bushels of horse feed, appraised at $3,000. On the 10th of March, 1866, the claimant paid into the registry of the court $15,000, as the appraised value of all the property except the horse feed and the distilled spirits, and afterwards, on the same day, a decree was entered, by consent of the claimant, releasing and discharging from custody the horse feed, and discontinuing this action as to the same, and condemning the spirits and the rest of the property (except the horse feed), and the proceeds so paid into court, and ordering the sale of the spirits, and directing the clerk to retain the proceeds of such sale and the $15,000, to await the further order of the court. On the same day, an order was entered discharging from custody, and delivering to the claimant, all the property proceeded against except the spirits. On the 26th of April, 1866, this court, upon affidavits and the motion of the claimant, the United States not resisting the motion, made an order that the proceedings as to the horse feed stand, and that the decree of March 10th, 1866, as to the condemnation and forfeiture of the spirits, be vacated, and the writ of sale as to the same be set aside (the same not having been yet sold), and that the spirits remain subject to the further order of the court, and that the proceedings under which the sum of $15,000, as the appraised value of the rest of the property, was paid into the registry of the court stand, the proceeds to remain in court to abide its further order, and that the condemnation and forfeiture of the property represented by the $15,000 be vacated, and that the claimant have leave to defend and answer, and that the cause stand for trial at the May term, 1866. On the 2d of May, 1866, Dorman filed his answer, denying all the allegations of the information. On the 17th of December, 1866, a decree was entered, by consent of the claimant, that the spirits, and the $15,000 so in the registry of the court, be condemned as forfeited to the United States, and that a writ of sale be issued, and that the marshal pay the proceeds into the registry of the court, to abide the further order and decree of the court thereon. A writ for the sale of the spirits was issued, and, on the 16th of January, 1867, the marshal returned the writ, and paid into the registry of the court $43,832 31, as the proceeds of the sale, after deducting the marshal's costs and disbursements, which amounted to $3,233 64, the gross proceeds of the sale having been $47,065 95. The commissions of the district attorney were taxed at two per cent. on $62,065 95, that is, two per cent. on the gross proceeds including the $15,000, and amounted to $1,241 32. The costs of the clerk of the court were $644 52. This left in the registry of the court $56,946 47, as net proceeds. On the 11th of March, 1867, the court made an order, referring it to Commissioner Betts to ascertain and report who was the informer herein, and on whose information the condemnation herein took place, and when such information was given, and what decrees of forfeiture had been entered herein, and when such decrees were entered, and how much had been realized under said decrees, and what number of gallons of spirits were made or run off after the seizure, and what the amount of tax on such spirits was, and to what share of the proceeds the informer was entitled, under any and all acts of congress, all questions of law as to what acts of congress said informer was entitled to claim under, and all other questions of law, to be reserved until the coming in of the report, and such questions of law to be passed upon by the court. On the 5th of June, 1867, the commissioner filed his report. He reported that Benjamin A. McDonald was the informer herein, and the person on whose information the condemnation herein took place, and that such information was given on the 15th of February, 1866. He also reported the facts as to the entry of the decree of March 10th, 1866, and of the order of April 26th, 1866, and of the decree of December 17th, 1866, as they are above set forth. He also reported that McDonald did not consent to the order of April 26th, 1866; that the cause was postponed, at the May term, 1866, on the application of the United States, on account of the absence of a witness; that the basis of the decree of December 17th, 1866, was a default duly taken in favor of the United States, at the December term, 1866; that, of the amount realized under the decree, there remained in the registry of the court the sum of $56,946 50; that, after the seizure of the distillery and property, 12,000 bushels of the grain seized were run off, at the request of the claimant, and 4,200 gallons of spirits were the result, and that was added to the other spirits, and what remained of the same was sold with the rest of said spirits; that the amount of tax on said 4,200 gallons was $2 per gallon, making in all $8,400; that the informer was entitled, under the different acts of congress, to the following shares, accordingly as the court should determine under which of said acts

the informer was entitled to share, namely: (1) If the informer's share were to be paid, as to the entire proceeds, under the act of July 13th, 1866, his share would be $5,000. (2) If the informer's share were to be paid, as to the $15,000 paid into the registry of the court, March 10th, 1866, according to the act then in force, and, as to the residue of the proceeds, according to the act of July 13th, 1866, his share would be one-half of the $15,000, or $7,500, and $5,000 of the residue, making a total of $12,500. (3) If the informer were to be paid, as to the entire proceeds, under the act in force at the time of the seizure, then the informer's one-half of the entire proceeds would be $25,473 25. The United States excepted to the report in these particulars: (1) To so much as stated that McDonald did not consent to the order of April 26th, 1866. (2) To all that portion of the report which referred to the amount to which the informer was entitled, which was included under the third head in the report on that subject. The case came up for hearing on the report and the exceptions, and on the questions of law reserved in the order of March 11th, 1867.

S. G. Courtney, U. S. Dist. Atty., for the United States.

C. Donohue, for McDonald.

BLATCHFORD, District Judge. The first exception is allowed, and the second exception is disallowed.

The main question arising on the facts in this case is as to the share of the proceeds to which McDonald is entitled. This depends on the question as to when his right to a share in such proceeds became vested in him. If such right became vested when the information was given by the informer which led to the seizure, the amount of his share must be determined by the law then in force. If such right became vested only by judgment and payment of the forfeiture thereunder, then the amount of his share must be determined by the law in force at the time of such payment. By section 41 of the internal revenue act of June 30th, 1864 [13 Stat. 239], and section 179 of the same act, as amended by section 1 of the act of March 3d, 1865 [Id. 469], which was the law in force at the time the information was given by the informer, the informer was entitled to a moiety of the forfeiture, on distribution. By section 9 of the act of July 13th, 1866, which took effect August 1st, 1866, the law was amended, so as to give to the informer such share as the secretary of the treasury should, by general regulations, provide, not exceeding one moiety, nor more than $5,000 in any one case. Under this amendment and the regulations made thereunder, the share of the informer in this case would be $5,000. Section 9 of the act of July 13th, 1866, also provides as follows: "It is hereby declared to be the true intent and meaning of the present and all previous provisions of internal revenue laws, granting shares to informers, that no right accrues to or is vested in any informer, in any case, until the fine, penalty, or forfeiture in such case is fixed by judgment or compromise, and the amount or proceeds shall have been paid, when the informer shall become entitled to his legal share of the sum adjudged or agreed upon and received."

The informer claims that his share of the proceeds in this case is to be determined by the law which was in force when he gave the information which led to the seizure; that, under that law, he is entitled to one-half of the proceeds of the forfeiture; that his right vested at the time he gave the information, subject to the result of a suit; that the decree relates back to the time of the seizure; and that, after the decree of forfeiture in March, 1866, no subsequent consent of the United States opening the decree could change the vested rights of the informer.

It has been uniformly held, under all revenue laws, that the title of the seizor or informer is liable to be divested by the government, until the money is actually paid over for distribution. Opinion of Attorney-General Berrien, 2 Op. Attys. Gen. p. 331; U. S. v. Morris, 10 Wheat. [23 U. S.] 290; Norris v. Crocker, 13 How. [54 U. S.] 440. When the money representing the forfeited property is actually paid over and is ready for distribution, then, and then only, does the interest of the informer become vested in the money. In this particular, the special provision, before cited, in section nine of the act of July 13th, 1866, as to the time when a right accrues to or is vested in an informer, is merely declaratory of what the general law was before that provision was enacted. Until the money is paid over for distribution, the United States have complete control over the suit brought to enforce the forfeiture, and over the forfeiture itself. They can remit the forfeiture and control the suit, at their pleasure. The suit is, by law, brought in the name of the United States, and there is nothing in the statutes applicable to this case, through which alone the informer acquires a right to any share at any time, to indicate that congress did not intend that the United States, as magister litis, should exercise complete control over the suit and its management, until the proceeds of the forfeiture should be ready for distribution.

In the present case, although the $15,000 were paid into court before the entering of the decree of March 10th, 1866, yet it was paid in merely as representing the property of which it was the appraised value; and then the decree of March 10th, 1866, was entered, condemning the spirits and the $15,000 as forfeited to the United States, and ordering a writ of sale, and further ordering that, on the return of the writ, the clerk retain the proceeds, together with the $15,000 to

await the further order of the court. The writ of sale was issued, but, before it was executed as to the spirits, it was set aside, by the order of April 26th, 1866. The $15,000, although in court, cannot be regarded as having been ready for distribution, any more than if it had been in the shape of the property which it represented, or as having been beyond the control of the court, so far as respected any vested right of the informer in it. Then came the order of April 26th, 1866, setting aside the first decree and opening the whole matter. This decree the court had a right to make, without the consent of the informer. The result is, that the case stands wholly on the decree of December 17th, 1866, and the informer is entitled only to such share as is given to him by the act of July 13th, 1866, and the treasury regulations made thereunder, as respects the $15,000, as well as the proceeds of the spirits, and that he is entitled to only the sum of $5,000.

This decision was affirmed by the circuit court, on appeal. [Case No. 16,564.]

TWENTY-FIVE THOUSAND GALLONS OF SPIRITS (UNITED STATES v.). See Case No. 16,564.

TWENTY-FIVE THOUSAND SEGARS (UNITED STATES v.). See Case No. 16,565.

TWENTY-FOUR COILS OF CORDAGE (UNITED STATES v.). See Case No. 16,566.

TWENTY-ONE BALES, ETC. (JOHNSON v.). See Case No. 7,417.

TWENTY-ONE BARRELS OF HIGH WINES (UNITED STATES v.). See Case No. 16,567.

TWENTY-ONE BARRELS OF WHISKY (UNITED STATES v.). See Case No. 16,568.

TWENTY PACKAGES DISTILLED SPIRITS (UNITED STATES v.). See Case No. 16,569.

TWENTY-SIX BALES OF RUBBER BOOTS (UNITED STATES v.). See Case No. 16,570.

Case No. 14,283.

TWENTY-SIX BARRELS AND SEVENTEEN TIERCES OF DISTILLED SPIRITS.

[11 Int. Rev. Rec. 78.]

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

FORFEITURE—INTERNAL REVENUE—PAYMENT OF TAX—BURDEN OF PROOF.

In the case of 26 barrels and 17 tierces of distilled spirits, shipped by Jacob B. Good, from Lancaster, Pa., and seized in the city of New York, in May, 1868, the defence admitted the seizure, and the prosecution claimed that, under the 45th section of the old act [14 Stat. 163], it devolved on the claimant to prove that the tax had been paid, while the defence argued that this rule had been repealed by the act of July 1868 [15 Stat. 125].

BLATCHFORD, District Judge, however, held that the old act was in force, and consequently the sprits were condemned.

TWENTY-SIX CASES OF RUBBER BOOTS (UNITED STATES v.). See Case No. 16,571.

TWENTY-SIX DIAMOND RINGS (UNITED STATES v.). See Case No. 16,572.

Case No. 14,284.

TWENTY-THREE BALES OF COTTON.

[9 Ben. 48.] [1]

District Court, E. D. New York. March, 1877.

SALVAGE—DERELICT PROPERTY.

Where a deck-load of cotton in bales had been dumped from a lighter, and part of it floated away with the tide, in the bay of New York, and next morning a tug, seeing the cotton floating near the Narrows, put out with a lighter and secured twenty-three bales, at some risk and with some damage to the vessels from ice, *held*, that the service was a salvage service; that the circumstances warranted the belief that the property was abandoned, notwithstanding the appearance of another tug, claiming to be sent by the owners to pick up the cotton; and that the salvors had not forfeited their right to compensation by refusing to surrender the cotton to the persons demanding it, nor by promptly libelling it to recover the salvage.

[Cited in Cope v. Vallette Dry Dock, 10 Fed. 145.]

This action was for salvage service, performed in picking up cotton bales floating in New York harbor.

Beebe, Wilcox & Hobbs, for libelants.

C. E. Crowell, for claimants.

BENEDICT, District Judge. This is an action brought to obtain at the hands of the court an award of salvage for services rendered in respect to twenty-three bales of cotton. The action has been hotly contested, and evidently a state of feeling has grown up between the parties that has rendered necessary the adjudication of a demand which, under other circumstances, would have been easily adjusted by the parties themselves. The feeling alluded to impels me to give the case a more extended examination than either the amount or the questions of law involved would ordinarily call for. The material facts disclosed by the evidence are as follows:

On the 10th of January, 1877, just at nightfall, a barge lying at the American docks, Staten Island, laden with cotton bales, then in the possession of the National Freight and Lighterage Company as common carriers, was caught by floating ice and thereby careened so that she dumped some five hundred bales of cotton into the slip. The weather was cold, the tide was running ebb, there

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

was much ice in the bay and night was at hand. The manager of the National Freight and Lighterage Company upon being informed of the mishap at once dispatched the tug C. A. Sumner, the steam lighter Watson, and another lighter, with an extra force of thirty-five men from New York, to secure the cotton. This force having proceeded to the scene of the disaster, boats were at once placed across the mouth of the slip to prevent the cotton then remaining in the slip from being carried out by the tide, while the men began to hoist out cotton from the water. They were engaged at this labor all the night and until about 11 a. m. the next day, when all of the cotton was secured except forty bales that had been carried out of the slip by the tide before the arrival of assistance. The cotton that had so escaped was left drifting about the bay with the heavy ice then moving on the tide. About 9 a. m., the master of the tug Harlow Bailey, in the employ of the Peerless Oil Works, a large oil refinery at the foot of 25th street, Gowanus, reported to Mr. Bush, one of his owners, that cotton bales were floating in the bay. Bush at once directed the lighter Susan and Rebecca to be taken in tow by the Harlow Bailey, and going on board the tug himself, with an extra man or two, making ten in all, proceeded out into the bay for the purpose of saving the cotton. The weather was still cold, the bay was full of ice, the tide was running ebb, the cotton had floated down towards the Narrows, and was then some three miles distant, and no other vessel of any description was to be seen, except a lighter over by Staten Island, in distress from the ice. The Harlow Bailey, with the lighter in tow, proceeded to the cotton, and, about half-past ten a. m., began to secure it. After a bale or two had been secured it seemed probable that some of the cotton would pass the Narrows before all could be secured, whereupon the lighter and tug proceeded directly to the Narrows, and then, turning, worked back, picking up the cotton as they found it in the ice. The mode of operating was to tow the lighter into the ice, alongside of each bale as found, and when the bale was alongside a man jumped on and fastened it in a sling. It was then hoisted on board the lighter. In this way, by 12 o'clock, all the cotton that could be found, except two bales, had been secured; and the tug and lighter, having 23 bales on board, were about completing the work when the Watson overhauled them, and those on board the Watson demanded the cotton, at the same time informing the salvors that they would get pay for their services at the American docks whence the cotton had escaped. The salvors declined to surrender the 23 bales they had secured, and declined to carry the cotton to the American docks, but proceeded with it to the libellants' wharf, at the foot of 25th street, whence they had started. The whole time occupied in the service was about three and a half hours. In the performance of the service the lighter Susan and Rebecca was stove by the ice, and was only kept afloat by placing a man in her hold at the break through which water was pouring in a stream, who, by constantly forcing cotton into the break, made out to stay the water so that the lighter was kept afloat. She ran great risk of loss, however, and was in a sinking condition when she reached her dock. The man in her hold was so chilled as to require assistance to get him ashore. On the same day this action was commenced to recover salvage for the service in saving the 23 bales thus secured. The demand is contested by the National Freight and Lighterage Company who have filed a claim to the cotton.

First, it is said the cotton was not abandoned, no request was made for the libellants to secure it, and without their assistance it would have been secured in due time by those in whose charge it was when it was dumped. The evidence shows that directions had been given to the tug Watson, to proceed to the Narrows as soon as all the cotton in the slip should be secured, and to search the Staten Island shore for cotton that might have drifted in upon that shore. After this she was to pick up any cotton that could be found in the bay. This instruction was obeyed, but the Watson was unable to get out until after the Harbor Bailey had begun to secure the cotton. When the Watson did get out, although the Bailey was seen to be picking up cotton, no signal was made to her but she was permitted to continue her labor on the Long Island shore, while the Watson, as directed, went down the Staten Island shore to the Narrows in the clear water. No communication was had between the tugs until 23 bales had been secured by the Harlow Bailey in the manner above described and the Bailey was well on her way back. This evidence shows that in determining the amount of salvage to be awarded the cotton cannot be considered a derelict; but it also shows that a salvage service has been performed. The cotton had been floating all night and a part of a day in the open bay when the service was performed. The service was undertaken when no one was endeavoring to save the cotton. When the service was seen to have been undertaken by the libellants no objection of any kind was made, nor any effort put forth to make known that the Watson was intending to pick up the cotton. It was not until after the service had been performed that any claim of right in the property was asserted by the lighterage company. These circumstances gave to any person the right to endeavor to save the property. The absence of an affirmative request of the service is not a material circumstance.

The presence of the Watson when she appeared upon the scene is a fact to be considered in determining the extent of the danger to which the cotton was exposed, but neither her presence nor her actions under

the circumstances prevented the rendition of a salvage service to the cotton. This is not a case of intrusion by persons desiring to force their services upon unwilling parties in distress. If such had been the fact, the court would look upon the libellants' claim with no favorable eye. The case here is one where parties, under no obligation to do so, voluntarily put out for the sole purpose of rescuing property floating about the bay, having no person near it, and there being no indication that any persons were intending to save it. It is a clear case of salvage, then, if the property was in danger. The claimants deny that there was any danger of losing the cotton, as it would float, and, as they believe, would not have passed out to sea upon that tide. But the acts of both the tugs show that danger was apprehended, if the cotton should pass the Narrows; for both the tugs proceeded at once to the Narrows to prevent such an occurrence. It is plain, too, that there was constant danger that some of the bales might be carried under the ice, and so wholly lost, and what is conclusive evidence of a real danger is the fact that, although every bale found was picked up, of the 41 bales that passed out of the slip 16 were actually lost. I find then in the case all the elements of a salvage service.

But it is further contended in behalf of the defence that the salvors were guilty of misconduct and forfeited all right to compensation by refusing either to surrender the cotton when the Watson came to them for it or to carry it to the American stores whence they were informed it came. I find no misconduct in these acts of the salvors. Having performed a salvage service they had acquired the right of possession, and any right of the claimants was for the time being subject to this right of the salvors. Besides, how could the salvors know that the parties claiming the cotton had any right whatever in the same? Acts of salvors in maintaining their right of possession, to the injury of other parties and without reason therefor, are not to be approved; but no such acts appear in this case. The tug and lighter having the cotton were well known to those demanding the cotton. The salvors and their vessels could at any time be found. There was no attempt to conceal or make away with the property. The place to which they were known to be taking the property was within sight of the place where the claimants desired to have it. No extra risk or charge was incurred and the refusal to surrender the cotton in accordance with the demand of those on the Watson does not afford ground for criticism. The good faith of the salvors is shown by the fact that when the Watson came up with parties who asserted that the cotton had escaped from their custody, no effort was made on the part of the salvors to secure the two bales that had already been discovered by them but not secured, and the locality of those bales was pointed out to the demandants in order that they might secure those bales themselves; and in this connection it may be noticed that after securing one of the bales thus pointed out the Watson did not think it advisable to continue her efforts but waited until the next day, when she resumed search for the missing bales.

Again, great complaint is made against the salvors because they filed their libel so promptly and when they knew that the claimants were willing to pay a reasonable compensation for the services performed. The fact proved that on the same day the cotton was picked up, the claimants procured a search warrant from a court of the state and also a warrant to arrest the master of the lighter for conversion of the property, warrants the inference that the filing of the libel may have been hastened by the attitude assumed towards the salvors by the agent of the claimants, who says, "I thought I should be ahead of them and I got a search warrant to take the cotton from them." But however this may be, the prompt filing of the libel caused no detriment to the owners of the property, but on the contrary enabled them the sooner to re-acquire the possession of it upon giving a stipulation for value as was done. There is no reason to suppose that the action of the libellants arose from a desire to incur expense or to make costs unnecessarily. Furthermore it is to be noticed, that although the manager of the lighterage company after the libel had been filed said that he would do what was right, and in vain attempted to have the salvors name the amount of their demand, still no definite sum was ever offered or suggested by the agent and no tender has ever been plead or made; while the proof shows that when he found a libel had been filed, he said that as a suit had been brought he would not pay a cent until compelled to. The defence made has been in harmony with this statement.

These conclusions compel a determination of this case in favor of the libellants, and there remains but to determine the amount of their reward. The value of the cotton saved is $1,150. The time employed was about three hours. The risk of total loss of the 23 bales saved was greatly diminished by the presence of the Watson after she was able to leave the work in the slip. The lighter, worth some $5,000, was used at considerable risk of her being sunk by the ice. The salvors put out from a safe harbor for the sole purpose of saving property apparently derelict. The value of the property saved is small and the award is to be divided among nine persons besides the owners of the tug and lighter. The owners of the lighter have expended $44.55 in repairing the injuries sustained by the lighter while performing the service. In view of all the circumstances, I shall fix the salvage at one-third the value of the property saved. This sum the libellants are entitled to recover, and as there has been no tender they must also recover their costs.

TWENTY-THREE COILS OF CORDAGE (UNITED STATES v.). See Case No. 16,573.

TWENTY-THREE GALLONS OF DISTILLED SPIRITS (UNITED STATES v.). See Case No. 16,574.

TWENTY-TWO PIPES & TEN HOGSHEADS OF WINE (BRITISH CONSUL v.). See Case No. 1,900.

Case No. 14,285.

TWIBELL et al. v. The KEYSTONE.

[9 N. J. Leg. Obs. 289; 4 Am. Law J. (N. S.) 103.]

Circuit Court, S. D. New York. 1851.

COLLISION—STEAM AND SAIL VESSELS—RUNNING OUT TACKS—DANGEROUS OBSTACLE.

1. Where a vessel is beating, and a steamboat is coming after or behind her, the former has the right, and it is her duty, to run out her tacks, irrespective of the course of the latter.

2. If a collision takes place, and the steamboat sets up that the sailing vessel did not run out her tack, and thereby caused the collision, the burthen of proving the defence rests upon the steamboat. *Held*, under the circumstances, the steamboat failed in making the necessary proof.

3. Where a wharf presented itself as a dangerous obstacle to a nearer approach to the shore by a vessel beating, and at the same time a collision was apprehended from an approaching and following steamboat, those navigating the beating vessel had the right of exercising ordinary judgment to go about, and throw the responsibility upon the steamboat of keeping clear of their vessel.

[Cited in Whitney v. The Empire State, Case No. 17,586.]

4. The vessel beating was not bound to incur a risk by coming up into the wind, and endeavoring to keep that position until the steamboat had passed.

5. Under the circumstances, the steamboat could, with proper care, having had the other vessel in view a sufficient time, have avoided any collision, and was responsible for the damages.

[Appeal from the district court of the United States for the Southern district of New York.]

[This was a libel by George Twibell and others against the steam tug Keystone for damages occasioned by collision. The district court decreed for the respondents, and the libelants appeal.]

F. B. Cutting and W. Q. Morton, for libelants.

Erastus C. & Charles L. Benedict, for The Keystone.

NELSON, Circuit Justice. The libel states that the sloop Thomas Lynch, with a cargo of eighty tons of coal, left Philadelphia, bound for Brooklyn, 7th November, 1848; that on the 30th of the month, when beating out of the Kills, and near the entrance into the Bay of New York, the wind and the tide against her, she had stood over to the Staten Island shore on her larboard tack, and, having stood in as far as was prudent without going ashore, she went about, and had just filled away on the starboard tack, when the steam tug Keystone, having in tow several barges heavily laden with coal, bound to New York, overhauled the said sloop, and ran into her, one of the barges having struck her about midships, cutting her down to the water, and causing her to fill and sink in about ten minutes. The answer states that on the day mentioned in the libel, the steam tug, bound from New Brunswick to New York, with a heavy tow, was moving against wind and tide down the Kills, after dark, when the sloop Thomas Lynch was observed ahead, beating down the Kills, and then on the larboard tack; that the tug being a little south of the middle of the channel, the sloop crossing her bows, on the same tack, passed her a short distance, starting across the Kills on a long tack, the wind being N. N. E.; that just after the sloop had passed the tug in safety, and when only about three hundred feet ahead, and one hundred feet to the leeward, and, at the time, a considerable distance from the Staten Island shore, and under no necessity of tacking, and but a short distance from the tug, she suddenly went about on her starboard tack, bringing her broadside to the tide, then running a very strong flood, and by the joint force of the wind and tide drifted down upon the tug so rapidly that it was impossible to avoid the collision; and that it was caused by the sudden and unexpected attempt of the sloop again to re-cross close under the bows of the tug, after she had crossed them once in safety, and when there was sufficient room for her to continue on her course without tacking. The question on the case lies within a narrow limit; and some of the facts very material in the determination of it are not in dispute. Both vessels were bound for the New York Bay, and were coming out of the Kills, off the Staten Island shore, with a pretty strong wind and tide ahead. The sloop was ahead of the tug, on her long tack from the Jersey to the Staten Island shore, and was seen by the captain of the tug, half a mile ahead, while she was on that tack. The tug had a heavy tow, and was moving only at the rate of a mile and a half the hour. The captain of the tug first saw the sloop on her long tack, over his starboard bow. As the tug was nearer the Staten Island than the Jersey shore, the sloop must have been pretty well on her way towards Staten Island when first discovered; and then she was half a mile ahead. The sloop having run out her tack and reached the Staten Island shore, off New Brighton, came about, and filled for the other tack, and had just got under way, when she came in contact with the outside tow, on the larboard side of the tug, striking her a little after midships, and cutting her to the water's edge, when she sunk. Now, it is not to be denied, under the circumstances stated, and not in dispute, but that the sloop had a right to keep her course,

and run out her tack, and at the proper place and time to come about and fill for the other tack, and that it was the duty of the tug not to interfere with her, but to take care and avoid her. The captain of the tug was bound to assume the sloop would run out her tack, and then come about, as this was her duty, as well as her right; and the burthen lies upon him to show that the sloop failed in her duty in this respect, and was in fault, by reason of which the collision happened. This burthen has been assumed, and it is asserted that the sloop failed to run out her tack, and came about unexpectedly and suddenly, before she had completed it, and took the hands on board the tug by surprise, and thus produced the collision. The whole case hinges upon this allegation in the answer, and proof in support of it, and depends on the evidence of the master and hand at the helm of the sloop, and the captain and pilot of the tug; the former proving that their vessel was within thirty yards of the wharf at New Brighton before she came about, and the latter that she was from 150 to 200 yards from the shore at the time. None of the other witnesses speak of the fact. The master of the sloop stood at the time on her bow, and had the best opportunity to judge as to the distance, and could not well be mistaken; besides, the fact was a subject of conversation between him and the man at the helm. They were both aware of the danger of the collision, from the proximity of the tug, and her unchecked advance towards them, and of the necessity of all proper measures to avoid it. They exercised their best judgment under the circumstances, the wind and tide being ahead, and somewhat strong, as to the point near the wharf, beyond which it would be unsafe to pass before coming about, and are responsible only for a sound and judicial exercise of it. Nor is there necessarily any discrepancy on this point in the evidence. The captain and pilot of the tug speak of the distance from the shore, not from the wharf, which is the material fact. Proving the distance from the shore, of itself affords no information to aid us in determining the question at issue. To make it at all available for this purpose, the distance of the wharf from the shore should have been given. It might well be that the sloop came about 150 yards from the shore, and still had run her tack as far as permitted by the wharf. The proof, therefore, in my judgment, fails altogether to establish any fault on the part of the sloop in this respect, but the contrary. Again, it is said, the sloop should have luffed up into the wind, and held that position, instead of filling away, until the tug had passed. But this, it is agreed by the experts, would have been a perilous experiment, regard being had to the wind and tide, and that the manoeuvre had to be made in the night. It was a peril to which the tug had no right to expose her, and for which there was no necessity. She was seen on her tack by the captain, some half a mile ahead, his vessel moving at the rate of a mile and a half the hour. With proper attention to his duty, and assuming that the sloop had fulfilled hers, by running out her tack before she came about, there was not the slightest difficulty in avoiding her. It required nothing beyond a proper lookout and competent skill in the navigation of the tug. The captain had perfect control of her. He could have checked her speed, or stopped, at any point within the half mile, when he found her approaching too near the vessel on the tack. This he was bound to do, and no excuse that can be given is admissible, under the circumstances, or can be sanctioned by the court, except the establishment of the fact that the vessel on the tack was guilty of fault, and which occasioned the accident. If she has conformed to the laws of navigation, as was done in this case, as a general rule, the captain of the steamer must so manage his vessel as to avoid her, and, if a collision occurs, he is responsible. The rule is inflexible, and should be sternly adhered to. In my judgment, it subjects the respondents in this case. The decree below must be reversed, and the case referred to the clerk to take proof of the loss and the damage.

TWICHELL, Ex parte. See Case No. 17,211.

Case No. 14,286.

TWICHELL v. MEARS.

[8 Biss. 211; 6 N. Y. Wkly. Dig. 400; 6 Reporter, 40; 10 Chi. Leg. News, 296.] [1]

Circuit Court, N. D. Illinois. May, 1878.

MORTGAGES—EQUITY OF REDEMPTION—PERSONAL LIABILITY OF PURCHASER.

When the payment of an oustanding incumbrance, created by the grantor of the equity of redemption, constitutes part of the purchase money, the law implies an undertaking by the purchaser to pay it, and the mortgagee may recover in assumpsit.

[Cited in Union Mut. Life Ins. Co. v. Hanford, 27 Fed. 591; Middaugh v. Bachelder, 33 Fed. 707; Kilpatrick v. Haley, 13 C. C. A. 480, 66 Fed. 137.]

[This was an action at law by C. A. Twichell against E. A. Mears.]

Kirk Hawes, for plaintiff.

W. E. Furness, for defendant.

BLODGETT, District Judge. This is an action brought on an alleged promise by defendant to pay the amount of a trust deed, in the nature of a mortgage, made by Austin H. Stowell to the plaintiff, on a certain

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 6 N. Y. Wkly. Dig. 400, and 6 Reporter, 40, contain only partial reports.]

lot in Highland Park. The proof shows that Stowell was the owner of the lot in question, and had borrowed of the plaintiff fifteen hundred dollars, which was secured by a mortgage on the lot; that he sold the lot to the defendant on the 15th day of April, 1875, for the sum of three thousand and twenty-five dollars, of which sum the mortgage in question was a part. The deed from Stowell to the defendant was for the express consideration of three thousand and twenty-five dollars, and contained the following clause: "This deed is given subject to an incumbrance of fifteen hundred and seventy-five dollars, secured by a deed of trust, dated October 1, 1874, of which seventy-five dollars is payable in one year, and fifteen hundred dollars payable in two years respectively, from the date hereof; said fifteen hundred dollars bearing interest, at the rate of ten per cent. per annum, payable at the office of Kirk Hawes, in the city of Chicago; which said fifteen hundred and seventy-five dollars, with the accrued interest thereon from Feburary 1, 1875, to April 15, 1875, is part of the consideration above named."

It also appears from the evidence that the defendant has paid one year's interest on this incumbrance.

The defendant insists that there is no privity of contract between the parties; that the mere purchase of the equity of redemption, or the purchase of the property subject to the mortgage, did not create such a privity of contract between him and the mortgagee as authorizes the mortgagee to maintain this action against him; that the law will imply no promise from such circumstances. The rule is probably as contended for by the defendant's counsel, that the purchase of an equity of redemption from a mortgagor of real estate, does not make the purchaser personally liable to the mortgagee. But where the payment of an outstanding incumbrance, created by the grantor, constitutes part of the purchase money, the law implies an undertaking by the purchaser to pay it, and the mortgagee may recover in assumpsit. The legal effect of the transaction is, to leave the portion of the purchase money represented by the incumbrance, in the hands of the purchaser for the purpose of paying the incumbrance, and the promise being made for the benefit of the holder of the incumbrance, he may maintain an action to enforce it. This is amply sustained, I think, by Burr v. Beers, 24 N. Y. 178; Comstock v. Hitt, 37 Ill. 542; Garnsey v. Rogers, 47 N. Y. 234; Thompson v. Thompson, 4 Ohio St. 333; Cumberland v. Codrington, 3 Johns. Ch. 229. There is also a series of cases in the Pennsylvania state courts to the same effect; but perhaps they would not be considered so much in point as the cases I have quoted, from the fact that they make no distinction between law and equity in that state, and many of the English cases proceed upon the assumption that while there may not be a remedy at law, there would be one in equity. But the cases I have cited are those where the principle is broadly laid down as I have assumed it—that an action at law may be maintained where the mortgage forms part of the consideration. The rule in this state is stated by Justice Breese in Comstock v. Hitt, supra, and I think very happily and tersely stated: "Taking a deed subject to an outstanding mortgage, creates no personal liability of the grantee to pay off the mortgage, unless he has especially agreed to do so, or the amount of the mortgage has been deducted from the purchase price. When the payment of an outstanding mortgage is a part of the purchase price of the land, the law will imply an agreement to pay it." The parol evidence and the deed, in this case, both show that the payment of the mortgage was a part of the consideration which the defendant agreed to pay for the land sold him by Stowell, which facts bring this case clearly within the rule laid down by the supreme court of this state, which I have just quoted. So, too, Chancellor Kent, in Cumberland v. Codrington, supra, says: "The leaving of so much money in the hands of the purchaser for the use of the mortgagee, would seem to be a sufficient ground for a suit at law by the mortgagee."

Other authorities to the same point undoubtedly exist, but it seems to me that these are sufficient to dispose of this case. There will be a finding for the plaintiff.

Case No. 14,287.

The TWILIGHT.

[Cited in Pollock v. The Laura, 5 Fed. 142. Nowhere reported; opinion not now accessible.]

TWINING (LINDSAY v.). See Case No. 8,367.

TWITCHELL (ROLLINS v.). See Case No. 12,027.

TWO ANCHORS & CHAINS (LLEWELLYN v.). See Case No. 8,428.

TWO BARRELS (UNITED STATES v.). See Case No. 16,575.

TWO CASES OF WOOLENS (UNITED STATES v.) See Case No. 16,576.

Case No. 14,288.

The TWO CATHERINES.

[2 Mascn, 319.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1821

SEAMEN — WAGES — WRECKED VESSEL—VOYAGE—EARNED FREIGHT—SALVAGE.

1. A ship sailed on a voyage from Newport to Gibraltar, and there landed her cargo and went

[1] [Reported by William P. Mason, Esq.]

in ballast to Ivica for a cargo of salt, and after taking it on board proceeded on her homeward voyage for Providence, and was wrecked on an island in Narragansett Bay, and the cargo totally lost, but the ship's tackle, &c., were saved. *Held*, that the seamen were entitled to wages up to the arrival of the ship in Ivica, and half the time she stayed there.

[Cited in Willard v. Dorr, Case No. 17,680. Disapproved in Bronde v. Haven, Id. 1,924. Cited in The General Chamberlain, Id. 5,-310.]

2. They were not entitled to their wages for the homeward voyage, because no freight was earned.

[Disapproved in Bronde v. Haven, Case No. 1,-924. Cited in Reed v. Hussey, Id. 11,646. Approved in Cartwell v. The John Taylor, Id. 2,482. Cited in The Niphon's Crew, Id. 10,277; Drew v. Pope, Id. 4,080.]

3. The seamen were entitled to salvage for saving the materials of the ship, and, under the circumstances, a salvage was allowed equal to the amount of their wages for the homeward voyage.

[Cited in The Wave, Case No. 17,297; Hobart v. Drogan, 10 Pet. (35 U. S.) 122. Followed in Pitman v. Hooper, Case No. 11,186. Cited in The Centurion, Id. 2,554; Mesner v. Suffolk Bank, Id. 9,493; The Dawn, Id. 3,666. Approved in Cartwell v. The John Taylor, Id. 2,482; The Massasoit, Id. 9,260; The Niphon's Crew, Id. 10,277; The Umattilla, 29 Fed. 257.]

4. The contract of the seamen is not dissolved by shipwreck; but they are bound to labour to preserve the wreck of ship and cargo; and if they leave the ship without endeavouring to save them, they desert their duty, and may forfeit wages antecedently due.

[Cited in The Dawn, Case No. 3,666; The Massasoit, Id. 9,260. Distinguished in The D. M. Hall and The John Land, Id. 3,939.]

5. The salvage paid to seamen in cases of shipwreck is a charge on the property saved, and to be borne by the underwriters, if the ship is abandoned to them.

[Cited in Brown v. Lull, Case No. 2,018; Pitman v. Hooper, Id. 11,186. Followed in Cartwell v. The John Taylor, Id. 2,482.]

[On certificate from the district court of the United States for the district of Rhode Island.]

Libel for mariners' wages and salvage, certified from the district court on account of the interest of the district judge, pursuant to the statutes of May 8, 1792, c. 36, § 11 [1 Stat. 278], and of March 3, 1821, c. 51 [3 Stat. 643]. The original libel was for mariners' wages, but as amended it wore a double aspect, asserting a right to wages, and if that could not be sustained, claiming a right to salvage equivalent to wages. The material facts were these: The ship on the 16th of April, 1821, sailed on her voyage from Newport, and arrived at Gibraltar, and there discharged her cargo, and thence proceeded in ballast to Ivica for the purchase of a return cargo of salt. She duly arrived at Ivica in June, and there took on board a cargo of salt, and on the 10th of July sailed on her homeward voyage for Providence. On the 3d of September following in the evening she was shipwrecked on Dutch Island, in Narragansett Bay, and soon afterwards sunk. The shipwreck was occasioned by a heavy gale of wind, which continued during a great part of the night. The master and crew remained by the ship during all the night, exposed to great peril and hardship, and made every exertion to save the tackle and apparel of the ship; and by their efforts and the encouragement of the master, that their wages depended upon the salvage from the wreck, the principal part of the sails, rigging, cables, and appurtenances were saved, and carried on shore at Dutch Island. The crew remained on board doing duty for three days after the wreck, and until they were discharged by the agent of the underwriters, to whom the ship was abandoned in the interval, and who accepted the abandonment. The cargo was totally lost by the shipwreck. Since the libel was filed, the ship has been weighed and repaired, and brought to Providence. But the present was a proceeding in rem against the property saved [the Providence Washington Insurance Company, claimants]. The wages had been paid up to Gibraltar, and during half the time the ship lay there.

Pitman & Tillinghast, for libellants. The shipping articles in this case constitute a maritime contract, which is to be construed and governed by the maritime law. This law, in the construction of contracts, is regulated by those principles of natural justice, which are the same in Westminster as in Rome, moulded by those principles of policy, which the wisdom and experience of all maritime nations have found essential to the prosperity of commerce and navigation. Hence we are to seek for the principles of maritime law among those nations of ancient or modern times, who have been the most conversant in maritime affairs. Hence also, maritime questions are out of their element in courts of common law, but have been carried thither, because in the contention between the courts of common law and admiralty in England, the stronger party prevailed, and the admiralty had no power to grant a writ of prohibition, when the former created their fictions, to extend their jurisdiction. In this country it is of the utmost importance, that on maritime questions, we should be governed by that wisdom of mankind in reference to things maritime, which is called maritime law. First, because a uniformity of decision throughout the United States is essential to our maritime prosperity. And, secondly, the extent of our country from the frozen to the torrid zone, and from the Atlantic to the Pacific, assures us of the greatness of our commercial destiny; and as we are now laying the foundations of maritime jurisprudence, we should seek for wisdom upon such subjects, where only wisdom is to be found. The contract for seamen's wages, being a contract, is to be construed like all other contracts, except so far as being a maritime contract, it is controlled by the policy of maritime law. It is a contract for services to be rendered on board a certain vessel during a certain voyage. To entitle the sea-

man to his wages, he must perform the contract; his duties and rights are correlative. If the voyage is not performed according to the principles regulating other contracts of the like nature, the seaman would not be entitled to his wages, but here this contract is moulded by the policy of the maritime law for the benefit of the seamen; the voyage is divided into as many parts as there are ports of discharge in the course of the voyage, at which the vessel earns freight, and the seamen are considered as entitled to their wages for each of these sub-divisions of the voyage. Here, the rule, that "freight is the mother of wages," operates to the benefit of the seamen, and is probably one of the reasons of the rule. The contract, however, is not, that the vessel shall earn freight, but that the seamen will perform certain services on board of her for a certain voyage. If the services and voyage are performed, and the vessel goes and returns empty, it is not the concern of the mariners, and they shall have their wages. This is in conformity with the principles of natural justice, and the policy of the law. If the vessel be lost, and cargo saved, they shall have their wages to the amount of the freight, if any, where the cargo does not belong to the captain or owners, and to the amount of the cargo saved, where it does; and where no freight is earned, in such a case the sailors are entitled to compensation as salvors merely, but this cannot be claimed under the contract So, where the freight is lost, or the cargo, not by the default of the sailors, and the vessel is saved, or a sufficiency of her to pay the wages, why shall not the mariners be allowed their wages? The same reasons of policy, which would give sailors their wages, where the ship was lost and the cargo saved, would give them their wages, where the cargo was lost and the ship was saved. The same reasons of policy require, that mariners should be induced to save the ship as well as the cargo. And, accordingly, we find, that in the latter case, the laws of Oleron gave the seamen a compensation, and the ordinance of Philip II. of Spain, the laws of Wisbuy, the Hanseatic and the French ordinances, which have been cited, give the sailors their wages in such cases. But it is said, "freight is the mother of wages;" this is true as an affirmative proposition; but does it from thence follow that no wages are recoverable where no freight is earned, though the ship may be saved? Abbott, in his treatise on Shipping (page 444), says: "If by any disaster happening in the course of the voyage, such as the loss or capture of the ship, the owners lose their freight, the seamen also lose their wages." He cites Molloy, bk. 2, c. 3, § 10; 1 Sid. 179; Abernethy v. Landale, Doug. 539; French Ordinance, liv. 3, tit. 4; Des Louages des Matelots, art. 8. Molloy states the rule in these words: "But if the ship perishes at sea, they (the mariners) lose their wages, and the owners the freight. And this being the marine custom, is allowed by the common law as well as the civil law." Here, it will be observed, that the wages are made dependent on the safety of the ship, not on the freight, which by the loss of the ship shares the same fate as the wages. The rule as laid down in Siderfin, is, "that if in the case of the loss of the ship by tempest, enemies, &c. the mariners were to receive their wages, they would not hazard their lives for the safety of the ship." But this reason would authorize the mariners to receive their wages, when they saved enough from the wreck to pay them, to induce them in such cases to hazard their lives for the preservation of the ship, or of any part thereof. The case cited from Douglas was a case of total loss of ship by capture; in such a case, there can be no doubt, but that wages and freight are both lost. The French ordinance cited is evidence of the rule, where there is loss of ship and freight; but it will be seen by reference to the same ordinance (liv. 3, tit. 4, art. 9) that it expressly directs the payment of wages out of the relicks and materials of the ship. Abbott, in page 437 of the above treatise, says, that he has not been able to find any decision of any English court on the point, which is now before the court, but thinks, that on principles of law the sailors would have no claim on the ship for wages. In this country there are decisions expressly on this point, at common law, and in the admiralty. The case of Frothingham v. Prince, 3 Mass. 563, is directly in point. See, also, Relf v. The Maria [Case No. 11,692, note], (observations of Judge Winchester). He says, "The contract of the sailors is a species of copartnership between them and the owners. If all is lost the sailors lose their wages; but if all is not lost, that which remains of ship and freight, is a common property, pledged for the payment of wages. Freight gained and put on shore in the course of the voyage, is saved from a subsequent shipwreck. It goes into the common stock; but like the savings from a wreck, is to the last nail or cable hypothecated to the wages." Giles v. The Cynthia [Id. 5,424], (a decision of Judge Peters). He there says, "The wages for the interval, after the vessel leaves her last port of delivery to the time of the wreck, depend on circumstances. The sailors must assist in saving the ship and goods, or so much thereof as possible, so as to entitle them, by way of encouragement, to their wages out of the property saved." In the case of Weeks v. The Catharina Maria [Id. 17,351], is given a decision of Judge Hopkinson. He there said, "So long as the duty of the mariners calls for their attention and services in the preservation of the ship or cargo, or of any part thereof, so long does their lien for wages inure, in proportion at least to the value of the property so saved." The case of Dunnett v. Tomhagen, 3 Johns. 154, does not affect the above decisions. That was a case of a total loss of the vessel; a portion of the

cargo was saved, which did not belong to the captain or owners, and was brought in another vessel to a place of safety. It was decided, as no freight was here earned, no wages were due, but that the mariners, as against the owners of the merchandize, might be entitled to salvage in proportion to the services rendered by them in saving this property. No fault can be found with this decision. The owners of this merchandize were no parties to the contract, under which the mariners can only claim their wages; and as all the property of the captain and the owners of the ship was lost, (viz. the ship and freight) they had nothing saved from which the seamen could recover their wages. The saving this portion of the cargo was no benefit to any but the owners of the cargo, and the mariners could claim nothing of them but in the character of salvors.

These principles determine in what character the libellants are to recover in this case, whether as salvors merely, or seamen. Salvors are volunteers, no duties are imposed upon them, and their reward is a part of the property saved in proportion to the services performed, and the benefit received. Mariners have duties to perform in reference to the vessel and the cargo, growing out of their contract as construed and moulded by the maritime law. So far as their duties extend their rights extend; so long as they perform what is required of them, so long they are entitled to the reward of their services as fixed by the contract; for it would be a strange construction of this contract, which should impose upon them all the duties at the very time, that the contract in reference to their wages should be considered as dissolved. It is admitted by all, that it is the duty of the mariner to remain by the ship in case of wreck, and to save all he can of the ship and the cargo. Why is it thus made his duty? Because the law gives this effect to his contract, and requires this at his hands. The same law, therefore, while it imposes upon him this duty, will give him the benefit of his contract, and enable him to recover his wages, if, thereby, a sufficiency is saved for that purpose.

A case has been put by the opposite counsel, in the argument, viz. suppose the ship arrives in safety, and all the cargo is lost, are the sailors entitled to their wages? And the answer, which has been given to it, is, that the sailors are not entitled to their wages in such a case, because their wages are dependent on the earning of freight. The title to wages, however, I consider as dependent on the services rendered, and not on the question of freight entirely. In the case supposed, it may be asked, how can the vessel arrive safe, and the cargo be lost? If by jettison, then clearly the sailors are entitled to their wages; the jettison was for the benefit of all, the owners of the ship saved shall contribute; but it is well settled, that the sailors shall not contribute in this case, and so recognized in the case of The Saratoga, decided in this circuit, which has been cited. If not holden to contribution, a fortiori they shall not lose all in such a case. If this loss of the cargo is occasioned by the nature of the cargo, as this is a subject, over which the sailors have no control, it would be hard, that their wages should be affected by it. If, in this case, should the cargo consist of salt, the vessel spring a-leak, and the mariners be employed for most of the voyage at the pumps, and the cargo be in this manner pumped out, should the loss thus occasioned produce a loss of wages? This would be contrary to all principles of natural justice, or maritime policy. The services of the mariners have been the more arduous in consequence of this, and their services have saved the vessel; surely in such a case they must be entitled to their wages. I do not contend, however, that it is of any consequence as to the question of wages, what is the cargo. It must be admitted, that if the owners put no cargo on board, the sailors are entitled to their wages on the arrival of the vessel; and it would be strange indeed, if by reason of a bushel of salt being put on board the wages of the sailors could be made to depend upon the safe arrival of this bushel of salt, and not upon the safety of the ship. But I do contend, that wherever the sailors perform their contract, whether freight is earned or not, or the cargo arrives safe or not, that they are entitled to their wages. That their contract is, not that the vessel shall earn freight, or that she shall carry a cargo in safety, but that they will perform certain services on board of the vessel for a specified voyage. If the services are performed, if the voyage is performed, their contract is performed, and they, upon every principle of justice, must be entitled to the stipulated reward. Is there any principle of maritime policy, which forbids this? None. On the contrary, as policy requires, that every inducement should be held forth to mariners to do their duty, it requires that their wages should be paid them in such a case. Against the loss of freight, or the loss of cargo, the owners may insure, but the mariners cannot insure their wages. This supposed case is not the one before the court, but it serves the purpose of elucidation, as to what extent the maxim, that "freight is the mother of wages," is to govern in cases like the present. The case before the court is one, in which the mariners have done their duty, have performed their services on board the vessel, until she arrived within a short distance of her destined port, and the termination of the voyage, when they were overtaken by a tempest, the vessel became a wreck, the cargo, being but a small portion of the proceeds of the outward cargo, returned to its original element, and the tackle and apparel of the vessel was saved by the crew at the hazard of their lives. In such a case,

although by the strict terms of their contract, the voyage not having been performed, they may not be entitled to their wages, yet by the marine law, governed by the soundest maxims of an enlightened policy, in the language of Judge Peters (Taylor v. The Cato [Case No. 13,786]), the mariner, "as a salvor, regains a rightful claim to wages restored by his exertions in rescuing the articles saved (whether parts of the ship or cargo) from the perils and loss to which the wreck had exposed them." The mariner cannot receive all his wages, unless the property saved be sufficient in value to pay them; hence his claim to wages in such a case is as a salvor, and yet his claim is for wages under his contract, and not simply for sal vage, because salvors, as before observed, are mere volunteers, but the law has imposed this service upon the mariner, and given him a correspondent right; and if his claim was purely as a salvor, he would only be entitled to a portion of the property saved, whereas the whole belonging to the captain and owners, shall be taken, if necessary, to satisfy in such a case the claim of the mariner.

Whipple & Searle, for claimants, contended, that the action for wages was not founded on the service performed by the mariner, but on the earning of freight. 12 Johns. 324. That if a seaman was sick, without any fault of his own, for the whole voyage, he would, notwithstanding, recover wages for the whole time; so if he was captured and put on board of an enemy's ship, and the ship is afterwards re-captured and earns freight, he is entitled to his wages. In this case the seaman performs no service, and yet receives full wages. In the case of a ransom, he performs full services, and receives but a part of his wages, because he must pay a portion of the ransom money; so if a part of the freight is advanced, and the ship is lost, he recovers a proportion of his wages. 2 Show. 283; Abb. Shipp. 484. In the case of a total loss, where no freight is earned, although he performs full services, he receives no wages. In cases of wreck, salvage is allowed, but no wages. Taylor v. The Cato [supra]. On an abandonment of the ship, the owners, and not the underwriters are responsible for wages. 2 Mass. 39. It was therefore urged, that in this case the seamen were not to receive any wages, nor any thing more as salvage, than would have been allowed, if wages had been earned. That the question of salvage was to be in no measure influenced by the loss of wages.

STORY, Circuit Justice. Upon these facts the material questions are, (1) whether the seamen are entitled to any wages beyond those already paid to them; (2) if not, whether they can claim as salvors, out of the goods saved from the wreck.

It is, in my judgment, perfectly clear, that the seamen are entitled to wages up to the time of the ship's arrival at Ivica, and during half the time the ship remained there; for at that place the homeward voyage properly commenced. The ship's having gone from Gibraltar to Ivica in ballast does not vary the case, any more than it would, if the whole of the outward voyage had been performed by the ship in ballast, in which event the seamen would unquestionably have been entitled to their wages. This doctrine is not new in our courts. It was early decided in the supreme court of my native state, after full argument (see Millett v. Stephens, MSS. Sup. Ct. Mass. 1800, cited in Abb. Shipp. p. 4, c. 2, note 1; Abb. Shipp. [Story's Ed. 1810] pp. 487, 490; Hooper v. Perley, 11 Mass. 545), and about the same period adopted by a venerable admiralty judge of our own country. Giles v. The Cynthia [Case No. 5,424]. It appears to me to be a natural result of the principles held by Lord Holt in 12 Mod. 409, 442, and Ld. Raym. 639, 739. And the language of Mr. Justice Powell in Brown v. Benn, 2 Ld. Raym. 1247, demonstrates, that the admiralty had acted with the approbation of the courts of common law upon the rule, that the seamen were entitled to wages, if the vessel arrived at her port of destination, even though it might not be a port of delivery of any cargo. Nor do I consider the case of Hernamen v. Bawden, 3 Burrows, 1844, and Edwin v. East India Co., 2 Vern. 211, as impugning this doctrine, but rather as admitting it, and turning upon the peculiar construction of the contract in that case. My brother, Mr. Justice Washington, in a recent case (Thompson v. Faussat [Case No. 13,954]) adopted a rule somewhat different, deciding, that if a vessel, after discharging her outward cargo, should proceed in ballast to another port to take in a return cargo, and, after receiving it on board, should be lost in the homeward voyage, the seamen would be entitled to full wages up to her port of delivery, and half the time of her stay there; and at most to half wages from that period to the time of her departure from the port, where the return cargo was taken on board. His language, indeed, leaves it doubtful, whether even this latter allowance meets his approbation. "If," says he, "the vessel leaves her port of destination, or unlading, for the purpose of receiving a return cargo, she is at such ports to be considered, either as on her return voyage, or as being in the same situation, as if she had remained at her last port of unlading, there to receive a cargo. If the former, then the whole of the wages from the time she left her port of unlading, including half the time she lay there, would be lost in consequence of the subsequent capture; if the latter, the seamen would be entitled to half wages only during the whole time the ship lay at the port of delivery, and the port of lading and departure. But upon no principle, that I can distinctly comprehend, can the port of lading and departure be considered as the port of delivery, or in other

words, the termination of the outward voyage, unless there be something particular in the contract made with the seamen." The conclusion adopted by the learned judge, is certainly irresistible, if the premises are admitted. It proceeds upon the ground, that the outward voyage terminates at the port of unlivery of the outward cargo, and that there can be no intermediate voyage, which does not constitute a part of the return voyage. That is precisely the point, in which I humbly doubt the accuracy of his doctrine. If a vessel proceed from a port in the United States with a cargo to a foreign port, and there land the same, and take in another cargo for another foreign port, and after landing that cargo take in a return cargo, and be lost upon the homeward voyage, it is clear, that the seamen would be entitled to wages up to the last port of departure, and half the time the ship stayed there. The intermediate voyage would be entirely distinct from the homeward voyage. If the vessel were lost in the intermediate voyage, the seamen would still be entitled to their wages for the outward voyage. And if in such case the vessel on the outward voyage were in ballast, instead of being loaded, the seamen in the same event would be entitled to their wages in the same manner, as if there were a cargo on board. If this be so, it can make no difference, that the vessel is in ballast in the intermediate, instead of the outward, voyage. Whenever the vessel proceeds from one port to another in the service, and for the benefit of the owner, if he does not choose to load a cargo, it appears to me unjust, that his voluntary neglect should operate to the injury of the seamen. The general rule is, that the seamen are entitled to wages not only, when the owner earns freight, but when but for his own act he might earn it. I am not able, therefore, to bring my mind to adopt the doctrine of the learned judge, though no one has a more profound reverence for his judgment than myself, because it seems to me, that in the case proposed, the intermediate voyage in ballast neither constitutes a part of the outward, nor of the return, voyage. The great difficulty on this subject arises from the inaccurate language of the books, which speak of the earning of wages by an unlivery of the cargo at the port of delivery, as if they were not equally due by an arrival at the port of destination, when no cargo is on board, or when the owner chooses to bring the cargo back again. "Port of delivery," in the cases, where this doctrine is found, is a phrase used to distinguish the port of unlivery, or destination, from any port at which the vessel touches in the course of the voyage for other purposes as for advice, refreshment, inquiry after markets, or in consequence of stress of weather, or other necessity. Following, therefore, the analogy of the law in admitted cases, I feel myself constrained, upon my notions of this subject, to hold, that the voyage to Ivica was an intermediate voyage, and that the seamen are entitled to their full wages up to the period of arrival, and during half of the time of the ship's stay there. To this extent, at all events, the seamen are entitled to wages.

But the most important question still remains, whether in the events that have happened, the seamen can claim wages, as such, for the homeward voyage, they having saved from the wreck property more than sufficient in value to cover all the wages. It is laid down as a general doctrine of the English maritime law, from which ours is derived, that the payment of wages is dependent upon the earning of freight; if no freight is earned in the voyage, no wages are due; for, in the expressive phraseology of the ancient law, freight is the mother of wages. Abb. Shipp. pt. 4, c. 2, § 4; 2 Brown, Adm. Law, c. 5, p. 176; 1 Ld. Raym. 639; Dunnett v. Tomhagen, 3 Johns. 154. There are exceptions to the rule not necessary here to be noticed, which on a former occasion, attracted the attention of the court. The Saratoga [Case No. 12,355]. Hence, if the ship be lost during the voyage, so that no freight is earned, the mariners lose their wages. Abb. Shipp. pt. 4, c. 2, § 4; 2 Brown, Adm. c. 5, p. 180 And by parity of reason, if by inevitable accident the freight is partly lost, it seems that the seamen lose a proportion of their wages. 2 Brown, Adm. 176, 180; Poth. Louage de Matelots, note 186; Abb. Shipp. pt. 4, c. 2, § 6; Consolato del Mare, c. 102. The ground of this doctrine is said to be, that "if the seamen should have their wages in such cases, they would not use their endeavors, nor hazard their lives, to save the ship." Anon., 1 Sid. 179. And the argument now is, that the reason of the rule shows, that it does not apply to a case of shipwreck, like the present, where the whole freight is lost; for if the seamen are not entitled to wages for salvage from the wreck, they can have no motive to remain by and use their exertions to save it. And it is earnestly contended, that all the cases, in which it has been held, that no wages are due to the seamen, are cases, not of shipwreck, but where the ship perished at sea, so that there was a total loss of ship and freight. See Molloy, bk. 2, c. 3, §§ 7, 10.

It appears to me, that upon the established doctrines of our law, where the freight is lost by inevitable accident, the seamen cannot recover wages, as such, from the ship owner. And that it is perfectly immaterial in such case, whether the ship be lost, or be in good safety. Nor does the case of shipwreck, strictly speaking, form an exception to the generality of this rule. It more properly introduces another principle, that of allowing salvage to the crew, where they cannot earn wages, and yet perform a meritorious service. Mr. Abbott in his valuable treatise has summed up the doctrine on this subject with great accuracy. He says, "In the case of shipwreck it is the duty of the seamen to exert themselves to the utmost to save as

much as possible of the vessel and cargo. If the cargo is saved, and a proportion of the freight paid by the merchant in respect thereof, it seems upon principle, that the seamen are also entitled to a proportion of their wages; and this is expressly directed by the French ordinance. And for their labour in saving the cargo or the remains of the ship, they, as well as other persons, may be entitled to a recompense by way of salvage." Abb. Shipp. pt. 4, c. 2, § 6; and see 2 Brown, Adm. 175, 176. The laws of Oleron, which may be considered as the primitive groundwork of the marine law of England, evidently contemplate a recompense of the same nature. Laws of Oleron, art. 3, Cleirac. 7. Some of the foreign ordinances provide for the payment of the seamen's wages on these melancholy occasions, if they exert themselves in saving the property, and even authorize a further reward. Others provide for a recompense in general terms. And others again direct the payment of the wages out of the relics and materials saved from the ship. Laws of Wisbuy, arts. 15, 16; Cleirac. 84; Ord. Phil. II. 1563, tit. "Average," art. 12; Cleirac. 8; 2 Magens, 17; Hanseatic Ord. 1614, tit. 9, art. 5; Ord. Rotterdam, art. 219; 2 Magens, 114; Ord. de France, liv. 3, tit. 4, art. 9; 1 Valin, Comm. 703; Abb. Shipp. pt. 4, c. 2, § 6; 2 Brown, Adm. 180; Hanseatic Ord. art. 44; Malyne, 27; Weskett, Insur. tit. "Wages," 16, 17. Mr. Abbott after citing these ordinances, adds, that he has not been able to find any decision in point in the English law; but he considers it a proper inducement to be held out to seamen in cases of shipwreck, that they may obtain their wages, if they save sufficient to pay them, asserting at the same time, that their claim on the ship for wages does not seem according to the principles of law to extend to such a case.

If the question were entirely new, it might, perhaps, be more consistent with the principle of the rule, that the earning of wages shall depend on the earning of freight, to hold, that the case of shipwreck constituted an exception from the rule, and that the claim to wages was fully supported by the maritime policy, on which the rule itself rests. The French marine ordinance provides, that in case the ship is taken or wrecked, with a total loss of ship and goods, the seamen shall claim no wages. Ord. de la Marine, lib. 3, tit. 4, art. 7; 1 Valin, Comm. 701. Pothier in commenting on this article, says, that this is for reasons of expediency, to the end, that the fortune of the seamen may depend on that of the ship and merchandize, and thus the motive of their personal interest might prompt them, in case of accident, to make greater efforts for the preservation of the ship and merchandize. Poth. De Louage des Matelots, note 184. I quote, however, from the excellent translation of Mr. Cushing (pages 111, 112), to whose labors we are indebted for a work, that should be in the hands of every maritime lawyer. This is precisely the reason assigned in 1 Siderfin, 179; and it is most obvious, that if by the loss of the whole cargo the wages of the seamen are lost, they can have but little inducement to expose themselves to perils and difficulties in saving the materials of the ship. The French ordinance, therefore, properly follows up the maritime policy by providing, that if any part of the ship be saved, seamen engaged by the voyage or month shall be paid the wages, that have fallen due, out of the wreck preserved; and, if goods alone are saved, shall be paid in proportion to the freight received, and shall moreover be paid for their days' work in saving the wreck and cargo. Ord. de la Marine, lib. 3, tit. 4, art. 9; 1 Valin, Comm. 703; and see Jac. Sea Laws, 148, 151. Thus nailing the interest of seamen to the last plank of the ship, and the last remnant of the cargo. Valin commends in the strongest terms this doctrine, not only as just in itself, but as intimately connected with the public good (1 Valin, Comm. 701); and the other foreign ordinances, giving wages in addition to salvage, manifest the strong opinion of the commercial world on this subject. See, also, Weskett, tit. "Wages," arts. 16, 17; 2 Browne, Civil & Adm. Law, 180, 181; Code de Commerce, lib. 2, tit. 5, arts. 258, 259.

But whatever may be the true doctrine on this subject in respect to wages, I am clear, that upon principle the seamen are entitled to salvage for their labour and services in preserving the wreck of ship and cargo, or either. It is a claim founded in natural justice, and sustained by the most obvious motives of public policy and interest. It has been urged at the bar, that the crew, while their contract continues, can never be entitled to salvage, and that when their connexion with the ship is dissolved by shipwreck, they can claim no more than common salvors. It is admitted, that for ordinary exertions in the discharge of their duty the crew are not entitled to salvage, because such exertions are fully compensated by their wages, and are stipulated for by the very nature of their contract. See Newman v. Walters, 3 Bos. & P. 612; Mason v. The Blaireau, 2 Cranch [6 U. S.] 240. But to assert, that the crew in no case can become entitled to salvage is begging the very point in controversy; and no authority in support of the assertion has been, or, as far as my researches extend, can be adduced in its support. Sir William Scott on one occasion said, "it may be in an extraordinary case difficult to distinguish a case of pilotage from a case of salvage, properly so called, for it is possible, that the safe conduct of a ship into a port under circumstances of extreme danger and personal exertion may exalt a pilotage service into something of a salvage service." The Joseph Harvey, 1 C. Rob. Adm. 306; and see Newman v. Walters, 3 Bos. & P. 612. Yet pilotage arises from contract, and ordinarily induces

no right to salvage. The rescue of a ship after capture from the hands of the enemy by the original crew is a meritorious case of salvage, although it can scarcely be contended, that such capture immediately works an utter dissolution of the contract, or goes farther than to suspend it during the hostile occupation.

Valin indeed considers, that by the shipwreck the dissolution of the contract of the seamen necessarily follows, because the voyage is broken up. He supposes, that in such a case the seamen are free to abandon every thing, because there is not due to them by the owner of the ship personally any wages or pay for expenses home, and of course there is nothing to say to them, if they refuse to work in saving the wreck. And he adds, perhaps it would be just to withhold from seamen who refuse to work, the wages fallen due, if any thing is preserved; but there must be a law expressly to decide it, for their wages are due out of the property, which is specially affected by them, whether they do or do not contribute to save it. 1 Valin, Comm. 704. Pothier adopts the same doctrine, declaring, that by the accident of superior force, which prevents the continuation of the voyage, both parties are released for the future from their engagements, and the seamen no longer owe their services; and for this reason he holds, that they are to be paid for their days' labour afterwards performed in saving the wreck of the ship or cargo. Poth. Louage de Matelots, note 187 (Cushing's translation) p. 113. I confess, that I doubt the general doctrine here stated. It is more consonant to reason, to justice, and to the nature of the contract, to hold, that in all cases of disaster the seamen are bound to remain by, and preserve the ship and cargo, as far as they can; and to punish their neglect by a forfeiture of any wages, which have been previously earned in the voyage. Although the voyage be broken up, or ended, it does not follow, that the contract of the seamen is dissolved, any more than a charter party would be dissolved by a shipwreck, so as to exempt the master from any care of the cargo. Duties may remain to be performed by master and seamen for the preservation of the ship and cargo, after the voyage is broken up, or becomes impossible to be pursued. And, in my judgment, it is a just interpretation of the maritime law on this subject to hold, that the duty of the seamen continues on these melancholy occurrences, as long as they can be useful in preserving the property at risk, and gathering up its fragments. And I feel the more confidence in this doctrine, since it stands approved by the laws of Oleron (Laws of Oleron, art. 3; Cleirac. pp. 7, 8); and by the most respectable foreign ordinances (Ord. Phil. II., 1563, tit. "Average," art. 12; Cleirac. 8; 2 Magens, 17; Ord. Antwerp; Weskett, tit. "Wages," 11; Ord. Rotterdam, arts. 216-220; 2 Magens, 114; Weskett, tit. "Seamen," 4; Hanseat. Ord. tit. 4, art. 29; Kuricke's Jus. Marit. Hans. 661, 751; Hanseat. Ord. 1597, art. 44; Malyne, 26; S. P. Cleirac. 104; Laws of Wisbuy, art. 15; Cleirac. 84); as well as by the authority of enlightened writers on the common law, and maritime law (Abb. Shipp. pt. 4, c. 2, § 6; Newman v. Walters, 3 Bos. & P. 612; Weskett, tit. "Shipwreck," 1, "Wages," 16, 17; Com. Dig. "Navigation" (I. 5); Cleirac. p. 8; Kuricke Jus. Marit. Hans. 751; Giles v. The Cynthia [Case No. 5,424]; Weeks v. The Catharina Maria [Id. 17,351]).

Assuming, therefore, as I do, that the crew were not ipso facto discharged from their contract by the shipwreck, but were still bound to labor for the preservation of ship and cargo, I am of opinion, that this does not disable them from claiming as salvors for extraordinary exertions in cases so perilous and fatal. It cannot be, that they are bound to labor, where there is no possibility of earning any reward; and if, by the very nature of the case, they are excluded from wages, that very circumstance raises a title of compensation by way of salvage. The sole ground, upon which they are denied salvage in common cases, is that they are earning wages within the line of their ordinary duty; and when this is removed, they stand upon the same right as other persons, to be paid a compensation pro opera et labore. In my humble judgment, there is not any principle of law, which authorizes the position, that the character of seamen creates an incapacity to assume the character of salvors; and I cannot but view the establishment of such a doctrine, as mischievous to the interests of commerce, inconsistent with natural equity, and hostile to the growth of sound morals and probity. It is tempting the unfortunate mariner to obtain by plunder and embezzlement, in a common calamity, what he ought to possess upon the purest maxims of social justice. And how stand the authorities on this subject? It appears to me, that in our own country there is, and for a long time has been, a great weight of judicial opinion in its favor. Judge Peters has uniformly sustained the right of salvage of the seamen in cases of shipwreck; and though he has been supposed at the bar to have allowed wages, eo nomine, in such cases, it is most manifest from his own expositions of his doctrines, that he considered the wages as merely a mode of ascertaining and fixing the rate of salvage. In Taylor v. The Cato [Case No. 13,786]; Giles v. The Cynthia [supra]; Weeks v. The Catharina Maria [supra] (see Weskett, tit. "Wages," 17). speaking of a shipwreck, he says, "The claim of the sailor is not under his contract for wages out of the freight; but in a new character, as a salvor, he regains a rightful claim to wages restored by his exertions in rescuing the articles saved, whether parts of the ship or cargo, from the perils or loss, to which the wreck had exposed them." And the lan-

guage of Judge Winchester in the case cited at the bar, may be interpreted in the same manner. Relf v. The Maria [Case No. 11,692, note]. See Consolato, c. 135, 136; Cleirac. Juris. de la Marine, art. 18. The case of Frothingham v. Prince, 3 Mass. 563, has been supposed to have decided, that the seamen in cases of shipwreck were entitled to wages, as earned in the voyage. When that case was reviewed by this court in The Saratoga [Case No. 12,355], it was thought susceptible of the other explanation. And I am the more confirmed in that opinion, by what fell from the court in a more recent case. The late Chief Justice Parsons argued the case of Frothingham v. Prince for the plaintiff, and in delivering the judgment of the court in Coffin v. Storer, 5 Mass. 252, where the vessel was wrecked on the homeward voyage, after stating, that the wages of the outward voyage were due, he added, "the other wages would have been lost by the wreck, had not sufficient been saved to pay them. They are then a charge on the property saved, in the nature of expenses towards the salvage."

This review of American judicial opinions establishes it as a common and received doctrine, that the wages recovered in cases of shipwreck are recovered in the nature of salvage, and as such form a lien on the property saved. And in this view, they are perfectly consistent with the rule, that makes the earning of freight generally a condition of the payment of wages.

I find also, that Mr. Weskett, in his work on Insurance, states "that it is still frequently practised in England, to allow the wages of the master and sailors to be paid to the time of their discharge, out of the produce of the wreck of the ship and goods saved; and if the saved materials, after deducting the general charges of salvage, are insufficient for that purpose, the seamen to be satisfied therewith; unless the freight is insured and recovered, and in that case the seamen, (freight being the mother of wages) to recover the whole of their wages from the master or owner." This is certainly strong evidence of a general usage on this subject, especially as he considers, that the statutes of 12 Anne, St. 2, c. 18, and 26 Geo. II., c. 19, had allowed them salvage, without mentioning wages, and thereby, as he supposes, had "excluded the master and mariners from any other claim, formerly customary, as for wages." Weskett, Inst. tit. "Wages," art, 17. It is not necessary to consider, whether Mr. Weskett's construction of these statutes be correct or not. It is sufficient, that the English usage was in conformity with the principles of the American decisions.

Upon the principle, then, that the seamen are entitled to salvage, the only remaining question is, as to the quantum of salvage. This is a highly meritorious service on their part, and was attended with no inconsiderable peril and difficulty. The remnants and appurtenances of the wreck, greatly exceed the amount of the wages from the last port of departure; and under such circumstances, I should not be scrupulous in allowing the seamen a liberal compensation. There is no case, in which the seamen have been allowed a less sum than the wages due to them; and the positive commands of foreign ordinances, and the clear language of our own adjudications, all point to the same allowance. It appears to me, that there is sound policy and wisdom in fixing in ordinary cases of this sort, a settled salvage, at least to the extent of wages earned; leaving an additional recompense to be made in cases of extraordinary danger and gallantry, where the service is greatly enhanced by the preservation of life, and the great value of the property at stake. It will stimulate seamen to great intrepidity and alacrity in performing their perilous duties, and prevent those contests and embarrassments, which are always felt, when compensation is to rest in a floating and undefined discretion. I shall, therefore, allow, as salvage, the wages of the seamen for the homeward voyage up to the time of the commencement of the present process, the ship not having then actually reached her port, but the seamen having been discharged from farther duty.

A question has been made at the bar, as to the party by whom this charge is ultimately to be borne, by the underwriters on the ship, to whom she has been abandoned, or by the original ship owner. As all the parties in interest have requested a decision on this point, to prevent farther litigation, I am willing to declare my opinion, that in this case it must be borne by the underwriter on the ship. It is not like the ordinary charge of seamen's wages, which are a charge upon the ship owner, and are to be borne by the freight; but it is an expense in the saving of the materials of the ship for the benefit of the underwriters on the ship, and as they exclusively receive the benefit, they are to receive it cum onere. The case of Frothingham v. Prince, 3 Mass. 563, is directly in point; nor do I think, considering the circumstances of the case, that any thing ruled by the court in Coffin v. Storer, 5 Mass. 252, weakens the effect of the former decision. If it does, in my judgment the former stands upon the true principles of insurance. See 2 Emer. p. 177, c. 17, § 2, and seq.

Decree accordingly.

TWO FERRYBOATS (The CHEESEMAN, v.). See Case No. 2,633.

Case No. 14,289.

The TWO FRIENDS.

[1 Gall. 118.] [1]

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

FORFEITURE—COASTING VESSEL—ILLEGAL TRADE—LICENSE—SALE TO FOREIGNER.

If a coasting vessel be engaged in an illegal traffic, it is a good cause of forfeiture, within the 32d section of the coasting act, Feb. 18, 1793, c. 8 [1 Stat. 316]. If a vessel licensed for the fisheries take on board goods with intent to transport them on an illicit voyage, it is a sufficient "trade other than that for which she is licensed" within the same section. A licensed vessel, transferred in whole or in part to a foreigner, is forfeited under the thirty-second section of the same act, notwithstanding upon such transfer, by the fifth section of the same act, the license is no longer in force. Under the thirty-second section, the cargo found on board at the time of seizure is forfeited, and not merely the cargo on board at the time of committing the offence.

[Cited, but not followed, in U. S. v. Open Boat, Case No. 15,968. Cited in The Nymph, Id. 10,388; The Henry, Id. 6,373; The Willie G., Id. 17,762.]

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

G. Blake, for the United States.

R. G. Amory, for claimant.

STORY, Circuit Justice. The libel in this case contains a number of counts; but three only were relied on at the trial. The first alleges, that the schooner Two Friends was a vessel of the United States, duly enrolled and licensed for the fisheries, and was, during the continuance of such license, transferred to the claimant [Thomas Young], who at the time of the transfer was an alien and subject of Great Britain, and that, at the time of the seizure, she had the cargo on board, which is now before the court. The second count alleges, that the said schooner, being so licensed, was employed in a trade other than that for which she was licensed. The third count alleges, that the claimant, being owner and master of the schooner, for the purpose of procuring a new license and enrolment of said schooner for the fisheries, took and subscribed the oath in that case prescribed by law, whereas, in truth and in fact, at the time of taking and subscribing such oath, he was not and never hath been a citizen of the United States; for all which reasons the schooner and cargo are now claimed as forfeited. The facts appear to be, that previous to the 2d of April, 1807, the schooner was owned by one David Stanwood, and stood enrolled and licensed for the fisheries in his name. On that day he conveyed the one moiety of said schooner to the claimant, upon which the schooner was enrolled and licensed anew for the fisheries, and continued thus employed, under a licence, until the 25th of March, 1808. On this day Stanwood sold his one half of the schooner to the claimant, who thereupon became sole owner. The bill of sale was drawn and executed in the custom house at Boston, and immediately thereupon the old enrolment and license were cancelled, and a new enrolment and license for the fisheries, for one year, were taken out by the claimant in his own name. In order to obtain such new enrolment, the claimant, as owner and master, took the oath prescribed by the act, in which among other things he swore, that he was a citizen of the United States. It abundantly appears from the declarations of the claimant, that he was a British subject, and never had become a citizen of the United States. On the 2d of November, 1809, late in the evening, the schooner was found laden with flour, then lying at Russel's wharf in Boston, the claimant was on board, and declared that the flour, amounting to 102 barrels, was intended to be transported to Point Shirley in Chelsea, but no doubt can remain, that they were really intended for a foreign voyage. At this time the papers of the vessel were in the custom house at Boston.

As to the last count, I doubt, if it alleges any matter, to which the law has attached any forfeiture. It is true that the act for registering vessels, in section 4 (Act Dec. 31, 1792, c. 1; 2 Laws [Folwell's Ed.] 135, § 4 [1 Stat. 289]), declares, that a false oath by the owner in any matter of fact, required to be sworn in that section previous to the grant of a registry, shall work a forfeiture of the vessel. And the act for enrolling and licensing vessels in the coasting trade and fisheries, in section 2 (Act Feb. 18, 1793, c. 8; 2 Laws [Folwell's Ed.] 168 [1 Stat. 316]), provides, that in order to obtain an enrolment, vessels shall possess the same qualifications, and the same requisites in all respects shall be complied with, as are made necessary to the registry of vessels, and the same duties and authorities are given and imposed on officers, and the same proceedings are to be had in similar cases touching such enrolment, and the ships and vessels so enrolled, with the masters and owners thereof, are to be subject to the same requisites, as are provided for the registry of vessels. But it is no where declared, that a violation of these provisions shall be followed with like penalties and forfeitures. On the contrary, the coasting act, in section 30, has substantively declared, that the false swearing in any oaths, required by that act, shall be punished as wilful perjury. Now it is certainly not the duty of the court to seek out new modes of punishment, when the legislature has prescribed a specific punishment in its own direct terms. Nor can it be proper to pronounce that to be a qualification, requisite, duty or proceeding within the act, which is a forfeiture for a wilful violation of the same act. However, I give no absolute opinion on this point.

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

As to the second count; it seems to me, that the decision of the supreme court of the United States in The Active v. U. S., 7 Cranch [11 U. S.] 100, fully applies to the present transactions. In that case the vessel was licensed for the fisheries, and in the night time took on board a cargo of goods of domestic growth and manufacture, and departed from a wharf, but had not left the port at the time of seizure; yet the court held it clear, that the vessel "was employed in a trade, other than that for which she was licensed," contrary to the thirty-second section of the coasting act. Now, there is no other difference between that case and the present, except the departure from the wharf; but that circumstance was not relied on. The act of taking on board the goods, with intent to transport them, seems to have been held a trading within the act.

As to the third count; it appears from the facts, that at the time of both of the transfers to the claimant (and either was sufficient to constitute a forfeiture, the vessel was a licensed vessel; and that immediately afterwards new licenses were taken out, and the vessel was employed under them in the fisheries of the United States. The case, therefore, falls directly within the prohibitions of the thirty-second section of the coasting act, which declares, that a licensed vessel, transferred in whole or in part to any person, not a citizen of the United States and resident therein, shall work a forfeiture of the vessel and the cargo found on board of her. But to rebut this conclusion, the counsel for the claimant has contended that the fifth section of the same act has declared, that no license granted to any ship or vessel shall be considered in force, any longer than such ship or vessel is owned as set forth in the license; and that, by the transfer to the claimant, the license became ipso facto void, and, therefore, the vessel could no longer be considered as a licensed vessel. If this argument be just, it completely defeats the whole operation of this part of the thirty-second section, and avoids the forfeiture in the only case, in which it ought to attach. Such a construction is, therefore, utterly inadmissible. Besides, the license even in this view would not cease, until after the transfer was complete, and the forfeiture would attach at the same instant, and by operation of law would acquire a priority. Plowd. 253, 264. For even an instant may, we learn, be divided for this purpose. See Plowd. 253, etc.; Co. Litt. 185; 14 Vin. Instants. But I do not rely on such niceties. The manifest intent of the fifth section was, that the license should be considered in force no longer than while the ship was held by the same owners; and that a subsequent transfer, even to a citizen of the United States, should not entitle the vessel to the further benefit of it, although such transfer would not work any forfeiture whatsoever. In this view it seems directory to the officers of the United States, as to the allowance of the privileges granted to such vessels. And, indeed, from the peculiar penning of the eighth section of the same act, it seems to result, that the legislature not only intended, that vessels employed in the coasting trade and fisheries should not be owned by foreigners; but also that, even after yielding up that employment, such vessels should not be entitled to carry on a foreign trade, unless registered as ships of the United States, and of course owned exclusively by citizens of the United States.

It is further argued, that supposing the vessel forfeited, yet the cargo is not; (1) because no cargo is forfeited, except what is found on board at the time of the transfer; (2) because the cargo was owned by a bona fide shipper, not being an owner or master or mariner of said ship, and so protected by the thirty-third section of the act.

As to the first point, I am satisfied, that the true construction is, that the cargo found on board at the time of the seizure is forfeited. The object of the legislature was, to punish any illegal trade carried on by persons who either knew, or ought to know, that the vessel is not entitled to such a privilege, but is sailing with false colors.

As to the second point, I answer, that no person appears as claimant but the owner of the schooner, no other person is named in the proceedings as owner; and I cannot decide upon the interests of persons, who do not choose to interpose their claims. I must doubt the real nature of that property, which is defended under cover, and is obtruded so indistinctly on the court, that it has never yet assumed a definite shape, and remains without a local habitation or a name in the cause.

On the whole, I affirm the decree of the court below, with costs.

TWO FRIENDS, The (GIBBS v.). See Case No. 5,386.

TWO FRIENDS, The (SHREWSBURY v.). See Case No. 12,819.

TWO FRIENDS, The (UNITED STATES v.). See Case No. 16,577.

TWO HORSES (UNITED STATES v.). See Case No. 16,578.

Case No. 14,290.

TWO HUNDRED AND EIGHTY-TWO BALES OF COTTON.

[Affirming Case No. 14,291. Nowhere reported; opinion not now accessible.]

Case No. 14,291.

TWO HUNDRED AND EIGHTY-TWO BALES OF COTTON.

[Blatchf. Prize Cas. 302.] [1]

District Court, S. D. New York. Dec. 30, 1862.[2]

PRIZE—LOCALITY OF CAPTURE—COMBINED ACTION OF LAND AND NAVAL FORCES—ENEMY PROPERTY.

1. It is no legal ground of objection to the jurisdiction of the court in a prize case that the arrest was made out of its territorial authority.

2. The court has jurisdiction, under the law of nations and by municipal law, when the subject-matter of the suit is prize of war, without regard to the locality of the arrest or cause of action; and it is unimportant to the question of prize or no prize whether the capturing land and sea forces act in conjunction or separately.

3. Where a combined action exists between vessel-of-war and land forces in making a capture, it is usually cast upon the latter to prove that their co-operation was direct and positive, to authorize their sharing in the prize, and they are not ordinarily recognized as joint captors unless it is proved on their part that the capture was produced by their active interference.

4. The prize court has cognizance of all captures in an enemy country made in creeks, havens, and rivers, when made by a naval force solely, or in co-operation with land forces.

5. The property in this case, consisting of cotton, rosin, staves, and planks, having been captured by the naval forces of the United States during the year, in the attack on Newbern, N. C., and being enemy property, employed at the time by the enemy in aid of hostilities against the United States, by being used in building fortifications, was condemned as prize of war.

In admiralty.

BETTS, District Judge. The above merchandise was brought into this port from Newbern, N. C., on board the schooner Napoleon, and was here arrested as prize, under process of attachment returned into court July 8, 1862. The claimants, Dibble & Brothers, intervened and filed their claim and test affidavit July 22, 1862, as to the rosin described in the libel, and deny the jurisdiction of the court in the cause. The cause is now submitted to the court for decision upon the proofs put in, and the briefs in writing of the counsel for the libellants and claimants, and upon the default of all the other parties in the suit. All the property was arrested and taken into possession by the naval forces of the United States at the capture of Newbern, in March, 1862, by the co-operation of those forces with the army of the United States in the attack and subjugation of that place and the seizure of the property claimed as prize. It is no legal ground of objection to the jurisdiction of the court that the arrest was made out of its territorial authority. The court has jurisdiction under the law of nations, and by municipal law, when the subject-matter of the suit is prize of war, without regard to the locality of the arrest or cause of action,—2 Stat. 759; 1 Kent, Comm. 357; Act Aug. 6, 1861, (12 Stat. 319); Upt. Mar. War & Pr. c. 6, 2d Ed.; and it is unimportant to the question of prize or no prize whether the land and sea forces act in conjunction or separately. Those are questions relative to the distribution or appropriation of the prize property, and do not necessarily, as to third parties, enter into the determination of the right of capture. This capture was made by vessel-of-war conducting warlike operations within the territorial limits of the state of North Carolina, on navigable waters, and the place of attack was approached by the fleet and army, waterborne from the high seas. The location became such that each arm of the public force might act severally in its appropriate sphere, or they might co-operate in action. Where a combined action exists between ships-of-war and land forces in making a capture, it is usually cast upon the latter to prove that their co-operation was direct and positive, to authorize their share in the prize, and they are not ordinarily recognized as joint captors unless it is proved on their part that the capture was produced by their active interference. Hal. Int. Law, c. 30, § 15; 2 Wheat. [15 U. S.] Append. 65. It seems admitted by Chancellor Kent to be the clear rule of prize law that the prize court has cognizance of all captures in an enemy country made in creeks, havens, and rivers, when made by a naval force solely, or in co-operation with land forces. 1 Kent, Comm. 357; The Emulous [Case No. 4,479]. This court has, in several instances, adopted the like rule, as applying to captures made in bays, inlets, and sea communications, within various rebel states. This case does not call for more than a recognition of the principles upon which like seizures have been adjudged in this court, during the present war, to be prize captures, because it is not now designed to extend these references to a full argument, comprehending all the debatable points attending the subject. The witnesses examined before the prize commissioners in this suit were Edward L. Haines, acting master in the United States navy, Ferdinand Crocker, captain of the army gunboat Hussar, and John West, captain of the gunboat Chasseur. The acts which they witnessed or in which they participated, were not performed for the purpose of capturing the property in question. Those witnesses disclose where the prize property was seized and under what circumstances it was taken. The same witnesses are sworn in nine several suits, which are prosecuted for the collective merchandise seized. The suits are only discriminated by the names of the vessels employed to transport the property from the place of capture to this port for adjudication, and the evidence has no relation to its situation afloat anterior to the warlike attack upon Newbern, but is limited to the actual taking of the merchandise libelled. Mr. Haines testifies that he was present at the attack upon Newbern, and the capture of that place, March 14, 1862, by a naval squadron under the com-

[1] [Reported by Samuel Blatchford, Esq.]

[2] [Reversed by the circuit court. Case unreported.]

mand of Commodore Rowan. The navy took possession of the town, and the crews were placed about the town in various positions, and were employed by the commodore to carry the naval stores across the river into the town, and secure them there. The witness was assigned by the commodore to take charge of such stores, and to hold them for the government, or to place on the several parcels the mark "U. S. N." The entire property was transported to New York on various vessels, as means therefor could be procured. A great part of the cotton and rosin seized had been employed in building fortifications in defence of the town, and the residue was owned by citizens of Newbern, who aided the Rebellion by every means in their power, and who are still in the Confederate army. Cannon were mounted by the enemy behind those defences, and there the enemy defended the place on the attack by the United States forces. Armed resistance was made to the taking of the town, and many guns were fired on both sides. The capture of the place was made by the flag-ship Philadelphia, and the other ships of the navy assisted her. This witness was on board one of the armed vessels, and was engaged in the action. He says he is well assured that the entire property seized was the manufacture or production of Newbern. The place was, prior to the capture of this property, in a state of armed insurrection, as was notorious to all, until it was captured, as above stated. Two of the brothers Dibble are now in the Confederate army. The same leading facts are stated by the other two witnesses who were examined. No one intervenes for the other property named in the libel and monition, and judgment by default was rendered against the two hundred and eighty-two bales of cotton, the two thousand white oak staves, and the quantity of yellow pine planks proceeded against in the suit. This property having been all captured during the war, and being at the time employed by the enemy in actual aid of hostilities waged against the United States, and being enemy property, it is decreed to be subject to condemnation and forfeiture to the libellants.

This decree was reversed, on appeal, by the circuit court, July 11, 1864, for want of jurisdiction in the district court.

[Subsequently a bill of charges for services rendered under the official employment of the officers of the court was allowed. Case No. 14,292.]

Case No. 14,292.

TWO HUNDRED AND EIGHTY-TWO BALES OF COTTON.

[Blatchf. Pr. Cas. 610.] [1]

District Court, S. D. New York. Nov. 15, 1864.

PRIZE—RESTORATION TO OWNER—COSTS OF STORAGE.

In this case, after the decree of this court condemning the property seized as prize [Case No. 14,291] had been reversed by the circuit court on appeal [case unreported], and the property had been restored to the claimant, a warehouseman presented his bill of charges for services in regard to the property, rendered under the official employment of the officers of the court. The court allowed the bill, the amount being a charge upon, and payable out of, the fund for defraying the expenses of suits in which the United States is a party or interested, under section 14 of the act of June 30, 1864 (13 Stat. 311).

In admiralty.

BETTS, District Judge. The above property having been captured as prize of war, and transmitted to this district, and here libelled, June 16, 1862, by the government, for adjudication in eight distinct actions, and having been further proceeded against by regular course of practice to an interlocutory decree for the sale of the property, under which the marshal made public disposal thereof, July 26th thereafter, for the sum of $66,447.90, and the claimant having, October 23d subsequently, on leave of the court, interposed his defences, by claim and answer, to the several actions, and the issues thereby formed between the parties having been brought to hearing on motion of the libellants, November 23, 1862, and this court having, on due considerations of the pleadings, proofs, and allegations in the causes, rendered judgments and decrees in the said suits January 5, 1863, condemning the whole of the said prize property arrested therein to forfeiture, and appeals having been thereafter taken from the decisions so made in this court to the circuit court in this district, wherein such proceedings were had that, in July, 1864, orders and decrees were rendered and perfected of record in the appellate court, reversing the decrees made by this court upon the matters appealed from, and decreeing and adjudging a restoration to the claimants, in entirety, of the prize property condemned as forfeited by the decrees of this court, which judgments of the circuit court were thereupon executed and carried into full effect, by order of the said appellate court, bearing date July 12, 1864, thereupon, subsequent and consequent to the before mentioned proceedings, Robert L. Ward and Walter S. Gove, composing the firm of Ward & Gove, warehousemen, transacting business in the city of New York, presented to this court, for adjustment and allowance by this court, with notice to, and consent of, the district attorney, their bill of charges for their services and expenditures in behalf of the libellants, in respect to the aforesaid property, which services had been theretofore rendered under the official employment of the officers of the court, during the pendency of the aforesaid actions therein, and between the 17th of April, 1862, and the 26th of July, 1862, and in pursuance of the authority of the second section of the act of congress in relation to the administration of the law of prize, approved March 25, 1862 (12 Stat. 374), praying the court to

[1] [Reported by Samuel Blatchford, Esq.]

allow to them their costs and charges, and such relief and remedy for the recovery thereof as may be authorized by law. Copies of said application to the court, and of the evidence supporting their claim, were served, with notice of the motion, prior to its being made, upon the marshal and district attorney. No objection was interposed by either of those officers to the application. On the same day the court ordered a reference of the application, with the bill of charges and disbursements aforesaid, to be made to the prize commissioners, to examine the said bill of charges and proofs, and report to the court the sum justly and reasonably allowable thereupon. On the 4th of November instant, the said commissioners reported that "the account is just and true, and that the sum of $7,619, being the whole amount thereof, is justly and reasonably due to said Ward & Gove thereupon." I accordingly, upon the aforesaid report and opinion, adjust and allow the said claim for services and expenses at the sum of $7,619 to the said Ward & Gove. The final decree in this cause by the circuit court being for the restitution of the prize property seized, and there being no money subject to the order of this court in these causes, the costs aforesaid became a charge upon, and payable out of, the fund for defraying the expenses of suits in which the United States is a party or interested, according to the provisions of the fourteenth section of the act to regulate prize proceedings, and for other purposes, approved June 30, 1864 (13 Stat. 311). Order accordingly.

TWO HUNDRED AND FIFTY-SIX BARRELS OF BEER (UNITED STATES v.). See Case No. 16,579.

Case No. 14,293.

TWO HUNDRED AND FIFTY BARRELS OF MOLASSES v. UNITED STATES.

[Chase, 502;[1] 11 Int. Rev. Rec. 92; 3 Am. Law T. Rep. U. S. Cts. 21.]

District and Circuit Courts, D. South Carolina. June Term, 1869.

FORFEITURE—CUSTOMS—SMUGGLING—ADMIRALTY JURISDICTION—APPEAL—TRIAL.

1. In a libel to decree goods forfeited by reason of a fraud on the revenue laws, admiralty has jurisdiction although part of the goods have been landed before the seizure.

2. But if admiralty had no jurisdiction, this must be pleaded, and the objection could not be made otherwise.

3. Under the act of March 3, 1863 [12 Stat. 737], if it be attempted to practice fraud upon the revenue in regard to only a portion of the cargo imported, the whole of the cargo belonging to the party attempting to commit the fraud is forfeited.

4. On an appeal from the district judge in an admiralty cause to the circuit court, the trial in the circuit court is de novo; and the opinion of the district judge can not be read.

The case is so fully stated and discussed by the district judge that his opinion is given in full.

BRYAN, District Judge. The facts of this case are as follows: Some time in July, 1866, the schooner Aid came to Charleston from Matanzas, with a part of her cargo included in one invoice consigned to Salas & Co. The invoice was produced by one C. P. Madan at Matanzas, who represented himself as the purchaser of the goods and swore to the correctness of the invoice required under the act of 1863 (2 Brightly's U. S. Dig. p. 177, § 78; 12 Stat. 737). On the arrival of the vessel, T. P. Salas, as consignee, presented the invoice at the custom house, and obtained an order for the entry of the goods; a part of these goods included in the invoice were landed and placed on drays and were removed to the store of Salas & Co. Suspicion having been excited, an examination of the goods took place, which resulted in the discovery that seven packages—viz., three hhds. marked in the invoice as containing sugar, contained boxes of cigars packed in the sugar, and four hhds. marked as containing sugar, contained each a quarter cask of brandy, packed in the sugar, and that out of thirty kegs marked California wine in the invoice, four kegs were found to contain rum. Upon the first suspicion of fraud, the collector revoked his entry, and ordered the goods on board ship as well as those which had already been landed to be seized. This was done, and the goods seized on board the vessel, and those, together with all the goods contained in the invoice, were taken possession of by the collector, and held under seizure by him. The libel was filed seeking to forfeit the whole of the goods contained in the invoice, on the ground that the invoice itself was false, and had been made up with intent to defraud the revenue, and all the goods contained therein and intended to be thereby entered, were therefore forfeited. In this libel Salas & Co. intervened as consignees, and claimed all the goods which were not falsely packed, except twenty bags of coffee, as belonging to six or seven different shippers in Matanzas and Havana, and at their instance the goods were appraised, and they deposited in the registry of the court eighteen thousand eight hundred and twenty-one dollars and seventy-two cents, and took possession as agents of the alleged owners of the goods which were correctly stated in the invoice, except the twenty bags of coffee, which were claimed by one A. J. Gonzales of Charleston, and the said A. J. Gonzales, having executed the usual bond, received the twenty bags of coffee. (The false packages not having been claimed, were condemned and sold.) Subsequently six or seven claims by different persons as owners were put in, covering every portion of the invoice, excepting the false packages and the coffee,

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

and claiming the goods as their property. A great deal of testimony was adduced to show that the ownership of the property was in the six or seven claimants, and that the false packages were shipped through mistake by Da Costa & Madan, the shippers in Matanzas; but Da Costa & Madan were examined by commission, and their answers established the fact that none of the parties claimants before the court, except Gonzales, were owners, or interested in any of the goods now sought to be forfeited, but, on the contrary, that F. P. Salas was the person who superintended the packing and shipment, he being at Matanzas at the time, and the name of Da Costa & Madan only used to clear the goods at the custom house in Matanzas. One of these commissions was adopted by the claimants and used as their testimony, and by it it was very clearly shown that none of the parties claimants before the court, except Gonzales in the coffee, were either owners or at all interested in the goods. No plea to the jurisdiction was filed, and the case was submitted upon the libel and answer and the testimony.

On the part of the claimants it was contended—First. That the court of admiralty had not jurisdiction, inasmuch as the goods were partly landed before the seizure. Second. That the libel was defective. Third. That under a proper construction of the act, only the articles falsely invoiced were forfeited, and not all the contents of the invoice.

On the part of United States it was claimed, that the whole of the goods mentioned in the invoice were forfeited; and it was insisted, first, that according to the case made by the pleadings and the proof, the goods were derelict, and introduced into the United States without an owner, as it was shown that Madan, who, by his oath on the invoice, claimed to have been the purchaser, was not the owner. That Salas & Co. by their claim expressly denied the ownership, and stated that they were but the consignees or agents of the seven claimants, and that the testimony adduced and introduced by these claimants themselves proved conclusively that they were not the owners, and never had been interested in the cargo, and that the whole matter was an attempt to defraud the revenue either by F. P. Salas or by Salas & Co., and that the goods thus being without an owner, were rightfully seized by the collector, and the money deposited by Salas & Co., who had received the goods, was forfeited, as was also the bond given by Gonzales.

The act of March 3, 1863, § 1 (12 Stat. 737), under which this libel is filed, provides that no goods, wares, or merchandise imported into the United States after July 1, 1863, shall be admitted to an entry, unless the invoice presented shall in all respects conform to the requirements thereinbefore mentioned, and shall have thereon the certificate of the consul, vice-consul, or commercial agent of the United States, nor unless said invoice be verified at the time of making such entry by the oath or affirmation of the owner or consignee, or the duly and authorized agent of the owner or consignee thereof; certifying that the said invoice and the declaration thereon are in all respects true, and were made by the person by whom the same purports to have been made, nor, except as thereinafter provided, unless the triplicate transmitted by said consul, vice-consul, or commercial agent to the collector, shall have been received by him. The act requires that the invoice of goods to be imported, shall be made in triplicate and signed by the persons or person owning or shipping said goods, wares, &c., if the same shall have been actually purchased, &c., and requires that such invoices, at or before the shipment thereof, be produced to the consul, vice-consul, or commercial agent of the United States nearest the place of shipment, and shall have indorsed thereon a declaration signed by the purchaser, manufacturer, or agent, setting forth that said invoice is in all respects true; that it contains the true and full actual cost thereof, and of all charges thereon, &c. The act further declares, "And if any such owner, consignee, or agent of any goods, wares, and merchandise, shall knowingly make or attempt to make an entry thereof, by means of any false invoice, or false certificate of a consul, vice-consul, or commercial agent, or of any invoice which shall not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, said goods, wares, and merchandise, or their value, shall be forfeited and disposed of, as other forfeitures for violations of the revenue laws." It is upon this last clause the present libel is founded. The first question raised by the defense in the argument, was as to the jurisdiction of the admiralty court, no plea to the jurisdiction having been filed.

The judiciary act of September 24, 1789, c. 20, § 9 (1 Stat. 73), enacts that the district court shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas. The libel expressly states that seizure was upon the water, navigable, &c. To this allegation, no plea denying the fact appears, but the objection is taken in the argument that this court is ousted of its jurisdiction, because it appears that a portion of the goods were landed before the seizure was regularly made. Mr. Conkling in his "Treatise on the Original Jurisdiction and Practice of the Courts of the United States," at page 592 of the third edition, lays it down as a settled rule "that the fact or the place of seizure is not put in issue

by a general denial of the alleged forfeiture."

A claimant who wishes to avail himself of such an objection (to the jurisdiction) must therefore put in an answer in terms denying the allegation of the fact or the place of seizure, and he cites the case of The Abby [Case No. 14]. In that case Mr. Justice Story also placed his decision upon the further ground that a plea to the merits was an admission of the jurisdiction of the court, and he was also of opinion, that applying for and receiving the property on bond, was such an acknowledgment of jurisdiction as the claimant was not at liberty to controvert. If this be the true rule, the claimants in this case, having not only failed to plead to the jurisdiction, or to traverse the fact or place of seizure, but having applied to this court for the property in question, are certainly precluded (at this stage of the proceedings) from taking advantage of any want of jurisdiction.

But let us examine the facts and proofs as made out by the evidence, and we will find that the first seizure was regularly made upon the vessel and on the water. This was the first original and legal seizure; the subsequent collection and taking possession of the goods which had been landed, was but an incident properly following upon the original seizure made on the water. It is a well-established rule in all cases of concurrent jurisdiction that the court which first obtains and entertains jurisdiction over the same subject-matter, is entitled to go on and decide the whole case ([Smith v. M'Iver] 9 Wheat. [22 U. S.] 535); and in this case the first seizure having been made on water, of a part of the goods, under an order to seize all the goods mentioned in the invoice, the jurisdiction of the admiralty court was obtained, and it has the right therefore to go on and decide the whole case involving the subject-matter—which subject-matter is the forfeiture of the whole of the goods mentioned and contained, or entered by means of that single invoice. But it is objected that the admiralty and common-law sides of this court are of separate, and not concurrent jurisdiction, depending on the place of seizure as to which court shall entertain jurisdiction. This objection, in the present case, can not, it seems to me, have any effect. The object of the libel is to forfeit all the goods entered, or attempted to be entered by means of a single false invoice; a portion of the goods, it is true, were loaded before the fraud was discovered, but the seizure was actually first made of a portion on board the vessel; and the jurisdiction as to that portion is clearly in the court of admiralty; but the question whether the whole of the goods, &c., entered under the false invoice are, or are not forfeited, is necessarily involved in any decision which may be made, and if this be the question, how can the invoice be divided, whether tried in either or both sides of the court? The question involves the whole of the goods, and not a part, and necessarily, therefore, the court that first obtains the jurisdiction, must go on and decide the whole case; otherwise it might so happen that for the same act, which tainted the whole of the goods, a part might be condemned in one court, and a part released by another.

In contemplation of law (if our view be correct, the goods contained in the invoice are one inseparable—one indivisible entirety) it is to be regarded as if it were a chain, one portion of which, when seized, was on the vessel, and the other portion on land. Or, to take another illustration, a horse seized with his fore-feet on the land, and his hind-feet on the vessel. The material unity, the physical links creating one whole, may be wanting in this case, but as strong a legal unity exists as we have given in the illustrations of the horse or the chain. In these cases it must be admitted that a seizure on the land or the water would give jurisdiction of the whole subject-matter, the chain or the horse, as in this case, the invoice, or all the goods contained in the invoice. I am therefore forced to the conclusion that the first seizure having been made on shipboard, gave to the admiralty proper, the instance side of the court, the jurisdiction of the whole, inasmuch as the permit to land, and the entry of the whole of the goods, was obtained upon a single invoice, they could not be separate, and the subsequent taking possession of the goods which had been landed, was but a part of the single act of seizure upon the waters.

The libel is in the usual form; it sets forth the seizure and forfeiture, the reasons of such seizure, and prays process and condemnation. The cause of seizure and forfeiture are set out in the words of the act, and this I think sufficient. U. S. v. Two Hundred Chests of Tea, 9 Wheat. [22 U. S.] 430; [U S. v. One Hundred and Twelve Casks of Sugar] 8 Pet. [33 U. S.] 277; [Barlow v. U. S.] 7 Pet. [32 U. S.] 410.

The next question, and the main one in the case, is whether, under the act, all of the goods which were entered or attempted to be entered are forfeited, or only the false packages. This is a new question under the act, and now for the first time to be decided. The words of the act, after requiring an invoice which shall be true in every particular, enacts that no goods, wares, or merchandise imported into the United States, shall be admitted to an entry, unless the invoice presented shall in all respects conform to the requirements of the act—shall have the certificate of the consul thereon, &c., nor unless said invoice be verified at the time of making such entry by the oath or affirmation of the owner or consignee or their agent, certifying that the said invoice and the declaration thereon are in all respects true—then declares—"And if any owner, consignee, or agent of any goods, wares, and merchandise

shall knowingly make or attempt to make an entry thereof by means of any false invoice, false certificate, or of any invoice which shall not contain a true statement of all the particulars required, or by means of any other false or fraudulent paper, or by any other false or fraudulent practice or appliance, said goods, wares, and merchandise, or their value, shall be forfeited." [12 Stat. 738].

It would seem to me that the signification and reach of these words are very clear: no entry can be made except by a true and perfect invoice sought to be entered and passed through the custom house; the whole of the goods mentioned in the invoice, or not mentioned, are then admitted to entry by virtue of the invoice, and if the invoice be false in any particular, and the agent, owner, or consignee, shall knowingly use it to obtain the entry, the whole of the goods, the entry of which was thus obtained, is forfeited. An invoice, full and faithful in every particular, of all goods attempted to be passed through the custom house is the means and test used by the country to protect its revenue, its officers, and honest dealing, and the sin of a false invoice infects all the goods embraced in it, or sought to be embraced by it, or under cover of it. It is the false invoice that is punished, and the forfeit extends to everything embraced within it, or identified with it in the transaction. No other measure of forfeiture is indicated, no other qualification.

The great object of the law is to enforce the collection of the revenue, secure fair dealing with the officers of the customs, and protect honest trade by the instrumentality of an invoice true in all particulars, as to all goods sought to be entered by it or by reason of it, and with this object in view, the invoice is one, the sin against it one, and the measure of forfeiture can only be one and coextensive with it. The fraud, whatever it be, covers the whole invoice. It is the plague-spot that infects and corrupts everything embraced in it, or not embraced in it, yet sought by reason of it and by a foul practice connected with it, to be clandestinely introduced without payment of the proper duty, into the country in fraud of the revenue, in contempt of the government and its officers, against public morals, and at the expense of all honest traders. Revenue laws are not penal in the sense that requires them to be construed with great strictness in favor of defendants. They are rather to be regarded as remedial in their character, and to prevent fraud, suppress public wrong, and promote the general good. They should so be construed as to carry out the intention of the legislature in passing them, and most effectually accomplish these objects. Taylor v. U. S., 3 How. [44 U. S.] 210; Cliquot's Champagne, 3 Wall. [70 U. S.] 145. The objects of the act in question are to compel fair dealing, and to suppress attempted frauds upon the revenue, and attempted deceits practiced on revenue officers, as well as prevent smuggling. The smuggler does not simply defraud the revenue; he also defrauds and injures every honest trader who has to compete with him in the market, and who would scorn, for treacherous and dishonest gain, to stain his conscience with a false oath or soil his hands with profit slimed and fouled with perjury.

The previous acts of congress seem to have been more strictly for the protection of the revenue. Section 67 of the act of March 2, 1799 (1 Stat. 77), authorizes packages to be opened, and forfeits all goods which do not answer to the invoice. Section 21 of the act of August 30, 1842 (5 Stat. 525), authorizes collectors to examine packages, one at least in every ten, and if any thing is found which was fraudulently in the package, the contents of the entire package are forfeited.

Thus stood the law up to the time of the passage of the act of 1863, now in question. The above acts seem not to have been sufficiently stringent and exacting to compel fair dealing, suppress frauds upon the revenue, and deceits upon officers, and the act was passed, and must be construed as cumulative and making an advance upon previous legislation, adding additional penalties, and providing ampler guards and restraints. It requires three invoices to be made under the sanction of an oath before the shipment of the goods, the certificate of the consul, &c., nearest the place of shipment, that such invoice has been produced to him, &c., and thereupon, that the person producing the same, shall receive one of said triplicates, to be used in making entry of the said goods, and upon the production of this invoice, verified by the oath of the owner, consignee, or agent, an entry could be made of all the goods covered by the invoice. This was all that was required,—surely an easy requirement,—and if the parties acted honestly and fairly, every opportunity and means were thus given and afforded to facilitate honest and fair dealings; but in case the owner, agent, or consignee should act dishonestly or unfairly, he was properly punished by losing the whole of the goods he thus entered by his false invoice or any false device.

In Cliquot's Champagne, 3 Wall. [70 U. S.] 144, under this very section and act, it is said: "The court has to consider whether the case has been made out, and the three following points having been determined, the case is made out under the act. First. Did the owner, agent, or consignee of the goods mentioned in the invoice furnished to the collector, make or attempt to make an entry of said goods. Second. Did the agent, consignee, or owner make use of a false invoice or use any other false or fraudulent document or practice, in making or attempting to make such entry? Third. Did the agent, owner or consignee know, at the time of making, or attempting to make said entry, that he was using a false invoice, or employing any false document or practice to

make such entry?" Apply these tests to the case before us: Salas & Co., who were certainly the consignees, if not the owners, made or attempted to make an entry of the whole of the goods mentioned in the invoice furnished to the collector. They presented and used a false invoice which is sworn to by Madan as the purchaser; the proof shows that F. P. Salas, one of the firm of Salas & Co., and he alone, either on his own account, or on account of his firm, was the purchaser, shipper, and packer of the invoice (except the twenty bags of coffee of Gonzales), and the invoice did not contain a true statement of the goods which were really entered or attempted to be entered under it. Salas & Co., through F. P. Salas, who put up and shipped the invoice, and who used it before the collector to make the entry, knew that the invoice so used was false in all the above particulars. This fixes the case, as far as the invoice is the invoice of any purchaser, manufacturer, or owner, or the "duly authorizer agent" of such purchaser, manufacturer, or agent.

The principle of the law, as we apprehend it, and as contended for by the claimants in this case, does not extend to the claim of Gonzales. He was not directly, as purchaser, manufacturer, or owner, the maker of the invoice, and it seems to the court that a fair interpretation of the whole evidence justifies the conclusion that Salas, the shipper, was not (in the language of the law) "his duly authorized agent." He was an intruder. He acted without the authority of Gonzales, and against his wishes and feelings. He would not have made him his agent. If he had confided in him and made him his agent, and Salas had abused his confidence, it would have been his misfortune, and he could not have escaped the penalty of the law, so far as this court could relieve him. His remedy would have been against his betrayer, or a resort to the equity of the government administrated by the secretary of the treasury.

With this exception the attempt here (as demonstrated by the evidence), was a most deliberate and skillfully contrived scheme to defraud the government of its revenue, in contempt of the officers of the customs, at the expense of all honest trade, and in shocking violation of commercial morals. And to add to the enormity of the offense, when the fraud was detected, it was sought to cover it up, by perjury so unblushing, elaborate, and multiplied as not often poisons the atmosphere of public justice. The case, in its entire character, vindicates the equity and policy of the act, and the forfeiture of the whole venture is only a part, and a very insufficient part, of the punishment that should be visited upon conduct so dishonest and criminal.

[It is therefore ordered, adjudged, and decreed that the said goods, wares, and merchandise (with the exception of the twenty bags of coffee, the property of Gonzales), mentioned and set forth in the libel filed in this case, represented by the money now in the registry of this court, their legal substitute, be forfeited. It is further ordered that the bond of A. J. Gonzales be discharged. It is further ordered that the money now in the court registry, as aforesaid, be retained subject to the orders of this court, in conformity to the provisions of the statutes of the United States in such case made and provided.] [2]

The cause came on appeal to the circuit court, and was argued by Mr. Corbin, U. S. Dist. Atty., for the United States.

Porter & Conner, for claimants [with whom was A. G. Magrath]. 1. The libel alleges a seizure on waters navigable from the sea, &c. The testimony shows that nearly all the goods were seized after they were landed. The first question is as to jurisdiction of the court. It is the place of seizure which decides the jurisdiction. The Betsey, 4 Cranch [8 U. S.] 443; The Bolina [Case No. 1,608]. If seizure is on land, triable by jury; if on sea, by court. La Vengeance, 3 Dall. [3 U. S.] 297; The Sarah, 8 Wheat. [21 U. S.] 394. The two jurisdictions are as distinct as if vested in different tribunals. The Sarah [supra]. The libel charges seizure on navigable waters. Probata must correspond with allegata, and only so much can be condemned under these proceedings as is proved to have been seized on navigable waters. Conk. Prac. 515. It is for libellant to prove jurisdiction. The argument that objection should have been taken by plea in abatement hardly merits reply. It presupposes jurisdiction in a court of limited jurisdiction, and casts proof of negative on claimant. The case in 8 Wheat. shows the true rule. The moment it appears that seizure was on land, jurisdiction ceases.

2. As to the offense. The charge is, the attempt to make an entry by means of false invoice. Act 1863, § 1 (12 Stat. 737); 2 Brightly's U. S. Dig. tit. "Imposts," § 78. All the preceding portion of the section refers to what the invoice shall express. No allegation that this invoice does not conform to the act in all these respects. The whole charge is that seven packages included in the invoice were fraudulently packed. As to them, the invoice is false. We concede that these seven packages are justly forfeited, but we deny that the fraudulent character of these packages can affect the rest of the goods, wares, and merchandise included in the invoice. As to these latter, there is no attempt to enter them by means of a false invoice. The argument of district attorney is that no matter how regular and true may be all the rest of the invoice, and all of the goods included therein, they are nevertheless forfeited, because in bad company. He

[2] [From 11 Int. Rev. Rec. 92.]

extends the act by construction, and condemns all as fraudulent because a part is. If the false could not be separated from the true, the condemnation of both might be asked with some show of reason, but where they are distinct and separable, the blending of innocent and guilty in one general condemnation seems repugnant to common sense and common justice. Such conclusion ought to rest on express enactments, not upon construction. The words of the act do not forfeit all the goods included in the invoice. It says, "If any owner of any goods, wares, or merchandise, shall knowingly make an entry thereof by means of any false invoice, said goods, wares, and merchandise shall be forfeited." The object of the legislation was to insure that the goods entered on the invoice should be correctly described, and the fair and reasonable interpretation of the act is to forfeit the goods which are not correctly described on the invoice. The construction contended for by the district attorney, gives no protection to the government. All that a fraudulent shipper has to do is to place his fraudulently packed goods in separate invoice, and the government is limited in its forfeiture to the falsely packed goods. The construction contended for by the district attorney, would not defeat the guilty. It will only punish the innocent. The act of 1823 (1 Brightly's U. S. Dig. 366 [3 Stat. 329]) authorizes shipper to include all articles shipped by him in one invoice; shipper may include in same invoice goods of twenty different people, and the fraud of one will forfeit the property of all. The express companies transporting goods from Europe to New York, include in one invoice, we suppose, the goods of fifty different owners, each trip of the steamer: shall a falsely packed package forfeit the whole invoice? "A construction which would sanction so glaring an invasion of the law ought in no case to be adopted." American Fur Co. v. U. S., 2 Pet. [27 U. S.] 367. The court below felt the injustice of such construction, and in the present case exempted from forfeiture Gonzales' goods. Yet they were all included in the same invoice, entered by the same party, and seized in the same manner. But two constructions can be placed upon the act: one that it forfeits all the goods included in the invoice; the other that it forfeits only the fraudulent packages. The exemption of Gonzales' goods shows the judgment of the court that the forfeiture does not extend to the entire invoice. It must therefore attach only to the fraudulent packages. A reference to the language of preceding acts and the decisions under them will sustain the view we take. See act of 1799 (1 Brightly's U. S. Dig. p. 409, § 386). The goods, wares, and merchandise forfeited are the goods, wares, and merchandise invoiced below cost. U. S. v. Wood, 16 Pet. (41 U. S.) 342. Under act of 1799, § 67 (1 Brightly's U. S. Dig. p. 409, § 387 [1 Stat. 677]), if the packages shall be found to differ from the entry, "then the goods, wares, and merchandise contained in such packages shall be forfeited." Under act of 1830 (section 4), all that is forfeited is the package which does not correspond with the entry. 1 Brightly's U. S. Dig. p. 367, § 206 [4 Stat. 409, § 4] See act of 1832 (1 Brightly's U. S. Dig. p. 413, § 405 [4 Stat. 593, § 14]). See act of 1842 (1 Brightly's U. S. Dig. p. 413, § 206 [5 Stat. 565, § 19]). See act of 1842 (Id. p. 413, § 407 [5 Stat. 565, § 21]). See act of 1799 (1 Brightly's U. S. Dig. p. 374, § 239 [1 Stat. 661, § 46]). When the acts intended to forfeit all that is connected with the fraud they say so, in unmistakable terms. "The whole contents, together with the envelope, shall be forfeited." Act of 1864, § 1 (2 Brightly's U. S. Dig. p. 183, § 106). "All invoices and packages whereof any such articles shall compose a part are hereby declared liable" to forfeiture. Act of 1857, § 1 (1 Brightly's U. S. Dig. 366, § 200 [11 Stat. 168]).

CHASE, Circuit Justice. This cause comes here on appeal from a decree of condemnation pronounced by the district court against certain merchandise, as forfeited to the United States, by reason of attempted fraud upon the revenue. The decree of condemnation is issued against the whole cargo of the British schooner, and mentioned in an invoice of goods consigned to Salas & Co., and imported into Charleston on July 2, 1866, from Matanzas, in the island of Cuba. The packages falsely entered upon the invoice were four hogsheads entered as containing sugar, each of which in fact contained a cask of brandy, or distilled spirits, packed in sugar; and three other hogsheads entered as sugar, each of which in fact contained a case of segars, packed in sugar; and four quarter casks entered as wine, each of which in fact contained rum or distilled spirits. There were twenty-five hogsheads entered as sugar in all, of which seven were unlawfully entered as first stated, and thirty quarter casks entered as wine, of which four were unlawfully entered. The rest of the hogsheads of sugar, the rest of the quarter casks of wine, and the whole remainder of the cargo, consisting of two hundred and fifty barrels and twenty-three tierces of molasses, one hunded and thirty-one barrels of sugar, and a large quantity of other goods, such as maccaroni, olive oil, sugar, syrup, and the wine, seem to have been truly entered upon the invoice. The whole invoice was consigned to Salas & Co., of Charleston. The evidence excludes all reasonable doubt that the goods, except twenty bags of coffee, were purchased by or for account of Salas & Co. in Cuba, either through Da Costa & Madan, or with funds furnished by that firm. The whole cargo was shipped by Da Costa & Madan, under the direction of F. P. Salas, and bills were drawn by them on Salas & Co. for the amount of it.

The claims put in by other persons are unsupported by the proofs. It is remarkable that Salas & Co. disclaim ownership, and claim only as consignees. As consignees, however, this firm, through one of its members, F. P. Salas, represented the invoice as true, made an entry of the goods by reason of it at the custom-house, Charleston, and obtained the usual permit to land part of the goods, for which he was prepared to pay the duties. A part of these goods were landed and conveyed to the house of Salas & Co. While the Aid was being discharged under the permit, it was discovered that a part of the goods were fraudulently entered in the invoice. The entry and permit were, therefore, revoked, and all the goods mentioned in the invoice, whether remaining on board the schooner, or landed, were seized, and the libel now before us was filed for condemnation. These two grounds are relied upon for the reversal of the decree of the district court: First. That the seizure of part of the goods was upon land, and that as to this portion, there is no jurisdiction in admiralty. Second. That the forfeiture contemplated by the statute is of the fraudulent packages only, and not of the whole invoice.

To the first objection, I think it is a sufficient answer that no objection to the jurisdiction is taken in the claim and answer of Salas & Co. But if the objection were not too late, it would be difficult to sustain it. The goods were in the act of being discharged. The discharge had not been completed; a large portion was still on board the vessel. The fraud was not discovered until a part had been landed. Under the circumstances, it is not unreasonable to regard that portion of the goods which had been put on shore as still a part of the cargo of the vessel, and the whole as subject to the jurisdiction of the admiralty.

The other objection must also be overruled. I shall not now enter into the history of the progressive severity with which congress has enforced, by forfeitures, the payment of duties on imported merchandise, first providing for the forfeiture of the particular articles imported in violation of law, afterwards by forfeiture of the package in which these articles were contained, and finally enacting the law of March 3, 1863. This last act provides that no goods, wares, or merchandise imported after July 1, 1863, shall be admitted to entry, unless on production of the required invoice, and compliance with the other terms prescribed, and that if any owner, consignee, or agent of any goods, wares, or merchandise shall attempt to make entry of them by false invoice, said goods shall be forfeited. What goods? The particular articles fraudulently imported? That will hardly be contended, for it would mitigate the already exising penalty; and the policy of congress, in view of the exigencies of the revenue, and of possible fraud, was to retain, not diminish, the former surety. Was it the packages in which the fraudulent articles were concealed? This construction would leave the former law, in this respect, unaltered, while it was the manifest purpose of congress to alter it, and augment the penalty. No construction will carry out this obvious design, except that which the words of the law manifestly suggested, and which made the penalty apply to the whole invoice owned or shipped by Salas. This construction condemns all the goods included in the invoice, except the twenty bags of coffee belonging to Gonzales. The decree of the district court will, therefore, be affirmed.

TWO HUNDRED AND FIVE BOXES OF SUGAR (WILKIE v.). See Case No. 17,662.

Case No. 14,294.

TWO HUNDRED AND NINETY BARRELS OF OIL.

[1 Spr. 475.] [1]

District Court, D. Massachusetts. April, 1859.

COSTS—ADMIRALTY—FINAL DECREES.

Where six libellants joined in one libel, and severally had decrees for their respective shares in a whaling voyage, from four of which appeals were taken, and from the other two no appeal lay: *Held*, that the two libellants who had obtained final decrees should recover all the costs which they had advanced, or for which they were liable.

[Cited in The Antelope, Case No. 484.]

[Cited in Story v. Russel, 157 Mass. 156.]

In admiralty.

C. G. Thomas, for libellants.

H. A. Scudder, for claimant.

SPRAGUE, District Judge. These libellants, six in number, sued for their share, as seamen, in a whaling voyage. The libel was first promoted by two, and the others subsequently joined by petition. After a full hearing, a decree was entered in favor of each of the libellants. Two of these decrees, viz., those in favor of Miller and Griffin respectively, were final in this court. From the other four appeals have been taken and allowed. The proctor now claims to tax the whole costs in the two cases which have not been appealed. This is resisted by the proctor for the claimants, who contends that the whole costs should be apportioned among the several libellants. In considering the question which has been raised, it is to be remembered that although these libellants are united in one libel, yet their claims are not joint, but several and independent, and a separate decree is entered for each; and although the aggregate of such decrees far exceeds the amount required by law to authorize

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

an appeal, yet no appeal is allowed, except where the separate decree, exclusive of costs, exceeds $50. By statute, and also by the maritime law, seamen are permitted to unite in one suit for their wages, although their contracts are several, and the right of each distinct from that of all others. And the claim of each must be tried, in most respects, in the same manner as if he were prosecuting a separate suit. Where seamen have so joined, if any of the taxable costs have been incurred for the exclusive benefit of any one or more of the libellants, they are to be taxed in the case or cases of the person for whose exclusive benefit they were incurred. But the costs which have been incurred for the maintainance of all the claims, and which were necessary for the vindication of the rights of each and every of the libellants, are to be awarded to those who have actually paid such costs, or have given security therefor. Thus if one of the libellants had, in the prosecution of his own claim, necessarily incurred expenses in taking depositions, he could not be deprived of his taxable costs therefor, merely because the same depositions enured to the benefit of other libellants. Or if, instead of himself advancing the money, he had given security to his agent or proctor, who thereupon had made the necessary payments, he would be entitled to have such costs awarded to him. The present case does not indeed come within this category, but stands, I think, upon the same principle. It appears that the proctor has himself paid for taking depositions, and incurred other expenses for his clients, and he holds each and all of the libellants responsible for all the expenses incurred to maintain his claim. Having recovered final judgment in favor of two of the libellants, and being authorized to receive payment, he will have the fruits of that judgment in his hands, and may indemnify himself therefrom, for all the advances which he has made in prosecuting the suit in favor of those two libellants, and it is but just that they should be reimbursed the costs which they shall thus have actually paid. This will be no injustice to the claimant. It is by his own breach of contract and violation of duty, that these two libellants have been compelled to institute a suit, and incur these expenses. Indeed, the taxable costs will not indemnify them for the outlay which they will be compelled to make. If the claimant shall not prevail in the appellate court, it will in the end make no difference to him, in which of the decrees for the several libellants these costs shall be awarded. If he shall prevail in the appellate court, then, indeed, he may not be called upon to pay costs which the appellants have incurred, but then there will be no sufficient reason why Miller and Griffin, who have a final decree in this court, should not recover the costs to which they shall have been actually subjected by the refusal of the claimant to pay their just demands.

Costs were taxed accordingly.

TWO HUNDRED AND SEVENTY-EIGHT BARRELS OF DISTILLED SPIRITS (UNITED STATES v.). See Cases Nos. 16,580 and 16,581.

TWO HUNDRED AND SEVENTY-FIVE CADDIES OF TOBACCO (UNITED STATES ex rel. AMES v.). See Case No. 15,881.

TWO HUNDRED AND SIX BARRELS (UNITED STATES v.). See Case No. 16,582.

Case No. 14,295.

TWO HUNDRED AND SIXTY-EIGHT LOGS OF CEDAR.

[2 Lowell, 378.] [1]

District Court, D. Massachusetts. Dec., 1874.

DEMURRAGE—NOTICE—BURDEN OF PROOF.

1. If part of a cargo is discharged at one wharf and part at another, the owners of the vessel not objecting, the time necessary for moving the vessel is not chargeable to the charterers.

[Cited in Carsanego v. Wheeler, 16 Fed. 254.]

2. A formal notice to the consignees that a vessel is ready to receive cargo is not necessary if they knew that she was ready.

3. That they did know it may be inferred from circumstances, so far as to throw the burden of proof on them to show the contrary.

Libel for freight and demurrage under a charter-party, by which the brig John Airles was let to hire to J. Van Praag & Co., of Boston, for a voyage to Surinam and back to Boston. At the trial it was admitted that the balance due for freight was $922.85, and the dispute was, whether any and what sum was due for demurrage. The master had died on the homeward voyage, and the mate testified to a considerable delay at Surinam beyond the time allowed by the charter-party, but could not explain its causes beyond what was taken up in repairing the ship, which, being deducted, left more than a week to be accounted for. There was conflicting evidence concerning the conduct of the parties on the arrival of the vessel at Boston. The contract provided for twenty-five running days, for discharging and loading again at Surinam, and despatch in unloading at Boston, "commencing from the time the captain reports himself ready to receive or discharge cargo."

J. C. Dodge, for libellants.

S. J. Thomas, for claimants.

LOWELL, District Judge. The evidence proves that part of the homeward cargo was discharged at one wharf and part at another; and no objection appears to have been made by the owners of the brig to this mode of unloading, and I assume it to have been proper and according to the usages of the trade. The time needed for moving the brig would not be chargeable to the charterers under these circumstances. The Mary

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

E. Taber [Case No. 9,209]. But it is proved that the charterers neglected for two or three days after the first part of the cargo was taken out to name the place at which the remainder was to be delivered; and for this time they must pay.

The more difficult question of fact is, whether they are responsible for ten days at Surinam, or only for two days. Twenty-seven days were actually taken in unloading and loading at that port, so that two days are clearly due; but whether the remaining eight are so is the difficult point. Those days were lost after the vessel was repaired and ready, and before the first log of cedar was brought alongside; and the point is, whether the master notified his readiness to load. This is a simple question of a presumption of fact; but I have found it none the less a difficult one, the master being dead, and the mate having no knowledge upon this matter.

I do not understand that any formal notice need be given, if the brig was ready, and the consignees knew it. The master's notice would not bring on the lay days if the ship was not ready, and his failure to notify in form would not put them off, if the other party was fully informed of the ship's being ready. The notice is provided for mainly to exclude the notion that the mere arrival of the vessel in port shall cause the lay days to begin to run.

Now, it is proved that, after the repairs were made, the brig was hauled into the stream within sight of the consignee's place of business, which was not more than two hundred and fifty yards away. It is further proved that after the loading was actually begun there was delay, and an evident deficiency in the men and means employed by the charterers. From the former circumstance, and from the constant intercourse that always takes place between the master and his consignees in a foreign port, especially when the vessel has just been discharged by the same consignees, and that the consignees advanced more money than the charter called for, which must undoubtedly have been to pay for the repairs, and from the fact that it was the manifest duty and interest of the master to give the notice, if necessary, I think common sense requires me to infer that the information was given to the charterers, or acquired by them in some mode. The probability that the delay may have been caused by some want of preparation on the consignees' part is strengthened by the fact that there was afterwards actual and undoubted delay and difficulty from that cause. And although the plaintiff can never succeed upon the mere weakness of the defendants' case, yet, if the burden of proof is once sustained, it is to be observed that the answer accounts for the delay only by the repairing of the ship, which does not fully account for it: and that no evidence has been given in on the claimants' part, though the case was delayed a long time, in order to take depositions at Surinam; and that there was no suggestion in any of the conversations or correspondence, so far as appears, that the consignees had failed to receive notice that the brig was ready to receive cargo after her repairs were completed.

The original charter-party stipulates that the demurrage shall be at the rate of thirty silver dollars a day. The notarial copies furnished the parties both vary from this: one says, "Thirty Spanish milled dollars," and the other "Thirty dollars," "Spanish milled" being erased. Of course the original must govern the assessment, and the premium for silver must be added. Decree accordingly.

Case No. 14,296.

TWO HUNDRED AND SIXTY HOGSHEADS OF MOLASSES.

[1 Hask. 24.] [1]

District Court, D. Maine. Oct., 1866.

CHARTER-PARTY—BILL OF LADING—PLACE OF STOWAGE—PARTNERSHIP.

1. A charter-party between the ship-owner and the merchant is the instrument and evidence of the contract for the conveyance of the property.

2. A bill of lading between such parties is but evidence of the shipping of the merchandise in pursuance of the contract, and any terms inserted into it by the charterer, either by accident, or design, that are in conflict with the charter-party will not supersede, or control that contract.

3. A bill of lading, silent as to the place of stowage of cargo, carries with it a presumption that the cargo is to be stowed under deck; but as such silence is not an express contract upon that point, the ship-owner may prove an agreement to carry on deck.

4. A bill of lading, consigning the cargo to a merchant, does not preclude the court from ascertaining the true ownership of the property by other evidence.

5. A partnership may exist in a single shipment, or adventure; and persons owning merchandise in common, who ship it on joint account and risk for sale, are copartners in the adventure.

In admiralty. Libel in rem by the owners of the brig W. H. Parks against her cargo of molasses to recover $1,848.70 freight, for bringing it from Cardenas to Portland under a charter-party, stipulating "for a full cargo of molasses under and on deck." The cargo was delivered on board, and 45 casks of the molasses stowed on deck. The master signed clean bills of lading for the whole cargo without reference to the charter-party, or mention that any of the cargo was stowed on deck. On the voyage, by the perils of the sea, the deck-load was lost. The consignees, Messrs. Churchill, Browns & Manson, made claim to the cargo as their own property, and by answer sought to offset the value of the deck-load, which was lost, against the freight sued

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

for. Mr. Manson, one of the consignees being in Cardenas, purchased of one Juan Ferrin in behalf of his firm one half of 1,000 hogsheads of molasses, to be delivered on shipboard at that port at an agreed price to be shipped to Portland on joint account and risk of Ferrin and the consignees. Ferrin chartered the brig in his own name, and prepared bills of lading which consigned the whole cargo to Churchill, Browns & Manson. These bills of lading after being signed by the master, Ferrin forwarded to the consignees with an "invoice of molasses, etc., shipped for account of whom it may concern, consigned to Messrs. Churchill, Browns & Manson." They insured the cargo accordingly, so that the policy did not cover the deck-load. A portion of the molasses shipped on joint account was forwarded by the Lizabel, and Ferrin from time to time drew on the consignees without any appropriation of the drafts to either cargo. The invoices of the two cargoes amounted to $27,359.18 and Ferrin's drafts on account of these invoices accepted by consignees to $19,840.89.

Almon A. Strout and George F. Shepley, for libellants.

Nathan Webb and Thomas Amory Deblois, for claimants.

FOX, District Judge. By the terms of the charter-party in this case, the master was bound to receive on board his vessel a full and complete cargo of molasses in hogsheads, under and on deck, with sufficient small stowage, the captain to sign bills of lading as presented without prejudice to the charter-party. The cargo was put on board by Ferrin, forty-five casks being on deck, and the master signed bills of lading for the full cargo without any exception or statement that any part was on deck, Ferrin being named as consignor, and Churchill, Browns & Manson consignees. The deck-load being totally lost by the perils of the sea, would Ferrin if he were the claimant have the right under the circumstances of the case to offset, or recoup the claim for freight by the value of the deck-load? I apprehend not. Ferrin is the person named in the charter party as charterer of the brig, and if he should be deemed the owner of the cargo, the charter-party is as between him and the ship-owner the instrument and evidence of the contract for the conveyance of the property, and the bill of lading is as between these parties only evidence of the shipping of the particular merchandise to be conveyed in pursuance of the contract. Any terms therefore incorporated by the charterer into the bill of lading, either accidentally or by design, which are in conflict with the terms of the charter-party, could not control the contract as evidenced by the charter-party. Parsons, in his treatise on Maritime Law (volume 1, p. 240), says, "It is usual for the master to sign and give bills of lading in like manner as if there were no charter-party. But nevertheless, they are little more than evidence of the delivery and receipt and shipping of the merchandise, for the charter-party is the controlling contract as to all the terms and provisions which it expresses."

This charter-party authorized the master to take as a part of the cargo a reasonable deck-load. This was done with the knowledge and consent of Ferrin, and the fact, that the bills of lading which appear to have been made out by one of Ferrin's clerks make no mention of a part being on deck, would not render the ship-owner responsible to Ferrin for the value of the deck-load if lost. Such was not the bargain and intention of the parties; it was on the contrary expressly agreed and understood, that a portion of the cargo should be taken on deck. It was placed there by the consent of Ferrin. No new agreement was ever made respecting it, requiring it to be under deck, and the omission of the fact in the bill of lading will not prevent the ship-owner from falling back on the terms of the charter-party, which it is admitted was the only agreement ever made respecting the way and manner of loading the cargo.

But if there had not been a charter-party, the result would have been the same, if Ferrin were the claimant. The bill of lading it will be observed is in the usual form, and does not in terms state where the cargo is stowed, whether under, or on deck. It is silent as to the place of stowage, and from this silence a presumption arises that the goods are to be stowed under deck, that being the usual and ordinary method of stowage. But if the contract or bill of lading is not express on this point, the ship-owner is then at liberty to rebut this presumption, and prove that the shipper agreed to the stowage of his goods on deck. This question has been examined very carefully by Judge Story in Vernard v. Hudson [Case No. 16,921]. In delivering the opinion of the court the learned judge said, "I take it to be very clear, that where goods are shipped under the common bill of lading, it is presumed that they are shipped to be put under deck as the ordinary mode of stowing cargo. This presumption may be rebutted by showing a positive agreement between the parties that the goods are to be carried on deck, or it may be deduced from other circumstances, such for example as the goods paying the deck-freight only. The admission of proof to this effect is perfectly consistent with the rules of law, for it neither contradicts nor varies anything contained in the bill of lading, but it simply rebuts a presumption arising from the ordinary course of business." A ship-owner, therefore, as against a shipper, would certainly under this authority be at liberty to show what was the agreement in this respect, and there is no dispute in the present case, that the agreement was, that a portion of the cargo should be placed on deck. Ferrin, therefore, could not hold the ship-owner responsible for the deck-load when lost.

The claimants contend that they stand in a very different relation to this cargo, and that they are in no way or manner compromised by the doings of Ferrin. In fact, they claim to be the owners of the cargo by virtue of the bills of lading of the cargo consigned to them by Ferrin, upon the faith of which they have accepted Ferrin's drafts for a large amount, and have procured insurance which did not cover the deck-load. It therefore becomes necessary to determine their true relations to Ferrin and the cargo, and how far they are affected by Ferrin's doings and his consent to a portion being placed on deck.

It appears that Mr. Manson agreed with Ferrin to purchase of him in behalf of the firm one half of a thousand hogsheads of molasses, of which this cargo is a portion, delivered on shipboard in the harbor of Cardenas at a fixed price, and that the same should be forwarded to the claimants at Portland on their joint account and risk. Under this agreement this cargo was laden; and in my opinion the parties became jointly interested in this adventure, and their relations to each other in respect to it were those of copartners. The court is not bound by the goods being consigned to the claimants, but is at liberty to go behind the documents and ascertain the true relations of the parties. The fact, that Ferrin once owned the whole of the cargo, does not vary the relations of the parties from what they would have been, if he had purchased of a planter this cargo upon joint account, and afterwards shipped it in his own name to the claimants, drawing on them in payment therefor. When the cargo was laden and Ferrin's drafts were drawn on the claimants for their proportion of the cost under the above agreement, the claimants became jointly interested in the adventure, with all the conditions of an ordinary partnership affecting it. The freight, with all other expenses and charges, was to be borne by the common and joint interest, and the property, from the moment of its shipment, was at the joint risk for profit or loss. There can be no doubt, that under this agreement between these parties, if this cargo had been lost on the voyage without insurance, the claimants would, notwithstanding the loss, have been accountable to Ferrin for one half of the amount of the invoice, or if it had arrived, and a loss had been sustained in the adventure, it must have been shared alike between the parties. I think all the elements of a partnership are to be found in the agreement and proceedings touching this adventure, and it is common learning, that a partnership may exist in a single shipment or adventure, as well as in the most complicated and extended undertakings.

Pothier tells us, "When two persons contract a partnership between themselves, to sell in common certain goods which belong in common to one of them, and to share the proceeds, it is necessary to examine carefully what is their intention. If the intention is to put the very goods into partnership, the partnership will extend to the same, and if a part of the goods perish before the sale proposed by the parties is made, the loss will be as a common loss; but if the intention is to put into partnership, not the goods themselves, but the price which shall be obtained therefor, the entire loss will fall upon the partner to whom the goods belong." See, also, Story, Partn. §§ 27, 28.

This being a partnership adventure, the cargo was to be transported from Cardenas to Portland at the joint and common charge and risk, and although Ferrin was bound by his contract with the claimants to place the goods on shipboard in the harbor, yet he was not to be at the sole expense of the transportation of the goods from thence to Portland. He was the partner at that end of the route, whose duty it was to contract for the carriage of the property. In the charter-party he contracted in his own name, and by so doing, I apprehend he must be considered as entering into it as agent "for whom it may concern," to use his own language in the invoice, and that it did not concern him alone, but the joint interest to be promoted by the charter-party, and the transportation thereby of the goods to Portland. Some one must contract for this purpose; no one but Ferrin was there in Cardenas authorized to contract, and he did not contract in his own behalf to carry his own goods, or his half of the common property, but in my view, rather acted in behalf of all interested, himself and his copartners at this end of the route, exactly as his copartners here did by procuring insurance, not for themselves, but to cover the property in the invoice for whom it might concern.

Ferrin therefore was a copartner, authorized to enter into such an agreement as he should think best for the transportation of this cargo; he might contract to have all go on deck, or all below deck, as he thought most for the common benefit; and any bargain he should make in respect to it would not only be obligatory upon him, but would also bind his copartners. He was their agent in these matters. Whatever he did, he did for them as well as for himself, and his knowledge and consent to the casks being stowed on deck is theirs, and equally obligatory and binding upon them as though they had personally been present at Cardenas, and assented to the shipment in that manner. By the arrangement in the present case, a portion of the goods being stowed on deck, that portion of the cargo which was below deck was taken at a lower rate than it would otherwise have been. The expense of sailing the ship would be the same to the ship-owner, whether he carried a deck-load or not, and having a full cargo on and under deck, the whole would be taken at a less average rate of freight than it would have been, if the ship-

owner was restricted from carrying any portion on deck. The claimants therefore, got the benefit of the goods below being taken with a deck-load at a less rate of freight than they would have been if no portion had been upon deck, and having thus derived and availed themselves of the advantages and profit of the agreement of their copartner, they must also share in any risks and losses attending it. "Qui sentit commodum sentire debet et onus."

But it is said the claimants, relying on the bill of lading, procured insurance on this cargo, which did not cover that portion which was on deck, and that thereby they have sustained a loss. But for whose benefit was this insurance? Was it for their individual benefit, or was it for the common interest? It should have been, and undoubtedly was for whom it might concern, that is, for Ferrin as well as for themselves, and being so, and Ferrin having knowledge that the goods were on deck, and having agreed to their being there, it is not for him, or his copartners now, to complain of any loss sustained by them by reason of the bill of lading being filled out fraudulently, or negligently, by Ferrin without mention of the deck-load. The same answer may be given to the claim of Churchill, Browns & Manson, on account of their acceptance of the drafts drawn upon them by Ferrin. They were drawn by one partner upon his copartners on account of the partnership business. If Mr. Manson, when in Cardenas, had there purchased on account of his firm a cargo of molasses, and had drawn drafts in payment of the cargo on his copartners in Portland, no one can entertain a doubt, but that the other copartners would have been bound by his acts, and that any agreement on his part, that a portion of the cargo should be shipped on deck, would be as obligatory upon them as on him, although they had no personal knowledge of such an agreement, and I can perceive no legal difference between that case and the present. Each are cases of partnership with all the rights and liabilities properly appertaining thereto.

The case of Berkley v. Watling, 7 Adol. & E. 29, is in some respects very similar to the present. In that case, Watling shipped a parcel of goods in his own name consigned to plaintiff on board a vessel belonging to himself and the other defendants. The goods not being delivered to plaintiff, he commenced an action against the three ship-owners; the defense was, the goods were never shipped on board, and that Watling the consignee knew this fact. The court held that Watling should be considered the plaintiff's agent, and if so, the plaintiff was cognizant through his agent that the goods were not shipped, and therefore he could not recover, although he held the bill of lading for value. The courts say the plaintiff is here the shipper in effect, and sues as shipper, and the bill of lading made out by his agent is not conclusive upon the other owners. In my opinion the defence can not prevail, and the libellants are entitled to the full freight. Decree for libellants for freight and interest and costs.

TWO HUNDRED AND SIXTY-NINE AND ONE-HALF BALES OF COTTON (UNITED STATES v.). See Case No. 16,583.

Case No. 14,297.

TWO HUNDRED AND TEN BARRELS OF OIL

[1 Spr. 91.] [1]

District Court, D. Massachusetts. Oct., 1844.

SALVAGE—DERELICT—MOIETY—AMOUNT.

1. The rule of giving a moiety as salvage, in cases of derelict, is so flexible, and has been so often departed from, that it is nearly abrogated.

2. The amount of salvage compensation, is to be such as justice and policy require; and various considerations, as stated, should influence the award of salvage. More than five-sixths are given.

In admiralty.

T. G. Coffin, for libellants.

J. H. W. Page, for claimants.

SPRAGUE, District Judge. This was a libel in rem for salvage. It appears that the ship London Packet sailed from New Bedford on the 24th of November, 1841, fitted for a voyage of three and a-half years, in the sperm whale fishery. On the 18th August, 1842, having taken one thousand barrels of sperm oil, she discovered the wreck of the whale ship Benezet, on a reef, about forty miles from the Feejee Islands, a place dangerous to navigation from reefs, calms and currents. The captain of the London Packet, hoping to save the crew, went in his boat to the wreck, and at some hazard, succeeded in getting on board. None of the crew were found. He took some coils of warp from the wreck, and returned to his own ship. On the two following days he boarded the wreck again, and took some articles of her apparel. He cut a hole through the deck, in order to take oil from the hold, but without success, and cut away the masts, in order to prevent her going to pieces. On the night of the 20th, the wreck went to pieces, and the next day the crew of the London Packet picked up about two hundred and ten barrels of oil, and some sails and rigging a-drift, from thirty rods to a mile from the reef. The following night, the ship, in a calm, was carried by the swell and current within twenty or thirty rods of the reef, and was relieved from her perilous situation by the springing up of a breeze. The salvors described the weather, after the discovery of the wreck, and before picking up the oil, as rough and squally.

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

Having been carried by the current some distance from the wreck, the London Packet beat back in two or three days, and took some other articles from the remnants of the wreck. On the 27th, they picked up, at sea, a cask of oil containing six barrels. On returning to the reef, about the 3d of September, no vestige of the Benezet, or of her cargo, remained.

The captain and crew of the Benezet, reached the Bay of Islands, New Zealand, about a thousand miles distant from the wreck, in a whale ship called the Hoogly; at what time, did not distinctly appear, although there was evidence tending to show that it was in the month of August. The master, after advertising ten days, sold the Benezet and cargo at auction, for the sum of fifty-five shillings sterling. The London Packet arrived at the Bay of Islands about the 18th of October following. The purchaser was then preparing to send a small schooner to the wreck, but upon information then received, abandoned the enterprise.

The London Packet arrived at New Bedford, on the 27th of June, 1844, with two thousand one hundred and fifty-five barrels of sperm oil, including that which had been picked up. She could have carried about two thousand two hundred barrels. She was insured for the voyage, at six per cent., for three years, and pro rata, for a longer time, and, at the time of the salvage, was, with her cargo worth $40,000.

It has very often been laid down that, in case of derelict, the salvor is to have a moiety. This rule is so flexible, and has been so frequently departed from, especially of late, that it may be deemed nearly abrogated. It never rested upon any sound reason, and seems to have had its origin in unsettled notions as to the right of the original owner. Doubts were felt whether such property belonged to the former proprietor, or to the finder, and resort was had to an arbitrary rule of equal division between them, as a practical, though not rational solution of the difficulty. It is quite clear, that upon just principles, the proprietorship is not lost by the forcible separation of the owner from his goods, by misfortune, even although abandoned, without hope of recovery. In such case, the only question is, what compensation should be made to the finder, for their rescue and restoration. The compensation, as in other cases of salvage, is to be such as justice and policy dictate. It should not be merely a quantum meruit, but as much more as will be sufficient to ensure prompt, energetic, courageous, and persevering efforts to save property, in the various circumstances in which it may be in peril, bearing in mind that, in general, there is no choice of means, but the service must be rendered instantly by the persons who chance to be at hand, and that the inducements to be offered, must be such as to operate effectually, and at once, upon every class of competent persons, even the reluctant, the hesitating and the timid; so that the indolent may be stimulated, and the calculations of the cautions result in bold, earnest, and effective exertions. In some cases, too, the salvage compensation should be such as to offer inducements to previous preparation and readiness, in anticipation of the actual emergency; as, for example, on a coast where disasters not unfrequently occur, but the business of the place would not, of itself, supply the appliances for instant relief. In the present case, we are to consider, 1st. The desperate condition of the property,—wrecked upon a desolate reef, a thousand miles from any country whence assistance could be rendered, abandoned by the master and crew,—the actual breaking up of the vessel and cargo, and the dispersion of their fragments, with the certainty of a total loss, but for the timely interposition of the London Packet. The opinion formed at the time, is shown by the fact, that the ship which took up the master and crew, did not choose to go to the wreck, or attempt to save anything, and the whole was sold at auction for fifty-five shillings. 2d. The meritorious conduct of the salvors, in boarding the vessel for the humane purpose of saving life; the personal hazard incurred by the master and crew; the risk to their ship and cargo—and to this, is to be added the forfeiture of her insurance; the situation of the London Packet; the nature of her voyage; the probability of obtaining a cargo; the great distance which the property was conveyed; and the skill and care required in preserving it.

On the other hand, whaling ships do not, upon an average, get more than two-thirds of a cargo, and not one in ten, comes home full. This ship returned in forty-three months, with two thousand one hundred and fifty-five barrels, including the oil saved, and could have carried only forty-five barrels more.

The evidence shows, that with average success in whaling, the London Packet would have taken fifty-five barrels a month. To have procured this oil from whales would, therefore, have required nearly four months. Many witnesses have been introduced on both sides, without objection, to give their estimate of the value of the oil to the salvors, in the condition it was when found. These opinions are various and conflicting, and I do not attach much importance to them. The value of the property saved, is always a material element in awarding salvage. In the present instance, the amount, at the market price in New Bedford, is $6740; of this I shall give $5740 to the libellants, which will leave $1000 to the claimants. Decree accordingly.

NOTE. "I am of opinion, that there is no such rule (as to award a moiety to the finder in case of derelict); it may have existed and become obsolete." Sir Wm. Scott, in The Aquila, 1 C. Rob. Adm. 45. "There is no valid reason to

be assigned for fixing a reward for salving derelict property at a moiety, or any given proportion. The true principle, is adequate reward, according to the circumstances of the case. The reward in derelict cases should be governed by the same principles as in salvage cases,—namely, danger to property, value, risk of life, skill, labor, and the duration of the service." Dr. Lushington, in The Florence, 20 Eng. Law & Eq. 622, cited with approval in Post v. Jones, 19 How. [60 U. S.] 161. But see Abb. Shipp. 555, Story's note; The Galaxy [Case No. 5,186]; The John Wurts [Id. 7,434]; The Britannia, 3 Hagg. Adm. 153. As cases in which more than a moiety has been awarded, see The Jonge Bastiaan, 5 C. Rob. Adm. 322; The Jubilee, 3 Hagg. Adm. 43, note; The Waterloo [Case No. 17,257], in which the salvage was two-thirds; and The Rising Sun [Id. 11,858], in which three-fifths was awarded. The William Hamilton, 3 Hagg. Adm. 168; Derelict, unknown., Id., note,—in which, the amounts being small, and unclaimed, the whole was decreed to the finders.

Case No. 14,298.

TWO HUNDRED AND THIRTEEN TONS OF COAL.

[7 Ben. 15.][1]

District Court, E. D. New York. July, 1873.

FREIGHT—CHANGE OF VOYAGE—DEMURRAGE.

A canal-boat was hired to carry a cargo of coal from Port Johnson, N. J., to East Chester, Conn. She was detained in loading, and, after loading, proceeded to New York, where her consignees determined not to send her to East Chester, but to sell her cargo in the port of New York, which, after some delay, was done: *Held*, that the owner of the canal-boat was entitled to recover freight at the usual rate from Port Johnson to New York, and demurrage for the detention of the boat at Port Johnson, and also for the detention at New York, over and above the usual time for unloading a cargo of coal in that port.

This was a libel to recover freight and demurrage. The libellant, Stephen Brown, was the owner of a canal-boat, and agreed to go with her to Port Johnson and get a cargo of coal and take it to East Chester, Conn. The boat went to Port Johnson, and after waiting two days for coal, was loaded and came to New York, where she arrived on the 23d of December. The consignees gave the libellant an order on a towing company to be towed to East Chester, which he presented on the 24th, but his boat was not towed, and the order was afterwards cancelled. On the 26th the consignees told the libellant they were going to sell the coal in Brooklyn. After waiting some days they ordered him to go to Brooklyn. He demanded demurrage for his detention, which they refused to allow, telling him that unless he would waive his claim for demurrage he must carry the coal to East Chester, according to the original contract. Thereupon his boat was towed over to Brooklyn, and there the cargo was discharged. The libellant then filed a libel against the cargo, claiming to recover freight at the usual rate from Port Johnson to New York, and demurrage for the detention of his boat at Port Johnson and at New York, over and above the usual time of discharging cargoes at that port.

Wilcox & Hobbs, for libellant.
F. A. Bowman, for claimant.

BENEDICT, District Judge. The legal effect of the action of the parties upon the contract of affreightment on which this action is based was to so modify the contract as to make it a contract to deliver the cargo at New York instead of East Chester, as originally agreed.

The substituting the port of New York as the port of delivery carried with it the obligation on the part of the consignee to accept the cargo there in accordance with the usage of the port.

Under these circumstances the libellant is entitled to recover for any unusual delay in providing him with the cargo at Port Johnson, to compensation for transporting the coal from the port of shipment to New York, at the current rates of freight, and to compensation for the delay in receiving the cargo in New York, after allowing the usual time for discharging a cargo in that port after the modification of the contract.

According to these views, the libellant must recover the balance of freight at the current rates of freight for transporting coal to New York, which amount to $70.85.

He is also entitled to recover demurrage for two days' detention in loading, which detention was for want of coal.

He is also entitled to recover demurrage for delay in receiving the coal in New York from December 26th, the day when the contract was modified, until the day the master was notified that the coal would not be received unless he waived his demurrage, which was the 20th of January.

There is some doubt upon the evidence as to the proper rate of demurrage, but I conclude that four dollars per day, being the highest sum named by the claimant of the coal, will be a fair allowance under the circumstances. The clerk will compute the amount due in accordance with this opinion.

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

TWO HUNDRED AND THIRTY-SIX DOZEN BOXES OF COSMETICS (UNITED STATES v.). See Case No. 16,584.

Case No. 14,299.

TWO HUNDRED AND TWO TONS OF COAL.

[7 Ben. 343.] [1]

District Court, S. D. New York. May, 1874.

SALVAGE—CONTRACT BY MASTER.

When a contract for salvage of a canal-boat and cargo was made by the master, the sunken boat being within easy reach of all parties interested: *Held*, that such contract must be closely scrutinized; that the rate agreed upon being exorbitant, the contract would not be upheld, and the amount of salvage would be reduced from $900 to $250.

[Cited in The C. M. Titus, 7 Fed. 831.]

The canal-boat John C. Churchill, loaded with coal, sank in the Kill von Kull; and the master, without consultation with the owners of the cargo, agreed with the libellant to give him sixty per cent. of the value of the cargo for the raising and recovery of it. The owners of the cargo disputed the claim as exorbitant, and the salvor libelled the cargo so recovered.

Goodrich & Wheeler, for libellant.
John McDonald, for claimants.

BENEDICT, District Judge. This action is brought to condemn the cargo of the canal-boat John C. Churchill, for services in the nature of salvage, rendered by the libellant in raising the coal in the canal-boat from a place where she had sunk in the Kill von Kull. The proofs show a written contract made between the master of the boat and the libellant, that the latter should raise the boat and cargo, and receive for his compensation sixty per cent. of the value of boat and cargo, which would be some nine hundred dollars. This contract is set up in the libel, but the prayer of the libellant is for such compensation as may be just. Agreements to pay for salvage services made by masters of canal-boats, when within easy reach of all parties interested in the property to be saved, are subject to be closely scrutinized, and will not be upheld in a court of admiralty when it appears that the price agreed on by the master is unreasonable or exorbitant.

In the present case the proofs show affirmatively a situation of the boat and her cargo which would not justify an agreement to pay so large a portion as sixty per cent., and satisfy me that justice will be done to the libellant if, in view of all the circumstances, the sum of $250 be awarded to him for his services in respect to the cargo, with the costs of this action. Let a decree to that effect be entered.

TWO HUNDRED BUSHELS OF CORN (UNITED STATES v.). See Case No. 16,586.

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

TWO HUNDRED BARRELS OF WHISKEY (UNITED STATES v.). See Case No. 16,585.

Case No. 14,300.

The TWO MARYS.

[10 Ben. 558.] [1]

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

PRACTICE IN ADMIRALTY—DISCHARGE OF ATTACHMENT—OPPOSING CLAIMANTS—RETAKING PROPERTY INTO CUSTODY—PRACTICE.

1. A libel was filed against a domestic vessel on January 25th, 1879, to recover for supplies furnished to her. Process was issued to the marshal, who returned that he had attached the vessel. At the libellant's request, no keeper was put by the marshal on board the vessel, which was then undergoing repairs at City Island. No notice to appear was ever published. On Sept. 16, 1879, on motion of the libellant's proctor, an order was made that the marshal take the vessel into his custody under the original process and put a keeper on board. The marshal did so, and removed the vessel from City Island to a pier in the East river. H., the shipwright, who had been repairing her, appeared as a claimant, averring that when the vessel was seized by the marshal, he was in possession of the vessel, on which he claimed a common law lien. He gave a bond under the act of 1847, and an order was made in the usual form for the release of the vessel, and the marshal gave him a notice to the keeper on the vessel to discharge her, with which he went to the vessel. C., the master of the vessel, who was also one-sixteenth owner, was on board and so was the proctor for the libellant. A controversy arose between them which resulted in H.'s being arrested by a police officer and compelled to leave the vessel. He had shown the marshal's notice to the keeper, but refused to leave it with him or to show it to the other parties. After his arrest the keeper left the vessel, leaving the vessel in the possession of the master. H. then moved the court for an order directing the marshal to retake the vessel and restore her to him. The master opposed the motion, claiming that he and not the alleged claimant was in possession of the vessel when the marshal retook her under the order of Sept. 16th. The libellant also opposed the motion, denying that he had had notice of the claimant's application to bond the vessel. Pending the motion the court made an order directing the marshal to take the vessel into custody and hold her till the determination of the motion: *Held*, that it is the duty of the court, on the dissolution of an attachment against a vessel under its process, to cause the vessel to be restored to the party who was in possession at the time when she was taken under the process

2. Where there are two different parties, each claiming to have been so in possession, the marshal ought not on the dissolution of the attachment to deliver her to either without the order of the court.

3. In this case, the order for the release of the vessel had not been duly executed, and the court therefore had jurisdiction to order the marshal to take her into his custody again under the original process.

4. The libellant's default as to the bonding of the vessel should be opened, and he have leave to file objections to the right of H. to appear as a claimant.

5. New publication of notice to all parties to appear should be had, on the return of which C., the master, would have the opportunity to appear and aver his possession at the time of seizure;

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and the question between him and H., could be then properly determined.

In admiralty.

Geo. A. Black, for the motion.

H. B. Kinghorn and Thos. W. Wyatt, opposed.

CHOATE, District Judge. This is a libel for supplies and materials furnished by David W. McLean to a domestic ship for which a lien is claimed in the libel under the law of New York. The libel was filed Jan. 25, 1879. On this libel a monition was issued, returnable Feb. 11, 1879, of which the marshal made return that on the 29th of January, 1879, he "attached the schooner at Hawkins' Dock, City Island." An order for publication of notice for all persons in interest to appear and intervene was made on the 25th of January, but no publication has been made. It appears by affidavit that at the request of the libellant the marshal put no keeper on board at the time of the service of the process; that the vessel was then hauled out of the water undergoing repairs and not in a condition to be navigated at all or to float in the water. Sept. 16, 1879, on motion of the libellant's proctor an order was made that the marshal take the schooner into his custody under the original process and place a keeper in charge. Thereupon the marshal resumed the custody of the vessel and removed her to a pier in the East river. On the 20th of September, one Hawkins appeared as claimant, averring in his claim that at the time of the seizure he was in possession of the schooner, reconstructing her, and claiming a common law lien therefor to the amount of $5,000. He offered a bond under the act of 1847 [9 Stat. 181], in double the amount of libellant's claim, and gave notice to libellant's proctor of the justification of his sureties for the 22d of September. The libellant's proctor did not appear and the bond was approved and an order was made in the usual form for the release of the vessel on the same day. The marshal thereupon gave to the claimant's proctor a notice to the keeper to discharge the vessel. The claimant took a tug and proceeded with this notice to the vessel, exhibited the notice to the keeper but declined to give it up. He met there the libellant's proctor, and one Crowley, who claims to have been previously appointed master of the schooner and who also appears to be the owner of one-sixteenth part of her. It is very difficult to ascertain with certainty from the conflicting affidavits, what occurred on the vessel at that time. It is sworn by witnesses on behalf of the libellant and Crowley, that the claimant did not demand the delivery of the schooner to him; but I am satisfied that the libellant's proctor and Capt. Crowley, as well as the keeper, understood that he was there for the purpose of taking possession of the schooner upon the discharge of the attachment. A controversy appears to have arisen, Crowley and libellant's proctor insisting that Hawkins, had no right to be there. The result of this controversy was that Hawkins, the claimant, was by the procurement of these parties or one of them taken under arrest by a police officer and compelled to leave the vessel. He seems to have refused to exhibit his authority to receive the vessel to libellant's proctor, but the evidence shows concert of action between the libellant and Capt. Crowley, the libellant now claiming to be the principal owner and Crowley as master claiming to act by his appointment and under his directions. After Hawkins left the vessel the keeper went away, leaving Capt. Crowley on the vessel, who claims now to have been left in possession by the discharge of the attachment. The result is in reality that the libellant has, or appears to have through Capt. Crowley, possession of the vessel; and through her seizure on his libel and her subsequent discharge, the claimant, if he was the party in possession, has been dispossessed. This is a motion on behalf of the claimant that the marshal retake the vessel and restore her to him, and for other relief. The libellant and the said Crowley appear to oppose the motion.

Although the customary order for discharging an arrest of the vessel is simply that she be released from custody, yet it is the duty of the court, on the dissolution of an attachment under its process, to cause the vessel to be restored to the party who was in possession at the time the officer of the court took her into custody. The process of the court in its execution and discharge must not be used as the means indirectly of taking a vessel from one party and giving it to another. In the case of The Neptune, 3 Hagg. Adm. 132, Sir John Nicholl says: "Had bail been given to the action for wages, the ship would be delivered up, upon the removal of the arrest, to the party previously in possession, whoever he might have been." Mr. Dunlap in his treatise says: "In the admiralty courts of the United States, in all civil causes, except perhaps those of bottomry and by hypothecation, it is usual for the court upon application to deliver the property to the claimant from whose possession it has been taken, upon bail or stipulation with ample security, conditioned in some cases for the restoration of the property, in others for the payment of the amount which may be decreed to the libellant and his costs." Dunl. Adm. Prac. p. 166. I cannot agree with the counsel for the libellant that the marshal's duty is simply to withdraw his keeper and leave the vessel, without regard to whether she thereby falls into the hands of her owners, or strangers, or river thieves. It is his duty under these authorities upon the termination of his custody to replace her in the possession of the party from whose possession

he took her. An admiralty suit in rem proceeding in proper course is a suit against all the world, against whoever has or claims to have any interest in the vessel, and where the proper notice is given, including the publication of notice to all persons interested to intervene according to the rules and practice of the court, all persons having an interest who do not appear are in default; and a claimant, who does appear and gives bond for value or under the act of 1847 for double the amount of libellant's claim and whose right to intervene as claimant is not challenged by the libellant or some other party intervening, is to be held to be by the acquiescence of all the parties to the suit the party entitled to the possession. A claim thus made is an application to the court for the possession of the vessel on giving bail. Thus in the case already cited, the court says: "The warrant of arrest calls upon all persons who have an interest to appear and show cause, and if the party in possession at the time the warrant was executed is no longer in possession, it is, I repeat, his own default; he has, by not appearing to give bail, acquiesced in being dispossessed and has thus allowed the proceeds arising upon the sale of the ship to come into the registry of the court." 3 Hagg. Adm. 132.

Now in this case it appears that there are two parties who claim to have been in possession at the time the marshal took the vessel under the process of the court, the claimant Hawkins, who has appeared, and the captain or the alleged captain and owner Crowley, who has not appeared as claimant but only to resist this motion. If publication had been made and the default of all persons not appearing had been entered, Crowley could not dispute the right of the claimant Hawkins to the possession of the vessel upon discharge of the arrest. But there having been no publication, I do not think he is in default, and he should have an opportunity to contest Hawkins' right to appear as claimant, which is based upon an alleged actual possession of the ship as a lienor at the time of the arrest. The libellant cannot of right now dispute Hawkins' right as claimant, because he made no objection to his appearing as claimant, when served, as the record shows that he was served, with notice of the justification of the claimant's sureties, which is in effect a notice of Hawkins' appearance as claimant. But as it appears by affidavit that the notice of justification did not in fact reach the libellant's attorney till after the time fixed therefor, he is entitled to have that default opened and now to make objections to Hawkins' appearance and claim. When such objections are made the practice is to refer the question to the clerk or a commissioner.

But the course pursued in this case was irregular. The owners of the vessel not having appeared nor being in default, no order should have been made which in effect gives up the vessel to a party claiming to be not the owner but merely in possession as a lienor. If the libellant refused and neglected to cause that publication to be made, the claimant should have moved that the libel be dismissed for want of prosecution and to have compelled the libellant to go on with his suit and procured the default of the owners, or their appearance, or he would have been allowed to have the publication made on his own motion. Still, the order that was made was not properly executed. If it required the delivery of the vessel to any party it was to the party who had appeared and had been allowed to bond the vessel. But if in such a case the marshal finds that there are contesting parties claiming possession, I think ordinarily he ought not to deliver her to either without the direction of the court. Such a question should be settled before the release of the vessel from custody. It is most unseemly that the retreat of the marshal should be the signal for rival claimants to rush in and contest the possession of the ship with each other on her decks. I think, therefore, that the order of the court for the release of the vessel has not been duly executed. The marshal ought not to have withdrawn his keeper after a party who had been admitted to appear and bond the vessel and who had exhibited to him the order for her release had been excluded from the ship.

It is claimed however that the court has now no jurisdiction to retake the vessel; that the marshal having left her in the possession of Crowley, who thereupon took possession, cannot be disturbed except by an action for that purpose. But it seems to me competent for the court to order the marshal to retake the vessel as under his original process, if the order for her release has not been duly executed. The vessel was in the custody of the court and that custody has never been properly and lawfully terminated. And as she remains within the jurisdiction, and as she is still in the hands of the party to whom she was improperly delivered and who actively, but under a mistake as to his rights procured such improper delivery, and no new rights appear to have intervened, I am of opinion that the court has power to direct the marshal to resume the custody. In fact, pending this motion, an order was made requiring the marshal to take her again into custody and hold her till the determination of this motion, and she is now held under that order. See The Union [Case No. 14,346].

The proper order to make seems to be that the order for the release of the vessel be vacated, as improvidently granted before a publication and default; that the marshal continue to hold her under his original process; and that the libellant's default be opened and he be allowed to file objections to Hawkins's appearance as claimant. A new order of publication should be made, the return-day having passed.

If Crowley voluntarily appears as claimant or comes in upon the return day of the notice by publication, he will then have the rights of any claimant, averring his possession at the time of seizure, to apply to the court for leave to bond the vessel, and the question of possession between him and the other claimant, Hawkins, can be properly tried. A great deal of the evidence by affidavit has been directed to the points that the libellant's claim is not such as gives him a lien enforceable in this court, and on the other hand that Hawkins had no common law lien and therefore no right to the possession of the vessel, as against the owners, because he has been fully paid, and because the work was done on the personal credit of the libellant and not on the credit of the vessel. These questions cannot be now entertained. They cannot be tried on affidavits. The first is an issue to be tried in the cause, if properly raised by the pleadings. The second may perhaps be properly inquired into upon trial of the objections that may be filed to Hawkins's appearance as a claimant. Let an order be entered in conformity with this opinion.

[NOTE. An order of reference was accordingly entered. Upon exceptions to the report of the referee, the court decided that Hawkins had a possessory lien upon the vessel, which entitled him to intervene as claimant. 10 Fed. 919. On other motions for leave to file petitions to intervene, see 12 Fed. 152, and 16 Fed. 697.]

TWOMBLEY (TAZAYMON v.). See Case No. 13,810.

Case No. 14,301.

TWO STEAM BOILERS.

[Cited in The Marquette, Case No. 9,101. Nowhere reported; opinion not now accessible.]

TWO STEAM BOILERS (UNITED STATES v.). See Case No. 16,588.

Case No. 14,302.

TWO THOUSAND BOTTLES OF LIQUORS.

[5 Ben. 265.] [1]

District Court, N. D. New York. June, 1871.

INTERNAL REVENUE—WHOLESALE LIQUOR DEALER—RECTIFIER AND DISTILLER.

Under the 44th section of the internal revenue act of July 20, 1868 (15 Stat. 142), the wine and distilled spirits owned by a wholesale liquor dealer, are not forfeited by reason of his not having paid the special tax. That forfeiture is applicable to the wines and spirits of distillers and rectifiers only.

This was an application for a new trial. The action was brought to forfeit the property under the 44th section of the internal revenue act of July 20, 1868. The proof showed that the claimant had carried on the business of a wholesale liquor dealer without having paid the tax required by law. A decree of forfeiture having been made, a motion was made for a new trial.

BENEDICT, District Judge. I am of the opinion that the 44th section of the act of July 20, 1868 (15 Stat. 142), cannot be held to forfeit the wines and distilled spirits owned by a wholesale liquor dealer wherever found, by reason of the fact that the dealer has carried on the business of a wholesale liquor dealer without having paid the special tax as required by law.

The words of the section "and all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation or rectification of spirits, or for the compounding of spirits, or owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment shall be forfeited," must be held applicable to distillers and rectifiers only. The section, taken as a whole, does not indicate an intention to inflict upon a wholesale liquor dealer a forfeiture of his whole stock for an omission to pay the special tax as required by law; and the words "such person," are intended to refer to those classes, and not to all the classes of persons previously mentioned.

The proof that the claimant was a wholesale liquor dealer was not, therefore, sufficient to warrant the direction of a verdict, and there must be a new trial.

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

TWO THOUSAND BUSHELS OF WHEAT (UNITED STATES v.). See Case No. 16,589.

Case No. 14,303.

TWO THOUSAND TIN CANS.

[7 Ben. 34.] [1]

District Court, E. D. New York. Oct., 1873.

FORFEITURE—IMPORT ACTS—RELANDING GOODS INTENDED FOR EXPORT—INTENT TO DEFRAUD.

1. Goods on board a ship, which had been entered for exportation under the act of 2d March, 1799 (1 Stat. 692), but for which no bond had been given, as provided in the 81st section of that act, and no debenture issued, were put on board a lighter alongside the ship. They were seized as forfeited under the 81st section of the act, as having been relanded. A verdict in favor of the government having been directed, in a suit brought to enforce the forfeiture, the claimant made a motion for a new trial: *Held*, that the discharge of the goods into the lighter amounted to a landing of them, within the meaning of the 82d section of the act. See Rev. St. § 3049.

[Cited in Kidd v. Flagler, 54 Fed. 369.]

2. A landing in the port of exportation, before the ship had broken ground, was within the act.

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

3. The forfeiture attached, although the bond had not been given nor the debenture issued.

4. Evidence that the claimant caused the goods to be relanded simply to correct a mistake which had arisen between merchants, whereby he had been led to enter for export a different quality of goods from that intended to be exported, afforded no defense.

5. An intent to defraud the government is not required for a forfeiture of goods relanded contrary to this act.

At law.

A. W. Tenney, U. S. Dist. Atty., for the United States.

R. H. Hollis, for claimant.

BENEDICT, District Judge. This was a proceeding to forfeit certain tin cans entered for exportation, which, it is claimed, became forfeited by virtue of section 82 of the act of 1799 (1 Stat. 692), because of a subsequent relanding thereof within the limits of a port or place within the limits of the United States. The entry of the goods for exportation was proved, and their inspection on board the outward bound vessel and the return of the inspector made to the effect that the goods described in the entry were actually laden for exportation on board the bark H. D. Stover, and the same so marked by the inspector.

It was also proved, that afterwards, and before the vessel sailed, the goods were found in a lighter lying alongside the vessel in which they had been shipped, where they were seized by the collector, and this proceeding thereupon instituted. On the trial of the cause, certain questions of law were ruled on, and a verdict directed in favor of the government. The correctness of these rulings has been called in question by a motion for a new trial, and they are now before me for re-examination.

The first question presented is whether the discharge of the goods from the ship to a lighter alongside amounts to a landing "within any port or place within the limits of the United States," within the meaning of section 82 of the act of 1799.

The correctness of the ruling, that such a discharge constituted a landing within the meaning of the act, was not seriously doubted on the trial, nor has the objection been seriously pressed upon this motion. My opinion is, that the ruling is correct.

The next question raised is, whether a landing in the port of exportation, before the ship has broken ground, is within the act? As to this, I am at a loss for any reason to sustain the position that such a landing is not within the act.

The next position taken by the defense is, that the forfeiture created by the 82d section cannot attach to these goods, because the bond prescribed in the 81st section had not been given, and no debenture had been issued. This position is untenable. The entry of these goods had been completed. Under the law, the claimants, by virtue of what had been done, had the right at any time within ten days after the clearance of the vessel to give their bond and receive their debenture certificate. The bond prescribed in the 81st section is intended as an additional security against a relanding, but has no such connection with the entry of the goods as to suspend the operation of section 82 until it be given.

The wide door for fraud which would be opened by permitting a relanding of goods, entered and returned by the inspector as laden on board a ship for export, at any time prior to the giving of the bond, forbids such a construction of the law.

The remaining and principal question of the case is, whether the claimant can defeat the operation of sec. 82, by evidence to the jury that he caused the goods to be relanded simply to correct a mistake which had arisen between merchants, whereby the claimant had been led to enter for export a different quality of goods from that intended to be exported. The ground taken is that such proof would repel the idea of any intent to defraud the government of the duties; and that inasmuch as the law provides no method of obtaining a permit to release goods, once entered for exportation, a relanding under such circumstances must make the case one of necessity and involuntary, so far as the owner of the goods is concerned.

The government having proved the entry, lading and inspection of the goods, and their subsequent relanding by the owners thereof, within the limits of a port or place within the limits of the United States, a case for forfeiture was made out. An intent to defraud the government of the duties is not required by the statutes to be an element in the case.

An intent to reland is proved by the act of relanding which the owners committed. And this was a voluntary act on their part, done, it may be to save themselves from loss, but nevertheless done in violation of law, and it worked a forfeiture of the goods under the act.

The cases of necessity cited, have little application here. This was no case of necessity.

To permit circumstances such as are relied on here, to be given in evidence to justify and explain a relanding of goods entered for exportation for the benefit of drawback, would afford opportunity for the concealment of frauds against which the government would have no means of protection. It was, doubtless, for this reason, that an intent to defraud of the duties was not made an element in the case.

My conclusion, therefore, is, that no error has been committed in directing the verdict. The motion for a new trial must be denied.

TWO TONS OF COAL (UNITED STATES v.). See Case No. 16,590.

TWO TRUNKS (UNITED STATES v.). See Cases Nos. 16,591 and 16,592.

Case No. 14,304.

The TYBEE.

[1 Woods, 358.] [1]

Circuit Court, E. D. Texas. May Term, 1870.

SHIPPING — CARRIERS OF GOODS — DELIVERY AT WHARF—CUSTOM.

1. A carrier's liability ceases when he has delivered the goods according to the bill of lading. In the absence of a special contract the goods are to be regarded as delivered when they are deposited upon the proper wharf at their place of destination, at a proper time, and notice given to the consignee, and he has had a reasonable time and opportunity, after notice, to remove them.

[Cited in Turnbull v. Citizens' Bank of Louisiana, 16 Fed. 147; The Boskenna Bay, 22 Fed. 665.]

[Cited in McNeal v. Braun, 53 N. J. Law, 624, 23 Atl. 687.]

2. A usage or special custom, prevailing at a particular port and brought to the knowledge of the parties, may vary this rule.

3. When it was the known usage and custom of the agents of a ship to keep goods in their possession after being landed upon the wharf, to take care of them, to protect them in case of rain, and to put them in a warehouse after delivery hours, for which they made a charge in addition to the freight; *held*, that they were bound to use ordinary diligence in taking care of the goods as long as the same remained in their possession, and the ship was liable for damages to the goods arising from the negligence of the ship's agents.

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

F. H. Merriman and L. A. Thompson, for libellants.

W. P. Ballinger, T. M. Jack, and M. F. Mott, for claimants.

BRADLEY, Circuit Justice. On the 22d of August, 1868, a case of dry goods was shipped at New York by Cochran & Co., on board the steamer Tybee bound for the port of Galveston, consigned to the libellants at the latter place. The bill of lading states that the package was in good order and well conditioned, and then states that the same "is to be delivered in like good order and condition at the aforesaid port of Galveston, the dangers of the seas, etc., excepted, unto Burkhardt & Shaper, or to their assigns, they paying freight for the said shipment, 40 cents per foot, with 5 per cent. primage, etc." The bill of lading then contains the following agreement: "It is expressly understood, that the articles named in this bill of lading shall be at the risk of the owner, shipper or consignee thereof, as soon as delivered from the tackles of the steamer at her port of destination; and they shall be received by the consignee thereof, package by package as so delivered; and if not taken away the same day by him, they may (at the option of the steamer's agents) be sent to store, or permitted to lay where landed, at the expense and risk of the aforesaid owner, shipper or consignee." Besides this special contract, on which the respondents relied, evidence was given by them of a usage at the port of Galveston, by which, if goods were not taken from the wharf by the consignee by 4 o'clock, p. m., the ship's agents put them into a warehouse (generally belonging to third parties), and charged the goods for the trouble of such removal in addition to the freight thereon; and also, in case of rain, covered them with tarpaulin or other covering, or removed them into a warehouse or under a shed for shelter and protection. In this case the steamer arrived at Galveston on the 1st of September, and on the same day published in the newspaper notice to consignees of her arrival, and that she was discharging cargo at New wharf. The notice contained this clause, that "all goods remaining on the wharf after 4 o'clock, p. m., will be stored at the risk and expense of the consignees." It is proved that the libellants saw this notice on the day of its publication; and that they had previously received a copy of the bill of lading from New York. It further appears by the weight of the evidence, as it seems to me, that the case of goods in question was discharged from the vessel upon the wharf on the morning of the 2d of September, and whilst lying there in a pile with other goods, a severe shower of rain came up, and the goods got wet and were damaged to the amount of $180.30. The ship's people, it is true, covered the goods with sails and tarpaulins; but from the defective character of the covering used, the damage was not averted. They endeavored to obtain a lodgment for them in an adjoining warehouse, but from some misunderstanding with the superintendent did not succeed. After the shower was over, the difficulty being removed, but at what precise time does not appear, the goods were put into the warehouse. The ship's agent testified that it was not their habit to do this till after 4 o'clock. On this occasion, in consequence of the difficulty which had occurred, and the injury the goods received, he directed them to be put into the warehouse without expense to the owners. The libellants did not send for their goods till afternoon—the clerk says, between 3 and 4 o'clock. They were then shut up in the warehouse, and the delivery clerk refused to open it that day, as the different packages were all mingled together. The next day they sent for the goods and obtained them, but did not open them until the 4th, when they discovered the damage which they had sustained.

Under this state of facts the respondents claim exemption from liability for the damage complained of. The carrier's liability ceases, of course, when he has delivered the goods according to the bill of lading. The

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

general rule with regard to delivery, as laid down in the books is, that in the absence of a special contract the goods are to be regarded as delivered, so far as the carrier's responsibility is concerned, when they are deposited on the proper wharf, at their place of destination, at a proper time, and notice has been given to the consignee. A usage or special custom prevailing at a particular place, and brought to the knowledge of the parties, may vary this rule. The Richmond [Case No. 11,796], and note. Some cases qualify the rule as thus stated, by adding that the consignee must have reasonable time and opportunity to take and remove his goods before the carrier's liability is ended. Understanding this to mean, reasonable time after receiving notice of the arrival of the goods, it is undoubtedly correct. In this case there is no question about sufficient notice having been given. The consignee was aware on the first of September, that the cargo of the Tybee was discharging, or ready for discharge. He had sufficient notice to be prepared to receive the goods on the morning of the 2d, when they were discharged on the wharf, before the shower, occurred. The special contract contained in the bill of lading was a valid one, subject to the qualification that notice of the steamer's arrival and readiness to discharge should be given to the consignee, which as we have seen, was given in this case. According to that contract, the goods were at the risk of the owner immediately after touching the wharf. But the usage of the port, and the actual practice of the ship's agents, may have imposed subsequent duties upon them outside of what is usually known as the carrier's liability. This, as we have seen, ceased by the contract when the goods were deposited on the wharf. By the usage and practice referred to, the ship's agents do in fact keep goods in their possession after being landed on the wharf, take care of them, put them into a warehouse after delivery hours, and protect them in case of rain; and they make a separate charge for this service in addition to the freight. They are still bailees of the goods for some purpose, and although, by the terms of the contract, they might abandon them and leave them exposed on the wharf, yet that is not the usage, nor is it the practice of the respondents. Their interest, undoubtedly, requires that they should treat their customers with some degree of attention beyond what the terms of their contract require; and, indeed, by giving up possession of the goods, they would lose their lien for freight.

What then are the duties which their continued possession of the goods, after their contract is determined, imposes? Under the usage, it cannot be said to be entirely a gratuitous bailment. My opinion is that they are analogous to those carriers who assume the duties of a warehouseman, when their duties as carriers are discharged, and that under the circumstances of the case they are bound to use ordinary diligence in taking care of the goods as long as they remain in their possession. They would not be liable for damage which might occur without their negligence, as by a fire accidently consuming them, or by any other accident against which they could not, by ordinary diligence provide. Then, did they use ordinary diligence in this case, or were they guilty of negligence? Why were not the goods placed in the warehouse on the approach of the shower? It is said that from some difficulty or misunderstanding, the warehouseman would not permit them to be put therein. But it must be remembered that the ship agent had advertised that he had a warehouse at his disposal in which the goods would be put after 4 o'clock, and it seems that this difficulty or misunderstanding was not such that it could not be remedied. Mr. McMahan, the ship's agent, on coming to the wharf, soon succeeded in removing it, and seemed to feel that some consideration was due to the owners of the goods which had been left out exposed to the shower; for, having ordered them into the warehouse, he directed that their storage should be without expense to the owners. Still, if the goods had been properly cared for on the wharf, no negligence could be attributed to the employés of the ship. But the captain admitted to one of the witnesses that he had not proper coverings to protect the goods; that the tarpaulins had been condemned, or something to that effect, and were insufficient. I think, therefore, that the agents and persons in charge of the ship are chargeable with negligence in not sufficiently providing for the safety of the goods, whilst they chose according to the local usage, their own practice, and from motives of their own, to retain them in their possession. Hence I shall affirm the decree of the district court, and direct that a decree be entered for the libellants for the sum of $180.30, with costs and the costs of the district court, against the claimants and their sureties.

Case No. 14,305.

In re TYLER.

[4 N. B. R. 104 (Quarto, 27).] [1]

District Court, D. Massachusetts. 1870.

BANKRUPTCY—DISCHARGE—TRADESMAN—FAILURE TO KEEP BOOKS.

A bankrupt, in June, 1867, sold out the whole interest in his store. His petition in bankruptcy was filed in February, 1868. Between June and February he was out of business, except that he bought and sold apples, partly on his account and partly on a joint enterprise with another. He kept no books of account. *Held*, that the omission to keep such books must prevent the granting of his discharge.

[1] [Reprinted by permission.]

In bankruptcy.

G. W. Bartlett, for objecting creditors.
H. G. Parker, for bankrupt.

LOWELL, District Judge. The bankrupt kept a shop in Greenfield until the latter part of June, 1867, when he sold out his whole interest, including the good-will, for about two thousand two hundred dollars. His petition in bankruptcy was made in February, 1868. Between June and February he was out of business, excepting that he bought and sold apples, partly on his own account, and partly on a joint enterprise with one Mansfield. The only objection to the bankrupt's discharge which appears to be important, is that he kept no books of account. He testified that he kept none at all, and a person who was his clerk down to June, 1867, says he did keep one small book, but does not know what was in it. He submits that he was not a merchant or tradesman by reason of his limited dealing in apples, and that his former business had been fully ended and disposed of long before bankruptcy. I have decided, in one case, that a trading which was wholly for cash, and was over long before the bankruptcy, leaving nothing for the assignee to inquire into, either in the way of debts, of credits, or of assets, did not make the bankrupt a tradesman within the act, at the time of bankruptcy (In re Waite [Case No. 17,044]); and, in another case, I held that a clerk who happened to buy and sell certain horses and other personal goods, not intending, when he bought, to sell again, was not a tradesman (In re Rogers [Id. 12,001]). In these cases neither the letter of the law nor its spirit appeared to require a more strict construction, because, in the first, the accounting which the law exacts from traders was unnecessary, and, in the other, the character of a trader had never been assumed.

I regret to be obliged to say, in the present case, that the bankrupt does not clear himself from that objection. As I understand the evidence, the affairs of his original trade are, to some extent, still outstanding. Precisely what he received on selling out, and what he did with the money, are important inquiries to his creditors, which they have been unable to prosecute satisfactorily for the want of regular accounts; and, besides, I should infer that some of the debts proved against him relate to that very trade. The strict law applied to brokers must be enforced by the court until congress shall choose to modify it, and it is within the scope of that law that the final winding up of a trader's business should be recorded, as well as its current course, and, unless a bankrupt can clearly show that everything has been so fully ended that no such account could affect his standing or touch the interests of the creditors at the time of his bankruptcy, I cannot hold him discharged for what was, at the time of the trading, an illegal act of omission. Perhaps it may help to express my opinion on this point if we suppose that full and perfect accounts have been kept and afterwards willfully destroyed before the bankruptcy; if it was certain that evidence was thereby lost, which was of present moment to creditors, the act would be immaterial, but the bankrupt must prove it to be so. Whether the dealing in apples constituted the bankrupt a tradesman within the statute, it is not necessary to decide. The distinction taken in England, whether every one who buys and sells goods is, quo ad hoc, a tradesman under section 39 of our statute [14 Stat. 536], may admit of question. And yet it is very difficult to draw any line founded solely on the smallness of the transactions. It would seem that any one who buys on credit with intent to sell again at a profit, and who has no other regular business, is fairly within the mischief sought to be remedied by the act, though the buying and selling were a mere incident; as if a farmer should buy stock or grain in addition to what he raised—perhaps such a person could not properly be described as a tradesman. I am constrained to say that the omission to keep the books of the admitted trade not being shown to be immaterial to his present creditors, must prevent my granting the discharge.

Case No. 14,306.

TYLER v. ANGEVINE.

[15 Blatchf. 536; 8 Reporter, 643.] [1]

Circuit Court, N. D. New York. Feb. 6, 1879.

BANKRUPTCY—WRIT OF ERROR—FINDINGS OF FACTS—FRAUD—LIMITATION OF ACTIONS—CONSPIRACY.

1. On the trial, before a referee, in the district court, of a suit brought by an assignee in bankruptcy to recover the value of property transferred by the bankrupt in fraud of the bankruptcy act, the referee found, as facts, in his report, that the defendant and the bankrupt concealed from the plaintiff the facts attending said transfer, and that said facts, and the fraud of the bankrupt in making said transfer, were not brought to the knowledge of the plaintiff until within three months before the bringing of the suit. The referee reported that the plaintiff was not precluded from maintaining the suit by reason of its not having been commenced within two years from said transfer. The report was not excepted to. The defendant sued out a writ of error from this court. A case containing exceptions formed part of the record on the return to the writ, but it contained only proceedings which took place prior to the making of the referee's report: *Held*, that the finding of facts by the referee could not be reviewed on the writ of error.

[Cited in Town of Lyons v. Lyons Nat. Bank, 8 Fed. 374.]

2. The referee had found a state of facts which constituted a fraud under sections 35 and 39 of the bankruptcy act of March 2d, 1867 (14 Stat. 534, 536).

3. On the facts as to the concealment of the fraud, found by the referee, the two years statute of limitation in section 2 of said act was no bar

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 8 Reporter, 643, contains only a partial report.]

to the action, although it had not been brought within 2 years after the date of the assignment in bankruptcy to the plaintiff.

4. What evidence is competent on an issue as to conspiracy between the defendant and the bankrupt to defraud the creditors of the latter.

[This was a suit in bankruptcy by John Tyler, assignee of Jacob Shell and John Peter Shell, against Jackson Angevine.]

N. Morey, for plaintiff.
Horatio N. Griffith, for defendant.

BLATCHFORD, Circuit Judge. The referee finds, as facts duly proved, that, at all times between the 1st of May, 1874, and the 15th of June, 1874, and within six months before the filing of the petition in bankruptcy, which was August 3d, 1874, the bankrupts were wholly insolvent and unable to pay their debts, and had been so insolvent for a long time prior to said 1st of May; that the bankrupts, so being insolvent, transferred and delivered to the defendant, the whiskey, on the 30th of May, and the wagon, between the 1st of May and the 15th of June, the whiskey and the wagon being owned by, and in the possession of, the bankrupts at the time of such transfer and delivery; that the whiskey and the wagon were so transferred and delivered in fraud of the bankruptcy act, with a view to prevent the property of the bankrupts from coming to their assignee in bankruptcy, and from being distributed under said act; that, at the time of such transfer of the whiskey and the wagon, the defendant had reasonable cause to believe that the bankrupts were then insolvent, and that such transfer and delivery were made in fraud of said act, with a view, at the time thereof, of preventing the property of the said bankrupts from coming to their assignee in bankruptcy, and to prevent the same from being distributed under the said act; that the value of the whiskey, at the time of such transfer of it, was $1,003, and the value of the wagon, at the time of such transfer of it, was $250; that the defendant and the bankrupts concealed from the plaintiff the facts attending the said transfer and delivery of said property, and that the said facts and the fraud of the bankrupts in making such transfer and delivery, and the knowledge of the defendant, at the time thereof, of the insolvency of the bankrupts, and that the defendant had reasonable cause to believe them to be insolvent, and the knowledge that the defendant had reasonable cause to believe that the said transfer and delivery of said property was made by said bankrupts with a view to prevent their property from coming to their assignee in bankruptcy, and to prevent the same from being distributed under the said act, was not brought to the knowledge of the plaintiff till the month of March, 1877; and that this action was commenced thereafter, and before the 1st of June, 1877. The referee found and decided, as conclusions of law, that the plaintiff is not precluded from maintaining this action by reason of its not having been commenced within two years from the said transfer and delivery of said property to the defendant by the bankrupts; and that the plaintiff is entitled to recover, in this action, of the defendant, the sum of $1,253, with $338 52 interest from June 15th, 1874. Judgment was entered in the district court, on said report, by order of that court, on May 15th, 1878, for the $1,253 and the $338 52, with $5 56 additional interest, and $263 76, costs, being, in all, $1,860 84. No exceptions were filed in the district court to said report. The defendant sued out from this court a writ of error to review said judgment. A case containing exceptions forms part of the record on the return to the writ, but it contains only proceedings which took place prior to the making of the referee's report. The record also contains a paper entitled and filed in this court, on behalf of the defendant, as plaintiff in error, purporting to be an assignment of errors, to which there is a joinder by the other party. The errors alleged in such assignment are, (1) that the referee erred in overruling each objection made by the defendant to evidence offered by the plaintiff; (2) that the referee erred in sustaining each objection made by the plaintiff to evidence offered by the defendant, and in excluding material testimony offered by the defendant, duly excepted to by him, and in receiving irrelevant, incompetent and improper testimony, influencing and directing his decision herein, duly excepted to by the defendant, and in that the referee refused to nonsuit the plaintiff, on the motion of the defendant; (3) that the referee was required by law to disregard the evidence of the bankrupts and other witnesses sworn for the plaintiff, on its appearing, uncontroverted, that they had sworn on a prior occasion, and before the register in bankruptcy, in regard to the transaction in dispute, directly contrary to the testimony given by them respectively on the trial of this action, without whose testimony he could not have found certain essential and necessary and material facts stated in his report; (4) that the uncontroverted evidence given on the trial shows that the plaintiff learned, more than two years prior to the commencement of this action, sufficient relative to the transaction or transactions in dispute, to require him to have brought this action prior to the time the same was commenced, in order to prevent the statute of limitations, set up in the answer, from barring the same, and that this action was not commenced within two years after the alleged cause of action therein accrued; (5) that the report of the referee does not state or find facts sufficient to sustain or uphold the conclusions of law stated therein, or either of them, and that he does not find at all as to the fact of payment being made by the defendant to the bankrupts, to the full value of the property

in question, prior to any proceedings relative to them in bankruptcy, in regard to which sufficient evidence was given on the trial, so that it does not appear from said report and judgment, but that the plaintiff, on the enforcement and collection of said judgment, would have received into his hands, as assets, twice the value of said property; (6) that the declaration, and the matters therein contained, are not sufficient in law for the plaintiff to maintain his action; (7) that the judgment was given for the plaintiff, whereas it ought to have been given for the defendant.

The statute of limitation in question is found in the 2d section of the bankruptcy act of March 2d, 1867 (14 Stat. 518), and is in these words: "Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district, of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee, but no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee." In Bailey v. Glover, 21 Wall. [88 U. S.] 342, an assignee in bankruptcy filed a bill in the circuit court more than 3 years after his appointment, against relatives of the bankrupt, to set aside conveyances of property made to them by the bankrupt, when solvent, with the fraudulent intent to avoid the payment of a particular debt, which was his only debt. The bill alleged that the defendants kept secret their fraudulent acts and endeavored to conceal them from the knowledge of the creditor and the plaintiff, whereby both were prevented from obtaining any sufficient knowledge or information thereof until within the last two years, and that, even up to the present time, they had not been able to obtain full and particular information as to the fraudulent disposition by the bankrupt of a large part of his property. The fraud alleged was not a fraud against the bankruptcy act. The bill was demurred to on the ground that the suit was not brought within two years after the appointment of the assignee. The circuit court sustained the demurrer. On appeal, the supreme court reversed the decree. The court say: "In suits in equity, where relief is sought on the ground of fraud, the authorities are, without conflict, in support of the doctrine, that, where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided suit is brought within proper time after the discovery of the fraud. We also think, that, in suits in equity, the decided weight of authority is in favor of the proposition, that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts, on the part of the party committing the fraud, to conceal it from the knowledge of the other party. Booth v. Earl of Warrington, 4 Brown, Parl. Cas. 163; South Sea Co. v. Wymondsell, 3 P. Wms. 143; Hovenden v. Lord Annesley, 2 Schoales & L. 634; Stearns v. Page, 7 How. [48 U. S.] 819; Moore v. Greene, 19 How. [60 U. S.] 69; Sherwood v. Sutton [Case No. 12,782]; Snodgrass v. Branch Bank at Decatur, 25 Ala. 161. On the question as it arises in actions at law, there is, in this country, a very decided conflict of authority. Many of the courts hold that the rule is sustained in courts of equity only on the ground that these courts are not bound by the mere force of the statute, as courts of common law are, but only as they have adopted its principle as expressing their own rule of applying the doctrine of laches in analogous cases. They, therefore, make concealed fraud an exception on purely equitable principles. Troup v. Smith's Ex'rs, 20 Johns. 33; Callis v. Waddy, 2 Munf. 511; Miles v. Berry, 1 Hill (S. C.) 296; York v. Bright, 4 Humph. 312. On the other hand, the English courts and the courts of Connecticut, Massachusetts, Pennsylvania, and others of great respectability, hold that the doctrine is equally applicable to cases at law. Bree v. Holbech, Doug. 655; Clark v. Hougham, 3 Dowl. & R. 322; Granger v. George, 5 Barn. & C. 149; First Massachusetts Turnpike Corp. v. Field, 3 Mass. 201; Welles v. Fish, 3 Pick. 75; Jones v. Conoway, 4 Yeates, 109; Rush v. Barr, 1 Watts. 110; Pennock v. Freeman, Id. 401; Mitchell v. Thompson [Case No. 9,669]; Carr v. Hilton [Id. 2,436]. As the case before us is a suit in equity, and as the bill contains a distinct allegation that the defendants kept secret and concealed from the parties interested the fraud which is sought to be redressed, we might rest this case on what we have said is the undisputed doctrine of the courts of equity, but for the peculiar language of the statute we are considering. We cannot say, in regard to this act of limitations, that courts of equity are not bound by its terms, for, its very words are, that no suit at law or in equity shall in any case be maintained unless brought within two years, &c. It is quite clear, that this statute must be held to apply equally, by its own force, to courts of equity and to courts of law, and, if there be an exception to the universality of its language, it must be one which applies, under the same state of facts, to suits at law as well as to suits in equity. But we are of opinion, as already stated, that the weight of judicial authority, both in this

country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion, that this is founded in a sound and philosophical view of the principles of the statute of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred or extinguished, if they ever did exist. To hold, that, by concealing a fraud, or by committing a fraud in such a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud, the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common law side of the courts' calendar as to those on the equity side. While we might follow the construction of the state courts in this matter, where those statutes governed the case, in construing this statute of limitation, passed by the congress of the United States as part of the law of bankruptcy, we hold, that, when there has been no negligence or laches on the part of the plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him."

The present suit is a suit at common law. It appears, by the record, that it was referred to a referee "to hear, try and determine the issues" therein. The referee, as to the finding of facts, stood in the place of a jury. It is well settled that, on a writ of error, the finding of facts by the tribunal to which such finding is lawfully assigned in the court below, cannot be reviewed by the court which issues the writ of error. The court in error cannot inquire whether, on the evidence, the facts were rightly decided, and the finding of facts by the tribunal of fact is conclusive on the court in error, in reviewing the case. Bond v. Brown, 12 How. [53 U. S.] 254; York & C. R. Co. v. Myers, 18 How. [59 U. S.] 246, 251, 252; Basset v. U. S., 9 Wall. [76 U. S.] 38, 40; Gregg v. Moss, 14 Wall. [81 U. S.] 564, 569. The referee has found the facts to be as before recited. He finds facts which bring the case directly within the inhibition of sections 35 and 39 of the bankruptcy act of March 2d, 1867 (14 Stat. 534, 536). The state of facts so found by the referee is declared by those sections of the act to be "fraud," and "a fraud on this act." The referee also finds, that the defendant concealed from the plaintiff the facts which the referee so finds as facts, and that the said facts, and the said fraud, that is, the said facts constituting the said fraud, and the said fraud constituted of the said facts, were not brought to the knowledge of the plaintiff until within three months before the action was brought. The facts so found by the referee, both as to the transfer and the concealment, are directly within the issues raised by the pleadings. The referee does not find that there was no negligence or laches on the part of the plaintiff in coming to the knowledge of the facts so found, and which constitute the fraud, nor does he find specifically that the concealment was the reason why such facts and such fraud were not sooner brought to the knowledge of the plaintiff. But, after the plaintiff had shown, to the satisfaction of the referee, that the facts and the fraud existed and were concealed by the defendant, and that the plaintiff did not, in fact, know of the facts or the fraud until within three months before the suit was brought, the burden was upon the defendant to show affirmatively, to the satisfaction of the referee, that there was negligence or laches on the part of the plaintiff in coming to such knowledge. Such negligence might have been equivalent to actual knowledge. In this view, the finding as to the want of knowledge must be accepted as equivalent to a finding, not only that there was such want of knowledge, but that the absence of the knowledge was not due to negligence or laches on the part of the plaintiff. Especially is this so, in view of the 4th assignment of error, before recited, and of the fact that the defendant put in, before the referee, evidence which it is contended by his counsel proved the truth of the allegation in said 4th assignment of error, as to what the plaintiff had learned, and when, and its effect in law.

These considerations show that the case is brought directly within the ruling in Bailey v. Glover [supra], and that the statute of limitation relied on is no bar to the action. The answer sets up, that the alleged causes of action did not accrue to the plaintiff within two years next previous to the commencement of the action. The 4th assignment of error contains the same allegation. The facts found by the referee show, that the plaintiff is not precluded from maintaining the action, by reason of its not having been commenced within two years after the 27th of October, 1874, which was the date of the assignment to the assignee in bankruptcy, and, therefore, the date when the cause of action accrued to the assignee. The report of the referee finds, that the plaintiff is not precluded from maintaining the action by reason of its not having been commenced within two years from the transfer by the bankrupts. The cause of action did not accrue to the assignee, within the meaning of the statute of limitation, until the assignee received his assignment.

The foregoing observations dispose of the 3d assignment of error. Whether the referee did, or did not, disregard certain specific

evidence, in finding any of the facts stated in his report, is a matter which this court cannot inquire into, or review, on this writ of error. So, also, as to the 4th assignment of error, this court cannot inquire whether the evidence does, or does not, show the fact alleged in said assignment. The same is true as to the 5th assignment of error, in so far as it complains that the referee fails to find at all as to a certain fact. This court cannot examine that complaint. The referee has found affirmatively facts which uphold his 2d conclusion of law. The fact of payment to the bankrupts is merged in the facts found.

No other questions remain to be considered except those which arise on the exceptions stated in the record as taken in the course of the trial before the referee.

(1) A witness for the plaintiff was asked, whether the bankrupts, within a few months prior to their failure, made any statements to him concerning their intended failure, and, if so, what. The defendant objected to the question, as calling for hearsay evidence and evidence that was irrelevant, immaterial and incompetent. The objection was overruled and the answer was, that the bankrupts proposed to him to take a lot of liquors, go to Michigan, sell them at wholesale and break down in the operation, and that would be an excuse for them to break down, and then all three would go thirds in the profits; that they afterwards made a like proposal to him in regard to going to Tonawanda; that they commenced making these offers in the fall of 1873; and that they made the last offer to him on the 6th of June, 1874, the same month in which they failed. The complaint alleges, that the transfers of the whiskey and the wagon were made by the bankrupts and received by the defendant, with the intent, and in pursuance of a scheme and conspiracy between the bankrupts and the defendant, to hinder, delay and defraud the creditors of the bankrupts, by putting it out of the power of such creditors to reach by process of law the property of the bankrupts, and that such transfers were, in fact, fraudulent and void as against the creditors of the bankrupts and as against the plaintiff, as their assignee in bankruptcy. These allegations are denied by the answer. The case made does not set forth all the evidence given before the referee, but only parts of it. It states, that the plaintiff produced different witnesses who gave evidence tending to prove the issues on his part, and that the plaintiff gave evidence tending to show that the whiskey and the wagon were transferred to and received by the defendant in fraud of the creditors of the bankrupts and of the bankrupt act. The statement, in the case, that the plaintiff produced different witnesses who gave evidence tending to prove the issues on his part, is the first statement, in order of time, in the case, as to the giving of any evidence, except an admission as to the proceedings in bankruptcy. What such evidence was does not appear. It was evidence tending to prove the issues. One issue was the conspiracy between the bankrupts and the defendant. Another issue was the insolvency of the bankrupts at the time of the transfers to the defendant. Another issue was the purpose of the bankrupts, in making such transfers, to violate the provisions of the bankruptcy act. The evidence objected to was relevant to the first and third of these issues. It tended to show a conspiracy between the bankrupts and others to defraud their creditors, to which conspiracy the defendant afterwards became a party. The case shows much other evidence of such conspiracy. It is true, that the declarations of the bankrupts, objected to, did not relate to the particular whiskey sued for in this suit. But, the common object of the bankrupts and of all with whom they conspired, including the defendant, was to defraud the creditors of the bankrupts. Necessarily, while the bankrupts dealt with all their property, one transferee would deal only with one piece of property, and another with another. But, the object was a common one with the bankrupts and all the transferees and conspirators. Nor is it of consequence that the particular declarations now under consideration were in reference merely to proposed acts of fraud which may not have been consummated in the particulars proposed. The proposed acts were sui generis with those committed by the defendant. It must be assumed, from the statement in the case, that a foundation was first laid, by proof, sufficient in the opinion of the referee to establish prima facie the fact of the conspiracy alleged in the complaint. That being so, every declaration of the bankrupts in reference to the common object before mentioned is admissible in evidence. It makes no difference at what time the defendant joined the conspiracy. Every one who enters into a common design is generally deemed, in law, a party to every act which has before been done by the others, in furtherance of the common design; and this rule extends to declarations. 1 Greenl. Ev. § 111. But, the evidence also tended to show, from the mouths of the bankrupts themselves, their purpose and intent in their transactions with the defendant, by showing the proposals of fraud in the same direction, which they were making down to a date subsequent to the transfer of the whiskey to the defendant, and for some months before such transfer. Such evidence was competent. U. S. v. 36 Barrels [Case No. 16,469]; Wood v. U. S., 16 Pet. [41 U. S.] 342, 361; Taylor v. U. S., 3 How. [44 U. S.] 197; Buckley v. U. S., 4 How. [45 U. S.] 251. On an inquiry as to the state of mind, sentiments or dispositions of a person at a particular period, his declarations and conversations are admissible. 1 Greenl. Ev. § 108.

(2) The foregoing views apply to the offer of one of the bankrupts, during the same pe-

riod of time, to convey his farm to the same witness, upon the understanding that he was to pay nothing for it; and to the representations the bankrupts made, in March, 1874, as to their pecuniary condition, whereby they obtained goods on credit, for which they never paid.

(3) The evidence as to the large purchases, by the bankrupts, of goods on credit, during the fall and winter, in connection with evidence as to the manner in which they disposed of such goods, was competent, as showing the nature and extent of the fraudulent scheme of which the transactions with the defendant formed a part.

(4) It was proper to show that the bankrupts, by deeds made between May 24th, 1874, and June 6th, 1874, conveyed certain real estate, in connection with further evidence which tended to show that those deeds conveyed all the real estate to which either of the bankrupts had title at that time. This was evidence tending to show the general scheme of fraud.

(5) Evidence of propositions for the fraudulent transfer of goods, made by one of the bankrupts, was competent, as against the defendant, in a civil suit like this. The conspiracy being proved, the declarations of each conspirator are admissible.

(6) There can be no objection to the plaintiff's testimony as to what property of the bankrupts he found, as assignee.

(7) It was competent to prove, by one of the bankrupts, what capital and property they had when they went into business, and the condition of the property, and how they raised money to start the business, and what was the condition of their business in the fall of 1873, and what they did, at that time, to relieve themselves from embarrassment, and that, after they knew they were insolvent and would have to suspend, they bought goods largely, on a credit of from 4 to 6 months, and shipped away the greater part, and failed with an indebtedness of $44,000 and a stock on hand of only from $4,000 to $6,000. All this went to show the character of the conspiracy which the defendant joined.

(8) It was competent to show the transaction with the defendant as to the 50 barrels of whiskey, prior to the one as to the 10 barrels in suit, as tending to characterize the latter.

(9) It was not error to excuse the bankrupt, on the ground of personal privilege, from answering the question as to whether the defendant paid the bankrupts for the ten barrels, on the ground that it might criminate him to answer, he being under indictment for putting goods out of the way to defraud creditors.

(10) It was proper to show the transfer of a patent by the bankrupts, May 30th, 1874, as part of the carrying out of the conspiracy to which the defendant became a party.

(11) There is no valid objection to the testimony as to the note given to Thayer in May, 1874, as it is part of the history of the bankrupts' transactions after the inception of the frauds.

(12) The deed of his farm by one of the bankrupts, in September, 1873, was not incompetent, as the frauds seem to have had their inception about that time. It is no valid objection that the grantee in such deed is not a party to this suit, nor that the deed was an act of only one of the bankrupts.

(13) The testimony of the plaintiff as to the time when he first learned the facts relative to the transfer of the property in question, and to the sham payment for the whiskey, was competent under the law as to the statute of limitation.

(14) It was proper to exclude such parts of the prior deposition in bankruptcy of the witness Jacob Shell as his attention had not been called to on his examination in this suit, as the former deposition is stated, in the case, to have been offered by the defendant with a view to contradict the testimony of the witness given in this suit and to affect his credibility.

No error is found in the record, and the judgment below is affirmed, with costs.

TYLER (CONNECTICUT MUT. LIFE INS. CO. v.). See Case No. 3,109.

Case No. 14,307.

TYLER et al. v. DEVAL et al.

[1 Code Rep. 30; 1 Am. Law J. (N. S.) 248; 6 West. Law J. 47.] [1]

Circuit Court, D. Louisiana. 1848.

PATENTS—PATENTABLE INVENTION—PRINCIPLE—COMBINATION—CLAIMS—INJUNCTION.

1. Motion for an injunction, to prevent the infringement of an alleged patent right. *Held*, that a machine is patentable, only when it is substantially new.

2. An invention in mechanics consists, not in the discovery of new principles, but in new combinations of old principles.

3. Where an inventor claims to have invented more than he has actually invented, the patent is void.

John Henderson, for complainants.

S. S. Prentiss, for defendant Deval.

Horner & Durant, for the other defendants.

McCALEB, District Judge. This is a motion to restrain the defendants from the infringement of complainants' patent [No. 3,885] for an improvement called the "Tyler Cotton Press." The complainants have filed, as exhibited in their bill, their own patent, and also the patent and specifications under which defendants claim their right to act. The parties have also furnished plans and models, which have placed the court in full

[1] [1 Am. Law J. (N. S.) 248, and 6 West. Law J. 47, contain only partial reports.]

possession of all that is necessary to enable it to comprehend the nature of the respective improvements or inventions.

The motion for an injunction is resisted by the defendants on three grounds: (1) That the complainants' pretended improvement or invention is not original. (2) That the patent is void, inasmuch as they claim more than was invented. (3) That the defendants' patent embraces a new and important improvement, wholly different and distinct from that of the complainants', and does not in any respect interfere with the latter.

I have attentively considered the arguments and authorities presented by the learned counsel for and against this motion, and am inclined to the opinion that all the grounds taken by the defendants are tenable. It is, I think, perfectly obvious that the direct application of the piston rod of the steam engine to the progression lever is not an original invention of either party. This combination and application of power was invented in 1839, by John G. Shuttleworth, as appears from the plans and descriptions published in the Repository of Patent Inventions, and Other Discoveries and Improvements in Arts, Manufactures, and Agriculture. If the patent of the Tyler cotton press embraces this as a part of the improvements, then it is clearly void, the claim being broader than the actual invention. On this point the language of Mr. Justice Story, in the case of Woodcock v. Parker [Case No. 17,971], is too plain to be misunderstood. "If," said he, "the machine for which the plaintiff obtained a patent substantially existed before, and the plaintiff made an improvement only therein, he is entitled to a patent for his improvement only, and not for the whole machine; and, under such circumstances, as the present patent is admitted to comprehend the whole machine. it is too broad, and therefore void." Again, in the case of Barrett v. Hall [Id. 1,047], the same eminent judge held that, "if a patent be for an improved machine, then the patentee must state in what the improvement specifically consists, and it must be limited to such improvement." If, therefore, the terms be so obscure or doubtful that the court cannot say what is the particular improvement which the patentee claims, and to what it is limited, the patent is void for ambiguity. Such was the opinion of Mr. Justice Heath in the case of Boulton v. Bull, 2 H. Bl. 463, 482, and of the supreme court of the United States in the case of Evans v. Eaton, 3 Wheat. [16 U. S.] 454. If the complainants' patent does not embrace the combination to which I have alluded, and it is not easy to determine to what it is to be specifically limited, I am unable to discover wherein the invention consists. The new connection of the progression levers with the plateau, by straight iron rods, can hardly claim the dignity of an invention or improvement. A machine is patentable only when it is substantially new. The mere application of an old machine to a new process is not patentable. In the case of Howe v. Abbott [Case No. 6,766] it was held by Mr. Justice Story that the application of an old process to manufacture an article to which it had never before been applied is not a patentable invention. There must be some new process, or some new machinery used to produce the result. He who produces an old result by a new mode or process is entitled to a patent for that mode or process. But he cannot have a patent for a result merely, without using some new mode or process to produce it.

In the subsequent case of Bean v. Smallwood [Case No. 1,173] the learned judge made a more definite application of the principle here laid down, by the citation of a few simple examples. "I take it to be clear," said he, "that a machine or apparatus, or other mechanical contrivance, in order to give a party a claim to a patent therefor, must, in itself, be substantially new. If it is old and well known, and applied only to a new purpose, that does not make it patentable. A coffee mill, applied for the first time to grind oats, or corn, or mustard, would not give a title to a patent for the machine. A cotton gin, applied, without alteration, to clean hemp, would not give a title to a patent for the gin as new. A loom to weave cotton yarn would not, if unaltered, become a patentable machine, as a new invention, by first applying it to weave woollen yarn. A steam engine, if ordinarily applied to turn a grist mill, would not entitle a party to a patent for it if it were first applied by him to turn the main wheel of a cotton factory. In short, the machine must be new, not merely the purpose to which it is applied. A purpose is not patentable, but the machinery only, if new, by which it is to be accomplished. In other words, the thing itself which is patented must be new, and not the application of it to a new purpose or object."

But even if I am mistaken in my view of the complainants' patent, I have no doubt of the correctness of the third position taken by the defendants, to wit, that their patent does not conflict or interfere with that of complainants. The invention or improvement claimed by Deval, both in his specifications and patent, is a combination of triangular levers, with the progression levers attached to the piston rod, by which great accession of power is gained. This increased power, arising out of his new combination of levers, constitutes the defendant's improvement, and it is this alone which he has patented. This combination does not exist in the Tyler cotton press, where there is only one set of levers simply attached to straight rods to the plateau of the press. In mechanics inventions consist, not in the discovery of new principles, but in new combinations of old ones. The principles of mechanics are few, simple,

and well understood; but their combinations are various and inexhaustible. Any new combination, which is of substantial advantage in the arts, comes within the policy and protection of the patent law. Even then, if the Tyler cotton press be an original and useful invention, I am of opinion that Deval's patent does not innovate upon it, and that the defendants have a right to make and sell the Deval cotton press.

For these reasons, the injunction prayed for by the complainants must be refused. Motion refused.

TYLER, The (GILMAN v.). See Case No. 5,446.

Case No. 14,308.

TYLER v. HAGERTY et al.

[2 Flip. 257;[1] 5 Reporter, 300; 10 Chi. Leg. News, 100; 6 Am. Law Rec. 385; 2 Cin. Law Bul. 301.]

Circuit Court, N. D. Ohio. Oct. Term, 1878.

REMOVAL OF CAUSES — SEVERAL DEFENDANTS — CONTROVERSY.

Where there are several defendants, to entitle a non-resident to remove a cause to the circuit court, there must be a controversy wholly between him and the plaintiff, so as in effect a final decree would settle the whole case.

[Cited in Donohoe v. Mariposa L. & M. Co., Case No 3,989.]

[This was a bill by Henry W. Tyler, against George R. Hagerty, Amanda Moore, and Clinton Idler, for specific performance. Heard on motion of plaintiff to remand the cause to the state court.]

WELKER, District Judge. The petition was filed in the common pleas of Ottawa county, by Henry W. Tyler, against George R. Hagerty, Amanda Moore and Clinton Idler, to compel a specific performance of a contract in writing for the sale of real estate lying in said county, made by Hagerty to Tyler on the 7th day of September, 1876; also alleging that Tyler, after the making of the said contract, and before the commencement of the action, fraudulently conveyed the land so sold to Moore, and made a lease for a part thereof to Idler, the other defendant, and prays the enforcement of the contract against Hagerty, and also that the conveyance made to Moore and Idler be set aside and they be ordered to convey the land to the plaintiff. Hagerty filed an answer to the petition denying plaintiff's right to enforce the contract.

The plaintiff and the defendants, Moore and Idler, are citizens of the state of Ohio, and the other defendant, Hagerty, is a citizen of the state of Missouri.

At the first term of the court of common pleas of Ottawa county, at which the case could be tried, the defendant, Hagerty, filed a petition therein for the removal of the case to this court, and executed and filed the necessary and proper bond, and an order was made by said court making such removal, and on the first day of the next succeeding term, to-wit: the second day of October, 1877, filed a copy of the record of the case in this court.

The plaintiff files a motion to dismiss the case from this court and remand the same to the common pleas, on the grounds:

First. That the controversy involved in the case is not wholly between citizens of different states.

Second. That the controversy can not be fully determined between the plaintiff and defendant, George Hagerty, a citizen of Missouri.

Third. That the controversy is between citizens of this state.

The only question presented in the motion is whether the defendant, Hagerty, being a citizen of Missouri, has a right to remove the case to this court.

In the second section of the act of March 3, 1875 (18 Stat 470), providing for the removal of causes from the state courts to the national courts, it is provided: "And if in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

Is the controversy involved in this case wholly between the plaintiff, a citizen of Ohio, and the defendant, Hagerty, a citizen of the state of Missouri? A part of the controversy is between them, and part of it is between the plaintiff and the other defendant, Moore, who is a citizen of Ohio. As to Hagerty, the controversy is whether he sold the land, as claimed by the plaintiff; whether the plaintiff has complied with the contract, and Hagerty refused to do so. As to Moore, the controversy is whether Hagerty fraudulently conveyed the land to her after the sale thereof to the plaintiff. A judgment against Hagerty that he shall convey the land does not determine the controversy. The character of the conveyance to Moore remains to be determined in the suit. So that the controversy cannot be fully determined between the plaintiff and the defendant, Hagerty.

The controversy is really between the plaintiff on the one side, and the defendants, Hagerty and Moore, on the other, and is not, therefore, wholly between the plaintiff and the defendant, Hagerty. This being the relation of the two parties, it is not such a controversy as entitles the defendant, Hagerty, to remove the case to this court.

Motion sustained and cause remanded.

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

Case No. 14,309.

TYLER et al. v. HYDE et al.

[2 Blatchf. 308.] [1]

Circuit Court, S. D. New York. Oct., 1851.

PATENTS—PARTIES—JUDGMENT—BAR TO ACTION.

1. Where T., a patentee, and P., his assignee of an undivided interest in the patent, brought a suit in equity in the circuit court of the United States in Louisiana, under section 16 of the act of July 4th, 1836 (5 Stat. 123), against D., the patentee of a junior patent, and other parties claiming under him, founded on the interference of D.'s patent with T.'s patent, and praying that D.'s patent might be declared void, and subsequently T. and P. brought an action at law in this court for the infringement of T.'s patent, against H., who was not a party to the suit in Louisiana, but who owned an undivided interest in D.'s patent, by title derived from D. after the commencement of the suit in Louisiana, although prior to the rendition of any judgment in that suit: *Held*, that the parties to the suit in this court were virtually within the proviso to said section 16, and that their rights would be bound by a decision in the suit in Louisiana pronouncing judgment that the two patents interfered or that either of the patents or any part of them was valid or invalid.

2. But, where H. pleaded in bar the bringing of the suit in Louisiana and the dismissal of the bill therein by the judgment of the court upon the merits thereof: *Held*, that that judgment did not necessarily import that the patents of T. and D. interfered or that T.'s patent was adjudged void and inoperative.

3. In order to be received and acted upon in this court, as against T.'s patent, and in a trial between other parties, the judgment should have been direct and affirmative in terms, and should have asserted the interference of the patents, and have declared T.'s patent void in the whole or in part, or inoperative and invalid in some particular part of the United States.

4. Such a judgment would, under the decision in Smith v. Kernochen, 7 How. [48 U. S.] 198, have been a bar to the action at law in this court.

This case came up on a demurrer to a plea puis darrein continuance. The action was brought for the infringement of letters patent. The original patent was granted to the plaintiff [Philos B.] Tyler, on the 16th of January, 1845, for an "improvement in cotton-presses." [No. 3,885.] That patent was surrendered by the patentee on account of a defect in the specification, and a new patent was granted to him, on a corrected specification, on the 1st of May, 1847. [No. 92.] On the 22d of February, 1848, the patentee assigned an equal undivided half of the patent to the plaintiff [William S.] Pendleton. The plea averred that letters patent were granted to one Augustus Devall, on the 17th of April, 1847, for an "improvement in cotton-presses;" that the present plaintiffs, on the 31st of March, 1848, commenced a suit in equity, by bill, in the circuit court of the United States for the Eastern district of Louisiana, against the said Devall and three others, setting forth the patent to Tyler, and its re-issue, and the right of the plaintiffs under it, and the patent to Devall, and charging that the defendants [Edward F. Hyde and others] had made and put into use, in New Orleans, a cotton-press constructed in conformity to the specification and drawings of Devall's patent, and that that press was a tame imitation of the cotton-press described in Tyler's patent, involved the same principles of action and the same combination of mechanical powers, and operated, to every material extent, in the same way as Tyler's press, and was a palpable infringement of the same, and further charging that the press, as constructed and put in use by the defendants and as patented to Devall, was, in its principles of construction, identical with the invention of Tyler, and that no patent therefor should have been granted to Devall, and that the same ought to be repealed, and praying that the defendants be ordered to account to the plaintiffs for the use and profits of the cotton-press, and that the court should decree that the patent granted to Devall be cancelled and annulled, avoided and set aside, as improperly and inconsiderately awarded, and for such other and further relief as to justice and equity might seem meet; that Devall put in his answer to that bill, denying the novelty and originality of the invention of Tyler, and averring that his patent was null and void, and that its re-issue was obtained with an intent to defraud Devall, and that the re-issued patent to Tyler was not for the same invention as the original patent, and that the improvement patented to Devall was original, and was entirely distinct from that patented to Tyler, and was not in any part embraced in it, and that cotton-presses built in accordance with Devall's patent were no infringement upon Tyler's patent, even if the same were valid; that the patent to Tyler, on which this action was founded, was the identical patent described in the bill of complaint in the Louisiana circuit court; that, on the 1st of June 1849, Devall assigned two-thirds of his patent and the said interest became on that day vested in the defendant Hyde, at whose instance and request, and as whose agents, the other defendants (who composed the firm of Stillman, Allen & Co.) made all the cotton-presses complained of in this action as infringements, and which were all made in exact conformity with the cotton-press described in Devall's patent; and that, on the 14th of June, 1850, the bill in the Louisiana circuit court was, by the consideration and judgment of the court and upon the merits thereof, dismissed, with costs to Devall, the suit as against the other defendants having been previously settled.

To this plea the plaintiff's demurred, and alleged, for causes of demurrer, that the suit in Louisiana was not between the parties to this suit, nor between their privies in law or in estate, and that it did not appear by the plea, on which of the several distinct defences set up in the equity suit, the bill in that suit was dismissed. The defendants joined in demurrer.

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

Edwin W. Stoughton, for plaintiffs.
George R. J. Bowdoin, for defendants.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. The bill filed by the plaintiffs in the circuit court in Louisiana was founded upon the 16th section of the patent act of 1836 (5 Stat. 123), and its scope and aim were to obtain the benefit of the extraordinary powers granted by that act to circuit courts. The section is as follows: "Whenever there shall be two interfering patents, or whenever a patent, on application, shall have been refused on an adverse decision of a board of examiners, on the ground that the patent applied for would interfere with an unexpired patent previously granted, any person interested in any such patent, either by assignment or otherwise, in the one case, and any such applicant in the other case, may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties, and other due proceedings had, may adjudge and declare either the patents void in the whole or in part, or inoperative and invalid in any particular part or portion of the United States, according to the interest which the parties to such suit may possess in the patent or the invention patented, and may also adjudge that such applicant is entitled, according to the principles and provisions of this act, to have and receive a patent for his invention, as specified in his claim, or for any part thereof, as the fact of priority of right or invention shall, in any such case, be made to appear; . . . provided, however, that no such judgment or adjudication shall affect the rights of any person, except the parties to the action and those deriving title from or under them subsequent to the rendition of such judgment."

It is plain, from the bill referred to, that the plaintiffs claimed their equity to be the interference of Devall's junior patent with their prior one, and the relief they sought was to have the posterior patent declared void. The court had jurisdiction of the subject-matter in equity for no other purpose, for, although the bill prayed an account of the profits received by Devall and his co-defendants for the use and manufacture of cotton-presses, and that such profits should be decreed to the plaintiffs for their damages, yet, manifestly, that prayer was but incidental to the one demanding judgment of nullity against Devall's patent as one interfering with Tyler's. The account is not required in aid of a suit at law, nor is an injunction prayed for; and, if it be competent to a party, by original bill in equity, to recover damages for the violation of a patent right, the bill is clearly not framed to that end, and contains nothing denoting such intent, other than the commonplace formula of a prayer "for such other and further relief as to justice and equity may seem meet." This court cannot intend that, under the bill presented to the circuit court in Louisiana, any other question was tried than the one designated by the statute—that is, which, if either, of the patents was void, in the whole or in part, or inoperative and invalid in any particular part or portion of the United States. Those particulars were placed within the cognizance of the court by the statute, and upon those the act authorized the court to adjudge and decree.

We consider the parties in this action to be virtually within the proviso to the 16th section of the act of 1836 (the defendants having become assignees of and privies with the defendant in the suit in Louisiana, pendente lite), and that their rights would be bound by the decision in that suit, had that court pronounced judgment that the two patents interfered, and upon the validity or invalidity of either of the patents or of any part of them.

In support of the plea of puis darrein continuance it is argued, that the court must presume that the judgment of the court in Louisiana was adverse to the validity of Tyler's patent, because that question was involved in the issues raised in the cause, and that the judgment of the court upon all the issues was, in effect, that the plaintiffs had no valid title to the invention claimed by them. This conclusion is, however, one of hypothesis and argument. It is not announced by the court, in rendering its judgment, nor, in our opinion, does that judgment exclude any other conclusion. The decree of the court upon the merits was, that the bill of complaint be dismissed with costs. This does not necessarily import that the patents interfered, or that Tyler's patent was adjudged void and inoperative. The plaintiffs in that suit may have failed to prove that the defendants violated their right, which would have been the case if Devall's machine was essentially different from theirs in construction and operation; or the plaintiffs may have parted with their title, or executed grants or licenses under which the defendants were protected. The plea supplies this court with no means of determining upon what description or character of merits, as between those parties, the decree dismissing the bill was founded; and, if any failure of evidence on the part of the plaintiffs, or any testimony on the part of the defendants within the issues, might have produced the result and justified the decree, this court cannot assume that the interference of the two patents, rather than any other one of such particulars, was the ground of the decision.

But, independently of the want of record proof that the circuit court in Louisiana heard and decided the case before it solely upon the question as to the interference of the two patents, and as to which was the valid one, we think that a judgment or decree cannot be accepted as determining that

point, unless it be direct and affirmative in terms, and in the words of the statute. The court must adjudge and declare the patent void, in the whole or in part, or inoperative and invalid in some particular part of the United States. A decree dismissing a bill seeking that relief does not imply such positive judgment, but, on the contrary, it indicates that the court, on the proofs before it, was unable to render that specific judgment. At all events, it cannot, in our opinion, be received and acted upon in another court, and in a trial between other parties, as amounting to the positive and affirmative declaration demanded by the statute. Had the decree of the circuit court asserted the interference of the patents and declared Tyler's patent void, that decree would have been conclusive in this court, on a trial at law. Smith v. Kernochen, 7 How. [48 U. S.] 198. The utmost effect that can properly be given to the decree dismissing the bill is, to consider the court as having determined that, upon the proofs adduced at the hearing, the plaintiffs had not supported, to the satisfaction of the court, the matters of complaint set forth in the bill. This is far short of the distinct adjudication which, in Smith v. Kernochen, the supreme court held to be a bar, in a different circuit, to a trial at law of the same subject-matter.

Judgment must be rendered, on the demurrer, for the plaintiffs, with leave to the defendants to plead over, on the usual terms of payment of costs.

[A motion made by plaintiffs to strike out a special plea by defendants, on the ground that it was a repetition of the plea puis darrein continuance, which was adjudged bad, was denied. Case No. 14,310.]

Case No. 14,310.

TYLER et al. v. HYDE et al.

[2 Blatchf. 399.] [1]

Circuit Court, S. D. New York. July 1, 1852.

PLEADING AT LAW—MOTION TO STRIKE OUT PLEA.

The sufficiency, in point of substance, of a plea which is regular in form, cannot be inquired into on motion.

After the decision in this case [see Case No. 14,309], on the demurrer to the plea puis darrein continuance, the defendants, under the leave then given them to plead over, put in a special plea, which the plaintiffs now moved to strike out, on the ground that it was, in effect, a repetition of the plea puis darrein continuance which was adjudged bad. The defendants opposed the motion, and insisted that the plea was regular and valid because it pleaded the judgment and decision of the circuit court of the United States for the Eastern district of Louisiana, as it now stands upon the records of that court.

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

Edwin W. Stoughton, for plaintiffs.

George R. J. Bowdoin, for defendants.

BETTS, District Judge. The court will not, on this motion, enter into a consideration of the sufficiency of the plea in point of substance, or inquire whether it is founded upon the rightful decree of the circuit court in Louisiana. It may, possibly, become necessary for this court to determine, when the proofs are presented, which decree of that court is the valid one governing the case, should two be certified from it which are in conflict in particulars affecting the merits. The privilege accorded to the defendants to plead over, was subject to no restrictions, and they are entitled under it to interpose any plea which would have been good if put in independently of that leave. The defendants plead at their peril, and their plea, being regular in form, cannot be displaced by motion. The plaintiffs must demur to it or take issue on the facts it sets up.

Motion denied.

TYLER (McCOBB v.). See Case No. 8,705.

Case No. 14,311.

TYLER et al. v. The SOUTH AMERICA.

[10 Betts, D. C. MS. 9.]

District Court, S. D. New York. July 3, 1847.

COLLISION — STEAM AND SAIL VESSEL — CROSSING STEAMER'S BOW.

[Where a steamboat was proceeding slowly to her dock, and a sloop endeavored to cross her bow into the same slip, the steamer is not liable for the resulting collision, it appearing that she stopped her engines as soon as this maneuver of the sloop was discovered, and that the latter had not taken proper and reasonable precautions.]

[Cited in The New Champion, Case No. 10,146.]

[This was a libel by Lindley B. Tyler, Josiah Smith, Usher Benjamin, and Henry A. Gording, owners of the sloop Jonah Smith, against the steamboat South America, Isaac Newton, claimant, for damages caused by collision.]

BETTS, District Judge. The pleadings and proofs in this case, and the arguments of the advocates of the respective parties thereon, being duly considered, and it being made to appear to the court that the said sloop, at the time of the collision in the pleadings mentioned, was attempting to cross the track and bow of the said steamboat, at the time approaching and coming into her well-known landing place and berth; and it appearing to the court that the said steamboat took the usual and notorious course of steamboats so situated to make her landing and come into her berth, and that her movements were open, and in plain view of the persons on board

said sloop; and it not being made to appear in behalf of the said sloop that reasonable and proper precaution and efforts were taken in her management to avoid the danger of collision, if she continued her then course into the slip, the circumstances in view affording reasonable presumption to the persons on board her that, if she held her way, the two vessels must strike each other, unless the steamboat should change her direction or be wholly stopped; and it being made to appear to the court, by the proofs of the claimants, that the speed of the steamboat had been slacked, and she was proceeding slowly along the docks to her berth, before it was discovered on board her that the said sloop was endeavoring to run across her bows into the same slip, and, so soon as it was so discovered, her engine was stopped, but that the two vessels were then so near each other that she could not at the time take any other or more effectual means than she actually used to avoid the collision: it is considered by the court that the said steamer is not liable to the libellant for the damages occasioned by the collision. Wherefore it is ordered and decreed that the libel in this behalf be dismissed. But inasmuch as the libellants have proved, by the testimony of witnesses standing on the dock, and observing both said vessels, and not attached to or interested in either of them, that in their opinion the said steamboat was at the time running with improper speed, and made no effort to prevent or lessen the danger of collision, thereby furnishing the libellants probable cause of action, it is further ordered that no costs be taxed in the cause in behalf of the claimants against the libellants.

TYLER (VIOLETTE v.). See Case No. 16,955.

TYLER (WADSWORTH v.). See Case No. 17,032.

Case No. 14,311a.

TYLER v. WALKER.

[2 Hayw. & H. 35.] [1]

Circuit Court, District of Columbia. Jan. 3, 1851.

ARMY—PERMANENT POST—DOUBLE RATIONS—PARTIES—CONSTITUTIONAL LAW.

1. Under the sixth section of the act of congress of August 23, 1842 [5 Stat. 513], allowing certain officers, while commanding separate ports, double rations, among them being "the commandant of each permanent or fixed post garrisoned with troops," under the evidence, it was *held* that the marine station at the navy yard in Washington was a permanent or fixed post, garrisoned by troops, and therefore the plaintiff is entitled to the rations allowed by said act.

2. This court had jurisdiction over this case.

3. In all cases where jurisdiction depends on the party, it is the party named in the record; consequently the 11th amendment of the constitution, which restrains the jurisdiction granted by the constitution over suits against the states or the government, is limited to those suits in which a state or the government is a party on the record.

Bill as rendered Major George W. Walker, to Capt. Henry B. Tyler, Dr.: "For amount retained in your hands as paymaster of the U. S. marine corps, for double rations due the said Capt. Tyler as commandant of a detachment of marines, stationed at the navy yard, Washington, from the 1st of December, 1849, to the 30th of September, 1850: 305 days, at 4 rations per day, is 1,220 complete rations, at 20 cents per ration, is $244.00; for allowance for responsibility and safe keeping of the clothing, arms and accoutrements of said detachment, due the said Capt. Tyler from October 1, 1849, to 30th of September, 1850; 12 months, at $10 per month, is $120.00,—total, $364.00."

This is an action in assumpsit to recover $364.00, the amount of double rations, and for the responsibility of arms, accoutrements, &c., and for the safe keeping and issuing of clothing, payable to the said plaintiff as captain in said corps, while commanding a detachment of marines at the navy yard, Washington city, as a permanent and fixed post garrisoned with troops from 1st of October, 1849, to the 30th of September, 1850, which amount has been withheld by said defendant from the said plaintiff. This action is brought to ascertain whether the said post at the navy yard, Washington, was during that time above named a permanent or fixed post garrisoned with troops, and if so, to recover the amount set forth in the declaration. This action is to be docketed by consent, and the clerk of the circuit court of the District of Columbia, for the county of Washington, is hereby authorized and requested, and so to enter it upon the trial docket of the October term of 1850, so that a trial may be had as speedily as may be. Henry B. Tyler, Captain U. S. Marines. George W. Walker, Paymaster U. S. Marine Corps.

It is agreed in this case that the plaintiff is a captain in the marine corps of the United States, and that the defendant is a paymaster in the same corps. Under the circumstances mentioned this suit is an amicable one, and docketed at the instance of the second comptroller of the treasury, for the single purpose of obtaining a legal adjudication of the question, whether the plaintiff is entitled to the allowance claimed by him; and it is agreed to submit the question to this court, and that the accompanying papers filed herewith are admitted to be competent evidence to prove the facts stated in them respectively.

The above is signed by the several counsels.

[1] [Reported by John A. Hayward, Esq., and Geo. C. Hazelton, Esq.]

The papers referred to above are mentioned in the opinion of the chief judge.

Henry M. Morfit, for plaintiff.

Richard S. Coxe, for defendant.

CRANCH, Chief Judge. Case agreed and docketed by consent, to try the right of the captain of marines, at the navy yard in Washington, to double rations as commandant "of a permanent or fixed post garrisoned with troops." Within the meaning of the 6th section of the act of congress of the 23d of August, 1842 [5 Stat. 513], by which it is enacted that the rations authorized to be allowed to each officer while commanding a separate post, by the acts of March 3, 1797 [1 Stat. 507], and March 16, 1802 [2 Stat. 132], shall be allowed only certain officers among whom is included "the commandant of each permanent or fixed post garrisoned with troops." It is admitted by the counsel of both parties that the only matter to be submitted to the court, upon the evidence filed, is whether the post at the navy yard, when commanded by Captain Tyler, was a separate permanent post garrisoned with troops?

Upon that question the evidence is: 1st. That Captain Tyler commanded the marines at the navy yard, stationed during the period claimed for, and that the defendant Walker was paymaster of the said marines during the same period. 2nd. The order of Mr. Badger, secretary of the navy, of the 30th of July, 1841, "that double rations should be allowed to the commanding marine officers at the navy yards, or upon the marine stations at Portsmouth, N. H., Boston, New York, Philadelphia, Washington, Norfolk and Pensacola." 3rd. Letter of General Henderson to Captain Tyler, approved by the secretary of the navy 15th September, 1843, re-establishing the post at the gate-way at the navy yard in Washington, which had been suspended on the 2nd of September of the same year. 4th. Affidavit of D. H. Smith, chief clerk in the paymaster's office of the marine corps at Washington, that Captain Stark, from 15th of July, 1848, to 31st of August of that year, was stationed at the navy yard in Washington, in command of a guard or detachment of marines, and as commandant of that post received double rations and $10 a month for the responsibility and safe keeping of the arms, accoutrements and clothing of the detachment. That Captain Tyler succeeded him in that command and continued there from the 1st of October, 1848, until the present time. That it appears by the records in the office of the adjutant and inspector that Captain Levy Twiggs was in command of said post from Nov. 6th to Dec. 31, 1830, and received double rations. That the propriety of such payment was never to his knowledge questioned until recently in the case of Captain Tyler, for the purpose of having it decided as he understood in court.

From this evidence I am satisfied that the marine station at the navy yard in Washington was (at the time when, &c.) "a permanent or fixed post garrisoned with troops." But a doubt is suggested whether this court has jurisdiction of the case, because the United States is the real defendant and cannot be sued. The answer is, that, for that very reason the suit must be against the officer who has the money in his hands to pay to the plaintiff, if in law or in equity he is entitled to it. In the case of Osborn, 9 Wheat. [22 U. S.] 738, the same question was raised and argued. This was a suit against an officer of the state of Ohio, and it was contended in p. 756 by the defendant that "if the state be the only party interested, and if the bill in its terms and in its effect operates solely upon the state, the state ought to be made a party. If the circuit court cannot exercise jurisdiction where a state is a party direct, it ought not, it cannot, be permitted to obtain that jurisdiction by an indirect mode of proceeding. The reasons which exempt the state from direct responsibility operate at least equally strong to exempt her from indirect responsibility." Page 802, "Here the sole interest is in the state of Ohio. She is therefore an indispensable party to the bill, but she cannot be made a party because she cannot be sued. The inevitable consequence is that the court below cannot take cognizance of the cause." Page 842, Chief Justice Marshall—"The objection is, that as the real party cannot be brought into court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties, but if the person who is the real principal—the person who is the true source of the mischief—by whose power and for whose advantage it is done be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit." Again in page 843 the chief justice says: "Will it be said that the action of trespass is the only remedy given for this injury? Can it be denied that an action on the case for money, had and received to the plaintiff's use, might be maintained? We think it can." Again in page 846 the chief justice says, "The bill is brought, it is said, for the purpose of protecting the bank in the exercise of a franchise, granted by a law of the U. S., which franchise the state of Ohio asserts a right to invade. It prays the aid of the court to restrain the officers of the state from executing the law. It is then a controversy

between the bank and the state of Ohio. The interest of the state is direct and immediate, not consequently. The process of the court, though not directed against the state by name, acts directly upon it by restraining its officers. The process therefore is substantially, though not in form against the state, and the court ought not to proceed without making the state a party. If this cannot be done, the court cannot take jurisdiction of the case. The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the state, in the suit as brought, is admitted, and had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the state was before the court. But this was not in the power of the bank. The 11th amendment of the constitution has exempted a state from the suits of citizens of other states or aliens, and the very difficult question is to be decided whether in such a case a court may act upon the agents employed by the state and on the property in their hands." Again in page 851 the chief justice says: "Do the provisions then of the American constitution respecting controversies to which a state may be a party extend, on a fair construction of that instrument, to cases in which a state is not a party on the record? The first in the enumeration is a controversy between two or more states." In page 853 he says: "The next in the enumeration is a controversy between a state and the citizens of another state. Can this case arise if the state be not a party on the record? If it can, the question recurs, what degree of interest shall be sufficient to change the parties and arrest the proceedings against the individual?" Again in page 857 he says: "It may, we think, be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record; consequently the 11th amendment, which restrains the jurisdiction granted by the constitution over suits against states, is of necessity, limited to those suits in which a state is a party on the record." This case seems to me to be decisive of this point, and as all the facts necessary to a decision of the case are admitted by the parties, I think judgment should be rendered upon the case agreed for the sum claimed by the plaintiff.

This case being heard upon the evidence and examination of the laws in relation to the subject, the court is of the opinion that the post at the navy yard, Washington city, commanded by the plaintiff from the 1st of December, 1849, to the 30th of September, 1850, was a permanent post garrisoned with troops, and that said plaintiff, Captain Henry B. Tyler, is entitled to double rations and allowances for responsibility and safe keeping of the clothing, arms and accoutrements of his detachment for the time as claimed, and that upon payment thereof by the said defendant as paymaster of the marine corps, he should be entitled to credit for it in his accounts by the accounting officers of the treasury.

Circuit Judge DUNLOP'S dissenting opinion, given December 5th, 1850:

I do not think we have any jurisdiction to try and decide this case. It is in substance a suit against the United States, who are not made parties, and who cannot be sued. It is not alleged that Mr. Walker, the defendant, owes any money in his own right to the plaintiff. He has no money of the plaintiff in his hands as paymaster, because the United States, whose agent he is, have not admitted the claim. The comptroller of the treasury cannot, by his consent, transfer to this court the discharge of an executive duty which he and the accounting officers ought themselves to perform. They must construe for themselves the acts of congress applicable to the case, when they are called upon to allow the plaintiff's claim. We can only obtain jurisdiction or the right to construe these laws affecting the rights of the United States in any case, as I suppose, than a case in which the United States are plaintiffs and Mr. Walker the paymaster is a defendant. If Mr. Walker had paid the money claimed to the plaintiff, and the treasury officers had disallowed it to him in his accounts, and he having money of the United States in his hands retained for the claim, and the United States sued him, a case would arise in which we could give an opinion and render a lawful judgment. In this case it is not pretended we can give judgment against Mr. Walker, because he personally owes the plaintiff nothing. The judgment, we are asked to give, is not against Mr. Walker, but substantially against the United States; we are asked by the judgment to control the comptroller and the accounting officers, which we have no right to do, and which, if we attempted to do, we could not enforce by any compulsory process.

Facts presented December 5th, 1850, which were not mentioned before DUNLOP, Circuit Judge, made his opinion:

The counsel on both sides, having seen the views taken by DUNLOP, Circuit Judge, desire to add some facts and admissions, which would have been presented if the case had been heard at bar.

First, it is not in substance a suit against the United States, because the defendant admits that he, and not the United States or its officers, suspends the amount claimed by Captain Tyler, and that it is not an official act, but one done to try whether the post at the navy yard is a separate, permanent post. It is admitted that Captain Tyler, commanded at the navy yard station, during the period claimed for, and that he

is entitled to recover of the defendant, if the court say that he commanded a separate post, or that the navy yard station was a permanent post.

Second, it is alleged that Mr. Walker owes the money—he holds it against both the United States and the defendant—against the United States because he says Captain Tyler is entitled to it; and against Captain Tyler because, though entitled to it if he commanded a separate post, he must first show that such post was a separate one in fact or in law. It is admitted that the money claimed is in the hands of the defendant to pay the plaintiff, if he commanded a permanent post. The comptroller does not attempt to transfer any jurisdiction, but merely says: as this is a question of law as to whether the post at the navy yard was a permanent post; that question should be decided by the court, and that he would acquiesce in it.

The rights of the United States will not be affected by this decision, as the paymaster will hold the money as a stake holder for Captain Tyler, even if the decision is against Captain Tyler.

In the case of Brown, paymaster of the same corps, v. Captain Twiggs [unreported], upon a similar question of double rations, the court did entertain jurisdiction, although the United States was affected by it, for it decided not only against the paymaster, but also that he was entitled to a credit for it in his public accounts. Besides in Osbern v. Bank of U. S., 9 Wheat. [22 U. S.] 738, the supreme court held that an officer of the government, who holds money under color of law virtute officii, is sueable, and for the very reason that if not the citizen would lose his remedy, as the state or government is not directly the subject of a suit.

But the counsel agree that the only matter to be submitted to the court, upon the evidence filed, is whether the post at the navy yard, when commanded by Captain Tyler, was a permanent post garrisoned with troops.

Case No. 14,312.

TYLER et al. v. WILKINSON et al.

[4 Mason, 397:] [1]

Circuit Court, D. Rhode Island. June Term, 1827.

RIPARIAN RIGHTS—USE IN WATER—PRIORITY OF OCCUPANCY—PRESUMPTION OF RIGHT.

1. Primâ facie every proprietor upon each bank of a river is entitled to the land, covered with water in front of his bank, to the middle thread of the river

[Cited in Bowman v. Wathen, Case No. 1,740; Stillman v. White Rock Manuf'g Co., Id. 13,446.]

[Cited in Fletcher v. Phelps, 28 Vt. 262. Cited in brief in Pratt v. Lamson, 2 Allen, 291.]

2. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But he has no property in the water itself.

[Cited in brief in Adams v. Barney, 25 Vt. 229; Chatfield v. Wilson, 28 Vt. 53. Cited in Clinton v. Myers, 46 N. Y. 516; A. C. Conn Co. v. Little Suamico Lumber Manuf'g Co., 74 Wis. 657, 43 N. W. 661; Corning v. Troy Iron & Nail Factory, 40 N. Y. 204; De Witt v. Harvey, 4 Gray, 500; Elliot v. Fitchburg R. Co., 10 Cush. 196; Ferrea v. Knipe, 28 Cal. 344. Cited in brief in Hough v. Patrick, 26 Vt. 439; Mayor, etc. v. Commissioners of Spring Garden, 7 Pa. St. 355. Cited in Smith v. City of Rochester, 92 N. Y. 480; Sweet v. City of Syracuse, 129 N. Y. 335, 27 N. E. 1081, 29 N. E. 289; Watuppa Reservoir Co. v. Fall River, 147 Mass. 554, 18 N. E. 465; Whitney v. Wheeler Cotton-Mills (Mass.) 24 N. E. 778.]

3. Every proprietor may use the water as it flows, according to his pleasure, if the use be not to the prejudice of any other proprietor.

[Cited in Union Mill & Mining Co. v. Dangberg, Case No. 14,370.]

[Cited in brief in Barre Water Co. v. Carnes, 65 Vt. 627, 27 Atl. 609. Cited in Davis v. Getchell, 50 Me. 605; Evans v. Merriweather, 3 Scam. 494; Farrell v. Richards, 30 N. J. Eq. 515. Cited in brief in Funk v. Haldeman, 53 Pa. St. 235. Cited in Garrett v. McKie, 1 Rich. Law, 444; Garwood v. New York Cent. & H. R. R. Co., 83 N. Y. 405; Lancey v. Clifford, 54 Me. 490. Cited in brief in Merrifield v. Lombard, 13 Allen, 17. Cited in Patten v. Marden, 14 Wis. 479; Pinney v. Luce, 44 Minn. 370, 46 N. W. 563; Pixley v. Clark, 35 N. Y. 525; People v. Bennett, 29 Mich. 452; State v. Pottmeyer, 33 Ind. 405; Weiss v. Oregon Iron & Steel Co. (Or.) 11 Pac. 258.]

4. There is no difference, whether a proprietor be above or below another in the river, for no right is acquired or lost by any such circumstance. No proprietor has a right to throw backwater on a proprietor above, or to divert it from a proprietor below, to his injury.

[Cited in Webb v. Portland Manuf'g Co., Case No. 17,322; Dexter v. Providence Aqueduct Co., Id. 3,864; Whipple v. Cumberland Manuf'g Co., Id. 17,516.]

[Cited in Cowles v. Kidder, 24 N. H. 378; Lawson v. Mowry, 52 Wis. 236, 9 N. W. 280; Reno Smelting, Milling & Reduction Works v. Stevenson (Nev.) 21 Pac. 318; Stein v. Burden, 29 Ala. 127. Cited in brief in Woodbury v. Short, 17 Vt. 388.]

5. Priority of occupancy of the flowing water of a river creates no right, unless the appropriation be for a period, which the law deems a presumption of right.

[Cited in brief in Arbuckle v. Ward, 29 Vt. 51. Cited in Davis v. Fuller, 12 Vt. 189; Evans v. Merriweather, 3 Scam. 494; Lux v. Haggin, 69 Cal. 392, 10 Pac. 754; Odiorne v. Lyford, 9 N. H. 513; Whitney v. Wheeler Cotton-Mills, 151 Mass. 407, 24 N. E. 774.]

6. The exclusive use of flowing water for twenty years, is a conclusive presumption of a right.

7. A mill-owner, as such, has no right to the water of a river, beyond what has been legally appropriated to his mill by title or long use.

[Cited in Webb v. Portland Manuf'g Co., Case No. 17,322.]

[Cited in Buddington v. Bradley, 10 Conn. 218. Cited in brief in Edson v. Munsell, 10 Allen, 559. Cited in Lehigh Val. R. Co. v. McFarlan, 43 N. J. Law, 619; Leonard v. Leonard, 7 Allen, 282; Prudden v. Lindsley, 29 N. J.

[1] [Reported by William P. Mason, Esq.]

Eq. 618; Watkins v. Peck, 13 N. H. 367–377; Williams v. Nelson, 23 Pick. 143.]

8. The riparian proprietors have a title to all the water not so appropriated.

[Cited in Swett v. Cutts, 50 N. H. 444.]

9. Of the nature and effect of presumptions arising from use of water, as to pre-eminent or prior use, in case of a deficiency to supply all concerned.

[Cited in Scheuber v. Held, 47 Wis. 352, 2 N. W. 783.]

Bill in equity [by Ebenezer Tyler and others against Abraham Wilkinson and others] to establish the right of the plaintiffs to a priority of use of the waters of Pawtucket river, &c. The cause was argued at great length, by Whipple and Webster, for plaintiffs, and by Cozzens and Searle, for defendants, at the last November term, and continued for advisement to this term when the following opinion was delivered.

STORY, Circuit Justice. This is a very important case, complicated in facts, and voluminous in testimony. It will not, however, be necessary to go over the details of the proofs, or even of the arguments, urged at the bar, further than may serve to explain the opinion of the court, and give a clear understanding of the points in controversy.

The river Pawtucket forms a boundary line between the states of Massachusetts and Rhode Island, in that part of its course where it separates the town of North Providence from the town of Seekonk. It is a fresh water river, above the lower falls between these towns, and is there unaffected by the ebb or flow of the tide. At these falls there is an ancient dam, called the lower dam, extending quite across the river, and several mills are built near it, as well on the eastern as on the western side of the river. The plaintiffs, together with some of the defendants, are the proprietors in fee of the mills and adjacent land on the eastern bank, and either by themselves or their lessees are occupants of the same. The mills and land adjacent, on the western bank, are owned by some of the defendants. The lower dam was built as early as the year 1718, by the proprietors on both sides of the river, and is indispensable for the use of their mills respectively. There was previously an old dam on the western side, extending about three quarters of the way across the river, and a separate dam for a saw-mill on the east side. The lower dam was a substitute for both. About the year 1714 a canal was dug, or an old channel widened and cleared on the western side of the river, beginning at the river a few rods above the lower dam, and running round the west end thereof, until it emptied into the river about ten rods below the same dam. It has been long known by the name of "Sergeant's Trench," and was originally cut for the passage of fish up and down the river; but having wholly failed for this purpose, about the year 1730 an anchor-mill and dam were built across it by the then proprietors of the land; and between that period and the year 1790, several other dams and mills were built over the same; and since that period more expensive mills have been built there, which are all owned by some of the defendants. About thirty years before the filing of the bill, to wit, in 1792, another dam was built across the river at a place above the head of the trench, and about 20 rods above the lower dam; and the mills on the upper dam, as well as those on Sergeant's trench, are now supplied with water by proper flumes, &c. from the pond formed by the upper dam. The proprietors of this last dam are also made defendants.

Without going into the particulars of the bill (for in consequence of intervening deaths and devises, the cause is now before the court upon a supplemental bill, in the nature of a bill of revivor), it is necessary to state, that the bill charges, that the owners of Sergeant's trench are entitled, as against the owners of the lower dam, only to what is called a waste-water privilege, that is, to a right to use only such surplus water, as is not wanted by the owners of the lower dam and lands for any purposes whatever. In other words, that the right of the owners of Sergeant's trench is a subservient right to that of the plaintiffs, and takes place only as to any water which the plaintiffs may not, from time to time, have any occasion to use for any mills erected, or to be erected, by them. It charges a fraudulent combination between the owners of the upper dam and Sergeant's trench, injuriously to appropriate and use the water, and that the latter appropriate a great deal more water than they are entitled to by ancient usage, and waste the water to the injury of the plaintiffs. The object of the bill is to establish the right of the plaintiffs, and to obtain an injunction and for general relief.

The principal points, which have been discussed at the bar, are, first, what is the nature and extent of the right of the owners of Sergeant's trench; and, secondly, whether that right has been exceeded by them to the injury of the plaintiffs.

Before proceeding to an examination of these points, it may be proper to ascertain the nature and extent of the right, which riparian proprietors generally possess, to the waters of rivers flowing through their lands. Unless I am mistaken, this will relieve us from a great portion of the difficulties which incumber this cause, and lead us to a satisfactory conclusion upon its merits. I shall not attempt to examine the cases at large, or to reconcile the various dicta, which may be found in some of them. The task would be very onerous; and I am not aware that it would be very instructive. I have, however, read over all the cases on this subject, which were cited at the bar, or which are to be found in Mr. Angell's valuable work on water courses, or which my own auxiliary researches have enabled me to reach. The general principles, which they contain and sup-

port, I do not say in every particular instance, but with a very strong and controlling current of authority, appear to me to be the following.

Primâ facie every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, usque ad filum aquæ. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial, whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that, which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood, as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and it is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private rights. The maxim is applied, "Sic utere tuo, ut non alienum lædas."

But of a thing, common by nature, there may be an appropriation by general consent or grant. Mere priority of appropriation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired. But our law annexes to the riparian proprietors the right to the use in common, as an incident to the land; and whoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law. Now, this may be, either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment, without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right. I say of a grant or right; for I very much doubt, whether the principle now acted upon, however in its origin it may have been confined to presumptions of a grant, is now necessarily limited to considerations of this nature. The presumption is applied as a presumption juris et de jure, wherever by possibility a right may be acquired in any manner known to the law. Its operation has never yet been denied in cases where personal disabilities of particular proprietors might have intervened, such as infancy, coverture, and insanity, and where, by the ordinary course of proceeding, grants would not be presumed. In these, and in like cases, there may be an extinguishment of right by positive limitations of time, by estoppels, by statutable compensations and authorities, by elections of other beneficial bequests, by conflicting equities, and by other means. The presumption would be just as operative as to these modes of extinguishment of a common right as to the mode of extinguishment by grant.

These are the general principles, which appear to me applicable to the present case. They will be found recognised in many cases; but are in none more fully and accurately weighed and discussed than in Bealey v. Shaw, 6 East, 208; Williams v. Morland, 2 Barn. & C. 910; and Wright v. Howard, 1 Sim. & S. 190,—in England; and in Ingraham v. Hutchinson, 2 Conn. 584; Merritt v. Parker, 1 Coxe [1 N. J. Law], 460; Palmer v. Mulligan, 3 Caines, 307; Platt v. Johnson, 15 Johns. 213; and Merritt v. Brinkerhoff, 17 Johns. 306,—in America.

With these principles in view, the general rights of the plaintiffs cannot admit of much controversy. They are riparian proprietors, and, as such, are entitled to the natural flow of the river without diminution to their injury. As owners of the lower dam, and the mills connected therewith, they have no rights beyond those of any other persons, who might have appropriated that portion of the stream to the use of their mills. That is, their rights are to be measured by the extent of their actual appropriation and use of the water for a period, which the law deems a conclusive presumption in favor of rights of this nature. In their character as mill-owners, they have no title to the flow of the

stream beyond the water actually and legally appropriated to the mills; but in their character as riparian proprietors, they have annexed to their lands the general flow of the river, so far as it has not been already acquired by some prior and legally operative appropriation. No doubt, then, can exist as to the right of the plaintiffs to the surplus of the natural flow of the stream not yet appropriated. Their rights, as riparian proprietors, are general; and it is incumbent on the parties, who seek to narrow these rights. to establish by competent proofs their own title to divert and use the stream.

And this leads me to the consideration of the nature and extent of the rights of the trench owners. There is no doubt, that in point of law or fact, there may be a right to water of a very limited nature, and subservient to the more general right of the riparian proprietors. It may arise from grant, and be affected by any considerations, conditions, and modifications, which the assent of the parties may impose; and where no such grant is established by written instruments, it may be inferred, like other grants, from long usage, and be governed by the limitations of that usage. The case of Bateson v. Green, 5 Term R. 411, is certainly good law; but it introduces no new principle. The doctrine of subservient rights and uses is probably as old as the common law itself. But in questions of usage, the fact, how much water has been actually used, is not always decisive of the nature and extent of the right. Nor are occasional interruptions of the use, under peculiar circumstances, conclusive of a superior right to control and limit the entire use, to suspend it at pleasure, or destroy it at discretion. The nature and object and value of the use are very material ingredients to explain and qualify the effect of such interruptions. It is not, for instance, to be presumed, that valuable mills will be erected to be fed by an artificial canal from a river, and the stream be indispensable for the support of such mills, and yet, that the right to the stream is so completely lodged in another, that it may be cut off, or diminished, or suspended at pleasure; but, if there should not be water enough for the progressive wants of all, the riparian proprietor should reserve to himself the power of future appropriation for his own exclusive use. In such cases, reasonable presumption must be made from acts in their own nature somewhat equivocal and susceptible of different interpretations. The interruptions may arise from resistance to an attempt by the canal-owner to extend the reach of his dam farther into the river for the purpose of appropriating more water, or from a desire to prevent undue waste, in dry seasons, to the injury of the riparian proprietor. But the presumption of an absolute and controlling power over the whole flow, a continuing power of exclusive appropriation from time to time, in the riparian proprietor, as his wants or will may influence his choice, would require the most irresistible facts to support it. Men who build mills, and invest valuable capital in them, cannot be presumed, without the most conclusive evidence, to give their deliberate assent to the acceptance of such ruinous conditions. The general presumption appears to me to be that which is laid down by Mr. Justice Abbott in Saunders v. Newman, 1 Barn. & Ald. 258: "When a mill has been erected upon a stream for a long period of time, it gives to the owner a right, that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvements in machinery. If, indeed, the alterations made from time to time prejudice the right of the lower mill (i. e. by requiring more water), the case would be different."

In this view of the matter, the proprietors of Sergeant's trench are entitled to the use of so much of the water of the river as has been accustomed to flow through that trench to and from their mills (whether actually used or necessary for the same mills or not), during the twenty years last before the institution of this suit, subject only to such qualifications and limitations, as have been acknowledged or rightfully exercised by the plaintiffs as riparian proprietors, or as owners of the lower mill-dam, during that period. But here their right stops; they have no right farther to appropriate any surplus water not already used by the riparian proprietors, upon the notion, that such water is open to the first occupiers. That surplus is the inheritance of the riparian proprietors, and not open to occupancy.

The question, then, resolves itself into a matter of fact:—What has been the quantity accustomed to flow in the trench, and what the qualifications and limitations accompanying the flow during this period? It appears to me most manifest from the general current of the evidence, that the trench proprietors do not hold a mere waste-water privilege in the sense which the plaintiffs attribute to those terms. It would be almost incredible, that a priority of right should be reserved to the plaintiffs, as riparian proprietors, to use the water of the stream for any new mills to be erected from time to time by them, so as to entitle them, at their choice, to divert the whole from the trench. Nothing but the clearest proofs could establish such a right, going, in the event, to the complete destruction of the mills erected on the trench. So far from such a pre-eminent right, as it is called, being justified by the evidence, it appears to me to be encountered by it at almost every step. The acts of the parties, at the different periods of their ownership, are irreconcilable with such a supposition. The answers of the defendants positively deny it. The most that can be

pretended from any portion of the evidence is, that the proprietors of the mills on the lower dam did in dry seasons, when the water was scant, remove the temporary dams erected by the trench proprietors, to gain at those periods an additional supply of water. But these acts of interruption seem confined to the temporary dam so erected, and not designed as interruptions of the ordinary flow of the water by means of the permanent dam, or otherwise, into the trench. And what is very material, they were interruptions for the purpose of supplying their mills, then existing on the lower dam, with water. If, therefore, we give the fullest effect to this assertion of pre-eminent right, it must be limited, as it was exercised, to the uses of the mills then in existence, that is, to the usual priority of supply, which, in a conflict of right and a deficiency of water, they were accustomed to take and require. Such a pre-eminent right, founded merely in usage, for particular mills, must be confined to those mills, and cannot be admitted as proof of a general unlimited right over all the water for all future mills. If the trench owners could only claim a waste-water privilege, it was of waste-water not then appropriated or used by existing mills. In this view of the case, it would not help the plaintiffs; for it is not shown, that the old mills would have sustained any injurious loss of water if no new mills had been built by the plaintiffs, requiring a further supply. But it cannot be disguised, that even this claim of right, so limited, has many difficulties to encounter. There is no uniform, clear, decisive evidence to support it. The evidence is contradictory, or inconclusive. There has been no acquiescence in the acts of interruption of such an unequivocal nature and for such a period, as would justify the court to infer any admission of right by the trench owners, or any original reservation on the part of the plaintiffs. On the contrary, the matter of right seems always to have been in contestation. The most that the court can say, is, that the claim of pre-eminent right is suspended in doubt; and that it ought not, under such circumstances, to give relief against the positive denials of the owners.

My opinion accordingly is, that the trench owners have an absolute right to the quantity of water which has usually flowed therein, without any adverse right on the plaintiffs to interrupt that flow in dry seasons, when there is a deficiency of water. But the trench owners have no right to increase that flow; and whatever may be the mills or uses, to which they may apply it, they are limited to the accustomed quantity, and may not exceed it.

What that quantity is, has not been ascertained by any precise admeasurement. The trench owners in their answer do not pretend, that they have acquired any new rights by an additional uninterrupted use within the last twenty years. On the contrary, they assert, that the quantity which now flows, is in conformity to the ancient usage, and does not exceed it. They assert, "that the present gate-hole, which leads the water from the said great flume [of the upper dam] into said trench, is about four feet wide, and fifteen or sixteen inches deep; that the said gate-hole was made about one year after said upper dam was built, and that the diversions thereof have never been altered from the time the same was first made, as aforesaid, to the present time." If the fact be so, it furnishes some elements for a very correct admeasurement of their rights. The principal difficulty in applying it as an absolute measure, arises from the fact of there having been a gate in this gate-hole, put there at the time of the hole itself being made. This gate was removed at least ten years, and more probably from fifteen to twenty years, before the filing of the bill. The plaintiffs insist, that this gate was designed to regulate the quantity of water to which the trench owners were entitled, and was adjusted accordingly. The latter admit the fact of its existence, but assert its removal twenty years ago, and that "it was placed in said gate-hole by the owners of the shops and mills on said trench, and used by them to shut the water out of said trench, while they were repairing the same or the works thereon." It is very difficult to ascertain, from the evidence, whether any positive limitation of right can be deemed to have been originally intended by it. It was hoisted and lowered by the trench owners, as well as by others, occasionally, while it existed, and its removal for a number of years affords some presumption, that it was not deemed a fixed regulator of right. Its height varied at different times according to circumstances; and it is not easy to infer that to be a positive gauge of quantity, agreed on by the parties, which was not immovable in its position.

There was an agreement entered into in the year 1796 between the owners of the upper dam, of the trench, and of the mills on the west side of the river (which is set out in the bill, and admitted by the owners), which has been relied upon by both parties as explanatory of the rights of all concerned. The plaintiffs, and those under whom they claim, were not parties to it; but as matter of evidence, they have themselves relied on it, and complain of it, not on account of its incorrect statement of the matter of right, but of the intentional omission, fairly to carry it into effect. It begins as follows: "Whereas the ancient privilege of Sergeant's trench or the shops thereon, has not been precisely ascertained, and whereas the owners thereof, the owners of the new upper dam, and the owners of the ancient mills at the falls are all interested therein, and in order to make each party right, and make the same as conveniently managed as may be, we, the subscribers, covenant and agree

as follows: The owners of the upper dam hereby convey to the owners of the shops below a full and free liberty of passing and repassing on their land to the gate, when they think proper, for the regulating the water according to their right in the same. And the owners of the works below the falls have the same liberty to shut or hoist said gate for the same purpose, in as full manner as ever heretofore, by custom, usage, or contracts. And to prevent any difficulty about ascertaining the proportion of water fully due and belonging to said trench works, it is mutually agreed, that Benjamin Cozzens, Jr. and Stephen Jenks, Jr. be and are hereby chosen to regulate and ascertain the same; and that the owners of the upper dam keep a suitable gate on their flume, suitable for conveying and regulating the said water, at their own expense. And that it is further agreed, that in case the said B. C. and S. J. do not agree, they have power to appoint a third person, two of whom agreeing, to settle the same. And that the ancient usage or quantity of water, which has been accustomed to pass the said trench, be the rule for them to aim at as near as they can, and the mode of settlement, and the quantity they agree upon, be hereafter the mode and quantity for ever. And that the said persons, within one year from the date, ascertain the same; and that they inform the parties, who now agree to make such other writings, as may then appear more descriptive of the mode and quantity, and the same be then recorded, and that the regulating gate be made at the expense of the privilege." Now, the gravamen of the bill is, that this agreement was never carried into effect by any award whatsoever, though the plaintiffs have requested it; but that it was entered into to defraud the plaintiffs, by deluding them into the belief, that the parties intended to secure the ancient privilege of the trench owners, and no more; whereas, under pretence of it, the trench owners have, within twenty years last past, used much more water.

We are then at liberty, as I think, to consider, that the agreement of 1796, in its terms and statements, is adopted by the plaintiffs. In this view it has a most important bearing on the whole case, not only as a document of considerable antiquity, but as one intended to settle rights between parties, all having different interests. Unfortunately, no award was ever made by the arbitrators, they differing in opinion (the one being an owner on the trench and the other an owner on the lower dam) as to the height which the gate ought to be raised in a dry time. The difference seems to have been between one inch and three quarters, and two inches and a half, in the height.

The agreement itself, however, deserves great consideration. In the first place, it states the right of the trench owners in a very strong manner. It admits, and indeed, requires, the arbitrators to allow them "the quantity of water, which has been accustomed to pass to the trench;" and of course it fixes the right by the quantity flowing in the trench, and not by the quantity, which the mills then existing actually required. In the next place, it contains no qualification or limitation of this right, by the slightest allusion to any pre-eminent right or priority of the lower dam mills, in case of a deficiency of water, or otherwise. Yet such an omission, if such a qualification or limitation as is now contended for by the plaintiffs existed, would be almost incredible. The presumption against its existence, connected with the subsequent lapse of time, during which it has not been admitted or acquiesced in, is of itself abundantly cogent and pressing. In the next place, it goes strongly to repel any inference, that the gate, erected in 1794 at the gate hole of the swift flume, was understood by the parties as an absolute measure of the quantity, or had a fixed position to limit the right of the trench proprietors. If it was a fixed gauge, there could have been no reason for an arbitration to ascertain it in 1796, much less would it have been recited in the agreement that it had "not been precisely ascertained." The most that can be properly said, is, that the parties placed it there for their convenience, but not as a positive limitation of right, which neither party was at liberty to alter, if it affected his acknowledged rights injuriously. In the next place, the agreement ascertains, that the right of the trench owners was not, if I may so say, an expanding right, increasing with the uses to which they might choose to appropriate the water of the river; and that, therefore, they had no right to extend their prior appropriation of the water. Their use of the water since that period ought to be referred back to their rights as recognized in 1796, and if any additional quantity has been appropriated in the intervening time (which they deny), that excess is to be deemed, not a matter of adverse claim, but of mere indulgence. In the next place, it is a fair inference from the agreement, that the water, which thus flowed into the trench of right, was ordinarily adequate to the use of all the mills then erected on it. At least, the existing state of things at that period may be taken to be rightful and adequate to the wants of the parties, or some exception would naturally have found its way into the agreement. And this inference is fortified by the deposition of Benjamin Cozzens, Jr. (one of the arbitrators) as well as by the subsequent user by the trench owners. The agreement of 1797, between the owners of the upper dam and the owners of the mills on the west side of the lower dam, for regulating the flumes of the upper dam, so as to secure a proper quantity of water to the lower dam, does not in the slightest degree impugn

these conclusions. The trench owners were not parties to it; but it has an implied reference to the agreement of 1796, and manifestly contemplated a ratification of its stipulations.

The memorandum, indorsed on the deed of Gideon Jenks to Eleazer Jenks in 1781, cannot be admitted as proof of the anterior pre-eminent right contended for by the plaintiffs. In the first place, however operative between the parties, it could not bind the rights of the other trench owners, who were not parties to it. In the next place, it is not in its terms a recognition of any antecedent existing right, but a reservation of a future right. Its effect, in this view, is equivocal; for the reservation of a pre-eminent right may have been a part of the bargain between these particular parties. But what is still more material, the reservation is not to the plaintiffs, or to the owners of the lower dam generally, or to the riparian proprietors, but simply a reservation in favor of the forge mill, then existing on the west side of the river. Its bearing, therefore, on the present case, must be very slight, if in truth it ought to have any bearing at all. The acts of particular owners respecting their own rights cannot be permitted to bind the rights of others, unless they are adopted and acquiesced in, with full knowledge by the other parties in interest. The agreement of 1796 repels any such inference. The fact of the actual flow and use of the water, for a considerable length of time, is proof of a general right; and no limitations are to be presumed, unless such limitations have constantly accompanied the use, and been acquiesced in by those, whose interests were adverse. For a period of forty or fifty years the water did flow into the trench without any known limitation upon it by grant or usage. The acts of interruption, since that time, were either such as referred to the removal of temporary dams, intended to increase the supply, or were under circumstances so questionable, as to leave behind them no clear traces of any admission of right, or uniform acquiescence in them, as just exercises of superior adverse interests.

I pass over any particular examination of the testimony of witnesses on this point, because it is extremely difficult to reconcile it throughout; and it is, in many respects, so loose and uncertain, that the judgment cannot repose upon it with entire confidence. It fails of establishing any solid ground, on which to rest a decree in favour of the plaintiffs of a pre-eminent right to the use of the water.

The conclusion, to which my mind has arrived on this point, is that the owners on Sergeant's trench have a right to the flow of the quantity of water which was accustomed to flow therein antecedent to 1796; that this right is general, and not qualified by any pre-eminent right in the plaintiffs or the other owners of the lower dam, either as riparian proprietors or otherwise, to the use of the water, in case of a deficiency; that, if there be a deficiency, it must be borne by all parties, as a common loss, wherever it may fall, according to existing rights; that the trench proprietors have no right to appropriate more water than belonged to them in 1796, and ought to be restrained from any further appropriation; and that the plaintiffs to this extent are entitled to have their general right established, and an injunction granted.

It is impracticable for the court to do more, in this posture of the case, than to refer it to a master to ascertain, as near as may be, and in conformity with the suggestions in the opinion of the court, the quantity to which the trench owners are entitled, and to report a suitable mode and arrangement permanently to regulate and adjust the flow of the water, so as to preserve the rights of all parties.

In respect to the question of damages for any excess of the use of the water by the trench owners, beyond their right, within six years next before the filing of the bill, I have not thought it my duty to go into a consideration of the evidence. It is a fit subject, either for reference to a master, or for an issue of quantum damnificatus, if either party shall desire it.

The decree of the court is to be drawn up accordingly; and all further directions are reserved to the further hearing upon the master's report, &c. Decree accordingly.

Case No. 14,313.

TYRELL'S HEIRS v. ROUNTREE et al.

[1 McLean, 95.] [1]

Circuit Court, D. Tennessee. Sept. Term, 1830.[2]

ATTACHMENT — SALE — COUNTIES — DIVISION OF COUNTY—EFFECT OF ON LIEN.

1. An attachment being levied on land fixes a lien from the time of the levy, and a sale by the sheriff of the land, under a judgment on the attachment, has relation to the time of the levy of the attachment.

2. Under these circumstances a division of the county which throws a part of the land in the new county, being made subsequent to the levy of the attachment and before the sale by the sheriff, will not affect the lien, or oust the jurisdiction of the court.

[This was an action at law by William Tyrell's heirs against Andrew Rountree and others.]

Mr. Washington, for plaintiffs.

Mr. Yerger, for defendants.

OPINION OF THE COURT. This action of ejectment was brought by the lessors of the plaintiff to recover possession of a cer-

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

[2] [Affirmed by the supreme court in 7 Pet. (32 U. S.) 464.]

tain tract of land, the title of which was proved to have been in their ancestor. The defendants set up a title by a sale made by the sheriff of Williamson county under a judgment rendered on an attachment. The attachment was levied the 13th February, 1807; the defendants did not appear and judgment was entered against them by default. The land was sold on execution the 2nd January, 1808. It was then proved by the plaintiffs that Williamson county was divided the 16th November, 1807, and that a part of the land was included in the new county called Maury. They therefore moved the court to instruct the jury that the sheriff's sale was void for so much of the land as lies in the new county. But the court instructed the jury, that the sale of the sheriff had relation to the time of the levy by the attachment. That from this time there was a lien on the land, and it was in the custody of the law subject to the satisfaction of the judgment which should be rendered on the attachment. And that a division of the county could not affect the lien, or oust the jurisdiction of the court. That the lien being fixed, by the levy of the attachment, the court could consummate the proceedings by a sale of the land, as if no division of the county had been made. The jury under this instruction found a verdict of not guilty, on which a judgment was entered.

The plaintiffs removed this case by a writ of error to the supreme court, which affirmed the judgment. 7 Pet. [32 U. S.] 464.

Case No. 14,314.

In re TYRREL.

[2 N. B. R. 200 (Quarto, 73).] [1]

District Court, S. D. New York. Oct. 17, 1868.

BANKRUPTCY—DISCHARGE—SPECIFICATIONS IN OPPOSITION.

Vague and general specifications filed in opposition to discharge are insufficient, and a discharge will be granted when the register will have certified conformity to the requirements of the law.

[Cited in Re Carrier, 47 Fed. 440.]

And now comes the creditor, John Williamson, and for grounds of his opposition to the discharge of said bankrupt alleges, upon the examination had, and upon all papers and proceedings herein, and upon his information and belief: First. That said bankrupt has concealed his estate and effects, in wilful violation and fraud of the bankrupt law. Second. That said bankrupt has per sequence of foregoing, sworn false in his affidavit annexed to his Schedule B, in wilful violation and fraud of the bankrupt law. Third. That said bankrupt has per sequence of specification one, and also concerning the indebtedness of, and the dealings with Wetmore, or Wetmore & Gamble and others, and the disposition of the payments for said indebtedness, and in other particulars, sworn falsely in relation to material facts concerning his estate, in wilful violation and fraud of the bankrupt law. Fourth. That said bankrupt has neglected to deliver to the assignee the property that in fact belonged to him at the time of filing his petition, and has not mentioned the same in his schedules annexed thereto, in wilful violation and fraud of the bankrupt act. Fifth. That said bankrupt has neglected to produce before the register, or deliver to the assignee, his books, papers and writings relating to his estate, in wilful violation and fraud of the bankrupt law. Sixth. That said bankrupt has in all his business transactions in effect changed his name from Daniel Tyrrel to J. Tyrrel; that he deals under that name in his business of carpenter, builder and contractor, and is known by that name and not otherwise by most of those with whom he deals; that he has received and earned moneys under such name within four months and for a long period prior thereto, not mentioned and accounted for in his schedules, all in wilful violation and fraud of the bankrupt law. Seventh. That in contemplation of being and continuing insolvent and bankrupt, and for the purpose of keeping and concealing his property and the proceeds of said business from his creditors, and preventing the same coming to his assignee, the bankrupt makes claim that his wife is the said carpenter, builder and contractor, and not he; and his said wife, at the instigation and with the connivance of said bankrupt, falsely and wrongfully makes claim to the property acquired and held by said bankrupt under said name of J. Tyrrel, all in wilful violation and fraud of the bankrupt law. John Williamson, by G. & P. Stillman, his attorneys herein.

BLATCHFORD, District Judge. The specifications filed in opposition to the discharge are all of them too vague and general, and are insufficient. A discharge will be granted when the register shall have certified conformity.

TYSEN (BUTCHER v.). See Case No. 2,233.

Case No. 14,315.

TYSEN v. WABASH RY. CO. et al.

[8 Biss. 247.] [1]

Circuit Court, S. D. Illinois, and D. Indiana. July, 1878.

RAILROAD COMPANIES — RECEIVER — FORECLOSURE OF MORTGAGE—DISCRETIONARY POWERS.

1. The appointment of a receiver pending proceedings for foreclosure, is a matter resting in the sound discretion of the court.

[Cited in Pennsylvania Co., etc., v. Jacksonville, T. & K. W. Ry. Co., 5 C. C. A. 53, 55 Fed. 136.]

[1] [Reprinted by permission.]

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

2. The mere fact that there has been a default in the payment of the debt, is no ground for the appointment of a receiver, unless there be a stipulation in the mortgage that the mortgagee shall have the rents.

3. The court will not, in deference to the mere technical rights of a very small minority of bondholders of a railroad corporation, appoint a receiver where it appears that such action would imperil, if not destroy, the interests of others whose rights are entitled to equal consideration.

4. In the exercise of the broad discretion which the court has, in the matter of appointing a receiver, it will not make such appointment if it perceives that a much greater injury would result to those interested in the railroad, than by leaving the property in the hands then holding it, especially, when it appears that the large majority of the stockholders and bondholders favor a funding plan then being negotiated.

[Cited in McGeorge v. Big Stone Gap Imp. Co., 57 Fed. 270.]

This was a suit to foreclose mortgages on the defendant railroad. Motion by complainant [David J. Tysen, Jr.] to appoint a receiver pending litigation.

Charles W. Hassler, James Matthews, Robert E. Williams, and S. A. Huff, for complainant.

W. Swayne, Henry S. Greene, and John N. Jewett, for defendants.

HARLAN, Circuit Justice (orally). The lines of railway now controlled by the Wabash Railway Company were formerly owned by different corporations, which respectively executed mortgages for large amounts at different times. It may be well to recall the history of those mortgages, and some of the material facts connected with the organization at a subsequent date, of the present company The different corporations referred to, executed first mortgages to secure the following amounts of bonds: In 1853, the Toledo and Illinois Railway Company, owning 75½ miles of railway in Ohio, executed a first mortgage for $900,000. In the same year the Lake Erie, Wabash and St. Louis Railroad Company, owning 116½ miles of railway in Indiana, executed a first mortgage for $2,500 000. In 1862, the Illinois and Southern Iowa Railroad Company, owning 29½ miles of railway in Illinois, executed a first mortgage for $300,000. In 1863, the Great Western Railway Company of 1859, owning 180$^{2}/_{10}$ miles of railway in Illinois, executed a first mortgage of $2,500,000. In 1865, the Quincy and Toledo Railroad Company, owning 33$^{6}/_{10}$ miles of railway in Illinois, executed a first mortgage for $500,000. In 1869, the Decatur and St. Louis Railroad Company, owning 108½ miles of railway in Illinois, executed a first mortgage of $2,700,000, making an aggregate of first mortgages on these different roads of $9.400,000.

Second mortgages were executed as follows: In 1858, the Toledo and Wabash Railroad Company, owning 75½ miles of railway in Ohio, gave a second mortgage of $1,000,000. In the same year the Wabash and Western Railroad Company, owning 166$^{1}/_{10}$ miles of railway in Indiana, gave a second mortgage of $1,500,000. In 1865, the Great Western Railroad Company of 1859, owning 180$^{2}/_{10}$ miles of railroad in Illinois, gave a second mortgage of $2,500,000, making an aggregate of second mortgages of $5,000,000.

In 1867, the Toledo, Wabash and Western Railroad Company, a corporation formed by consolidation, and then owning all the lines of railway now operated by the Wabash Railway Company, except the St. Louis division, executed what is styled in the record the "Consolidated Mortgage." In 1873, the consolidated Toledo, Wabash and Western Railroad Company, then owning and operating the entire line of railway now owned and operated by the Wabash Railway Company, executed what is known as the "Gold-Bond Mortgage."

In February, 1875, the Metropolitan Bank of New York, and others, holding bonds secured by the gold-bond mortgage, filed a bill of complaint in the court of common pleas in Lucas county, Ohio, seeking a foreclosure and sale upon the ground of default in paying interest.

A receiver was appointed, and by him the line of railway was operated for nearly two years. Similar proceedings were had in the courts of other states as to the portions of the road in those states. In June, 1876, the property covered by the gold-bond mortgage —which was the last one—was sold under a decree at public auction, when John W. Ellis and others became the purchasers at $2,500,000. That sale and purchase were subject, by agreement, to all mortgages prior in time to the gold-bond mortgage, the priority and continuance of all prior mortgage liens being expressly reserved in the decree and declared unaffected by the sale. So that, that sale was exclusively for the interest covered by the gold-bond mortgage. The purchase by Ellis and others was made in pursuance of an understanding previously had among those interested in the property, but whose rights were subordinate to those created by the first mortgages. Had the foreclosure taken place under the prior mortgages, or any of them, or if a forced sale had then been ordered for cash, it is entirely clear, in view of the condition of the country at that time, and in view especially of the depressed value of railroad property, that the rights of all the parties would have been seriously endangered, if not ruinously sacrificed. Hence the arrangement to sell under the gold mortgage alone. One of the avowed purposes of that arrangement was, if possible, to save something for the stockholders, who, as a general rule, in railroad foreclosures lose all. To that end the purchasing committee organized a new company with a capital of $16,000,000—that is, the present Wabash Railway Company. The stockholders of the old company were invited to put up $1.600.000 with which to buy the entire capital stock of the new company, receiving

new stock at the rate of ten for one on the subscription. Of the 160,000 shares of new stock, all were subscribed for by the old stockholders, except 800 shares, and that amount was subsequently taken by the bondholders' committee in accordance with the plan proposed.

After the purchase, the new company, on the 13th of January, 1877, executed what is called the "Seney Mortgage" upon the road for $1,026,555.22 to secure certain indebtedness which the new company agreed to pay at the time, and as a condition of its purchase, and also, perhaps, to raise funds needed by the new organization for the operation of the road.

In January, 1877, and after the execution of the Seney mortgage, a funding scheme was proposed to the bondholders for the purpose, as the company declared, of restoring the property, and placing it on a substantial and interest-paying basis. The main feature of this scheme was to give the holders of past due and unpaid coupons of prior mortgages and coupons maturing as far ahead as November 1, 1878, scrip certificates, to run until the maturity of the bonds from which the coupons were detached, bearing seven per cent. interest payable annually, the coupons to be returned to the holders whenever there was any default in paying the interest on the certificates; such arrangement in nowise to impair the liens on the portions of the road by which the respective bonds and coupons were secured. The holders of scrip certificates were given the option of funding the same into bonds of $500 or $1,000 each, with coupons at seven per cent. semi-annually, maturing in 1907, when the consolidated bonds mature, and to be called the funded debt bonds. In order to provide for the extinguishment of the funded bonds and the scrip certificates, the company, as a part of the funding scheme, proposed to set apart from its earnings after the year 1882, annually the sum of $100,000, to be invested in the purchase and the cancellation of the scrip certificates or of the funded bonds, at not exceeding the par value thereof; those pertaining to the first mortgages to be retired first, the second mortgages second, and the consolidated mortgage last.

The company, in its funding proposition, said: "The directors of the Wabash Railway Company, having in mind the fact that all the bonds cover only portions of the road, none being secured by the entire property, have endeavored to give due consideration to each class, and to treat each with the utmost liberality that the prospective earnings of the road will admit of, and at the same time keep it in a condition to enable it to earn sufficient revenue to accomplish the result proposed."

Modifications of the funding scheme were subsequently proposed, but these modifications need not be noticed here, since they do not materially affect the determination of the present motion. On the 30th of April, 1878, the funding scheme had been expressly agreed to, by over 96 per cent. of the bondholders holding under first mortgages, by more than 84 per cent. of those holding under second mortgages, and by 70 per cent. of those holding under the consolidated mortgages. These figures are as nearly accurate as I have been able to make them. It is thus seen that over 80 per cent. of all the bondholders have agreed to this scheme. Those who have indicated their dissent in express terms are less than one per cent. of all the bondholders. The holders of nearly $100 000 of bonds, who declined to assent to the funding scheme, have, notwithstanding, filed affidavits opposing the present suit and motion. The remaining bondholders are silent so far as the record shows. Without notice to, or demand upon the trustees, this suit was instituted by Tysen, he holding some of the second mortgage and consolidated or third mortgage bonds, by comparatively recent purchases made in the New York market, for the purpose of having the mortgage foreclosed, and the road sold to pay past due interest and the mortgage debt. He sues on behalf of himself and all others in community of interest with him, and who may unite in this proceeding. Some of the bondholders have united with him, the aggregate of bonds represented on that side of the case being a little over $100,000.

The matter now before the court for its determination is the application of complainant, and those standing with him, for the appointment of a receiver, pending the proceedings for foreclosure. That motion is opposed, although the right of complainant, and those united with him in these proceedings to a decree of foreclosure, whenever the case is ripe for such a decree, is conceded.

At the threshold of this contest, the inquiry arises as to the nature and extent of the discretion which the court may exercise in determining applications for a receiver of a railroad. Judge Story, in his Equity Jurisprudence (second volume, § 831), says: "The appointment of a receiver is a matter resting in the sound discretion of the court." In High on Receivers (section 365) the author says: "While the jurisdiction of equity over railway corporations, as enlarged by the statutes and practice of the various states, is based upon and exercised in accordance with substantially the same principles which govern its jurisdiction over other corporations, the courts are more reluctant to lend their extraordinary aid by the appointment of receivers over railways than in almost any other class of corporate bodies. The importance of these corporations as being quasi-public bodies, and the peculiar nature of their property and franchises, sufficiently explain the reluctance with which equity interferes with their management, and, in general, the courts proceed with extreme caution in placing them

in the hands of receivers. And wherever the ordinary remedies provided by law are open to the creditors of such corporations for the enforcement of their demands, the appointment and continuance of a receiver in office for a long period of years, is the exercise of a judicial power which can only be justified by the pressure of an absolute necessity."

In Jones on Mortgages (volume 2, § 1516) the author says. "The mere fact that there has been a default in the payment of the debt is no ground for the appointment of a receiver, unless there be a stipulation in the mortgage that the mortgagee shall have the rents."

There is no such stipulation in these mortgages.

The supreme court of the United States, in the case of Railroad Company v. Soutter, 2 Wall. [69 U. S.] 523, says: "Sebre Howard objects to the discharge of a receiver, because he has a judgment of $16,000 against the LaCrosse and Milwaukee Railroad Company, which he claims to be a lien on the road; and as the present receiver has also been appointed receiver in his suit, he claims that his debt must first be paid before he can be discharged. The idea of appointing or continuing a receiver for the purpose of taking ninety-five miles of railroad from its lawful owners, which is earning a gross revenue of $800,000 per annum, to enforce the payment of a judgment of $16,000, the lien of which is seriously controverted, is so repugnant to all our ideas of judicial proceedings that we cannot argue the question. If Mr. Howard has a valid judgment, the usual modes of enforcing that judgment are open to him, both at law and in chancery, but the extraordinary proceeding of taking millions of dollars' worth of property—of such peculiar character as railroad property is—from its rightful possessors, as one of the usual means of collecting such a comparatively small debt, can find no countenance in this court."

Further on in the same opinion (page 524) the court says: "In reference to all these parties, we remark again that the court deprives them of none of their rights to proceed in the courts in the ordinary mode to collect their debts, and that the appointment of receivers by a court to manage the affairs of a long line of railroad, continued through five or six years, is one of those judicial powers the exercise of which can only be justified by the pressure of an absolute necessity."

Upon examination of these and other authorities cited, it will be found that the action of the courts has depended largely upon the peculiar circumstances of each case. In no instance has the action of the court, in appointing or refusing to appoint a receiver, rested exclusively upon the technical, legal rights of the parties.

The rule deducible from the cases, and which commends itself to my judgment as sound, especially in suits to foreclose railroad mortgages, is well stated in the case of Vose v. Reed [Case No. 17,011], where this language is used by Mr. Justice Bradley: "The next question is, whether the court will appoint a receiver. This is a matter always in the discretion of the court, but as a general rule a receiver will be appointed for the purpose of protecting the fund when the complainant has an equitable interest in the subject, and the defendant having possession of the property is wasting it, or removing it out of the jurisdiction of the court. But all the circumstances of the case are to be taken into consideration, and if the case be such that a greater injury would ensue from the appointment of a receiver than from leaving the property in the hands now holding it, or if any other considerations of propriety or convenience render the appointment of a receiver improper or inexpedient, none will be appointed."

Applying these principles to the case in hand, what do we find? On the side of the complainant, it appears that he is the owner of certain bonds, for the security of which mortgages were executed. In the payment of interest upon those bonds there has been a default. The present managers in execution of the funding scheme have been paying interest to those bondholders who have given their assent to that scheme, and decline to pay interest to complainant and those standing with him, who refuse to become parties to the funding scheme. More than that, the present managers are not applying all of the net revenue arising from the operation of the road to the payment of interest in the order of priority of mortgages, but are applying a portion to the discharge of obligations created by the Seney mortgage, which is the last mortgage upon the property. Complainant claims that this is a misapplication of the income, and of itself, in connection with the present supposed inadequacy of the security for all the bonds, would make it the duty of the court to take charge of the property by a receiver. Tysen and his colleagues insist that the duty of the managers is to keep down the interest on the first mortgage to the extent of the entire net income of the company; since that course, they contend, will increase the value of the subsequent incumbrances; that the company have no right, as a condition precedent to the performance of their duty, according to the legal rights of the parties, to require the complainant and his colleagues to submit to a funding scheme which they do not approve.

Upon the other hand, we find the vast majority of the bondholders, under all the mortgages, insisting that the funding scheme is the best arrangement for all concerned,

and that under that arrangement, faithfully and honestly carried out, the rights of all parties will be best secured. The company invites complainant and those now standing with him to join in that scheme with the large majority of those who have the same character of rights with them. That that scheme is being honestly adhered to, and will be carried out in good faith, the evidence does not permit me to doubt. I will not stop to state in detail all the reasons arising out of the evidence for the conclusion I have reached. But, I cannot doubt that the appointment of a receiver, at this time, would not only break up this line of railway into its original fragments, but would overturn the funding scheme, thereby destroying a large present income for the great majority of bondholders. It would, in addition, work the financial ruin of all the interests involved in this railroad enterprise, subordinate to the first mortgage boldholders, including the interests of the complainant, and those united with him in this suit. Those who will certainly suffer, and who will suffer first, will be the stockholders of the old company, and who became the stockholders in this new organization by advancing $1,600,000. None of the bondholders, including the interests of the 600,000 was advanced by the stockholders, are here actively seeking the appointment of a receiver.

Some of those who are conspicuously moving in that direction became, according to their evidence, the owners of bonds quite recently, and as we may infer from the evidence, for merely speculative purposes. The present company did not get possession of the property until January 1, 1877. It has not yet had a fair chance to test the question, whether this vast railroad enterprise in its charge, may not be saved for the benefit of all concerned in its success. It did not fairly get to work for some months after January 1, 1877, and during that time they had much to contend with. Such is the testimony of its officers. Nevertheless, we find that while the net revenue from the business of 1875 is computed at $660,385.21, and from the business of 1876, at $984,646.73, such revenue from the business of 1877 is computed at $1,384,094.37. During the first four months of 1878, the increase in the net revenue as compared with the net revenue of the corresponding four months of 1877, is computed at $156,897.99. The same increase, if it continue throughout the year, will give a net revenue in 1878 of $2,021,686.33. These are the computations of the treasurer of the company, a witness accredited to the court by both parties, and they seem to be fairly made. That officer says:

"That, in pursuance of said agreement of 1876, large amounts of money were paid for the stock of the new company, a large sum expended in organizing and establishing a thorough management, and improvement of the property and increase of equipment; that every possible effort has been made to increase the earnings and decrease the expenses, and to increase its capacity; that the present company did not get possession of the property till January 1, 1877, and did not get fairly to work for three or four months after, and then had much to contend with in heavy storms of snow, and the strikes, which diminished earnings in the months when they are never large, say the first three or four months of the year. They are known among railroad men as unprofitable months usually. But after four or five months had elapsed the earnings began to increase and expenses to diminish, and from thence hitherto have so continued. That the net earnings, over and above operating and renewal expenses, are so steadily increasing that there is the best prospect that said road will, during the current year, be able to pay all its current interest, and also that the company will be able to pay all the suspended indebtedness under the funding scheme. That said funding scheme has already saved millions of dollars of capital, bona fide invested in the road, from utter cancellation; and that all classes of the securities of said road have been enhanced in value thereby."

Under such circumstances, and with a probability, recognized by sagacious men, that the country will soon pass from the era of hard times into an era of general prosperity for all, including those holding railroad securities, the court cannot, in deference to the mere technical rights of a very small minority of bondholders, lay its hand upon a railroad, over six hundred miles in length, running through three great states, and thereby imperil, if not destroy, the interests of others whose rights are entitled to equal consideration with those of the complainant and his colleagues. If the present management of the road were guilty of any fraud or dishonest practices in their control of this property, I should feel differently. While there are differences between them and some of the bondholders, as to certain matters connected with the discharge of the company's obligations, those differences do not involve the integrity of those operating the railroad. The court is disposed to recognize the absolute necessity of large discretion in the management of such vast property, and in the distribution of the net income arising therefrom, and it is unwilling, for the present at least, to make honest differences as to such matters, the basis for its interference by the appointment of a receiver. It will leave the parties to the ordinary remedies for the enforcement of their rights. Let the complainant proceed with the foreclosure suit, and take a decree for sale whenever it is proper to do so under the law and practice of this court. In the exercise of the broad discretion which the court has in the mat-

ter of appointing a receiver, it will not make such appointment in this case, under the present showing, for the reason that a much greater injury would result from so doing, to all interested in this railroad, including even the complainant and his colleagues, than by leaving the property in the hands now holding it pending the foreclosure suit.

The motion for the appointment of a receiver is denied, and counsel will prepare the necessary orders.

Case No. 14,315a.

TYSON v. BELMONT.

[16 Betts, D. C. MS. 12.]

District Court, S. D. New York. Feb. 23, 1849.

AMENDMENT OF PLEADINGS.

[It is proper to allow plaintiffs, on motion, to amend by changing the form of action from debt to covenant, and by striking out the name of one of the plaintiffs.]

BETTS, District Judge. This case comes before the court on double motions; on the part of the defendant to set aside the proceedings for irregularity, and on the part of the plaintiffs to amend the form of action stated in the writ, and to strike out the name of one of the plaintiffs from the pleadings. It is only necessary to notice the points raised on the latter motion.

First, it is objected that the court has no power to vary the nature of the action and the form of pleadings after issue joined between the parties; and, secondly, that the plaintiffs have been guilty of laches which exclude them from all appeal to the equity of the court. The act of congress of September 24, 1789 (1 Stat. 91, § 32), extends to United States courts the powers of amendment over process beyond that exercised under the English act of jeofails, or that of New York of similar effect. Smith v. Jackson [Case No. 13,065]. The judicial discretion of courts in respect to amendments is most ample, and in no way regulated by the consideration that they go to matters of form or substance, or the particular stage of the cause. Woodward v. Brown, 13 Pet. [38 U. S.] 1; Randolph v. Barrett, 16 Pet. [41 U. S.] 138; The Harmony [Case No. 6,081]; Calloway v. Dobson [Id. 2,325]. The stated rules of this court and the circuit court are framed upon this enlarged acceptation of their powers, and are designed to give suitors the advantage of amendments without any special appeal to the court in term. Dist. Ct. Rules 186, 241; Cir. Ct. Rules 40, 102. This being, however, an application in term time, the court can exercise inherently the powers given by statute or appertaining to its functions, without any specific direction by the rules.

The amendments sought for do not touch the merits in controversy, and no way prejudice the defence on those merits. It is of no importance to the right in controversy whether it be determined in an action of debt or covenant, or whether the suit be continued in the name of one or both plaintiffs. The plaintiff seeks a favor in ratification of his own errors, and it will be accorded him on the usual condition of paying the costs attending this motion. The plaintiff is accordingly allowed leave to amend his action by changing the form from debt to covenant, and to amend the declaration by striking out the name of Jans C. de Vries, as a plaintiff, on payment of the costs of this motion.

[See Cases Nos. 14,316 and 1,281.]

Case No. 14,316.

TYSON v. BELMONT.

[28 Hunt, Mer. Mag. 583.]

District Court, S. D. New York. Feb. 12, 1852.[1]

CHARTER PARTY—INTERPRETATION—EXECUTION BY PART OWNER—AUTHORITY OF MASTER—SUBMISSION TO ARBITRATION—CUSTOM AND USAGE.

[1. Where a merchant, who is part owner of a vessel, executes a charter party in his own name, describing himself as part owner, it is to be presumed that, although the captain is also a part owner, he is bound by the provisions of the charter party, and, consequently, that on the voyage under the charter party he has no power to exercise the rights of a part owner.]

[2. Where a charter party was executed at New York to take a load of lumber from the port of Apalachicola to a foreign country, it is to be presumed that the parties contracted with reference to the character of that port, and the incidents and difficulties attendant upon entering the harbor and loading the vessel at that place.]

[3. In an action at law for breach of a charter party, whereby the vessel was to receive a load of lumber at Apalachicola, it being alleged by plaintiff that a full cargo was not furnished, and contended by defendant that before the loading was finished the ship went outside the harbor, where it was difficult to supply her, *held*, that it was a question for the jury whether the master had acted judiciously and properly in determining that it would be unsafe to cross the bar if the ship were more deeply laden; and that, if his action was proper, it was the charterer's duty to deliver the remainder of the cargo outside.]

[4. Under a charter party providing that cargo is to be furnished as "required" by the master, it is sufficient, on the ship's part, if the master gives notice that he is in want of more cargo.]

[5. A master, though a part owner, has no power, when acting under a charter party of the vessel, executed by the other part owner in his own name, as part owner, to submit to arbitration a controversy as to the amount of freight due.]

[6. A usage cannot be considered for the purpose of determining the construction of a charter party unless there is an ambiguity in the terms of the instrument itself.]

[This was an action of covenant brought by William Tyson against August Belmont upon a charter party.]

The plaintiff in this case, being part owner of the American ship Probus, agreed by charter party with defendant to freight the ship for a voyage from the port of New York to

[1] [Affirmed in Case No. 1,281.]

Apalachicola, the vessel to be in good order, well manned and provisioned, thence to proceed to Toulon or Brest, the whole of the freighting part of the ship to be according to the custom of merchants, at defendant's sole disposal for a cargo of lumber; the cargo to be delivered at Apalachicola, alongside, as fast as required by the captain, who was to use all precaution for its safety, and be responsible for losses by neglect. The defendant agreed to furnish complete cargo, and to pay freight, 90 francs per load of 50 feet string measure, and 5 per cent. primage, lay days to be allowed; and in case of detention by defendant, to pay 100 Spanish milled dollars a day. Penalty, $10,000. The ship left this port on 17th February, 1848, and arrived at Apalachicola 15th March, 1848. That defendant failed in leaving the cargo as agreed upon, and, after shipping part, by an indorsement on the charter party, changed the destination of the vessel to Liverpool, and the freight to 80 shillings sterling, instead of 90 francs, with the same primage. The indorsement was dated 19th April, 1848. The ship left Apalachicola on 15th June, 1848, and arrived at Liverpool on 8th August, 1848. There the cargo was delivered according to the bill of lading.

The breaches assigned were that the cargo was not ready as agreed upon; that it was not a full one; that it was not ready or delivered alongside as agreed upon; that defendant caused a delay of 18 days; that he did not pay the freight, amounting to £2,657 5s. 2d. sterling. The defence was non est factum, with general traverse, and special notice of matter in bar. That the captain was part owner, and interested in the covenants. That much less than the cargo acknowledged by the bills of lading was delivered to the agents of the consignees. That the captain claimed, as part owner, freight and primage, which was denied by defendant's agent to be chargeable on more than the cargo actually delivered. That the matter was left to arbitration. That on 7th December, 1848, a submission to arbitration was entered into. That arbitrators were appointed. That an award was made, deciding freight was to be paid at the rate of delivery measure at Liverpool, and that, thereunder, the amount of £2,657 5s. 2d. was paid to the captain, leaving to plaintiff and the captain only such claim as they may have for dead freight and demurrage, of which defendant avers there was none. That the alleged delay was caused by the captain, who took the vessel round from the East Pass, where she was anchored, and had been supplied with most of her cargo, to the West Pass, where it was almost impossible to take the lumber to her, and that the agent of the defendant had made a stipulation with the captain that, if the ship was taken round, no demurrage should be charged. It was also contended that if the ship had remained at her original anchorage, the cargo would have been all delivered by the agent of the defendant. The delay was also attributed by defendant to the weather. That the sole use of the ship was not given to defendant, and that there was damage arising from improper stowage. Defendant claimed damages $18,000, as recoupement of any damages to be recovered in this action. The plaintiff denied the plea in bar, and traversed it generally.

[For proceedings on motion to amend the action by changing its form from debt to covenant, see Case No. 14,315a.]

D. Lord and J. Laroque, for plaintiff.

F. B. Cutting and E. H. Owen, for defendant.

BETTS, District Judge (charging jury). The plaintiff, as owner, wishes full cargo, and chartered full possession. There was no estimation as to the amount of cargo, yet this was important, as the penalty was large. It appears the captain was part owner, yet plaintiff executed the charter in his own name, still representing himself therein as part owner. A question arises what operation the charter had on the captain's rights. A question also arises whether the captain could exercise rights of part owner on that voyage. It is to be implied that plaintiff was empowered to act as whole owner. It is to be presumed that defendant informed himself that plaintiff had a right to exercise full power as owner. It is implied that plaintiff had such right. It is usual for merchants to take in the master as part owner to stimulate his exertions. But though he stands as part owner at the custom-house, yet the practice is to let the merchant owner take the direction and planning of the voyage. Upon general principles of commercial law, it might well be that the captain, though part owner, had no right to interfere with the letting of the ship.

Another thing to be presumed is that both parties so contracting knew the character of the port of Apalachicola and the incidents of entering the harbor, and difficulties are to be taken as understood as if they were mentioned in the contract. There is no objection of want of sufficient diligence in the captain on arriving at Apalachicola. The contract stipulated the cargo was to be furnished as required by the master. Notice from him, therefore, was necessary. The cargo was to be supplied alongside as the master required. The only exception was the weather. The captain was to take the goods alongside, and not be liable for loss, except through neglect. There was a stipulation for lay days. The cargo was to be sent as the captain required and state of weather allowed. The word "require" is not of definite meaning. It has two significations,—one, "demand" that captain should make; another, is "necessity" or "need," or as fast as he needed. If one of these be the signification, the captain was to look to it; if the other, the shipper

was to do so. The action is brought alleging that full cargo was not supplied. The ship was obliged to sail though not filled up. Compensation is claimed for fifty loads at 80 shillings sterling per load. The next default is detention eighteen days, the ship being ready to receive cargo. Another claim is that when the cargo was delivered the ship only received three-fourths of the freight; over $3,000 not paid.

The defenses are as to the sufficiency of the pleadings, and that the cause is to be tried on issues framed in writing. The plaintiff insists the pleas do not meet various points, and that defendant is not entitled to give evidence on various matters. In my opinion the pleadings are so framed as to admit every defense. You are to look at the charter and evidence to see what the rights of the parties are. The destination was changed; all else remains the same. The charter is to be applied to all the changes of destination, of the port originally designated. This will obviate one of the grounds set up by the defendant in respect to the claim of freight.

The first question is whether there was any default in supplying a full cargo. Two grounds are taken by defendant as to not supplying full cargo: First, that it was fully loaded; that it had a competent lading; second, the vessel was out at sea, where it was very inconvenient, if not dangerous, to transport cargo; that a portion was sent, but defendant was not compellable to send more than was convenient. As to the first,—the obligation to supply all she could stow away. Upon the contract the obligation is express. The defendant was to supply full cargo, and subjects the owner to loss of entire freight if he had not taken a full cargo. No stipulation was more important to the owner of the vessel than the cargo. The stipulation was to carry timber of unusual dimensions for shipping. The vessel could not receive the logs and pass throughout the full width of the vessel. The stipulation, therefore, was that the vessel should be supplied with full proportion. The plaintiff is entitled to exact a full performance, unless he has put it out of his power, or was relieved from performance.

The second question is whether the captain was justified in going outside of the bar. It must be understood that the contract was entered into between men who knew the situation of the port, and the depth of water she would carry over the bar. It must be presumed they knew how far down they could load the vessel. Suppose the captain was influenced by undue timidity, and had gone away before loading to the depth she could carry over the bar, then the act was wrongful. But if he found she was loaded as deep as prudent where she lay, then defendant is answerable for removal, and was not explicit as to how far she should be loaded, and the usage to supply an inadequately filled ship outside. If usage be applied to this contract, she could go outside and claim cargo there; she could command there enough to fill her up. She must take up the best position that circumstances permitted. The question arises, whether she did take such position. You are to determine whether what was done was judicious and proper. It was his duty to select the most proper place. If he made a proper selection, then he was entitled at that place to all the advantages at Apalachicola. These matters you will dispose of according to evidence.

The judge then charged the jury on the third question of the demurrage charged for eighteen days—and said, after reviewing the testimony, they had a right to imply that more timber was required, adopting the defendant's views; that the captain should demand timber, and that plaintiff should show the demand. The jury are to determine and be satisfied whether notice has been given. And the judge said that the defendant said that during that period the men were engaged on ship's duty. The defendant must show more than mere statement on this head. The obligation to give notice was fully satisfied by showing she was in want of timber, and defendant was bound to furnish it, unless on intimation or notice from the captain that he did not want it.

The last question relates to freight. This involves questions of law, novel and difficult. The matters of fact can be arranged so as to leave the questions of law to be found upon hereafter, and need not therefore involve a new trial. The cargo was taken to Liverpool. When the ship was ready to sail, the captain, at request of defendant's agent, executed a bill of lading, which was indorsed to the Rothschilds, and then by them to Jaques, Myers & Co., who presented it and claimed delivery. There are some questions as to the rights of the latter persons, whether they were owners of the cargo or agents. If Belmont sold to Rothschilds, he is not affected by any arrangement. It was the duty of the master to collect the freight for the owner. Difficulties arose and it was agreed to arbitrate. The arbitrators decided freight should be according to Liverpool measure, and the freight so settled was paid, and defendant claims the award as conclusive. These are all nice questions. I will lay before you my first impressions. What authority had these persons to arbitrate? On what authority did Jaques, Myers & Co. interfere? Whether Rothschilds were owners or agents of Belmont does not appear. Ordinarily he received the cargo to hold as stockholder. He must show that Myers had all the power the original owner possessed. He had undertaken to pay freight according to the charter-party, and after that could make no other condition. After delivery of the cargo, if delivered without exacting freight, the captain had lost his lien and had no resource except

to the shipper. I think the submission on Myer's part would be nugatory, and, if entered into in perfect good faith, not valid. Is the captain bound by it or the plaintiffs? In respect to plaintiff, he is to be considered all along as entire owner of the ship. Whatever rights the captain had are to be enforced against him, and not against the ship. The ship, freight, and cargo, are all under the contract of plaintiff, and the captain had no right to arbitrate away his rights. If the captain made the submission, it would not bind plaintiff. Did it bind the captain? If nothing were shown but the fact of part ownership, he was entitled to half the freight, and could arrange as to it, but on the question here presented the inference is the other way, and that the captain had placed in plaintiff's hands all his rights. So that in respect to his own rights he would have no power to arbitrate.

But, again, Belmont is not bound, and the rule applies, that if not binding on one it is not binding on others.

The judge declined to state his views on the point urged by plaintiff, that he had nothing to arbitrate, because the submission says the freight, as per charter party, was submitted, and the parties understanding when originally bound she would be entitled to freight without deduction, and the change of destination providing that all other stipulations should remain the same, there was then nothing as to freight to submit. But defendant urges it is a mercantile contract, and to be understood according to its usage at the place where it was to be executed. This is true to a certain extent, if there were ambiguity on the face of the contract, but, if none, then usage cannot be brought in. If there be no doubt as to what parties mean, there is nothing for usage to act on. If doubtful on the contract, whether on sending to Liverpool freight was to be paid according to bill of lading or according to usage where delivered, then usage may be admitted; but not to be admitted to any stipulations of the charter. There are questions raised as to what the custom is. Defendant claims that by the usage all timber delivered pays freight according to quantity of merchantable timber delivered. Plaintiff claims that usage is only between merchant and merchant on sale. You will therefore have to inquire what the custom is; not to determine the right of the parties, because the law does that, but to protect rights of parties. On review, you will state what you find the custom is.

It is undoubtedly against reason, against the propriety of things, and also against the plain meaning of the parties, and unjust to the ship owner, that he should not be entitled to compensation for carrying a portion of cargo. The master has nothing to do with inquiring from owner of the cargo what use he intends to put it to. It would subject him to damages from the shipper if he refused to take just what was presented, and therefore, in my notion of things, the law intends that he is entitled to payment for what he carries, and therefore there is no room for question, unless the law implies that he contracted with reference to usage. If the captain sued defendant for not putting on board merchantable timber, Belmont might answer: "I had a right to send what I chose. If by the usage you could not claim pay for it, that is the end of it." The court can entertain no doubt upon the contract that the owner is entitled to payment for all he carried. There was little difficulty between the captain and defendant's agent as to difference and measurement. They decided the difference, and settled in the bill of lading the quantity of timber.

Another question was raised, as to its being a fraudulent submission and deceitful, and the award of the arbitrators a fraudulent one. If this be so, it is all void. So with regard to the arbitrators; if the award be corrupt, it is void. You are not to imply or impute fraud. You are to understand that the parties acted in good faith. You are not to impute that they designed to practice any trick, or that the arbitrators intended to practice fraud. You are to be satisfied that the evidence fully supports the charge.

Mr. Lord excepted to the charge.

The jury retired, and found for plaintiff damages $7,484.24.

[Affirmed on appeal to the circuit court. Case No. 1,281.]

TYSON (BELMONT v.). See Case No. 1,281.

Case No. 14,317.

TYSON et al. v. The JASON.

[Betts' Scr. Bk. 141.]

District Court, S. D. New York. July 24, 1849.

COLLISION — VESSEL AT PIER — BREAKING FROM FASTENINGS.

[1. It is negligence on the part of a vessel to attempt to take and hold a berth at a pier in New York harbor in midwinter, while a strong tide is running, and the river is full of floating ice, without having the supervision and authority of a competent pilot or master on board.]

[2. To constitute misconduct in the management of a vessel, rendering her liable for damage done to another vessel, it is not necessary that the conduct should be intentionally wrongful. Mistake, misjudgment, or ignorance is sufficient; for those in control of her are bound to ordinary care, caution, and skill.]

[3. Where a sailing vessel in tow of a steamer is left at a pier, the act of detaching herself from the steamer, and fastening herself to the pier, is to be considered her act, and she is responsible for damage done to another vessel in consequence of negligence therein, unless she affirmatively shows that she was abandoned and left at the pier in opposition to her wishes.]

[4. An illegal or improper act of a vessel injured by collision is no defense or excuse in favor

of the other vessel, unless it be shown to have conduced to the collision.]

[This was a libel in admiralty by William Tyson and others against the bark Jason to recover damages for injuries occasioned to the ship Probus, with which the Jason collided.]

BETTS, District Judge. The point put directly in issue by the pleadings is the negligent and culpable conduct of the Jason in taking a position outside the pier, without fastening sufficient to secure her there.

I think the decided strength of the evidence on this head is adverse to her. First. It was blameable negligence on her part to come round at that season of the year, and attempt to take and hold a berth, without having the supervision and authority of a competent pilot or master on board. She had neither. Second. It was midwinter, the tide was strong ebb, and there was ice floating in the river, the natural course of which upon the tide would place the Jason in a state of exposure, and those having her management were bound to take notice of those facts, and take measures accordingly. Third. When the steamboat cast off and left her at the dock, and when the ice came upon her, she was insufficiently fastened for her own safety, and that of other vessels near her. This those with her were well aware of, and the pilot, who came to her at the dock, directed additional fasts instantly put out for her protection. These facts are proved by several witnesses.

To constitute blameable misconduct in the management of a vessel, when damage is sustained by another, it is not necessary that the conduct should be intentionally wrongful. Mere mistake, misjudgment, or ignorance is sufficient, because the party is bound to ordinary care, caution, and skill. Not to use these qualities subjects him to the damages he occasions, and no inquiry is made whether he is destitute of them by actual defect. On this issue the case is with the libellant.

The claimants set up, in avoidance of their liability, first, that the steamboat improperly left the bark at the pier, to escape the approaching ice, before she was properly fastened and secured; that the Probus was guilty of illegal conduct in taking a position forbidden by law.

To this point it must be answered that, whatever may be the relative responsibility of the steamer and her tow in respect to other vessels whilst they are under way, propelled by the power of the steamer, yet that in attaching herself to a steamer, and detaching herself when at anchor or at a berth, the sailing vessel determines her course for herself, and the steamer is but her agent. Her consent to the departure of the steamer, and to be left to her own means of protection, must be assumed until the contrary is shown. If the sudden and unexpected desertion of a tow by a steamer, under circumstances leaving the sail boat no means of self-protection, or of avoiding injury to others, will exonerate her from liability for those injuries, the fact of such abandonment and mischance must be proved by her, and that it was in opposition to her wishes.

Second. Claimants do not succeed in placing the case in the situation to call for a decision whether the Probus lying heading toward the outside of the pier, and not up the dock, or if her jib boom was outside the pier, it was an illegal position, the taking of which would exonerate the bark from responsibility for collision with her, because they fail to prove that, if lying entirely within the pier, the collision would any way be more promoted by her being stern up the dock, than if heading that way. The authorities are clear that, if an illegal or improper act of the injured vessel is set up by the colliding one, it cannot avail to her defence or excuse, unless it be shown to have conduced to the collision. The proof here is that the bark, once driven into the slip where the ship lay, must inevitably have come into collision with her. The opinion of some witnesses that the collision was brought about by the bark striking the end of the jib boom outside of the piers, by which she was brought up, and forced against the ship, cannot avail against the greater weight of evidence produced by the libellants, that the jib boom was in fact inside of the piers, and the bark was also not arrested by it on the outside.

Upon a careful revision of the evidence, I cannot see grounds for regarding this collision an inevitable accident. It was undoubtedly accidental, so far as the purpose and intention of those connected with the bark was concerned, but it could have been avoided by the exercise of a reasonable and a prudent precaution, by making the bark adequately fast and secure at the dock, or if that was an improper place for her to lie, and meet the coming ice, by remaining with the steamer until a safe berth could be provided for her. The bark had to take the responsibility of these considerations. Other vessels, lying safely in their berths, had a right to exact of her, in taking a position near them, that she should so do it as not to be the occasion of damage to them; and in a misfortune of serious consequence to herself, as well as another, the law does not stop to estimate the particular loss, but imposes upon her the additional burden of covering that she has improvidently caused to others.

The decision must be in favor of the libellants, with an order of reference to ascertain and report the amount of damage.

TYSON (MYERS v.). See Case No. 9,995.

Case No. 14,318.

TYSON v. The PANAMA.

[See Case No. 11,697.]

Case No. 14,319.

TYSON et al. v. PRIOR.

[1 Gall. 133.] [1]

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

SALVAGE—AMOUNT OF COMPENSATION—DERELICT.

1. The amount of salvage rests in the sound discretion of the court In general it ought not to be less than one third, unless the property be very valuable, or the services very inconsiderable.

See the case briefly stated in Curt. Adm. Dig. tit. "Salvage," pp. 419, 426; The Henry Ewbank [Case No. 6,376]; Bearse v. Three Hundred and Forty Pigs of Copper [Id. 1,193]. See Abb. Shipp. (Shee's 7th Ed.) pp. 554, 594, c. 12, where all the English cases down to 1844 are collected.

[Cited in Hand v. The Elvira, Case No. 6,015; The Emulous, Id. 4,480; Smith v. The Stewart, Id. 13,070; The John Wurts, Id. 7,434.]

2. A case of derelict can occur only where the property has been abandoned without the hope or intention of recovery.

See Rowe v. The Brig [Case No. 12,093]; The Boston [Id. 1,673]; Flinn v. The Leander [Id. 4,876]; L'Esperance, 1 Dod. 46.

[Cited in Cromwell v. The Island City, Case No. 3,410; The Cleone, 6 Fed. 525; The Viola, 5 C. C. A. 283, 55 Fed. 832.]

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

This was a case of salvage [by Benjamin Tyson and others, claimants of eight hundred barrels of flour, against Matthew Prior] claimed by the libel, as due from property derelict.

G. Blake, for salvors.

C. Jackson, for claimants.

STORY, Circuit Justice. The schooner Polly, with a cargo of flour, &c. on board, sailed on the 5th of August, 1809, from Baltimore, bound to Lisbon. About the 30th of the same month, the schooner was dismasted in a gale of wind, and continued for about nine days sailing under jurymasts, and in a very distressed situation. Afterwards, on the 4th of September, the schooner was fallen in with, about the latitude 43° 50′ N. and longitude 46° W. by the brig Triton from Liverpool bound to Boston; and by another brig, which afterwards by consent parted from them. The whole crew of the Polly went on board of the Triton; and at the request of the master of the Polly, the Triton remained along-side of her during that day and the following night. Early on the next morning, while the brig was lying to the leeward of the schooner, the ship Reserve, commanded by the libellant, Matthew Prior, hove in sight, and soon afterwards boarded the Polly, and after bearing down to the leeward, spoke with the Triton. The Triton being nearly fully laden, it was agreed, that the captain and crew of the schooner should go on board of the ship, and that the ship should take on board whatever of the cargo might be saved from the schooner. This was accordingly done. The brig soon afterwards parted company, and the weather continuing moderate, Captain Prior took the schooner in tow for six or seven days, and during that time took out of her the articles libelled. The schooner's crew assisted in taking out the cargo; and no accident happened, during the time, except the staving of one boat of the ship, and the loss of fifteen barrels of flour. The schooner was then abandoned, and the ship arrived safely in Boston. Various claims were interposed in the court below; but as no appeal has intervened, except in behalf of the owners of the goods saved, no notice is necessary to be taken of the others. The gross value of the whole property saved, appears to be $6,770; and the court below adjudged a salvage of one third of this gross value.

It is admitted on all sides, that the salvors have a meritorious claim; and the only controversy is, as to the amount, which ought to have been decreed. The original libel appears to have been founded on the supposition, that this was a case of derelict. This was a clear mistake. For it is not sufficient to constitute derelict, that the vessel should be abandoned; but the abandonment should be without the hope of recovery; and without the intention of ever returning to the vessel again. The Aquila, 1 C. Rob. Adm. 37. And accordingly upon the argument this ground was abandoned. What shall be the amount of salvage decreed, in cases of this nature, must necessarily rest in the sound discretion of the court. In the exercise of that discretion, different minds of equal force and elevation may entertain very different judgments. The rate of salvage is not governed by the mere extent of labor; but is a result from the combination of various considerations. The value of the property saved, the degree of hazard in which it is placed, the enterprise, intrepidity, and danger of the service, and the policy of a liberal allowance for the timely interposition of marine assistance, all conspire to heighten the amount. Where the value of the property is small, and the hazard is great, the allowance is always in a greater proportion. On the other hand, where the value is large, and the services are highly meritorious, the proportion is diminished.

I have looked into the cases cited on the argument, and into other leading cases. The Aquila, 1 C. Rob. Adm. 37; The William Beckford, 3 C. Rob. Adm. 355; The Jonge Bastiana, 5 C. Rob. Adm. 322; The Mary Ford, 3 Dall. [3 U. S.] 188; Mason v. The Blaireau, 2 Cranch [6 U. S.] 240; Bond v. The Cora, 2 Pet. [27 U. S.] 361. In The Aquila two fifths of 12,000 pounds were allowed; and in The Jonge Bastiaan, two thirds of 3,400 pounds; and in our own courts, the allow-

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

ance in the three cases, which I have cited, was one third of the gross amount, although the average value of the property was about $50,000. It is undoubtedly true, that in some of these cases the services were of very superior merit; but the value made the compensation an extremely liberal allowance. It is argued in the present case, that there was no hazard of life, and no uncommon exertions. The ship however was detained a week on her voyage, and the services appear to have been rendered with alacrity. By the stoppage, during this time, it seems to have been generally considered, that a deviation resulted, and of course that the ship was put at the hazard of the owner. Mason v. The Blaireau [supra]; Bond v. The Cora, 2 Pet. [27 U. S.] 361. The property also, which was saved, is of small value; and even one third does not offer a very strong inducement to hazard the fate of a voyage upon such a salvage. I think that sound policy dictates, that the compensation should not in general be less than one third, unless the property be very valuable, or the services be very inconsiderable. If I were to reverse the decree of the district court in this case, I do not perceive any solid distinction, on which I could rest it. It was an exercise of discretion, which violated no principle, and does not seem to have assumed any extraordinary latitude. It is best for all parties, that litigations of this nature should be speedily settled; and when I cannot perceive an undue inflammation of the rate of salvage, I do not think, that, sitting in an appellate court, I should nicely balance the subordinate distinctions of cases, whose complexions carry a plain merit and humane interposition.

No objection has been taken to the distribution of the one third allowed for salvage, by the court below; and I therefore give no opinion, as to what ought to be done in such particulars, when the parties bring the subject into contestation. I affirm the decree of the court below, with costs.

Case No. 14,320.

TYSON v. RANKIN et al.

[1 McA. Pat. Cas. 262.]

Circuit Court, District of Columbia. June, 1853.

PATENTS—WHAT CONSTITUTES AN INTERFERENCE—IMPROVEMENTS IN PROPELLERS.

[1. To constitute an interference, there must exist substantially an identity; and, in the case of machines, the modus operandi may be looked to as a test.]

[2. Two parties claimed an invention consisting of placing a flange on the rim or periphery of propeller blades. The purpose of one was to adapt the propeller to use on canals, by preventing the formation of lateral waves, which he proposed to accomplish by preventing the water from being thrown from the ends of the blades, and directing it aft. His flanges were accordingly constructed so that their inner surfaces formed parts of a cylinder exactly concentric with the axis about which they revolved. The other apparently proposed to use his invention in general navigation, and his flanges had an outward inclination, so that the water was only partially deflected, and the formation of lateral waves but partially prevented. *Held*, that there was no interference between the two machines.]

[This was an appeal by William F. Tyson from a decision of the commissioner of patents in an interference proceeding, awarding priority to Ebenezer Beard in respect to the invention of an improvement in propellers.]

P. H. Watson, for appellant.

Examiners Peale and Everett, for Commissioner.

MORSELL, Circuit Judge. In the early stage of the proceedings in this case it appears that there were other opposing parties, but in the close the only real parties to the issue were the said Tyson and Beard. Beard's original application, with his specification, was presented to the office in June, 1845, and his claim was "the application to each of the helical wings of a propeller of one flange so as to extend in both sides at the outer edge or end of it for the purpose or purposes as herein described, and also the arrangement of the flange upon the outer edge of the wing in the diagonal manner herein explained." He claimed also the peculiar mode of constructing the propeller by making or casting the hub in sections, and each of said sections upon and with one of the wings, the whole being arranged and confined together, substantially as set forth. He also claimed the combination with each of the sections of the hub, and with the collars or other contrivances by which the parts of the hub are confined together, of a tenon and mortise formed in or upon the opposite sides of the said section, as therein above set forth, the same being for the purpose of transferring the strain upon each wing to the sections of the hub and parts adjacent to the aforesaid section. It appears from the report of the commissioner that upon refusal of the office of a patent to Beard he withdrew his said application, in which rejection he is informed "that a propeller with the curved wings referred to was then in the office, and that it was rejected as unpatentable in the spring of 1844." Again, on the 27th of September, 1845, the commissioner states to him "the opinion was expressed that the flange could not be claimed." Tyson's application for a patent in this case was made in the year 1850. In his specification he says: "Having thus described my propeller, what I claim therein as new and desire to secure by letters-patent are the blades constructed with lips or rims which are sections of a cylinder concentric with the axis on which the propeller rotates, as herein specified. The object for which this propeller is designed is the propulsion of vessels; but it is believed to be peculiarly fitted for canal navigation, as the rims of the blades, by retaining the water, prevent it from moving laterally from

the propeller-shaft, and thus prevent the production of waves, which would act injuriously upon the banks. Upon examination it was at first supposed that this claim was the same as that of Hollingsworth's propeller, which had been rejected as unpatentable. On further examination the commissioner, by his letter of the 11th of November, 1852, informed Mr. Tyson that his claim was again rejected; and he was additionally referred to an application of Mr. E. Beard, withdrawn in August, 1846, wherein is described and represented the cylindrical flange applied to either or both sides of the helical blades.

On the 30th of October, 1852, the commissioner addressed a letter to Mr. Beard, stating that since the rejection of his application for alleged improvements in propellers an application for the same contrivance has been filed by Mr. William F. Tyson, of Orwigsburgh, Schuylkill county, Pennsylvania. "After some correspondence Mr. Tyson was rejected upon your propeller. He now proposes to prove that he invented the exterior flanges, which are portions of a cylinder whose axis is the same as that of the propeller-shaft, prior to the date of your invention thereof. If he succeeds in his purpose, the office will be obliged to grant him a patent, as it has not, after diligent search, been able to find flanges of the same shape, and as it now believes that such shape produces useful effects, differing from those produced by other shapes of flange. Mr. Tyson has been ordered to notify you of the time and place of taking the testimony, so that you may appear, &c. (See rules, &c.) You also are at liberty to take testimony under notice to Mr. Tyson. Such testimony, if taken, must be received by this office prior to the first Monday in February, 1853; and if you thereby prove that you invented before Tyson, of which fact the office judges, you will be given notice thereof; you may renew your application, and obtain a patent for your flange, if you in addition prove that you invented prior to the invention of the same thing by James Rankin, Jr., of Detroit, Michigan, who has now before the office a pending application describing the same form of flange, your testimony must therefore be taken under notice to Rankin." In this letter it will be observed that the commissioner states the contrivance to be the same in Beard's specification of claim as in that of Tyson's; whether in all its material features or not, he does not say. In alluding to the peculiar form of the flanges in Tyson's specification, which is a section of a cylinder concentric with the axis on which the propeller rotates, he says, after diligent search he has not been able to find flanges of the same shape, and that said shape produces useful effects differing from those produced by other shapes of flanges; from which it would certainly appear that he thought the peculiar form or shape of Tyson's flange a very important and material feature. It is to be clearly inferred that he thought the invention new, useful, and patentable; perhaps he might think it especially so as designed and fitted for canal navigation. The parties were authorized to take testimony according to the rules of the patent office to show which was the prior invention. From what I have above said, it is but reasonable to suppose that the commissioner did not mean to say that the issue, "whether there was or not a substantial difference in the two inventions." was not also to be understood as a necessary part of the proof to be offered.

The witnesses on the part of Tyson prove his invention as far back as the 19th of October, 1844. This, Rankin seems to admit, is prior to his claim; so there only remains to oppose Tyson, Beard's invention. The depositions of several witnesses were taken on the part of Mr. Beard, the first of whom proves that Beard suggested the idea of the flange for preventing the water from passing off of the blades, and for making it pass off more in the direction of the wake of the screw-propeller in December, 1840. The next witness proves that in July, 1844, the said Beard made the portion of the pattern of a screw-propeller marked "Exhibit A," then produced and shown to him, and to be forwarded to Washington with the witness' deposition; that he assisted him in making it. The peculiarity of this model or pattern of a propeller consisted in its having attached to the outer rim or periphery of its arms or blades a flange projecting at right angles from both sides the plane or surface of the blade or arm, and resembling in form the tread of a cast-iron rail car-wheel. The object of this flange or rim was to prevent the water passing off the extremity of the blades and to give the water a direction aft in passing from the propeller when in motion. "After the pattern marked 'Exhibit A' had been made about a month, I saw the cast-iron model here present, marked 'Exhibit B;' it was then on board a steamboat then lying at a wharf in Boston harbor. This was the latter part of July, 1844, or the early part of August." He says he knows this date, from the fact that he was then employed on said boat as cook. The cast-iron model has the flange like the wooden model "A." The depositions of the other witnesses are to the same effect.

On the first Monday of February, 1853, according to previous notice, the case was tried before the commissioner, who says: "The testimony submitted by the parties having been fully considered, it is hereby decided that the interference be dissolved, the evidence showing that Ebenezer Beard is the prior inventor." From which decision this appeal has been prosecuted.

The first reason of appeal states that priority of invention of the improvement claimed by the said William F. Tyson "of a flange on the outer ends of the blades of propellers whose position and form coincide with a spiral section of the periphery of the figure

described by the rotation of the ends of said blades ought not to have been adjudged by the commissioner to Beard, because it is not in proof, or pretended, that the said Beard at any time, even to this day, ever invented such flanges." The second and third reasons are the same in substance with the first—"that Tyson's is a different contrivance from that which Beard claims." The fourth reason is "because the form of the flanges of the blades of the propeller claimed by said Tyson, and which constitute the essence and only subject-matter of Tyson's invention, Beard neither proves he has invented nor claims that he has." The commissioner in his answer to these reasons states that it was upon the broad ground "that the evidence showed that priority of invention was in favor of Beard that the decision was so made." According to previous notice given of the time and place of hearing the appeal, the appellant by his counsel and an examiner on the part of the office appeared, and all the papers, with the models and evidence and the reasons of appeal and the report of the commissioner, were produced and laid before the judge, as required by law. On which trial, at the request of the appellant by his counsel, the said officer so appearing on the part of the office was examined on oath in explanation of the principles of the invention and models for which a patent is prayed for. The examiner in substance says to the seventh and eighth interrogatories "that the inner surface of the flanges of the blades of Tyson's propeller, he supposes, will be admitted to be concentric with the axis in which they rotate, and that the water thrown out by the blades of said propeller, he supposes, it will be admitted will be deflected by the flange considerably, and the formation of a lateral wave greatly prevented." To the eleventh interrogatory he says, as he understands from Tyson's specification, his propeller is designed by him for canal propulsion. In his answer to the twelfth interrogatory, after stating that he had not an opportunity of examining all the propellers in the model rooms of the office, he says: "I do not recollect of any propeller having flanges to the blades where the inner surfaces of the flanges are concentric with the axis in which they rotate, except Tyson's, unless one of the models of Beard's rejected application deposited in the office of the judge (where the cause was heard by the judge) shows such flanges; and with respect to them, I have not a definite recollection." (They have been carefully examined since, and found that they do not show such flanges as above described.) To the fourteenth interrogatory he says Beard's models do not all show the flange placed in the same relative position to the blade, nor do they all show precisely the same direction of inner surface of the flange. "No one of them, probably, would give the same deflection to the water as Tyson's, nor tend so greatly to lessen the formation of the lateral wave." There were further answers made by this examiner to other interrogatories, to which I refer, and proceed to state the answers of Mr. Examiner Peale made on the same subject at my request. On examining critically the various models hereinbefore alluded to, he says, in answer to the seventh question: "The flanges on the blades of Tyson's propeller are so formed that their inner surfaces are concentric with the axis on which they rotate." To the eighth: "Water thrown out radially by the rotation of the blades will be arrested on striking the inner surfaces of the flanges at right angles to the radii or blades, which thus tend to prevent the formation of a lateral wave." To the fourteenth he says: "The inner surfaces of the flanges in Beard's propeller slope outwards from the radial line at an inclination of at least ten degrees; consequently water thrown out radially by the rotation of the blades will be deflected an equal number of degrees backwards which will lessen, but not destroy, the lateral wave." To the fifteenth he says: "The flanges of Tyson's propeller being parallel with or in the line of circumference, are at less than a right angle with the radial line, and incline inwards about ten degrees. The inside of Beard's flanges slope outwards about ten degrees. Thus the first (Tyson's) may be said to form an acute angle with the blade, while the latter (Beard's) forms an obtuse angle with the blade." To a supplementary question—"Is the difference between the flanges of Tyson's and Beard's propeller-blades so substantial and important as clearly to distinguish them and to constitute the subject-matter of letters-patent?"—he says: "If the object of Beard in constructing the flange to his propeller-blade was to prevent a lateral wave in canal navigation—which appears to be the object aimed at by Tyson—the difference of construction would not be patentable; but if Beard aimed only at the propulsion of a sea or river boat, and disregarded the lateral wave, while Tyson had in view the prevention of the lateral wave only, the difference, in my opinion, is sufficient to authorize the issue of letters-patent—the object of the invention, as well as the specific construction of the apparatus in each case, being different, although bearing a close resemblance to each other; but as I have not read the specifications of either of the parties, I am not prepared to say that their objects were as I have supposed."

What, then, is the proper effect which ought to be given to the testimony? The witnesses on the part of Tyson establish his invention, as stated and claimed by him in his specification, to have been discovered in October, 1844; those on the part of Beard prove his to have been at an earlier period. In their testimony to show the particular description of the invention they refer to the models "A" and "B," from which some in-

accuracy in what they state is apparent. The models must, I suppose, be preferred in ascertaining the true shape and form of his flanges. This proof may be sufficient, perhaps, to support his claim for a patent. On this point, however, I do not deem it necessary in determining this issue to decide. What I am to consider is, whether there is an interference, according to the principles of patent law, between Tyson's invention and that of Beard's; because if there is not, then there is no such priority as ought to prevent Tyson from obtaining his patent as prayed, by which principles there must exist substantially an identity; and this being in the case of a machine, the modus operandi may be looked to as a test. In the application of the facts it will not be improper to notice what is said by Commissioner Ewbank in his letter addressed to Beard. In that letter he seems to consider the peculiar shape of Tyson's flange as material and important, and I think very correctly. He says that the one attached to Tyson's propeller was unlike any thing that he had been able to discover after a diligent search in the office; and that he believed it would produce useful effects, differing from those produced by other shapes of flanges. On a particular examination and comparison of the different models in the two cases, although in some respects they were found to be alike, in others they were found materially different—the invention of the one fitted and suited for canal navigation, for which it was intended, and the other only for sea or river navigation. In the one the flanges stand parallel to the circumference of their circle of rotation, and form an acute angle with the blade; the others stand across the circle of rotation, forming an obtuse angle with the blade. The one arrests the radial motion of the water and prevents the lateral wave, whilst the other, by deflecting, lessens it; the inside of the flanges of the one sloping outwards about ten degrees, and forming an obtuse angle with the blade, and the other being parallel with or in the line of circumference at less than a right angle with the radial line, and inclining inwards about ten degrees, as I have before partly said. Such appear to me to be the differences between the two inventions, and which I consider very material and essential, and sufficient to show that they are not so identical as to sustain the issue of interference and the priority involved in it, and to justify the decision on that issue in favor of Mr. Beard.

I have been greatly assisted in this investigation by the able and lucid statements made by the two examiners from the office in their answers made to the interrogatories put them on this occasion, whose answers will be herewith sent, and which upon examination will be found fully to justify the conclusion to which I have arrived. I am therefore of opinion, and do so decide, that the said decision in favor of Mr. Beard is erroneous, and ought to be reversed, and that a patent ought to issue to Mr. Tyson for his said invention.

[Subsequently patent No. 9,810 was granted to W. F. Tyson, June 12, 1853, and patent No. 10,124 to E. Beard, October 18, 1853.]

Case No. 14,321.

TYSON v. VIRGINIA & T. R. CO. et al.

[1 Hughes, 80; 4 Am. Law T. 223.] [1]

Circuit Court, W. D Virginia. Nov., 1871.

PARTIES—RAILROAD COMPANIES—CONSOLIDATION—SUIT TO RESTRAIN.

By an act of state legislation, four independent railroad companies were authorized to be consolidated into one company, with provisions looking to the rights of the stockholders of each. Under this act, formal consolidation was carried into effect, and the charter and the formal consolidation had remained unimpeached for more than a year. On a bill brought by an owner of five shares in one of the companies (who had purchased fifty additional shares after consolidation), against the president and directors of that company, praying injunctions, and also on motion for temporary restraining orders, *held*, that the bill must be dismissed for want of proper defendants, especially for not making the president and directors of the consolidated company defendants, and that the temporary restraining orders must be refused.

By an act of the general assembly of Virginia, passed the 17th of June, 1870, four several railroad companies, whose lines stretched from Norfolk, via Petersburg and Lynchburg, to Bristol and beyond, were authorized to consolidate themselves into one company, by the name of the Atlantic, Mississippi and Ohio Railroad Company, upon such terms as the stockholders of each company in general meeting might agree upon, but with no power to compel any stockholder in any divisional company to exchange his stock in such company for stock in the consolidated company. There was a provision that as to such divisional stock as its owners should refuse or fail to convert into consolidated stock, the divisional companies should retain their corporate existence, in the stockholders' meetings of which the consolidated company should vote upon stock which had been converted at a rate of one vote for each share. The conditions of the act of June 17, 1870, were complied with fully, and the consolidated company was formed in November, 1870. One of the companies so consolidated was the Virginia and Tennessee Railroad Company, whose line of road extended from Lynchburg to Bristol. The common president of all four of the companies, before consolidation, was William Mahone, and he remained president of such company afterwards, and was elected the president of the consolidated com-

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 4 Am. Law T. 223, contains only a partial report.]

pany. James E. Tyson, of Baltimore, was, before consolidation, owner of five shares of stock in the Virginia and Tennessee Company, and refused to convert them into the stock of the consolidated company. After the consolidation had been formally effected, he purchased additional fifty shares of the stock of the Virginia and Tennessee Company, from owners who had refused to convert them into shares of the consolidated company. On the 13th of November, 1871, he filed his bill in this court, making Mahone, as president of the Virginia and Tennessee Company, and his directors parties defendant, reciting the foregoing among other facts, charging that the charter of consolidation of June 17, 1870, was void, and conferred no legal authority or power upon Mahone or his directors; that the organization of the Atlantic, Mississippi and Ohio Company was illegal; that the use of the property of the Virginia and Tennessee Company in the interest and under the direction of the consolidated company was illegal; that said Mahone had become president of the Atlantic, Mississippi and Ohio Company, and as such, with the direction of that company, had executed a mortgage upon the property of the Virginia and Tennessee Company, and of the connected companies, and were then negotiating a sale of the bonds, for securing which such consolidated mortgage was given. The bill prayed that the act of consolidation, and the proceedings under it, should be declared void, and the deed of trust annulled and set aside; and, at this special term of the court, called to hear the complainant's motion after due notice, prayed for a temporary injunction restraining the said Mahone, president, and the directors of the Virginia and Tennessee Company from using the property of said company in the interests of the consolidated company, and from proceeding further with the sale of bonds under the consolidated mortgage, etc.

John Baldwin and John W. Daniel, for complainant.

James A. Jones, W. W. Crump, Robert W. Hughes, and James C. Taylor, Atty. Gen. of Virginia, for defendants.

Before BOND, Circuit Judge, and RIVES, District Judge.

BOND, Circuit Judge. The court has listened with great interest to the argument of counsel in this cause, and hesitates to express any opinion until it has had opportunity to examine the large number of authorities to which they have been referred. (The court here gave its reasons for thinking the Atlantic, Mississippi and Ohio Railroad should be a party.) Nevertheless so great pecuniary interests are involved in this suit, and the danger of loss to one of the parties, at least if the proper persons were made parties, would be so serious and immediate, that the court is inclined at once to determine the motion before it without attempting to decide any of the other questions affecting complainant's rights, which have been elaborately argued, and which will be more directly before the court at the final hearing of the cause. What the court is now asked to do is to enjoin these new defendants, provided they are made parties, as they should be, by a preliminary injunction, from proceeding to execute any of the powers and franchises alleged to be granted to them by the act of June 17, 1870, pending the suit. This is to invoke the extraordinary power of this court, which ought not to be exercised unless the injury threatened the complainant be immediate, serious, and irreparable; and not then, if the damage to the defendants is likely to be greater than that of complainant, and equally immediate, serious, and irreparable. It seems to the court that the complainant has neither of these reasons for asking the court to exercise this power in his behalf. Whatever has been done by the defendants respecting the stock or property of the Virginia and Tennessee Railroad Company was done, or was contemplated to be done, twelve months before the complainant purchased his stock in the road, and the former owner of his shares was a participant in part of the proceedings which led to defendants' action. Complainant had full notice of what defendants were about to do, and if, under these circumstances, he purchased his stock in the Virginia and Tennessee Railroad Company, he voluntarily put his interest in jeopardy, and cannot call upon the court to exercise its extraordinary powers to protect him, pending a suit to determine his jeoparded rights, which had been in danger, if at all, twelve months before he voluntarily purchased them.

It is manifest to the court that the danger of loss to defendants in case the court should exercise the power invoked, if at the final hearing its judgment should be for defendants, is likely to be more serious and irreparable than any possible loss to complainant. Credit is a delicate thing. Confidence in the power and right of defendants to make the pledges they have made to raise the money authorized by the act of June 17, 1870, is absolutely necessary to the success of the loan. In this suit defendants have at stake millions of dollars, while the complainant, at the commencement of the action, had but five shares of stock, which he alleges in his bill are in immediate danger of depreciation in value by defendants' conduct, which danger was not great enough to prevent his purchasing fifty shares more since the suit began. Under these circumstances the court is of opinion that the complainant has no right to ask the court to exercise this extraordinary power. Whatever rights or interests the complainant may have are in no danger of great or irreparable loss. They may be fully determined and secured at the final hearing, without the aid

of a preliminary injunction, and the court will refuse the motion.

RIVES, District Judge. This cause cannot now be heard by us in the breadth and to the extent in which the pleadings and arguments of counsel have claimed our attention. The necessary parties are not here. We have no other parties before us but a solitary shareholder as complainant, and his company and its president as defendants. Nevertheless the rights, the acts, the lawful existence of another corporation, namely, the Atlantic, Mississippi and Ohio Railroad Company, have been the chief theme of discussion by counsel on both sides, and the principal topic of complaint on the part of the complainant. Yet this company has not been made a party by this bill, nor any officer thereof, in his character as such. The president of it is indeed a party, but wholly in his character as president of the Virginia and Tennessee Company, or else as an individual, uniting in himself the presidency of both companies, but nowhere in the bill called to account as the president of the consolidated company. The corporation, thus overlooked as a party in these proceedings, is a most important one in the legislation of the state, both as regards the magnitude of its enterprise, the amount of its capital, the munificence of the state towards it, and the policy which it established. It was created as a means of uniting in one organization four distinct lines of railroads, having one common object of attracting to our seaboard the trade of the West. Its claims and rights, therefore, cannot be impleaded in a controversy confined to one of these four companies, and a member of it. The great object of this suit is to assail the validity of the charter of the Atlantic, Mississippi and Ohio Railroad Company, of a large loan recently effected by its president, and of a mortgage to secure it, and, further still, to arrest and defeat the negotiation and sale of the bonds of the company, based upon this mortgage. And the only pretext offered for this by the bill consists of the allegation that all this proceeds from the acts of William Mahone, the president of the Virginia and Tennessee Company, and, as such, constituting a breach of trust towards the complainant. But the mortgage, when exhibited in this cause, is shown not to proceed from William Mahone, as president of the Virginia and Tennessee Company, but from William Mahone, as president of the Atlantic, Mississippi and Ohio Company. It purports on its face to be a deed of this company alone. It would, therefore, be out of the power of this court, under the state of parties, to adjudicate the questions raised in argument, or to grant an injunction calculated to restrain a corporation or its officers who are strangers to this suit.

This defect is patent. It is sufficient to justify a refusal of the preliminary injunction asked for. Nevertheless it has not been availed of by the able counsel for the defendant. They have vied with the counsel on the other side in the elaborate presentation of the vital questions growing out of the act of June 17, 1870. This defect can be readily cured by amendment, and with opinions already matured upon the instructive arguments we have heard, we may incur the repetition of the discussion, and be more regularly required to decide the issues that have been made before us. Without prejudice, therefore, to any future rehearing of the cause, when more regularly matured, I seem invited, by the course of counsel, at this time to indicate my conclusions from the learned and protracted debate we have heard. In an inferior court like this it may be of use in shaping the course of counsel, and narrowing the scope of their inquiries. Great public interests are also at stake in this litigation, and any opinions from the bench that may have the effect of composing this strife, disembarrassing a great public work of suits, and defining the rights of private corporators connected therewith, are not improper on an occasion like this, but, on the contrary, calculated to subserve a good end. Under this impression, I proceed to give briefly the opinions to which I have been led by a careful consideration of the topics that have been so ably discussed before the court.

The chief reclamation in this cause, the gravamen of the complaint, is, that the act of June 17, 1870, commonly called the "Act of Consolidation," operated a diversion of plaintiff's shares, profits, and franchises from the object to which they were pledged by his charter, to a different enterprise, in which he was not bound nor willing to embark. From the numerous authorities that have been cited to us I deduce this leading principle—that a charter involves two contracts: First, on the part of the state, as to the nature and limits of its grants; second, as between the corporators themselves, binding them collectively and singly by its terms. The perpetual obligation of the first was affirmed in the great Dartmouth College Case. That decision has not been impugned, nor its authority shaken, by the prevailing spirit of change and progress. On the contrary, it has led to the now common reservation in charters, of the power to repeal, alter, or amend. In our general act of 1837 it takes the form of a privilege to modify, alter, or amend, so far as not to affect the rights of property. This legislative reservation clearly pertains to the first contract. The second one existing between the corporators is without its purview, because that is protected by a constitutional guarantee, which forbids its impairment by the state, either in the form of law or constitution. Hence I infer that any law which enters within the pale of a charter, and violates the contract subsisting between the corporators, by committing them

or diverting their assets to any new work not embraced by their charter, is void, because subversive of the contract between themselves, and therefore obnoxious to the constitutional restriction. In such a case restraint by writ of injunction is appropriate, because it secures to a dissentient stockholder his full measure of protection under the constitution, both state and federal. Any such abuse of the charter may also be corrected by the judicial application of the doctrine of "ultra vires." From this reasoning, therefore, it follows that the legislature cannot avail of this reserved power to free people of the obligation of their contracts. All it is intended for is to allow succeeding legislatures to limit, alter, or modify previous grants by the state of its public franchises, and can of necessity have no operation upon the interior contract existing in the body of the charter between its members.

Does the act of June 17, 1870, militate against the principles thus announced? Does it infringe, alter, or pervert the rights of the shareholders in the original companies having severally charge of this continuous railway through the state? Does it consolidate these companies against the will of even a minority of the stockholders? The fundamental provision of this act gives the negative to these questions. In the first, leading section of the act, no one share of the original pre-existing companies can be subscribed to or merged in the stock of the new company, or otherwise acquired by it, except upon the agreement of the shareholder. With this distinct and unqualified stipulation before us, we are challenged with a bare parenthetical implication, growing out of the eighth section, to the effect that these pre-existing companies are to be extinct upon their abandonment by a majority of the stockholders in each. This is but a cursory implication. How it came to be made, or with what purpose it was expressed, whether by way of inducement, suggestion, or coercion, is scarcely worthy of inquiry in my view; it is reprobated by the whole structure of the law. Though termed an act of consolidation, it does not of itself operate as such. It stamps on its frontlet and recognizes to its extremest limit the right of each and every stockholder in the pre-existing companies, and actually preserves their organization so long as there are any to cling to them. True, it does not make ultimate provision for the case of stockholders who may not choose to cast their shares into the new concern. In other states, it seems, provision is made for ascertaining by commission the value of such shares, and providing for their ademption by the payment of such values. This ulterior arrangement was doubtless not made by this act, because of the confidence entertained by the legislature that in view of the great liberality of the state in the endowment of this new company, and the attractive policy and advantages of its charter, everything necessary or desirable would best be accomplished by treaty and agreement between the companies and private stockholders, whose interests were so perfectly akin to each other. At any rate, the dissentient stockholder is safe under the provisions of this act. Nothing can be done with his share or franchise without his assent. It is "so nominated in the bond." If he has not been fairly dealt with in the past, he has rights of contract by common law; he can enforce them at law or in equity, as he may choose to assert his claim. It is the manifest interest of all, and especially the duty of the great, overshadowing corporation —the Atlantic, Mississippi and Ohio Company—to seek and effect an early settlement with all and each of the shareholders in the original, outlying, and now nearly extinct companies, so as to be able to prosecute, with unity of effort and design, their important undertaking under one charter, and under the cheering auspices of a contented public, and a scrupulous regard for the rights of all who have had a share, however small, in these works. But if, perchance, injury has been done or is apprehended by dissentient stockholders, it does not present a case for injunction; it can be adequately redressed by damages ; they can always demand and have a fair and just account of their corporate assets, and full satisfaction for their stock. But the action now asked against this company is a far different case. If you now arrest them in the negotiation of their loans, you give a fatal, incurable stab to their credit and works. An injunction against them at this time would be an irreparable injury. The apprehension of it at any future time, and in a perfected state of the pleadings, is so grave a matter as, in my opinion, to require the intimation now thrown out to counsel, that they are not likely hereafter, when they have been made proper parties to their bill, to get this court to intervene in this form of a preliminary injunction.

The view I have thus taken of the charter of the Atlantic, Mississippi and Ohio Company frees it of the constitutional objections urged against its validity. I have but little doubt these objections were present to the minds of the framers of this law when they drafted it. They have accordingly steered clear of them. It was not enforced consolidation. It was not a diversion of corporate property or franchises to a new undertaking not in the terms or contemplation of the original charter. It was a tentative measure toward consolidation. Its success all rested on the voluntary action of the stockholders of the separate companies. The state set the example of transferring its shares and bonds to the new company for a moderate consideration, and upon terms of long and generous indulgence. This example, combined with obvious considerations of private interest and public policy, was reasonably counted on as means to lead the private stockholders out of the old companies into the new all-embracing

company, and thus to bring about the final abandonment of the old antagonizing charters for the one common harmonizing charter for all. Nor has the event disappointed this reliance. We are told that nearly all of the individual stockholders in three of these companies, and upwards of 8,000 out of 12,000 in the Virginia and Tennessee, have taken refuge under the late comprehensive charter of June 17, 1870. Doubtless this process of transfer is still going on, and will continue to go on. Until it is completed in the way designed by law, the courts will be open to adjust and liquidate the claims of all dissentient stockholders. In this very case, the bill may be amended and prosecuted as an original one, to give the complainant the benefit of any accounts he may choose to call for, and the relief to which he may show himself entitled. The concession is due to the minority of stockholders, however small. Their rights are to be respected. However obstinate they may be in resisting overtures to subscribe their stock to the new company, no one, under the terms of this act, can demand a reason of them. "Voluntas stat pro ratione." But I would not be understood as precluding the courts, on a proper case made, from interposing their rightful authority to settle these obstructing claims, and to remove out of the way a grand improvement ordained by the legislative will, rights unreasonably withheld, and admitting of just and full compensation.

While I thus state the case, and construe the rights of the minority, I must add that the majority have rights equally clear and indisputable, and among these I reckon the right to abandon and forsake their separate charters, and betake themselves to a common one more to their liking. The mode of exercising this right has been appointed by the act of June 17, 1870. That is essentially the aim, the scope, the effect, the operation of this act. It does nothing more. It is permissive, not mandatory. As the means, therefore, of accomplishing in the given emergency a public policy agreeable to the legislature, and promotive of that unity and harmony which it aimed to introduce in the conduct and completion of this work, I am free to say that I can conceive of no measure to this end less liable to constitutional objections than the act in question. I cannot, therefore, refrain from imparting at this stage of the proceedings these my strong convictions to the counsel, whose opposing views on this subject I have studiously considered and patiently weighed. As they have on both sides discussed these questions, I shall not, I hope, be accused of rashly prejudging them. But at the same time, I beg to assure them of my readiness to reopen the discussion at any future stage of this cause, when fully matured as to all proper parties, and invoke their assistance in a review of these opinions, with a full purpose on my part to discard the bias of all preconceived opinions as becoming the bench, where the pride of opinion should always yield to better thought, more patient investigation, and, above all, to the honest and brave pursuit of truth and justice.

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Case No. 14,321a.

UDELL v. The OHIO.

[18 Betts, D. C. MS. 90.]

District Court, S. D. New York. March 27, 1851.[1]

MARITIME LIENS — NEW YORK LIEN LAW — SUBCONTRACTOR—MATERIAL FURNISHED—OWNERSHIP OF BUILDING VESSEL.

[A vessel is built under a contract which names the persons for whom to be built as owners, and further provides that payment is to be made monthly, as the building progresses, to the builders. The builders are paid in full, and the vessel launched. Subsequently a furnisher of material libels the vessel, and claims a lien under the New York law (2 Rev. St. p. 423, § 1), upon the ground that the builder was, for the purposes of the statute, the owner of the vessel until finished. *Held*, that the builder had no such interest in the vessel, as against the owners thereof, as could be subject to the lien of the libellants.]

[This was a libel by James Udell to recover for supplies furnished the steamship Ohio; George Law and others, claimants.]

BETTS, District Judge. This case is of considerable importance because of the amount involved, but more so in respect to the question of extent to which the privilege of material men for liens upon vessels may be carried under the state statute. It was argued orally before the court, with great minuteness, and the counsel for the libellants have since furnished written points expounding the argument, and criticising the cases referred to as having application to the subject.

I lay out of view the claim that the libellants here have a privilege or lien by the general maritime law, independent of that provided by the state statute. I regard it as definitely settled that in respect to domestic vessels a material man must look to the local law alone as the source and measure of his lien upon the vessel. [The General Smith] 4 Wheat. [17 U. S.] 438; [Peyroux v. Howard] 7 Pet. [32 U. S.] 341; The Chusan [Case. No. 2,717]; Hull of a New Ship [Id. 6,859]; The Phebe [Id. 11,065].

The local statutes will be enforced in the

[1] [Affirmed in Case No. 14,322.]

United States courts in appropriate cases according to their effect in the state where enacted, and consequently the expositions of the state tribunals are to be received as the highest evidence of their design and import. Elandorf v. Taylor, 10 Wheat. [23 U. S.] 152; Shelby v. Gray, 11 Wheat. [24 U. S.] 361; U. S. v. Morrison, 4 Pet. [29 U. S.] 127; Green v. Neel, 6 Pet. [31 U. S.] 291. Not only is this principle observed as to the construction of statutes already declared by the state courts, but the United States courts so far defer to that interpretation of the law as to repudiate decisions of their own when the state courts subsequently put a different construction upon local statutes. The United States circuit court in Virginia decided that an elegit could not issue against real estate until the remedy on a fieri facias against personal property had been exhausted, and that the lien was suspended during the running of that process. A case soon after arose in the court of appeals of Virginia, in which it was decided that the right to take out an elegit is not suspended by suing out a writ of fieri facias, and that consequently the lien of the judgment continued pending the proceedings on that writ. Upon the ground that the judgment of the state court on the import of the state law supplied the rule of decision to the United States court, the decision of the circuit court, although made anterior to that of the court of appeals, was reversed. U. S. v. Morrison, 4 Pet. [29 U. S.] 124. The same doctrine was declared in the circuit court of this district. A construction was put upon the existing statute of limitations of the state. Dorr v. Swartwout [Case No. 4,010]. On the appearance of the report of the case of Burroughs v. Bloomer, 5 Denio, 532, in which the supreme court of the state adopted a contrary construction of the statute, it was declared by the court to the bar that the latter decision would be followed in the United States courts in this district as the proper construction of the statute. It, however, appearing that about simultaneously with the decision in Burroughs v. Bloomer another branch of the supreme court created by the new constitution, and of co-ordinate power with the old supreme court, had expounded the statute in the same sense as the United States circuit court, that decision has not been revoked. Cole v. Jessup, 2 Barb. 309.

The admiralty courts have manifested a disposition to give a liberal effect to state statutes providing a lien to material men and mechanics for supplies and services rendered to domestic vessels, and one most beneficial to the interests of that class of creditors. The laws have been regarded remedial as to those interests, and thus entitled to a benignant interpretation. Many cases have occurred in this court where the influence of that principle has had great weight in controlling the decision, such as protecting those classes of creditors against the loss of their liens from surreptitious removals of the vessel out of the state or from the port, or where they left the port, not on a business employment, but to test the sufficiency, or proper arrangement of the machinery, or other parts of the vessel.

In the case of Force v. The Nathaniel P. Tallmadge, brought before this court in October, 1836, the leading points in controversy in the present cause were raised and considered.[2] No detailed opinion was delivered in writing by the court, but the final order entered, compared with the proofs and points discussed before the court, indicates distinctly the view taken of the statute and the interpretation put upon it by the court. Tooker & Haight, as ship builders, in August, 1835, contracted with the Dutchess Whaling Company to build a ship for them. She was commenced in June, 1836, and then delivered to the company. The company had then advanced from $2,000 to $3,000 on her, and were owing the builders $750 on the contract. The builders were insolvent, and were at the time indebted to the company $4,500 on a judgment. The company employed an agent to superintend the building of the ship. Tooker & Haight kept a ship yard where general work in their line was done, and they purchased on credit from time to time materials adapted to their busuiness, which were kept in their yard. In the winter of 1835–36, Tooker & Haight also commenced building a schooner in their yard, and applied to her from time to time materials on hand, including some of those furnished by the libellants. Some of the same materials also went into another ship they were repairing at the yard. The libellants had previously furnished brass work, nails, spikes, &c., to Tooker & Haight, on credit for their business. The old account with them was settled in June, 1835, and a new account opened at 90 days' credit. They said they were about building a ship, and wanted these articles for her. The articles in question were sold him at 90 days' credit, and, the libellant proved, were used in the ship to the amount decreed in his favor. A bill was drawn by the libellant on Tooker & Haight for account since 1835, and accepted by them, but not paid. The court first rehearsed that the materials used and applied in the ship having been furnished by the libellant, and not having been paid for, and no exclusive personal credit having been given the builders therefor, and there being no waiver direct or implied on the part of the libellant of the lien on the vessel therefor, and that consequently, by the law of this state, the price contracted for continues a lien on the ship, decreed that the libellant recover for the various supplies (as detailed), with interest.

The only noticeable distinctions between the main features of that case and the present are that the Whaling Company had an agent superintending in their behalf the building of the ship, although it does not appear he directly sanctioned this purchase or exercised any claim of ownership or possession or

[2] [Case unreported.]

agency over the ship itself, until after she was launched, and that the full amounts due the builders had not been paid them by the company when the ship was launched, and went formally into their possession. Still, it was equally obvious in that case and in this that the credit was directly to Tooker & Haight, and that their personal responsibility was relied upon at the time, although there was no express interpretation to that effect, and also that the materials were furnished on a general purchase, and not delivered specifically for the use of the ship Nathaniel P. Tallmadge. The ground upon which the court obviously proceeded in the judgment was that Tooker & Haight were to be regarded as owners of the ship pro hac vice at least, as they had not merely a right of possession in the character of bailees for labor, but were owners of the materials put in her not then paid for, or might be regarded as acting under the approval of the agent and superintendent in buying materials for her, and that a liberal construction of the statute of the state should seize upon every such consideration to uphold the equities of a material man whose property had gone into her construction. Merritt v. Johnson, 7 Johns. 473; 2 Kent, Comm. 361.

Other judges have concurred in the disposition to give these lien laws a liberal construction, holding them to be beneficial to the general interests of commerce, and having a foundation in national equity. The Calisto [Case No. 2,316]; Weaver v. The S. G. Owens [Id. 17,310]. The highest court of this state, on the contrary, is disposed to hold the law to a rigid construction. The court, in considering a claim to a lien under this statute, say: "It is a privilege granted to certain descriptions of creditors by a specific law in derogation of the common law, and cannot be extended or enlarged by construction." Veltman v. Thompson (July, 1850) 3 Comst. [3 N. Y.] 441.

The interpretation of the statute in relation to facts analogous to those in the present case has also since the decision of this court in the case of The N. P. Tallmadge been made by the supreme court of the state in a judgment apparently well considered, and which does not appear to have been since called in question in the state courts. The facts are not now set out with fullness in the report of the case, but they are distinctly signified in the report of the referees and the judgment of the court. Hubbell attached the schooner Columbus for a debt due him contracted by "the master and builder, owner and contractor," for building her, for work and labor done upon, and materials found for, the schooner, at the request of such owner-builder, etc. The referees reported that the builder for the time being was the master of the vessel, and that the lien attached, etc. Builder was originally a part owner, for it is adjudged that upon his assignment of his interest he stood only in the relation of builder. On appeal to the supreme court, those provisions of the statute were rehearsed, and the court say, the proof is that the builder was not owner, for he had assigned all his interest, and stood in the simple relation of a man hired to build. Upon the facts in evidence, the court also say, it is clear the builder was not agent or consignee or master competent to charge the vessel under the statute, and declared emphatically that the builder is neither within the words, nor the reason, nor equity of the act, and therefore the report of the referees in favor of the lien was set aside. Hubbell v. Denison (October, 1838) 20 Wend. 181.

In the present case, Bishop and Simonson made a contract with the claimants to build the steamship Ohio, furnish the labor and materials, etc., for the sum of $110,000, to be paid in monthly instalments as the work progressed. The payments were fully made by the contractors at the terms stipulated, and when the ship was launched and taken possession of exclusively by the claimants, all due to the builders under that contract had been satisfied. Bishop & Simonson, on these facts, also stood in relation of builders hired to furnish the ship to the claimants, and had no right of ownership in her as against them, at any time, even in equity, except the scintilla of title which might seem in them for the periods intermediate their respective payments. Then both the labor and materials applied to the vessel, being fully paid for, became the property of the claimants. So the parties understood their own relations, for the claimants are specifically named as owners of the ship in the contract with Bishop & Simonson and the contract and all the transactions under it were in concurrence with that relationship between the parties. In Hubbell v. Denison, it is implied that the materials sued for in this case were supplied in part during the progress of the work, and in part before Bishop & Simonson commenced building the ship, on a general account between them and the libellant for timber ordered to their yard. The same course of dealing had subsisted between them many years. The bill alleges that the timber furnished by the libellant under orders commencing at about the time they undertook to build the ship and continuing to the failure of Bishop & Simonson amounted to the sum of $2,973.57, of which there is still due and unpaid $2,159.28. This account is made up of portions of a much larger amount for the same description of timber furnished by the libellant to the ship yards of Bishop & Simonson, and out of which he alleges a quantity equal to this sum was applied to the ship. It however appears by the proofs, that, during the running of the account, he received in cash and merchandise from Bishop & Simonson $3,768.08, a sum very considerably exceeding the value of the timber charged by him against the Ohio. This evidence is

at least conclusive to show, that the libellant has been paid the value of his timber which has gone into the Ohio, although not paid for specifically as such, and although there is a large balance in his favor on general account against Bishop & Simonson. The fact is referred to not to show the difficulty of identifying the quantity of timber used in the Ohio, and apportioning to her the just quoto of the whole value, but in connection with the position that the claimants were equitably as well as legally owners of the ship during the progress of her construction, and that Bishop & Simonson had no claim to the character of owners of her at any period of their connection with the libellant or the claimants.

It is proper to remark that Bishop & Simonson being the direct and immediate contractors with the claimants for the timber supplied, they had in themselves no privilege or lien for their demands other than the common-law right to retain possession of the ship until their demands against her were satisfied (Gregory v. Stryker, 2 Denio, 628); and with their claim after giving over possession to the owners (The Etna v. Treat, 15 Ohio, 585), it is doubtful, upon authority, whether the privilege in respect to it would attach to the ship in favor of any remote or secondary party upon the ground that he was the one actually supplying the materials to the contractors. Judge Story, in discussing a claim of kindred character, brought by the employé of an employer, who, under a statute of the state of Maine similar to that of this state, had a lien for his work, says it is difficult to perceive the ground upon which the servant can entitle himself to any lien. Read The Hull of a New Brig [Case No. 11,609]. That case also announces another doctrine adverse to the right of a party to claim in this court a distribution of his services when rendered under a general undertaking, so as to give part of them the benefit of a lien. The libellant was hired as a shipwright generally in the employ of ship builders, and a portion of the time was devoted to working in the vessel attached, and the residue to the current business of his employers. Judge Story decided, that his contract was an entirety, and the court had no authority to apportion it so as to give a lien upon the different things on which his work was done during the period. Id. The case contains another principle applicable to this: That the right of lien arises only when the service or materials for which it is claimed, were rendered or supplied specifically for the ship sought to be charged. Id.

Bishop & Simonson had two large yards in which they built and repaired vessels, and where materials were kept on hand for those purposes, and were transferred from one yard to the other as their business required, and whilst the Ohio was building at one, two other steamers were constructing at the other. They had, for years antecedent the orders to the libellant now under consideration, purchased various kinds of timber of him, which was supplied of the sizes and descriptions called for, without any reference to the uses to which it was to be applied. An account current was kept between them, and it was adjusted by payments as called for, without any designation in such payments of any particular part of the account on which they were made. The account was treated as an entirety, and settled as such from time to time. When Bishop & Simonson were about to fail, they requested the libellant to take back out of their yard a portion of timber then remaining there which they had received from him, and he did so. On their failure, they stood indebted to him on that general account the balance above stated. In a suit by Van Pelt v. The Ohio [Case No. 16,870a], in this court, before Judge Nelson, the judge held, under a similar state of facts, that the credit was given by the libellant to Bishop & Simonson as timber merchants, and had no relation to the ship then building or any other specific use, and dismissed the libel, on the ground that no lien attached to the ship therefor. I in no way dissent from the decision in that case, but in the present I found the decision more on consideration of law arising out of the proper interpretation of the state statute, than on the effect of the direct contract between the parties. I hold that Bishop & Simonson were not owners of the ship. The materials and labor put in her during her construction became the property of the claimants, which Bishop & Simonson could not divest by transferring the ship to another person, nor could they withhold it from them, under any other right or authority than the common-law privilege of lien in their behalf as builders. They were not agents of the owner in their capacity of builders competent to charge the ship, with liens to third parties; nor did they, in any legal sense, possess the rights or authority of a master of the ship to that end. I do not deem it necessary to determine under what circumstances, if any, subcontractors or employés of shipbuilders can acquire liens for their labor or supplies applied to the ship under contract with the builders; but I apprehend it will be difficult to support such lien without some direct sanction of it by the owner or his authorized agent, or notice to the owner that the ship will be charged therefor before the service is rendered or the materials supplied, or at least before payment therefor made by him. The inclination of the court is always against tacit and implied liens. They tend to embarrass the commerce in ships, and entangle bona fide holders in claims and controversies which they are not to be presumed connected, and respecting which they possess no means to compel a disclosure, against those setting them up. The policy of the

law will not look less solicitously to the protection of the rights of a purchaser of a ship without notice of a tacit and implied lien, in favor of workmen and materialmen, than it does to the interests of the latter parties: and the court will take care not so to enlarge the equities of the state statute in behalf of one class of claimants as to do irreparable injustice to another class equally meritorious.

The libel in this case must be dismissed.

[Affirmed on appeal by the circuit court, Case No. 14,322.]

Case No. 14,322.

UDELL v. The OHIO.

[29 Hunt, Mer. Mag. 717.]

Circuit Court, S. D. New York. Sept. 20, 1853.[1]

MARITIME LIENS — NEW YORK LIEN LAW — SUBCONTRACTOR—MATERIAL FURNISHED—OWNERSHIP OF BUILDING VESSEL.

[1. The New York statute (2 Rev. St. N. Y. p 423, § 1) giving a lien to the furnisher of materials or work for the building, fitting, furnishing, equipping, or repairing of any vessel, when contracted for by the master, owner, agent, or consignee, does not apply to one who furnishes material to the builder who builds the vessel under the supervision and direction of the owner.]

[2. In order to bind the vessel it must be shown, since he clearly does not come within any other class, that the builder is the owner of the vessel until finished. *Held*, that in this case the contract for the building of the vessel shows clearly that the property in the vessel shall at all times be in the owner and not in the contractor.]

[Appeal from the district court of the United States for the Southern district of New York.]

Libel to recover value of materials furnished the builders of a steamship.

NELSON, Circuit Justice. The libel was filed in the court below by the appellant to recover the value of materials furnished the builders in the construction of the steamship Ohio, and the important question in the case is whether or not the ship is liable under the lien law of the state of New York; being a domestic ship, it is only under that law that she can be charged, if at all. The court below held that she was not liable, and dismissed the suit [Case No. 14,321a]. The case turns upon the effect of the contract made by the owners with the contractors to build the Ohio, in connection with the true construction of the state statute. The statute provides that "whenever a debt, amounting to fifty dollars or upwards, shall be contracted by the master, owner, agent, or consignee of any ship or vessel within this state, for either of the following purposes: 1. On account of any work done, or materials furnished in this state, for or towards the building, repairing, fitting, furnishing or equipping such ship or vessel, &c., such debt shall be a lien upon such ship or vessel, her tackle, apparel and furniture, and shall be preferred to all other liens thereon, except mariners' wages." 2 Rev. St. N. Y. p. 423, § 1. The contract to build the Ohio was entered into by George Law and his associates, with the firm of Bishop & Simonson, ship builders, of the city of New York, on the 19th of October, 1847. The recitals contain a full and detailed description of the vessel, including size, model, and the materials with which she is to be constructed; and it is then agreed on the part of Bishop & Simonson, that they will construct, build and complete the ship, of the dimensions and materials mentioned in the specification, and in all particulars conforming to the specification; and to the directions that may be given by the superintendent thereinafter named, for the sum of $110,000; the ship to be launched on or before the 15th day of August next, and as soon as launched to be placed at the disposal of the said superintendent, for the purpose of receiving her engines and machinery, and thereafter to be fully completed as soon as the superintendent should require. They agree to furnish all the materials for the said ship, according to the specification, except such as the owners had agreed to supply; and in respect to every particular not named in the specification, they agree to construct of such materials as the superintendent shall direct. And the parties of the second part agree, that upon condition of the faithful performance of all things, on the part of the builders, to be performed, to pay the $110,000 by installments, as the materials are delivered and the work progresses, the first payment to be made when the keel is laid, and the other payments at the end of every month successively, therefor, and the amount respectively to be in the same proportion to the whole amount to be paid which the work done and the materials delivered, shall bear to the whole work and the materials required for the full performance of the agreement; and it is then agreed that George Law shall have the superintendence and direction of the building and construction of the ship.

The Ohio was launched on the 5th of August, 1848, and performed her first trial trip soon afterwards; and for aught that appears at this time the payment to the builders had all been made according to terms of the contract; and it was not till after this that the claim for materials was presented by the libelant against the ship. Now, the question in the case is, whether Bishop & Simonson, who contracted this debt with the libelant for the materials that entered into the ship in its construction, were, within the true meaning of the statute, "masters, owners, agents," or "consignees" of the Ohio, while thus engaged in building her? The heading of the statute is, "of proceedings for the collection of de-

[1] [Affirming Case No. 14,321a.]

mands against ships and vessels," and the terms used in the body of it describe persons connected with the navigation of ships, and standing in a relation to the same well known and understood in this branch of business. The terms at once indicate this relation to all persons engaged in commerce and navigation, and it is in this sense, I think, the court must understand them, in giving a practical construction to the statute. All the provisions of the act—and they are numerous—show that the framers of it must have used the terms in this sense; and hence it is proper to look to this branch of business to which the subject of the statute relates, in order to ascertain their true meaning. Now, bearing in mind this view of the statute, it cannot, I think, be pretended that Bishop & Simonson were masters of the Ohio, or agents or consignees of her. To hold either, it seems to me, would be absurd and a gross perversion of these terms; and the case, I think, comes down to the question whether or not they were owners in the sense of the provision. If they can be brought within either of the terms used, it must be this one. A contractor employed, generally, to build a vessel, furnishing all the materials, and to complete it at a given time at a price agreed upon, is doubtless the owner until the vessel is built and delivered. And under such a contract the lien of the material man would clearly enough attach, and if the case in hand is not distinguishable, the decree of the court below cannot be upheld. The demand of the libelant would be a debt contracted by the owner, and although the vessel may have been delivered, the lien would remain. The only limitation in the statute is, that the proceedings must be instituted before she leaves the port. Section 2. But in this case the contract is for the construction of a ship after a specified model and materials, to be built under the special superintendence and direction of one of the owners, and to be paid for from time to time as the work progressed and the materials were furnished; and I cannot doubt but that Law and his associates became the owners of it as the construction advanced and was paid for. Their interest as owners commenced when the keel was laid, and continued from that time down till the ship was launched, and passed into their full possession and control. It was not in the power of Bishop & Simonson, at any period of its construction, to sell it, nor could it have been subjected for the benefit of their creditors, except so far as they might have a lien for the current monthly installment. This, I think, is the legal effect of the contract.

It seems to me clear that the framers of the law did not intend that persons dealing with a mere contractor, divested of ownership, should have a lien on the vessel; for, if so intended, some provision would have been made for presenting the accounts within a given time, as in case of the mechanics' lien law, so that the owner could have some means of ascertaining the demands, and protecting himself against imposition. No such provision is to be found here. The act simply provides that a debt contracted by the master, owner, agent, or consignee of the ship, for work done or materials furnished, shall be a lien upon her; not a debt incurred by the contractor to build. The latter would have been the natural phraseology if the case in hand had been within the contemplation of the legislature. An illustration of the repairs of a vessel. Suppose the owner contracts with the shipwright for these repairs in the terms of the contract in the present instance, no doubt the shipwright would have his lien under the act, for the debt would be a debt contracted by the owner, but could this be averred of the debts contracted by the shipwright with the material men? Certainly not upon consistent use of language. The statute has been before the supreme court of the state of New York, and the decision we have arrived at is in conformity with the views there expressed. The case is not very fully reported in respect to the facts, but the doctrine of the court in expounding the terms, "master," "owner," "agent," or "consignee," is fully in accordance with our view of the case. Hubbell v. Denison, 20 Wend. 181. The facts here exemplify the gross injustice that might result to the owners upon the contrary construction. The libelant was advised of the contract with Bishop & Simonson, at the time he was furnishing the materials, and of the terms of payment, and yet no steps were taken by him to arrest the payments and have them applied to his demand. I am satisfied, therefore, that the decree below is correct and should be affirmed. Van Pelt v. The Ohio [Case No. 16,870a], George Law and others, claimants. The decree of the district court affirmed, with costs to be taxed.

[An appeal was taken to the supreme court, but was dismissed for want of jurisdiction. 17 How. (58 U. S.) 17.]

Case No. 14,323.

ULARY v. The WASHINGTON.

[1 Crabbe, 204.] [1]

District Court, E. D. Pennsylvania. April 6, 1838.

SEAMEN — ABSENCE — ENTRY IN LOG-BOOK — BAD PROVISIONS—SUNDAY WORK—RETURN.

1. The law requires that the entry made in the log-book of the absence of a seaman shall show that it was without leave, in order that an innocent departure shall not afterwards be turned into a desertion.

2. To justify a seaman in leaving his ship, in a foreign port, because of the bad provisions sup-

[1] [Reported by William H. Crabbe, Esq.]

plied, the case must be very clear in point of fact, and the provisions must be not merely not of the best, but positively bad, and unfit for the men's support.

[See The Balize, Case No. 809.]

3. There is no law to relieve a seaman from working on Sunday.

[Cited in Johnson v. The Cyane, Case No. 7,381; Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Tow-Boat Co., 23 How. (64 U. S.) 219; Pearson v. The Alsalfa, 44 Fed. 358.]

4. If seamen, absent from their ship, in a foreign port, without leave, attempt to return to her by night, not saying who they are or what they want, it is not such a return as will restore to them their right to wages.

This was a libel [against the ship Washington, Oakford, owner, and James Taylor, master] for wages. It appeared that the libellant [Edward Ulary] shipped on board the Washington, at Philadelphia, on the 17th July, 1835, for a voyage to Calcutta and back, at $13 per month; that, on the arrival of the ship at Calcutta, the crew were supplied with fresh provisions, and continued to be so supplied until the 10th January, 1836; that, on Saturday, the 9th January, 1836, they worked at discharging saltpetre from lighters into the ship till nine o'clock at night; that at that hour the mate ordered them to cease working: that they expressed a desire to finish the work that night, rather than leave it till Sunday morning, but were refused permission to do so; that on Sunday morning, when ordered to work, a large portion of them, among whom was the libellant, refused, saying that they would not work on Sunday; that the supply of fresh provisions to all those who refused to work was then stopped; that on Monday they still refused to work, because, they said, they had been made to eat salt provisions, but no complaint was made of the quality of such provisions; that the forecastle was then nailed up, to prevent their leaving the deck; that on Tuesday they left the ship; and that on Friday night a boat came towards the ship, but, on being hailed, changed her course and returned no answer. It was alleged that the libellant and the other seamen who had left the ship on Tuesday were in the boat, and endeavoring to return to the ship, but all that appeared in proof was that, while on shore, they had stated their intention to return to the ship by night, and obtain their clothing. On the day the men left the ship, an entry was made in the log-book that they "ran away;" and on the subsequent days they were noted as being "absent without leave." The Washington arrived at Philadelphia on the 17th June, 1836. The libellant left Calcutta on the 4th February, 1836, reached Philadelphia on the 28th August, 1836, and the libel was filed on the 8th September, 1837. The libellant claimed his full wages for the voyage, less certain credits for cash advanced, and for £2. 1s. earned by him on the passage home.

Mr. Grinnell, for libellant.

We contend, first, that the libellant has not forfeited his whole wages. When a total forfeiture is claimed, a strong and clear case must be made out (Magee v. The Moss [Case No. 8,944]), which has not been done here. The desertion—if any—was involuntary and justifiable; the libellant was not supplied with the usual provisions, and was forced to go on shore to get them; he was treated with cruelty by being forced to remain on deck, and by being required to work on Sunday, without reason. Whitton v. The Commerce [Id. 17,604]; Dixon v. The Cyrus [Id. 3,930]; The Castilia, 1 Hagg. Adm. 59; The Bulmer, Id. 163; The Jane & Matilda, Id. 187; Abb. Shipp. pt. 5, c. 2, § 2; Magee v. The Moss [supra]. Secondly, the libellant was entitled to his full wages, because, as we have seen, he was justified in leaving the ship, or even if not, he made an attempt to return, which was unsuccessful, although the captain was obliged to receive him. Whitton v. The Commerce. Thirdly, the libellant is entitled, at least, to wages up to the time of his leaving the ship; for an assent to his absence may be implied from the fact that no means were taken by the captain to cause his arrest as a deserter. Magee v. The Moss.

Mr. Scott, for respondents.

It is worthy of remark that more than a year had elapsed since the return of the ship before this libel was filed. It is admitted that the entry in the log-book is such as the law requires; that the entry is true has been shown by the evidence; and it only remains to examine whether or no the libellant was justified in leaving the ship. The misconduct of the crew commenced with their positive and mutinous disobedience of orders, and refusal to go to work on Sunday. It cannot be admitted that the men shall be judges of the propriety of an order. Their duty is to obey; if the order is wrongful, they can obtain redress afterwards. This order, however, was not wrongful. We look in vain for any law which exempts the sailor from working on Sunday. The supply of fresh provisions was an indulgence, to which the law gave no claim; and this indulgence was withdrawn when the men ceased to conduct themselves in a way to merit it. The forecastle was nailed up to prevent the men from retiring there in idleness when they should have been at work. So much for the justification. But it is said that the forfeiture of wages, which the men had incurred, was done away with by their attempted return. Their offer to return was not such as to produce this effect; to do so the offer must be clearly made to the captain, and must be accompanied by an offer of amends. Whitton v. The Commerce [supra]; Relf v. The Maria [Case No. 11,692]. It is said by Judge Peters (Whitton v. The Commerce) that the captain is bound

to receive back a mariner who has forfeited his wages, if he offers to return and to make amends. We are constrained to doubt this position. If this is law, it is in the power of seamen to nullify the act of congress, and rid themselves of a forfeiture absolutely incurred. The case of The Commerce did not require this decision, as the captain had actually received the men back, and thereby waived the forfeiture. The point was not in any way material to the case.

Mr. Grinnell, for libellant, in conclusion.

The entry in the log-book was not such as is required to forfeit the wages. It merely stated, on the day that they were first absent, that they "ran away," and afterwards it was said that they were "absent without leave." The entry must, 1st, be made on the day; 2d, show that the absence was without leave. See Act 20th July, 1790, § 5; 1 Story, Laws, 104 [1 Stat. 133]. The law forbidding labor on Sunday applies to seamen, except in case of necessity. Thorne v. White [Case No. 13,989].

HOPKINSON, District Judge. This claim is for wages, for a voyage from Philadelphia to Calcutta and back, or, at least, from Philadelphia to the time when the libellant left the ship at Calcutta. The ship sailed from Philadelphia on the 24th July, 1835, and returned on 17th June, 1836. The libellant left the ship at Calcutta, on the 12th January, 1836, with most of the crew, and never afterwards returned to her. The respondent alleges that the libellant has forfeited his wages; first, by desertion, and second, by disobedient and mutinous conduct. The disobedience and departure from the ship are justified, by the libellant, first, on account of the character of the provisions furnished; and second, because he was required to work on Sunday. As to the departure from the ship. It has been denied that the entries in the log-book are sufficient to forfeit the libellant's wages. All that the law requires is that the entry shall show that the absence was without leave, in order that an innocent departure shall not afterwards be turned into desertion. We find in the log-book the term "ran away," and afterwards an entry that the men were "absent without leave," though not made on the day the men were first absent. Taking the whole book together, however, the second entry is explanatory of the first. But it is not necessary to insist upon the entry in the log-book in order to show that the libellant's wages were forfeited, as the refusal to work, the obstinate disobedience, and the final abandonment of the ship and his duty, will work a forfeiture, unless avoided by sufficient reasons on the part of the libellant.

The libellant has alleged two grounds of justification. First, the character of the provisions furnished; and second, the fact of his being required to work on Sunday.

In regard to the provisions, it appears that they were the same that the crew had used on the voyage out, without complaint, and that the same were used, equally without complaint, by the returning crew. But the case must be extremely clear in point of fact, and the provisions not merely not of the best, but positively bad, and unfit for the men's support, to justify their leaving the ship in a foreign port. They had another remedy; and an extreme case only can justify desertion. I think the libellant has failed to justify himself on this point.

The libellant contends that he was not bound to work on Sunday. There is no law for this position. The nature of the service requires that the men should do so, and they must not be allowed to set themselves up as judges, and refuse to do their duty on such excuses. I think that, on the whole, the libellant has failed to justify his refusing to work, and his leaving the ship.

Has he avoided the forfeiture by his subsequent good conduct, that is, by his repentance, and offer to return to his duty and make amends for the past? It is wholly uncertain whether or no the boat spoken of was their boat, or whether the libellant and his companions were in it. But, supposing that it was they, is this the state of repentance, of return to duty, of tender of amends, intended by the law? To come off at night, to say nothing, not to explain who they were, or what they wanted? I cannot think that this was the proper course. We do not know that they did not come off simply for their clothes. There was no offer to return to duty, merely an effort to come on board; but for what purpose, no one knows. This is not what the law requires. The offending seamen must come in person, must show their repentance for their fault, and their willingness to return to duty. Libel dismissed.

Case No. 14,324.

An ULLAGE BOX OF SUGAR.

[1 Ware (350), 355.] [1]

District Court, D. Maine. Dec. Term, 1836.

CUSTOMS DUTIES — FREE ENTRY — SEA STORES — COLLUSION — SELLING AS MERCHANDISE — FORFEITURE.

1. What may be a reasonable allowance of goods to be made to a vessel, to be entered free of duty, as sea stores, is referred to the judgment of the collector and naval officer, where there is one, and in ports where there is none, to the collector alone.

2. If there be no reason for imputing collusion between the importer or master, and the officers of the customs, for the purpose of defrauding the United States of the duties, the decision of the collector is conclusive.

3. If an amount manifestly excessive were allowed, it might furnish a presumption of fraudulent collusion.

[1] [Reported by Hon. Ashur Ware, District Judge.]

4. If the importer takes goods from the vessel, which have been entered free of duty, as sea stores, and uses them as merchandise, as by offering them for sale, he will be liable to an action of debt for the duties; but the goods are not liable to forfeiture.

This was a case of seizure of an ullage box of sugar. Several other articles were seized in company with it, which were condemned on default, no person appearing to claim them. For the sugar, a claim was interposed by Messrs. Dunlap & Jewett. The facts disclosed by the evidence are that the sugar was imported into New York in the brig Frances Ellen, owned by the claimants. It was purchased in the West Indies by the master, without any order from them, for ship's stores, and was the only sugar on board the vessel. Part of it was used on the voyage, and the remainder was specified in the manifest as sea stores, and admitted to entry, as such, free of duty. A portion of what remained in the box when it was entered, making with what had been used about one hundred pounds, was taken out for the use of the brig, and the residue was shipped in the Orb, and consigned to the owners in Portland. The gross weight of the box originally was 500 pounds; excluding the tare, about 450 pounds of sugar. There was no evidence that the custom-house officers were deceived as to the quantity of sugar in the box, nor was there any suggestion of that kind made.

Dist. Atty. Anderson, for the United States.
G. Jewett, for claimants.

WARE, District Judge. A forfeiture is claimed on the part of the United States, on two grounds:—First, because the quantity entered free of duty in this case, as sea stores, was excessive; secondly, because goods entered as sea stores cannot lawfully be appropriated to any other use. The provisions of the law relating to the entry of goods as sea stores, are found in the 45th section of the collection law of 1799 [1 Stat. 661]. That provides that "in order to ascertain what article shall be exempt from duty, as sea stores of a ship or vessel, the master, &c., shall particularly specify said articles in a report or manifest, &c.—designating them as sea stores of such ship or vessel; and in the oath to be taken by the master, on making such report, he shall declare that the articles so specified as sea stores are truly such, and are not intended by way of merchandise or for sale." But if it shall be the opinion of the collector and of the naval officer in ports where there is one, that the quantity of articles reported as sea stores is "excessive," he may in concurrence with the naval officer, or alone in ports where there is no naval officer, "estimate the amount of duty on such excess, which shall be forthwith paid by the master on pain of forfeiting the value of such excess." What may be a reasonable amount of goods to be allowed to a vessel as sea stores, must depend on circumstances, as the number of persons on board, and the facility with which supplies may be obtained in the business in which she is engaged. If she is employed in a trade in which the voyages are long, and where it is difficult to obtain supplies, a larger amount will be required; if in short voyages, less will be sufficient. A vessel bound to the Pacific Ocean will of course want more than one bound on an European voyage. It would not be easy to limit the amount to any precise and fixed measure. The law, therefore, refers the matter to the judgment and discretion of the officers of the customs. And it would seem from the tenor of the act, where goods are admitted to entry by them as sea stores, with a full knowledge of the amount, and where no deception has been practised, that their decision is conclusive, if the case is free from any imputation of collusion or fraud. If there should be admitted an amount manifestly exorbitant, and such as could not be presumed to be intended as sea stores, it would present a case deserving attention. A very considerable excess might of itself furnish strong ground to presume a collusion between the master and the officers of the customs, for the purpose of defrauding the United States of the duties. But if the case presents no grounds of suspicion, although a larger quantity may have been admitted to entry free of duty, than in the opinion of the court might seem to be necessary, and strictly proper, it is not easy to be seen where the court gets authority to revise the decision of the collector, unless the excess is so palpable and gross as to lead to the presumption of fraud and collusion. In the present case, the quantity admitted to entry as sea stores, is apparently quite liberal, but it is not so large that the court can be authorized to infer, from this circumstance alone, a fraudulent collusion between the master and the officers of the customs; and the quantity alone is the only circumstance of suspicion attached to the goods. It is understood, and such is the evidence, that the practice of the revenue officers in this particular is liberal towards the merchants; and, if a cask of molasses, a bag of coffee, or a box of sugar, has been broken open and partly used by the crew, that it is not unusual to pass it as sea stores, although the quantity may appear to be a large allowance for the use of the vessel. It is also in proof that in some ports there is greater liberality than in others, in this respect, which in a matter of pure discretion, may well be supposed to exist, without any imputation of a want of fidelity in the officers of the different ports.

It is also argued that goods entered free of duty, as sea stores, cannot be lawfully used for any other purpose. Certainly the language of the law, as well as the reason of the thing, leads to this conclusion. The master is required to swear that the goods entered as sea stores are truly such, and are not intended by way of merchandise, or for sale.

They are also entered as sea stores of the vessel in which they are imported, implying that they are intended for the use of that vessel, and not of another. The sugar having been separated from the vessel, it is said that it cannot be supposed to be intended for her use, but must be intended to be applied to other purposes. Granting the whole force of this argument—and it seems to be founded in a fair and reasonable construction of the statute—it does not follow that the goods are liable to forfeiture. The court cannot create penalties and forfeitures by implication. They must be found in the plain letter of the law, and not raised by inference and construction. Admitting that these goods are intended to be appropriated to other uses than those avowed by the master, the law does not annex to such an appropriation of them the penalty of a forfeiture of the goods. If the master specifies on his manifest a greater amount of goods, as sea stores, than the collector thinks ought to be allowed, he may demand immediate payment of the duties on the excess. If the duty is not paid, the penalty is not upon the owner or importer, but upon the master. The goods are not forfeited, but the master forfeits a sum equal to the value of the excess. And if the goods, having been passed as sea stores, are afterwards used as merchandise and for sale, the master, who knows and is party to the design thus to defraud the United States of the duties, may be liable to the penalty of false swearing. And if the owners take them and offer them for sale, they would be liable to an action for the duties. Whenever goods are imported which are liable to duty, and from accident, mistake, or fraud, the duties are not paid or secured, the importer does not become exempted from the debt. The duties accrue as a debt against the owner on the importation, and an action or information of debt will lie for the recovery of the duty. U. S. v. Lyman [Case No. 15,647]; U. S. v. Goodwin [Id. 15,229]. Whether the facts in proof are such, in this case, as to warrant the inference that this sugar is intended for sale, is a question on which it is unnecessary to express an opinion, as the duties cannot be recovered under this libel.

Decree of restoration—and certificate of probable cause of seizure.

Case No. 14,325.

ULLMAN v. MURPHY.

[11 Blatchf. 354; [1] 18 Int. Rev. Rec. 156.]

Circuit Court, S. D. New York. Nov. 6, 1873.

CUSTOMS DUTIES—PROSPECTIVE PROTEST—STATUTORY REQUIREMENTS.

1. A prospective or continuing protest is not valid, under the laws now existing in relation to duties upon imports.

2. The 14th section of the act of June 30th, 1864 (13 Stat. 214), provides, that, on the entry of any goods, the decision of the collector as to the rate and amount of duties to be paid on such goods, shall be final and conclusive, unless the importer shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, give notice in writing to the collector, on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto. The plaintiff, on paying duties, January 10th, 1871 on certain goods, added to a protest then filed by him with the defendant, as collector, in respect to the exaction of duties thereon, these words: "I intend this protest to apply to all future similar importations by me." On the 21st of January, 1871, the plaintiff entered for warehousing like goods, and, on the 20th of June, 1871, the defendant exacted, and the plaintiff paid, duties thereon, on a withdrawal entry thereof, at the same rate so protested against. In a suit to recover back the alleged excessive duties: *Held*, that such prospective notice was not a sufficient protest, under said 14th section.

[Cited in Haynes v. Brewster, 46 Fed. 476; Davies v. Miller, 130 U. S. 288, 9 Sup. Ct. 562.]

This was an action to recover back money claimed to have been erroneously exacted by [Thomas Murphy] the defendant, as collector of customs for the port of New York, for duties exceeding the true amount due upon certain goods imported by the plaintiff [Sigmund Ullman]. The parties respectively agreed to and read a statement of facts, in which it appeared that the goods in question were imported by the Aleppo, and were entered for warehousing on the 21st of January, 1871; that the amount of duties then claimed by the defendant thereon was liquidated on the 11th of February, 1871; and that, on the withdrawal entry, on the 20th of June, 1871, the defendant exacted, and the plaintiff paid, the excessive duty in question. On a previous importation of like goods entered December 10th, 1870, the defendant required the payment of duties at the same rate, and the plaintiff, on the payment thereof, on the 10th of January, 1871, filed due protest in respect to such last named exaction, and to such protest he added the words following: "I intend this protest to apply to all future similar importations by me." It was thereupon stipulated by the respective parties, that, if the court should be of opinion that such protest was a sufficient compliance with the 14th section of the act of June 30th, 1864 (13 Stat. 214), the jury should be instructed to render a verdict for the plaintiff for the sum claimed; and that, if the court should be of the contrary opinion, the jury should be instructed to render a verdict for the defendant —either party to be permitted to except to the decision of the court upon the question of law thus submitted and to review the same according to the practice of the court, on bill of exceptions, or otherwise, as advised. For the plaintiff it was insisted, that the notice thus given and filed was a sufficient prospective or continuing protest, applying to all like goods imported by the plaintiff, and satisfying the requirements of the acts of congress, which make a protest necessary in

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

order to entitle the importer to bring and maintain an action for money paid to the collector on an erroneous exaction. For the defendant it was insisted, that such prospective protest was insufficient, and that the action could not be maintained.

Sidney Webster, for plaintiff.
Thomas Simons, Asst. Dist. Atty., for defendant.

WOODRUFF, Circuit Judge, at the close of the argument, stated his opinion, in substance, as follows:

The act of congress of February 26th, 1845 (5 Stat. 727), provided, that no action should be maintained against any collector, to recover the amount of duties paid under protest, unless such protest was made in writing, and signed by the claimant, "at or before the payment of said duties." It appears by the case of Brune v. Marriott [Case No. 2,052], that Chief Justice Taney held that language sufficiently broad to justify him in sustaining an action brought by Brune to recover for duties paid upon sugar and molasses imported and entered after the protest was made, where the protest expressly declared the intent of the importer that it should apply to all his importations of sugar and molasses. There the protest was literally before the payment of the duties. The supreme court of the United States (Marriott v. Brune, 9 How. [50 U. S.] 619), on writ of error, affirmed the judgment and so, in effect, affirmed the sufficiency of a protest made in one case but, by its terms, declared to be intended to reach and embrace subsequent importations of a like character belonging to the same parties. This affirmance, however, was deemed by Mr. Justice Curtis to have rested on the "very peculiar" circumstances of that case, which, he says, were "relied on by the court as the reasons for a decision at which they manifestly felt great difficulty and hesitation in arriving." He, therefore, held, in Warren v. Peaslee [Case No. 17,198], that, where the importers added to a formal protest in relation to specific goods, the words, "You are hereby notified that we desire and intend this protest to apply to all future similar importations made by us," such prospective protest was not sufficient to entitle the importers to maintain an action for the amount of duties erroneously exacted on goods subsequently imported, and that a protest should be made in reference to the particular payment complained of. But, in the case of Steegman v. Maxwell [Id. 13,344], in this court, Mr. Justice Nelson, sitting with Judge Betts, then district judge, held a similar protest sufficient. Judge Betts, in delivering the opinion, adverts to the apparent hesitation of the supreme court in sustaining such protests, as a general rule, but he nevertheless affirms and approves it. Soon thereafter, the act of March 3d, 1857 (11 Stat. 192), was passed, and by the 5th section, it provides, that, on the entry of any goods, the decision of the collector shall be final and conclusive, unless the owner shall, "within ten days after such entry," give notice to the collector, in writing, "setting forth therein distinctly and specifically his grounds of objection." Under this act, the like question of the validity or effect of such prospective or continuing protest was raised in this court, in Hutton v. Schell [Case No. 6,961], Judge Smalley, district judge for Vermont, holding the court. The same construction was given to the act of 1857 as had before been given to the act of 1845, and for like reasons, the cases above mentioned being cited and commented upon. Judge Blatchford, in Wetter v. Schell [Id. 17,470], declares it settled, in this district, that such a protest as to future importations is valid and effective under this act of 1857, and is so valid and effective, although the collector to whom it was delivered is no longer in office, and the action is brought to recover the amount of duties exacted by his successor or successors; and he states that Mr. Justice Nelson, in Chouteau v. Redfield [Id. 2,696], so decided. The result of these decisions under the act of 1857 is, that a requirement that a notice shall be given "within ten days after such entry" is satisfied by the giving of a notice ten or, it may be, twenty years before such entry; and that, although the statute declares that, on the entry of any goods, the decision of the collector shall be final and conclusive, unless the owner, &c., shall give notice to the collector, &c., it will be sufficient if the owner have given notice to any predecessor in office, immediate or remote, of the collector making the exaction. Whatever my own unaided judgment would have suggested concerning the question under the acts of 1845 or 1857, and notwithstanding various and impressive reasons and arguments urged upon me adverse to the construction given, especially to the latter act, I should not, in a case arising under that act, feel at liberty to regard it as an open question in this district. The construction I have mentioned having been given to it during many years, not only by the district judges holding the circuit court, but by Mr. Justice Nelson, my predecessor in this position and, by his relation to the supreme court, my superior in office, I should regard myself as bound by their decisions. The government has not seen fit to take those decisions to the supreme court for consideration; and it is not fit that I should review them, even though they seemed doubtful.

The present case did not arise under either of the acts thus far mentioned. It is the act of June 30th, 1864 (13 Stat. 214), by which this case is governed. The 14th section of that act provides, that, "on the entry of any vessel, or of any goods, * * * the decision of the collector of customs, at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such goods,

* * * shall be final and conclusive against all persons interested therein, unless the owner, * * * in the case of duties levied on tonnage, or the owner, importer, * * * in the case of duties levied on goods, * * * shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond, as for consumption, give notice in writing to the collector, on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto." This act has not heretofore been under judicial consideration, and I am now called upon, for the first time, to give an opinion of its meaning, with reference to a prospective or continuing protest. Had there been no change in the law other than from the words, "within ten days after such entry," to "within ten days after the ascertainment and liquidation," it would be difficult to withdraw the present case from the operation of the decisions I have mentioned, and I must have held that those decisions bound me to give the act the same construction given in this district to the previous acts. They do not, however, bind me to go any further. The act does not stop with that change. It provides, that such notice shall be given "on each entry." Whether these words were inserted in view of the difference between the construction given to the previous law by the court in this district and the court of the First circuit, I do not know. But they are significant words, and, by sound rules of interpretation, I must assume that they have a meaning and that congress intended that meaning. Under the act of 1857, a question had arisen in relation to goods entered for warehousing, whether the language, "ten days after such entry," meant ten days after the first entry, or whether the protest might be made within ten days after the withdrawal entry, when the duties were paid; and, in Iselin v. Barney [Case No. 7,103], Mr. Justice Nelson held, that a protest within ten days after the withdrawal entry, when the duties were paid, was permitted by the act. He placed his decision mainly upon the ground that the duties were not ascertained and liquidated when the entry for warehousing was made. Ten days, according to the course of business at the custom-house, would often elapse before such ascertainment. No uniform or certain time elapsed before such ascertainment, and no notice was given thereof to the importer when the duties were ascertained. It is apparent, that the act of 1864 obviated the embarrassment which led to this construction of the act, and, at the same time, enabled the government to finally settle the amount of duties to be paid, without waiting to the end of the three years, during which the goods might remain in bond, and be then met by the protest of the importer. The act fixed the time of the ascertainment and liquidation of the duties as the date when the ten days allowed for the protest should begin. It is urged, that this is all the change intended by the law. This, however, gives no meaning to the words, "on each entry." These latter words do not mean, and are not claimed to mean, on each entry, whether for warehousing, or for withdrawal for consumption, so as to require a protest on the withdrawal of the goods from the warehouse, i. e., on each entry of the same merchandise, one protest when entered in bond, and one when entered for withdrawal. It would be impossible to do this within ten days after the ascertainment and liquidation of the duties, for, such withdrawal for consumption may not be made for more than two years after such ascertainment. On such a construction, compliance with the statute would be impossible. It is suggested, that "on each entry" means no more than that, whether the entry be in bond or be for consumption, in either case, the protest must be made within ten days after the ascertainment and liquidation of the duties; but this makes the expression, "on each entry," add nothing to what had already been distinctly expressed, and no reason appears for its use. "Shall, within ten days after the ascertainment and liquidation of the duties, * * * as well in cases of merchandise entered in bond as for consumption," is clear and distinct, and imports that, in either case, the protest shall be within ten days after the duties are ascertained. Why, then, was it added, "on each entry?" The reading which alone gives meaning and effect to those words, is, that in all cases, whether of entry in bond or for consumption, the owner shall give notice in writing, on each entry, to the collector, &c., not meaning on the paper or record called the entry, but, in respect of each entry. This gives meaning and effect to all the language of the section, and it serves a very important purpose. Whether congress had in view the reasons assigned by Judge Curtis for his opinion, whether the motive to the introduction of the words, "on each entry," was to obviate the disadvantage of a difference in the construction of the law or the practice in different collection districts, or to do away with a practice which permitted the importer to lie by, as it might be, for years, and then claim the benefit of a protest given years before, and to some former collector, we are not informed, save by the terms of the act. Those terms are apt to work such a result. It is my duty to assume that they were intentionally employed, and were, for the first time, introduced into the law relating to this subject for some useful purpose, and I ought to give them meaning and effect according to the rules which govern the construction of statutes. In view of, to say the least, the doubtful construction heretofore given in this dis-

trict to the former acts, the change of the phraseology, in this respect, in this act of 1864, seems to me especially significant. I cannot give to that change any operation or effect without holding, that the notice to be given to the collector must specify the entry or entries to which it applies, and that the statute is not satisfied by a protest declared by the importer to apply "to all future similar importations" by him. I might add reasons why this reference to "similar importations" ought not to be held sufficient, even if a notice applied to goods definitely and precisely described and identified was held good, as was the case in Marriott v. Brune [supra]. This distinction is, in some degree, alluded to in the opinion of Judge Curtis. The litigation that has arisen out of the various laws fixing the duties upon imports, furnishes abundant evidence that the question, what goods are "similar," under the tariff acts, is often a perplexing one, and a question upon which the importers and the officers of the customs very often disagree. The protest of the importer ought certainly to be in such clear terms that the officers of the customs should know exactly to what goods it relates; and, if a protest applied to all future importations can be permitted, this explicitness is of especial importance. Otherwise, duties may be levied and received on goods for some years, without even a suspicion that the importer claimed that such goods were, under the tariff laws, to be deemed "similar" to those mentioned in the protest long before filed.

My conclusion, that, under the statute of 1864, such prospective or continuing protest as to future importations is not valid and effective, and that the protest in this case does not satisfy the statute, requires, according to the terms of the stipulation made by the parties, that the jury render a verdict for the defendant. Conclusions formed upon the presentation and argument of a question for the first time raised, may properly be reviewed, and the court will give to the plaintiff, if he so desires, time and opportunity for such review, and a more deliberate examination of the subject in this court, or in the court of last resort.

ULLMAN (UNITED STATES v.). See Case No. 16,593.

Case No. 14,326.

The ULPIANO.

[1 Mason, 91.] [1]

Circuit Court, D. Massachusetts. May Term, 1816.

PRIZE—DAMAGES FOR GOODS TAKEN.

Damages decreed for the amount of goods taken out of a prize captured after the treaty of peace of 1815. Costs, when allowed in prize causes.

[Cited in Elliott v. The Leah H. Miller, Case No. 4,393a.]

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

The Ulpiano [John White, master] was captured by the private armed ship Blakeley, Williams commander, after the time had expired, within which captures could lawfully be made by the treaty of peace between Great Britain and the United States. The vessel and cargo had been restored by a decree of the district court, and the sole remaining question was as to the damages to be allowed for sundry articles of merchandise, and ship stores, and furniture, alleged to have been taken from the Ulpiano, at the time of the capture by the captors. A decree was rendered by the district court for $625 damages, and costs of suit; from which decree, the captors appealed to the circuit court.

Mr. Welsh, for captors.

Mr. Hall, for claimant.

STORY, Circuit Justice. The evidence in this case is extremely contradictory, both as to the value and as to the quantity of the goods taken from the Ulpiano. There is a disposition manifested, on the part of the claimant, to inflame the amount in both respects. And this exaggeration unavoidably lessens the confidence, which the court would otherwise incline to place in the statements of the master of the prize. There is no pretence, that the captors have acted unreasonably, or with ill faith; and it is very properly conceded, that the claimant is entitled to nothing more than a just compensation for the loss of the goods, which have been consumed or destroyed by the captors. This compensation, it is the duty, as well as the inclination of the court to allow to the utmost extent of loss, which the evidence will reasonably warrant. But it is a material consideration, that in this inquiry the onus probandi rests on the claimant; and, if the evidence on his part be lax, infirm, and unsatisfactory, he cannot complain, that the court arrives at its conclusion by the application of this general principle, rather than embarrasses itself with doubts and conjectures. I am not satisfied, that the claim for fifty fathoms of rope, and sixty fathoms of cable, is sustained by the evidence; and the quantity of wine and brandy and the number of hides and poultry admitted in the evidence of the captors to have been taken from the prize, seem to me to approach much nearer to the truth, than in the inflamed accounts of the claimant. As to the residue of the items, it cannot be necessary to examine them in detail; and, making the most liberal allowance in relation to them, after the deductions from the claim already specified, the sum of four hundred dollars will be a full compensation for the loss, as it stands in proof before the court; and to that extent, I shall pronounce a decree

[1] [Reported by William P. Mason, Esq.]

in favor of the claimant. As to costs, the allowance or denial of them rests in the discretion of the court; but I do not think, that there is any solid reason, why they should be denied in this case. The capture, though made in good faith, must in point of law be deemed a tortious act; and as the party had a just claim for restoration of the goods, or their value, which has never been admitted by the captors, nor compensation tendered therefor, he is entitled, by the general practice of the court, to such costs as have necessarily arisen in the prosecution of his claim; and he has not been guilty of such misconduct, as amounts to a forfeiture of such costs. Costs must, therefore, be decreed.

Case No. 14,327.

In re ULRICH et al.

[3 Ben. 355; [1] 3 N. B. R. 133 (Quarto, 34).]

District Court, S. D. New York. Aug., 1869.

JURISDICTION—WITHDRAWING APPEARANCE—BILL AND PETITION—PLEADING.

1. The general appearance of a party to a suit in personam waives all irregularities in the service of process, and confers jurisdiction so far as the person is concerned.

2. Such jurisdiction, when once conferred, cannot be withdrawn by the act of the party who has so appeared, without the consent of the court, or of the prosecuting party.

3. On a petition by an assignee in bankruptcy, seeking to set aside transfers of property by the bankrupts to K., the court made an order requiring K. to show cause why the prayer of the petition should not be granted, which order was personally served on K., in Illinois. Thereupon a general appearance for K. by an attorney, was filed with the clerk of the court, and served on the attorney for the petitioner, and proceedings on the order to show cause stood over for the party to answer. On the adjourned day, the attorney for K. filed a withdrawal of his appearance for K., stating that the same had "been made by mistake." *Held*, that the attorney had no right to withdraw such appearance without application to the court for leave to withdraw it, and that the court had jurisdiction over K. to grant the relief prayed for against him.

4. The objection that the relief sought must be obtained by bill, instead of on petition, was one which could be waived, and must be *held* to have been waived, if not taken by pleading.

[In the matter of Isaac Ulrich and others, bankrupts.]

A. R. Dyett and B. C. Thayer, for petitioner.

J. B. Bullock, for Kaufman.

Kaufman, Frank & Wilcoxson, for Steiner & Brother.

BLATCHFORD, District Judge. The prayer of the petition of the assignee in bankruptcy in this matter is, that an assignment, alleged to have been made by the bankrupts to one Gustav Kaufman, on the 11th of January, 1869, two months and sixteen days before the adjudication of bankruptcy herein, and when the bankrupts were insolvent, of certain goods, wares, and merchandise, with intent to give a preference to certain of their creditors, and a transfer alleged to have been made by the bankrupts, when insolvent, to the firm of Steiner & Brother, at the same time, of certain goods and merchandise, with intent to give a preference to Steiner & Brother, as creditors, Kaufman and Steiner & Brother having reasonable cause to believe that the bankrupts were insolvent, and that the assignment and transfer were made in fraud of the bankruptcy act [of 1867 (14 Stat. 517)], and to prevent the property from being distributed thereunder, and to defeat the provisions thereof, may be adjudged void, and that so much of the property as is not excepted from the operations of the act, may be delivered to the petitioner as assignee.

Kaufman and Steiner & Brother having been personally served, at Peoria, Illinois, on the 6th of July, 1869, with an order, made by this court on the 25th of June, 1869, requiring them to show cause before this court, on the 15th of July, 1869, why the prayer of the petitioner should not be granted, appeared in this court, on the last-named day, on the return of the order, each by a separate attorney of this court, and a written appearance for each, by his attorney, entitled in this matter, was, on that day, entered and filed with the clerk of this court, the notices of appearance so filed being each of them addressed to the clerk of the court, and to the attorney for the petitioner in said petition. The matter then stood over for the parties so appearing to answer the petition On the 29th of July, Steiner & Brother put in an answer, denying the receipt by them of any property on account of the bankrupts, in respect of any indebtedness of the bankrupts to them. On the same day, the attorney who had appeared for Kaufman filed, in the office of the clerk of this court, a paper entitled in this matter and signed by himself, but not addressed to any person, and reading as follows: "I hereby withdraw my appearance in behalf of Gustav Kaufman in the above-entitled matter, the same having been made by mistake." Kaufman has put in no answer to the petition, and claims that his appearance has been legally and properly withdrawn, and that this court has now no jurisdiction over him, and that the service on him, in Illinois, of the order issued by this court, was of no avail to confer on this court jurisdiction over his person.

There can be no doubt that this court has jurisdiction, by virtue of the first section of the bankruptcy act, to adjudicate in regard to the matters set up in the petition, in respect to both of the adverse parties, provided it obtains jurisdiction over their persons. The bankruptcy proceeding was instituted in and is pending in this court. The object of the petition by the assignee is to collect assets of the bankrupt, and to ascertain and

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

liquidate liens and specific claims on such assets. The jurisdiction of this court in such a case, under the first section of the act, is established by the decision of the circuit court for this district. In re Kerosene Oil Co. [Case No. 7,726]. The question whether such jurisdiction shall be exercised in a plenary suit commenced by bill in equity, or in an informal and summary way, by a petition filed as a part of the case in bankruptcy, the adverse party being brought into court by personal service or by voluntary appearance, is one which such adverse party may raise, if he chooses, or may waive. It is a question as to the form of proceeding, and not one which affects the jurisdiction of the court as to the subject-matter of the controversy, provided the adverse party is brought into court, or comes into court personally, in a proper manner. If such party, when so in court, does not raise, by demurrer or quasi demurrer or by answer, any objection to the method of proceeding by petition, he must be held to waive such objection. The objection must be taken in season, and it comes too late if not taken by pleading to the petition, or before the time for pleading to it has expired. I do not regard the decision of the circuit court in the case before referred to, as inconsistent with this view or as covering this point. In that case, the objection to the proceeding by petition was taken at the time the court made an order requiring the party to answer the petition. In the present case, the two adverse parties were required, by the order of this court, served upon them personally, to show cause, on the 15th of July, 1869, before this court, why the relief asked for in the petition should not be granted. Both of them appeared on that day by attorney, in the manner before mentioned. Time was given to them until the 29th of July to answer the petition. Steiner & Brother answered it, setting up the defence beforementioned, but taking no objection to the form of procedure. Kaufman put in no demurrer, plea of answer, and voluntarily suffered his time to do so to expire. He contented himself with putting on the files of the court, on the adjourned day, the attempted withdrawal of his appearance, before referred to. This court cannot recognize such withdrawal as of any avail. The appearance was by a notice signed by an attorney of this court, and placed on the files thereof, and addressed to the clerk and to the attorney for the petitioner, and entitled in this matter, and using this language: "Take notice that I hereby appear for Gustav Kaufman in the above matter." This appearance would have been effective to confer jurisdiction over Kaufman in this matter if there had been no previous service on him of any order to show cause. The appearance was thus effective, without reference to the question whether or not, without it, the service of such order in Illinois would have been ineffectual to confer such jurisdiction. The object of process in a suit in personam is, to secure the appearance of the party, and his general appearance waives all irregularities in the service of such process, and confers jurisdiction so far as the person is concerned. That jurisdiction, when thus once conferred, cannot be withdrawn by the act of the party who has so appeared, without the consent of the court or of the prosecuting party. No such consent has been given or applied for in this case. The allegation by the attorney, in the notice of withdrawal, that the appearance was put in by mistake, and that it is withdrawn for that reason, is of no avail. It is not stated whether the mistake was one of law or one of fact. If it was one of law, the party making it must abide its consequences. If it was one of fact, the court must pass upon the existence and pertinence of the fact, and allow the withdrawal, on previous notice to the prosecuting party. It is clear, therefore, that this court has jurisdiction over Kaufman, by his appearance; that his withdrawal of appearance is unavailing; that he has waived all objection to the form of proceeding; that the court has jurisdiction of the subject-matter of the petition; and that the petitioner is entitled to a decree against Kaufman for the relief prayed for. This court has jurisdiction, also over Steiner & Brother by their appearance and answer, and they have waived all objection to the proceeding by petition. A reference must be had to take testimony as to the issue raised by such answer.

[For subsequent proceedings, see Case No. 14,328.]

Case No. 14,328.

In re ULRICH et al.

[6 Ben. 483;[1] 8 N. B. R. 15.]

District Court, S. D. New York. May, 1873.

JURISDICTION — INJUNCTION ON PETITION BEFORE APPOINTMENT OF ASSIGNEE.

In proceedings in involuntary bankruptcy, on a petition by creditors after an adjudication in bankruptcy, an injunction was issued restraining certain creditors from interfering with the property of the bankrupts. This injunction was served on S., one of the creditors, before an assignee was chosen. Afterwards proceedings were taken to punish S. for contempt, in violating that injunction, which resulted in an adjudication that he was guilty of contempt. He then applied to the court to vacate the injunction, on the ground that the court had no jurisdiction to grant the injunction on a petition. *Held*, that the court had jurisdiction to make the injunction which it issued, and that the motion must be denied.

[Cited in Re Duncan, Case No. 4,131; Re Irving, Id. 7,073; Re Oregon Iron Works, Id. 10,562; Re Sims, Id. 12,888; Re Litchfield, 13 Fed. 866.]

[In the matter of Isaac Ulrich and others, bankrupts. For former report, see Case No. 14,327.]

Roger A. Pryor, for the motion.

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

Anthony R. Dyett, opposed.

BLATCHFORD, District Judge. On the 27th of March, 1869, in a proceeding in this court, in involuntary bankruptcy, against these bankrupts, they were adjudged such. On the 3d of April, 1869, the creditors on whose petition the adjudication took place presented a petition to this court, setting forth the fact of such adjudication, and representing that the greater part of the property of the bankrupts consisted of merchandise in the state of Illinois; that said property, or some of it, was in the possession of one Kaufman, to whom the bankrupts made a fraudulent assignment in January, 1869; that, since said assignment was made, H. B. Claflin & Co., of the city of New York, and Steiner & Brother, of the same place, had caused attachments to be put on said property, on their claims as creditors of said bankrupts; and that suits were still pending in Illinois, in favor of H. B. Claflin & Co., and of Steiner & Brother, against said bankrupts, in connection with said attachments. The petition prayed, that an order be made by this court, restraining Kaufman from making any disposition of any of said goods under said assignment, and from any proceedings under said assignment, and also enjoining H. B. Claflin & Co. and Steiner & Brother from taking any further proceedings in their said actions, until the question of the discharge of the bankrupts should be determined, and for such further or other order in the premises as the court should deem meet. On such petition, this court, on the 3d of April, 1869, made an order directing that Kaufman refrain from taking any further proceedings under the assignment to him, and from selling or disposing of any of the property assigned to him, except such as was exempt from the operation of the bankruptcy act [of 1867 (14 Stat. 517)] and further ordering that all proceedings in certain actions commenced by H. B. Claflin & Co. and by Steiner & Brother, in the state of Illinois, against said bankrupts and wherein said assigned property, or a part thereof, had been attached, be stayed "so far as regards proceedings against said property, or any part thereof, except such thereof as is exempt from the operation of the bankruptcy act," and enjoining and restraining Kaufman, and his agents and attorneys, from further proceedings "as aforesaid" under said assignment, and restraining and enjoining H. B. Claflin & Co. and Steiner & Brother, and their agents and attorneys, from further proceedings "as aforesaid" in said actions, until the further order of this court.

No assignee in bankruptcy was appointed until the 6th of May, 1869. On the 5th of April, 1869, the injunction order was personally served on Michael Steiner, one of the firm of Steiner & Brother, within this district. In October, 1870, attachment proceedings, in the name of the United States, on behalf of the assignee in bankruptcy, as relator, were commenced in this court, against Michael Steiner, to punish him for an alleged contempt of this court, in violating the injunction against Steiner & Brother, contained in said order, by proceeding, after the service of such injunction upon him, with the sale of the property attached in the suit brought by Steiner & Brother, mentioned in the injunction order. An attachment against Michael Steiner was issued by this court, and, after protracted proceedings thereunder, an order was made by this court on the 29th of March, 1873, adjudging him guilty of the contempt charged against him. See U. S. v. Bancroft [Case No. 14,513]. He now applies to this court, on behalf of himself and of Steiner & Brother, to vacate, annul and set aside said injunction order, on the ground that it was irregular and erroneous, and that this court did not have jurisdiction to grant it.

It is contended, on the part of Steiner, that this court, as a court of bankruptcy, had no jurisdiction to enjoin Steiner & Brother in the terms contained in the injunction order, on the application of a creditor of the bankrupts, made after adjudication, by a petition, in the exercise of the summary jurisdiction conferred by the 1st section of the bankruptcy act, or in the exercise of any power of granting injunctions conferred by the 21st section, or by the 40th section of the act; and that an injunction, in such terms, against Steiner & Brother, could be granted only in a formal suit in equity, on bill filed, under the jurisdiction conferred by the 2d section of the act.

It is apparent that the petition for the injunction proceeded, as regarded Steiner & Brother, on the idea that they could be enjoined, under the 21st section of the act, from proceeding further with their suit against the bankrupts, to collect their debt, until the question of the discharge of the bankrupts should have been determined by this court. Such is the prayer of the petition, as respects Steiner & Brother. But the court, in granting the injunction, restrained Steiner & Brother only from further proceeding against the property which, in the suit against the bankrupts, they had attached as the property of the bankrupts.

The question of the jurisdiction of this court to make the injunction order in question, so far as it restrained H. B. Claflin & Co. and Steiner & Brother, was raised in the contempt proceedings, which proceedings were taken against a member of the firm of H. B. Claflin & Co. as well as against Michael Steiner. In its decision in those proceedings, this court said: "The creditors' petition for adjudication was filed on the 18th of March, 1869. The order of adjudication was entered on the 27th of March, 1869. The attachments were levied in January and February, 1869. They were, therefore, dissolved by the bankruptcy proceedings. Having authority, by virtue of the adjudication, to issue a

warrant to its messenger to take possession of all the estate of the bankrupts, and, among other property, of the property so attached as the property of the bankrupts, and to which the firms of the respondents made no claim except by virtue of the dissolved attachments, this court necessarily had the incidental and ancillary authority to enjoin these respondents, and their firms, from further proceeding against the attached property in the suits such firms had brought. The authority is derivable from the power given by the 1st section of the bankruptcy act, to collect and dispose of the assets, as well as from the power given to the court by the judiciary act, to issue all writs necessary for the exercise of its jurisdiction. This injunction was issued on a special petition to that effect, presented by the petitioning creditors after adjudication, and before the appointment of an assignee, and the court, having jurisdiction of the res, had authority to issue an injunction to restrain interference with such res."

The same question thus disposed of is now raised directly in the bankruptcy proceedings. It is contended that the power to stay proceedings, given by the 21st section of the act, is limited to a stay to be made on the application of the bankrupt, and that the injunction provided for by the 40th section of the act, in involuntary cases, is an injunction which cannot operate, in any event, beyond the time of adjudication, and that there is no other power given to the district court, by the act, to grant injunctions, except in a formal suit in equity brought by the assignee in bankruptcy, under the 2d section of the act. In other words, it is maintained, that, as the 40th section applies only to involuntary cases, and as the 21st section provides only for an application by the bankrupt to stay proceedings, so that he may be afforded an opportunity to obtain his discharge in order to be able to plead it in bar of all proceedings to collect the creditor's debt, this court is utterly without power, in voluntary cases, as well as in involuntary cases, after adjudication, and before an assignee is appointed, to restrain interference with the acknowledged property of the bankrupt, in the custody of the court. The doctrine must go to that extent. In involuntary cases, on adjudication, there is a warrant to the marshal to take possession of all the estate of the bankrupt; but, in a voluntary case, there is no warrant of seizure. There may be no person claiming an adverse interest touching the property; or, if there is, and the claim, as in the present case, is one founded solely on an attachment by mesne process, it ceases, by operation of law, through the ipso facto dissolution of the attachment, the moment the assignee obtains the assignment which alone can authorize him to bring a suit, under the 2d section of the act, against any person claiming an adverse interest touching any property covered by the assignment. Therefore, at least in a voluntary case, the court is, according to the doctrine advanced, powerless, between the time of adjudication and the time the assignee receives his assignment, to restrain any person from interfering with admitted property of the bankrupt, in its custody, unless the bankrupt himself can be moved to apply for such interference. This is not the law. Congress has not confided to the bankruptcy court the important trust of administering the property of adjudged bankrupts, and yet left it without the necessary means of maintaining its authority and jurisdiction in respect of such property. It has the unquestioned power of punishing for contempt those who interfere with property of a bankrupt in its custody. If so, it must have the subsidiary power of restraining persons, by injunction, from interfering with such property, and then punishing them for contempt, if they violate such injunction. These powers have both of them been exercised by many of the bankruptcy courts, and the right to exercise them has been upheld, on full consideration.

By the 1st section of the act, the bankruptcy court has power and jurisdiction, as a part of the proceeding in bankruptcy, to collect all the assets of the bankrupt, and to ascertain and liquidate the liens and other specific claims on such assets, and to duly distribute such assets among all the creditors. In the present case, Steiner & Brother, by attaching, as the property of the bankrupts, the property which they did attach, in the suit they brought against the bankrupts, to collect their claim, as creditors of the bankrupts, admitted such property to be assets of the bankrupts, and were, by their attachment, seeking to enforce a lien and a specific claim on such assets. This court had a right to collect such assets, to take possession of such property as assets, and to ascertain whether such lien and specific claim existed and should be admitted. Hence, it follows, logically and inevitably, that this court had a right to prevent, by injunction, the claimants of such lien, and all other persons, from proceeding against the specific property and assets attached, and from interfering with or disposing of the same, under and by virtue of the lien claimed. Otherwise, if the assets attached should be disposed of under the lien, and in the suit in which they were attached, there would be no such assets for this court to collect, and no lien or specific claim thereon for this court to ascertain, and no power in this court to distribute such assets, either by awarding them to the claimant of the lien, or dividing them among creditors generally.

In the case of In re Schnepf [Case No. 12,471], in the district court for the Eastern district of New York, Judge Benedict recognizes the power of granting an injunction as included in the other powers conferred on the court by the 1st section of the act, in a case where a voluntary bankrupt obtained, after adjudication, an injunction from the bankruptcy court restraining judgment cred-

itors from enforcing a levy under execution against his property.

In the case of In re Wallace [Case No. 17,094], in the district court in Oregon, Judge Deady, in a well-considered opinion, takes the same view, in a case where the bankrupt, after adjudication, obtained an injunction to restrain some of his judgment creditors from selling his property on execution.

In the case of In re Vogel [Cases Nos. 16,982 and 16,983], in this court, after the filing of a voluntary petition by a bankrupt, some persons took some of his property by replevin proceedings. This court made an order that they deliver up the property to the assignees, or pay its value, within a time limited, and that, in default thereof, attachments issue against them for contempt. The order was made on the petition of the assignees. The jurisdiction of the court to administer the property was conferred upon it by the 1st section of the act, in the clauses before referred to, and its power to punish for contempt those who interfered with such property, while in its custody, was regarded as an incident of its jurisdiction to administer the property so in its custody. The order of this court was affirmed by Mr. Justice Nelson, in the circuit court, on review. On this principle, Steiner and Bancroft might have been punished for contempt, if there had been no injunction, for interfering with the admitted property of the bankrupts, by selling it after adjudication. If so, there can be no well founded objection to the power of the court to give them warning in advance, so that they may refrain from committing such contempt. At least, they ought not to be heard, after they have committed the contempt of selling the property, to object that the court gave them warning beforehand.

In the case of In re Mallory [Case No. 8,991], in the district court for Nevada, Judge Hillyer, in an opinion reviewing all the cases on the subject, sustained the power of the district court to grant an injunction which a voluntary bankrupt applied for, after adjudication, to restrain a sheriff from selling property of the bankrupts, levied on under an execution on a judgment obtained before the commencement of the proceedings in bankruptcy. The power is referred by the court, in its opinion, to the jurisdiction given by the 1st section of the act, as delegating, at the same time, by necessary implication, the power to administer such remedies, known to the law, as are absolutely indispensable to the complete exercise of the jurisdiction expressly conferred, and as giving the right, in collecting the assets, to employ the proper legal process for effecting the result. The report of this case shows that, in a review of the decision of the district court, the circuit court (Mr. Justice Field) affirmed it, stating that he concurred in both the reasoning and the conclusion of the district judge, and that that opinion presented the law in a clear and satisfactory manner.

In the case of In re Clark [Id. 2,801] the district court for Vermont, in the exercise of its summary jurisdiction under the 1st section of the act, and on the petition of the assignee in bankruptcy, enjoined a creditor of the bankrupt's from further prosecuting, in a state court, a suit against the bankrupt, in which the creditor was seeking to establish a lien on the bankrupt's property. The case being brought before the circuit court, it was contended, by the creditor, that the district court had no power to proceed summarily in the case. Judge Woodruff, in his decision, upholds the power of the district court, under the 1st section of the act, to assume the entire administration of the estate of the debtor, to determine all questions touching the existence of liens thereon, to ascertain and settle the amount of such liens, and to make provision for the liquidation and settlement thereof, and, as incidental to this, to restrain a claimant of such lien from proceeding elsewhere to enforce his lien. He also holds that such power may be summarily exercised, without a formal suit; and that, although, in some cases, the assignee may be unable to secure all the relief he needs without a formal suit, yet, when the property affected by a lien is confessedly the property of the bankrupt, and has passed to the assignee, and it only remains to ascertain and liquidate the alleged lien, the summary jurisdiction of the district court is entirely adequate.

There can be no sound reason whatever given for permitting the assignee, after his appointment, or the bankrupt, after adjudication, and before the appointment of an assignee, to procure from the court an injunction of the character indicated, which should induce a denial of the power to grant such an injunction, after adjudication, and before the appointment of an assignee, on the application of any creditor, much less of the petitioning creditor, who has, by the fact of an adjudication, a debt established by the record. There is no assignee, the bankrupt is not supposed to be looking especially after the interests of his creditors, and he may be in collusion with the creditor who ought to be enjoined, and it is eminently proper that the equitable power of the court should be set in motion by the petitioning creditor, or even by any creditor, either in a voluntary case or in an involuntary case, the action of the court being for the benefit of the creditors generally.

It is urged that the views of the supreme court in the case of Smith v. Mason, 14 Wall. [81 U. S.] 419, are opposed to the jurisdiction I have maintained. But I do not so understand that case. In the present case, the petition on which the injunction was granted prayed for no adjudication as to the rights or claims of Steiner & Brother, and the time had not arrived when any formal suit could, under the 2d section of the act, be brought, because no assignee was in existence to bring any such suit. All that is determined by the

case of Smith v. Mason [supra] is, that a district court, sitting in bankruptcy, in the exercise of the summary jurisdiction conferred by the 1st section of the act, cannot proceed, on the petition of an assignee in bankruptcy, to determine a right of property, as between such assignee and a person who claims the absolute title to, and dominion over, a fund, the absolute title to which such assignee also claims, and that, if such assignee wishes to divest such person of the possession of such fund, he must do it by a formal suit, under the 2d section of the act.

The motion to vacate the injunction order is denied.

Case No. 14,329.

ULRICH v. The SUNBEAM.

[1 N. Y. Law J. 141.]

District Court, D. New Jersey. April 16, 1878.

NEGLIGENCE—TOWAGE—CARE AND SKILL—LIMITING LIABILITY.

In cases of towage, the tug boat is not an insurer or common carrier, and hence is not liable for the want of the exercise of the highest possible degree of care and skill. But she must use reasonable carefulness and ordinary skill, and cannot bargain to be exempted from all the risks of the service.

Libel in rem, filed to recover damages for negligence and carelessness in towing the canal boat Van Olinda, from Newark to Passaic on the Passaic river. The two defences were: (1) That the master of the canal boat assumed all risks in the towage; (2) that the unskillfulness of said master caused the accident.

NIXON, District Judge. As the testimony of the respondents is uncontradicted that the service of towage was undertaken by the Sunbeam with the understanding and agreement between the parties that the same should be at the risk of the canal boat, it becomes important to inquire how far such an understanding and agreement relieves the tug from responsibility. It is the settled doctrine in cases of towage that the tug boat is not an insurer or common carrier; and hence that she is not liable for the want of the exercise of the highest possible degree of care and skill. But she is bound to bring to the performance of the duty which she undertakes reasonable carefulness and ordinary skill, and she cannot relieve herself from the consequences of a lack of these by a bargain with the other party that she shall be exempted from the risks of service. Such a bargain doubtless means something; but it is contrary to public policy to so construe a contract of that nature that the tower is allowed to go clear of all liability when it is shown that he has relaxed his faithfulness and duty in performing the service. Ashmore v. Pennsylvania Steam Towing & Transportation Co., 4 Dutch. [28 N. J. Law] 192. The true rule was announced by the supreme court in the case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 384, where the court, considering a special agreement of a like nature, say that its proper effect was to change the burden of proof, and to throw upon the libelants the duty of showing that the loss was occasioned by the want of due care or by gross negligence.

Have the libelants in the present case satisfactorily proved gross negligence or want of due care on the part of the respondents? The undertaking was to tow the canal boat from Newark to Passaic. The offer implied a guaranty of skill on the part of the master of the tug in performance of the service; such a knowledge of the channel as would enable him to make the trip with safety; and the adoption of such methods of attaching the boat to the tug that the former would not be unnecessarily exposed to the hazards of navigating a river which has long been considered somewhat dangerous from the rocks in the bed of the stream.

The facts commented upon and the conclusion reached that the master of the tug exhibited both negligence and want of skill in the towage. Decree for libelants.

ULRICI (UNITED STATES v.). See Case No. 16,594.

Case No. 14,330.

The ULYSSES.

[5 Law Rep. 241; 1 Brunner, Col. Cas. 529.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1800.

MISCONDUCT OF SEAMEN—DEPOSING AND CONFINING MASTER—FELONIES—CONSTITUTIONAL LAW.

[1. The offence of seamen who revolt against the master, and place him in confinement, continuing the voyage under the mate, is not a felony.]

[2. The power of congress to punish offences committed on the high seas, below the grade of piracy or felony (which are expressly provided for in the constitution), may be sustained under the provison conferring power to regulate foreign commerce.]

The Ulysses, a merchant ship of Boston, sailed from that port on the 25th of August, 1798, on a voyage to the Northwest coast of America, at that time regarded as a most hazardous and difficult undertaking. Nothing material occurred till their arrival at St. Jago, where a lad going on shore and not returning in due season, was left by the captain. In the course of the voyage, between St. Jago and the Falkland Islands, the gunner was suspected by the whole crew of having committed depredations on the bread-room; upon which he was put in irons, and, at his own request, was put on shore at the Falkland Islands, where they soon after-

[1] [1 Brunner, Col. Cas. 529, contains only a partial report.]

wards arrived. Here, three of the crew, discovering an uneasy disposition, and a mutinous spirit, were severely beaten by the captain, who put them in irons. Off Cape Horn, John Salter, the first officer, took a lunar observation, and by his calculation they were in longitude sixty-nine degrees and some minutes west from Greenwich. This differed materially from the captain's calculation by the dead reckoning, and originated a quarrel between them, which was pursued with mutual violence and invective. On January 24, they were in imminent danger of running aground on Terra del Fuego, from which they escaped by the prudence of Captain Lamb. The quarrel between him and the mate was revived by this circumstance, and the next day the latter was degraded for incapacity, as was entered in the log book, and was turned before the mast. The voyage was then pursued without any remarkable occurrence, till April 30, when the crew revolted, seized the captain, put him in irons, imprisoned him in his stateroom, and transferred the command to Salter. They had previously signed a paper containing their reasons for the revolt. These were, the captain's intemperance, which incapacitated him for the command, and had, in two instances, endangered the safety of the ship; and second, the fear, that in a moment of passion, he would leave some of them on some desert island, or on some inhospitable coast, as he had frequently threatened. The ship continued under Salter, in this revolted state, for ten days, when they arrived on the Northwest coast, where by the interposition of Captain Rowan, of the Eliza, and Captain Breck, of the Hancock, ships belonging to Boston, the crew returned to their duty, Captain Lamb was reinstated in his command, and the officers were imprisoned. On the return of the ship to Boston, the three officers, John Salter, John Carnes, Stephen Bruce, Jun., and two seamen, John Bullock and Edmund Smith, were indicted in the circuit court of the United States, for feloniously confining the master of the Ulysses, and endeavoring to excite a revolt in the ship. The case being of a somewhat novel character, and there being an impression that the crew, before confining the captain, had good reason to fear that he intended to leave some of them amongst the savages on the Northwest coast, excited much interest, which was greatly enhanced by the fact that the most eminent counsel of that day were engaged on either side. The trial took place before the circuit court of the United States at the October term, 1800, before WILLIAM CUSHING, Circuit Justice of the United States, and JOHN LOWELL, District Judge. The case was conducted, on the part of the defendants, by Theophilus Parsons and Fisher Ames. For the government, by Harrison Gray Otis, and John Davis, district attorney of the United States.

It appeared clearly in evidence, that the defendants confined the master, and, indeed, they did not deny the fact, but set up a justification of their conduct.[2]

Fisher Ames, in opening the defence, stated, that he could with pleasure leave the cause in the hands of the jury, without attempting to influence either their hearts or understandings. He confessed the necessity of subordination among sailors, but denied that the acquittal of the defendants would weaken the authority of masters, who would be restrained by it, not from preserving discipline, but from acts of cruelty. At most, it would be but an exception from the general rule, requiring subordination. The consequence of leaving sailors to the brutal ferocity of captains, would be piracy and death; it would be more fatal to the interests of commerce, than restraining ship government within strict and definite limits. He laid it down as a principle, that when men act from honest motives, they cannot be considered as criminals; and, if the defendants were really in fear of their lives, it sufficiently justified their conduct. That fear might be ill-founded; but its reality was their justification. Self-defence is a supreme law of nature. It is written in the heart,

[2] Salter applied for a separate trial, that he might have the privilege of peremptorily challenging the jury. His counsel urged, that it was the privilege of persons, indicted for felony. But by the thirtieth section of the act of April 30, 1790, on the twelfth section of which this prosecution was founded, the privilege of peremptory challenge is restricted to capital cases: and on this, the motion was overruled. The following points were ruled in the course of the trial: It was not permitted, that witnesses should testify, what others said of the defendants, unless they were present. It was not permitted to testify, what others said, respecting expressions, used by defendants, unless they were present. What others said, when the defendants were not present to contradict, is no testimony. If the defendants, before the accusation, were said to have used expressions, which they did not deny, it is good evidence, because it is a confession, that they did utter the expressions. It was not permitted, to show, that Capt. Lamb was cruel, after his reinstatement. If this might have been done, it would have been equally proper, to enter into his general character, through every period of his life. In criminal prosecutions, depositions are not admitted as regular evidence, unless by mutual consent. The deposition of W. Sturgis was offered. Mr. Davis, the attorney for the district, objected to its being read, on account of unfair practice. After he had consented to a deposition of Sturgis, some addition was made to it. Though this addition might have been true, yet Mr. Davis had no opportunity to cross-examine Sturgis on this point. The court did not consent to its admission. Where there are several defendants, and one consents to the taking of a deposition, that deposition may not affect the other defendants, who did not consent to the taking of the deposition. Where a private journal was produced, that journal may be used against its author, but not against the other defendants. Evidence to show, that a witness has given an account of a transaction, in a manner similar to what he has testified, is good corroboration of his testimony. And so vice versa. Several were concerned in this revolt. Some who were concerned, and who were under bonds to answer in another district,

and cannot be obliterated. If men make laws to restrain it, their voice will not be heard in the moment of danger.[3]

The crew complained of the want of provisions. Mr. A. remarked on the effects of hunger in a small degree. It keeps the mind in a constant state of irritation. An uninterrupted series of small vexations, which individually require no magnanimity, will, in the course of time, humble and conquer the greatest spirit. The crew complained of the want of rum, to deprive sailors of which, said Mr. A., has always been considered as depriving them of the rights of man.

The crew accused Lamb of intemperance.[4] An intemperate use of rum has various effects on different constitutions. It deprives some of the powers of their body; some it makes loquacious, unlocking the secret recesses of the mind; it makes some very foolish, and others ferocious, adding to their nerves, strength, and to their intellects, fire. It converted Lamb into a tiger. When he came from his cell, he resembled an Eastern despot, who delighted only in scattering fears, and in inflicting torture. He compared Lamb to a giant, whose twisted nerves, and black countenance, would appal the stoutest heart. He eulogized sailors, as the most sincere and heroic of men. Among them, the purest and most exalted friendship subsists, and almost only among them. Their whole life is on the scale of heroism, and it is only because it is common, that they are insensible of their heroic character. The character of the sailors of New England is superior to that of those of any other nation. During the war, few of them ever entered on board an English vessel of force, without soon deserving and receiving an honorable commission.[5]

Theophilus Parsons:

This prosecution is founded on a law of congress, but I do not fear the accusation of want of attachment to the federal government by asserting, that the clause of the act, on which the indictment is founded, is unconstitutional. I have been accused of the wish to elevate that power on the ruins of the state government. This I disavow. I consider the state governments the pillars, on which the federal arch stands, and the federal constitution as the key-stone of the arch: they mutually impart strength and beauty.

The defendants are accused of endeavoring to make a revolt. To show what a revolt is, he quoted Johnson's Dictionary, folio, on this word. It signifies a departure from one power, and going over illegally to another. But to whom did the sailors go over? If to Mr. Salter, to whom did he revolt?

2. Is the offence, with which the defendants stand charged, felony? If so, it must be either by common law, or by the statute. It is not by the common law, because that code extends not to offences, committed on the high seas. If it had been meant to be felony by the statute, it would have been so expressed. I do not know, that we have a right to supply the omission of congress, even if it were their intention to declare this offence felony. Laws ought to be clear. Congress has power, by the constitution, to define and punish all piracies and felonies on the high seas. If this offence is neither piracy nor felony, congress had no jurisdiction, and therefore this clause is unconstitutional.

3. Admitting the fact, I ask with what intention did the defendants confine Capt. Lamb, and make this revolt. It is the felonious intention, which constitutes the crime. A man may kill another, but if it is by accident, or if from self-defence, and in a justifiable cause, the guilt of murder cannot attach to him. If the defendants had acted with a felonious intention, wherein, I say, the guilt of the offence consists, they would either have perpetrated murder, or run away with the property. They committed no murder. If they had run away with the property, it

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but who were not indicted, were offered to testify in behalf of the defendants. Objection was made to their testimony. They had every inducement to swear, so as to clear these defendants, in the hope of receiving a similar return of kindness. Court determined, they were competent, and their probable interest affected only their credibility. It was asserted, that P. Robinson, a witness, had told the American consul, at Canton, a story differing in some considerable circumstances from the testimony which he had given in court. He was asked, what story he had told the consul? but the court adjudged the question illegal, as he was not bound to criminate himself. Soon after Capt Lamb's reinstatement, P. Robinson wrote an account of the revolt, and gave it to the captain. This account was offered, to corroborate the testimony, which he had already given in court. It was admitted, as to those circumstances, which he had testified. It was doubted, whether the log book was the record of the mate, or of the captain. Captains of vessels were produced, who testified, that the log book is always to be considered as a record of truth; that it is the duty of a mate to keep one for the inspection of the owners of the ship; the mate is not bound to insert therein any thing false, even though commanded by the captain; and therefore a log book may be taken as the confession of the mate. I have said, depositions are not legal evidence in criminal prosecutions. One was offered by Salter, and it was moved, by his counsel, that it be accepted. Salter had no means legally to detain the deponent, but it was evident, that he had evidence in existence. Court said,—If the attorney for district will not agree to the admission of this deposition, the cause must be continued. A similar determination of Lord Mansfield was quoted, in which he was said to have asserted, if the deposition were not admitted, the cause should be continued forever. The attorney agreed.

[3] Mr. Ames recapitulated the evidence, but I thought imperfectly. His observations were in some instances more uncandid, than his duty to his clients required.

[4] But of this there was not sufficient proof.

[5] The preceding are heads of Mr. Ames's argument. It was addressed principally to the feelings. I could not preserve its exact order, or correctness, or beauty.

would have been piracy, and of this they are not accused. But from their conduct, we may infer the purity of their intention. They pursued the voyage, and traded with the natives of the country, with the express view of doing for the owners, as they would have done, had they been present. It is a correct rule, that where certain facts exist, we are to consider the probable cause of their existence. This will assist our investigation of the true cause. It is clear, they could not act without some motive, and it is equally certain, they had neither murder nor theft in their hearts. It must then have arisen from necessity, from a sense of eminent hazard of their lives, from the right of self-defence, which is imprinted in the heart, and which is superior to all law.

4. On the subject of Capt. L.'s testimony, Mr. P. observed, that it is true, in one sense, he neither gains nor loses by the event of this trial, and on that account is a competent witness. But, has he not a character to gain or lose, or is he a bankrupt in reputation? Has he not the strongest human feelings of resentment and revenge to gratify? Almost every active motive, which influences human conduct, impels him to color his evidence, and to effect the conviction of the defendant. Besides, when a man is under the influence of strong feelings, he easily persuades himself to believe, that that is true, which is most for his interest to be true. He then noticed some omissions of important matters in L.'s evidence, exaggerations, and attempts to influence the witnesses. One of these he had supported for some time, and supplied with money.[6]

5. Leaving Charles Read at St. Jago, discovered the greatest cruelty in Capt. L. A youth of respectable connections, without experience, committed to the care of Capt. L., who was bound both by feeling and duty, to protect him, was left at an immense distance from his native country, among strangers, with whose language he was unacquainted, without the power of making himself known, and without the means of subsistence. The young men of New England, who engage in this hard life, are generally of respectable connections, of good education, and hope, in the course of time, to rise to respectability in their profession, and to political eminence among their fellow citizens. Of this number was young Read, left in this desolate condition, his fair and honest hopes cut off in their very birth. Had Capt. L. been a parent, what would have been his feelings; had Read been his son, what would have been his indignation! The crew of the ship applied to Capt. L. for permission to bring Read on board: but to this application he only returned language, the fit offspring of such a heart! He damn'd Read, and swore, that he would not send for him, if he were his brother. Can it surprise us, that this conduct inspired the crew with fear and detestation!

6. Putting the gunner in irons on suspicion merely, was regarded as a severe punishment, even had he been really guilty, and showed Capt. L.'s temper to be ferocious, delighting in inflicting pain. Mr. P. called him a despot, being both a judge and executioner, examining without deliberation, and punishing with the utmost violence.

Mr. Parsons defended the prisoners with the most energetic eloquence; and Mr. Otis, with equal eloquence, and with more candor, supported the prosecution. Mr. Davis, with his usual, and almost proverbial candor, recapitulated the evidence for the government. In the course of his observations, he applied one from Hooker. "He that goes about persuading men they are not so well governed as they ought to be, will never want adherents."

Harrison Gray Otis closed the pleadings. In relation to the first position, taken by Mr. Parsons, he said; the crew did make a revolt; this necessarily includes the endeavor to make one. They departed from the legal authority of their commander, and went over to the dominion of their unlawful and uncontrolled will. The revolt consisted in the departure from their duty.

2. Upon the second point, he said; felony has a popular and a technical signification. In the former, it is an offence committed with a corrupt, malignant, and evil intention. Congress undoubtedly had the right to use this expression in either sense. They were describing offences against the United States, and undoubtedly considered this offence as felonious. In this same act, they speak of theft on the high seas, but omit the term "felonious." If a person, charged with theft on the high seas, were indicted, and the term "felonious" omitted, would not that omission be sufficient cause to quash the indictment? This whole act is a transcript of the British statute, in which this very offence is felony, and punished with death. Because congress meant to lessen the offence, and meliorate the punishment, could they mean to make it no offence? For if it is not felony, it is not within the powers of congress; and, being out of the reach of the common law, it cannot be punished.

This question called forth much learning and ingenuity. The etymology of the word was investigated. It was further suggested by Mr. Otis, that congress having power to define and punish felonies on the high seas, it was to be supposed, that when legislating on this offence, they were legislating on a felony.

Mr. Parsons. That is, because congress is legislating on an offence, it is felony. It is a pernicious doctrine.

THE COURT thought this doctrine strain-

[6] This was justified by the necessity of the case. Lamb had not power to compel the witness to stay, and therefore made it for his interest. This is not a legal exception. 2 Bac. Abr. 592.

ed, but stopped the discussion, as belonging properly to the court. It would be ground for a motion in arrest of judgment, and ought not to be addressed to the jury.

3. The felony consists in the very act of confining the master, and making the revolt. The law says it is an offence, and they may not make a revolt, even with the intention of pursuing the voyage. Their asserting it to be their intention to pursue the voyage, does not authorize their conduct. We grant, that fear is a sufficient justification, but not every fear. To justify this crew, it must have been lawful for them, not only to confine the master, but, in case of resistance, to put him to death.

4. Upon the fourth point discussed by Mr. Parsons, Mr. Otis acknowledged, that Capt. L. must be under the influence of strong passions, but perhaps, not more so than the witnesses in behalf of the defendants. They were all engaged in one common cause; they had a fellow feeling. Their interest and their reputation were engaged equally with Capt. L.'s. Capt. L. had not designedly omitted any thing. If he had omitted facts, it arose from the negligence of his counsel, who had omitted to interrogate him, and not from his crafty design. His evidence had been confirmed in all its principal parts. It was not pretended, that he was not a warm man, imprudent, and perhaps a rigid disciplinarian: but it did appear, from all circumstances, that the defendants were equally warm, imprudent, and perhaps violent.

5. In relation to leaving the lad at St. Jago, Mr. Otis said: The situation of Capt. L., and the circumstances of the crew, at the time amply justify his conduct. The Ulysses had stopped at St. Jago for water. This Read knew. The water was procured, the boats were taken in, and the wind was fair: the crew were in liquor, and when they applied to Capt. L., it was late in the evening. It was an order of the governor of St. Jago, that no boat should come on shore in the evening. Whoever infringed this law would be fired upon. Capt. L. had the charge of a valuable cargo worth $40,000. Had he stopped till morning, he might have lost the opportunity of a fair wind, he might have been exposed to shipwreck, and thus, the hopes of a valuable voyage would have been ruined. Capt. L. acted, then, as every prudent and good man ought to act.

6. In regard to the treatment of the gunner, the captain acted upon the suspicion of the whole crew, as well as his own. He was engaged in a long voyage; it was necessary to preserve strict economy; and if an individual committed depredations on the provisions, he would deserve the most severe punishment. It was not to be expected, that legal forms were to be observed. There were circumstances which justified the suspicion which fell on the gunner. Perhaps Capt. L. was too severe, but it was a necessary severity. Much was said on the conduct of Capt. L. at the Falkland Islands, where it was acknowledged, he was guilty of excess. It was denied, that Salter discovered incapacity, or deserved to be degraded. It was proved, however, that he had been found sleeping on his watch. It was clear, that Salter, excited by disappointment, and revenge, had stimulated the crew to mutiny. He told them, that he knew the laws of America, and that when two-thirds of a crew agreed, they might depose their captain. Some of the crew, in their evidence, confessed, that though Capt. L. was a violent man, using most intemperate language, and threatening to heave some overboard, and to leave others on some desert island, or on the N. W. coast among the natives; yet, they regarded them merely as words of passion, and never feared, that he would attempt to realize his threatenings. They signed the paper from motives of personal safety. Besides, it was urged, that, to justify their revolt, they ought to have stopped till Capt. L. should attempt to leave them on shore, or to throw them overboard.

[Before CUSHING, Circuit Justice, and LOWELL, District Judge.]

CUSHING, Circuit Justice, committed the cause to the jury. He addressed them for about ten minutes, and, with great impartiality noticed everything of importance. He seemed to consider the charges in the indictment supported, and that the justification was not sufficient. The jury found the defendants guilty. A motion was made for an arrest of judgment, on the ground that the offence was not felony. This was argued on the ground already mentioned. The court judged that it was not felony, and ordered the "felonice" to be blotted from the indictment. They thought, however, that the clause in the law, on which the indictment was found, was not unconstitutional, because in the enumeration of the powers of congress, they are to take care of foreign commerce, and to pass all laws necessary for that purpose.

A question then arose, whether, on this verdict, the prisoners might be punished for a misdemeanor. This was argued. The authorities did not seem to justify it. THE COURT would have arrested the judgment, had not the motion for an arrest been withdrawn by the counsel for the prisoners, who must otherwise have been exposed to a second prosecution.

This trial commenced on Friday, October 24, and continued till the following Monday. The jury returned their verdict on Tuesday morning. On the following Saturday the prisoners were brought up for sentence. Salter was ordered to pay a fine of two hundred dollars, and to be imprisoned six months. Carnes and Bruce were fined the same sum each, and imprisoned two months. Bullock and Smith were fined forty dollars each, and imprisoned three months.

Case No. 14,331.

The UNA.

[5 Ben. 198; [1] 14 Int. Rev. Rec. 6.]

District Court, S. D. New York. June, 1871.

COLLISION — MASTER — PRESUMPTION OF ABSENCE.

1. The master of a vessel has authority, as such, to maintain an action in his own name for damages to such vessel by collision.

2. The owner of a foreign vessel, in such a case, is presumed to be absent till the contrary is shown.

[Cited in The Tillie, Case No. 14,049.]

In admiralty.

Stevens & Reymert, for libellant.

Beebe, Donohue & Cooke, for claimants.

BLATCHFORD, District Judge. This is a cause of collision, to recover for the damages caused to the Norwegian bark Elizabeth by a collision which took place between her and the lighter Una in the harbor of New York, on the 16th of July, 1868. The fault of the Una is admitted. In the libel, the libellant, Edward M. Jensen, describes himself as having been the master, the managing owner, and the ship's husband, of the bark, at the time of the collision. The answer admits that he was the master of the bark, but denies that he held any other relation to her, and takes the objection that he has no right to maintain this action in his own name. There is no proof that he sustained any other relation to the vessel than that of her master. But, his authority as master was sufficient to authorize him to bring this suit in his own name. Ben. Adm. (2d Ed.) § 384; Houseman v. The North Carolina, 15 Pet. [40 U. S.] 40, 49; McKinlay v. Morrish, 21 How. [62 U. S.] 343, 355; The Commander in Chief, 1 Wall. [68 U. S.] 43, 51. His position as master constituted him so far agent for the owners of the vessel, who, as the vessel is shown to be a Norwegian vessel, must be presumed to be absent until the contrary is shown, that he could bring this suit in his own name, and receive on behalf of such owners the damages awarded.

On the merits, I award to the libellant $108 43, with interest from July 30th, 1868, rejecting the item of $20 for superintendence. I also reject the claim for demurrage and for permanent deterioration, and award no costs to either party as against the other.

Case No. 14,332.

The UNADILLA.

[8 Ben. 478.] [2]

District Court, N. D. New York. June, 1876.

MARITIME LIEN — SUPPLIES TO VESSEL IN HER HOME PORT—STATE LAW.

1. The lien, given by the laws of the state of New York (Sess. Laws 1862, c. 482), for supplies furnished to a vessel in her home port is valid and enforceable in the admiralty, the vessel being of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between different states upon the lakes and navigable waters connecting them.

2. Such a lien must prevail over the title of a purchaser of the vessel who has bought her without notice of the lien.

3. Case of The Edith [Case No. 4,283] criticised.

In admiralty.

WALLACE, District Judge. This case presents the question whether a lien given by the laws of New York (chapter 482, Laws 1862), for supplies furnished a vessel in her home port can be enforced in rem in this court, the vessel being of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and employed in business of commerce and navigation between ports and places in different states upon the lakes and navigable waters connecting the lakes. If the statute confers a valid lien, inasmuch as the cause of action is founded on a maritime contract, and the court has therefore jurisdiction of the controversy, the admiralty will enforce the lien given by the local law. The St. Lawrence, 1 Black [66 U. S.] 522; Peyroux v. Howard, 7 Pet. [32 U. S.] 321; The New Orleans v. Phœbus, 11 Pet. [36 U. S.] 275. Prior to the amendment of the 12th admiralty rule by the supreme court in 1859, it had been the common practice of the district courts to issue process in rem for the enforcement of such liens. The rule was amended, for reasons of policy stated briefly in Maguire v. Card, 21 How. [62 U. S.] 251, and more fully stated by Judge Taney in The St. Lawrence, 1 Black [66 U. S.] 527, and thereby process in rem in such cases was denied. The amendment to the 12th rule, promulgated by the supreme court in May, 1872, restores the right to process in rem; and as stated in The Lottawana, 21 Wall. [88 U. S.] 581, the rule of 1844 is restored so far as to give material men the right to enforce their liens; and when the lien exists, no matter by what law it is created, all obstacles to a proceeding in rem are now removed.

Whether or not the lien given by the act of 1862 is valid, depends upon the constitutionality of that act. That the act transcends the legislative power of the states, so far as it attempts to transfer to the state courts the power to enforce maritime causes of action by remedies unknown to the common law, and thus encroaches on the admiralty jurisdiction vested exclusively in the district courts, is clear both upon principle and authority. But that the act is wholly void does not follow. A statute may be void in part and valid in part, and those provisions which are unconstitutional will not vitiate those which are lawful unless all are so mutually co-operative and dependent

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upon each other as to possess no independent vigor. Of the several sections of this act, one creates a lien while others provide the procedure and remedy for its enforcement. An amendment of the sections conferring the remedy would remove all the obnoxious features of the act. The lien created is not made to depend upon the remedy, but the remedy depends upon the lien. If the section creating the lien was void for unconstitutionality, doubtless the sections giving the remedy would be void also, because there would be nothing upon which they could operate; but, if the remedy were taken away, the lien would not be inoperative. Where a statute creates a right, and prescribes the remedy to enforce it, doubtless the party is confined to the statutory remedy; but, when no remedy is prescribed, the party to whom the right is given may enforce it by any appropriate action at common law. Ewer v. Jones, 2 Salk. 415; Dudley v. Mayhew, 3 N. Y. 9.

But assuming that the right and remedy are so inseparable and dependent that one cannot exist without the other, the act is operative over a class of cases within the legitimate legislative control of the states. A law may be unconstitutional and of course void, in relation to particular cases, and yet valid for all purposes in its application to other cases within the scope of its provisions but varying from the former in particular circumstances. Golden v. Prince [Case No. 5,509]; Bank of Hamilton v. Dudley, 2 Pet. [27 U. S.] 526. The act is unobjectionable in its operation over all transactions which are not cognizable in the admiralty; and, as will hereafter appear, as to vessels engaged in navigating the lakes, is to be given full effect. And for this reason the court of appeals of New York has held the statute constitutional, and sustained it, both as to the lien and the remedy, except in its application to causes of action exclusively cognizable in the district court. Sheppard v. Steele, 43 N. Y. 52; Brookman v. Hamill, Id. 554. I am aware that Judge Woodruff expressed a contrary opinion in the case of The Edith [Case No. 4,283], but he was considering its effect where the attempt was to apply the act to afford a lien for a cause of action purely maritime, and in which he held that under the 12th admiralty rule, as it then existed, the lien, if valid, could not be enforced in the district court. It was not necessary to decide the question now presented; and in its present aspect it was not presented for his consideration. As to vessels engaged in navigating the lakes the act is valid in all its provisions. The act of congress of 1845 [5 Stat. 726], extending the jurisdiction of the district courts in admiralty to cases arising upon the lakes and navigable waters connecting the same, does not confer exclusive jurisdiction upon these courts, but contains a limitation upon such jurisdiction, "saving to parties the right of a concurrent remedy at the common law, where it is competent to give it and any concurrent remedy which may be given by the state law." The jurisdiction thus conferred is not exclusive, but is expressly made concurrent with such remedies as may be given by the state laws. The Hine v. Trevor, 4 Wall. [71 U. S.] 555. The remedies provided by the laws of the states may be enforced in their full vigor over vessels navigating the lakes.

These conclusions lead to a decree for the libellants. The statutory lien must prevail over the title of a purchaser who has paid the purchase money without actual notice of the lien.

Case No. 14,333.

The UNADILLA.

[9 Chi. Leg. News, 427; 2 Mich. Lawy. 441.]

District Court, E. D. Michigan. 1877.

ADMIRALTY—DISTRIBUTION OF PROCEEDS OF SALE—PRIORITIES.

In the distribution of proceeds of sale, claims for towage and necessaries are entitled to rank those for breaches of contract of affreightment.

The barque was originally attached upon a libel for towage. A number of other libels were filed for towage and necessaries, and one for a breach of contract on the part of the owners of the vessel in failing to deliver a cargo of coal. The barque was sold, and the proceeds paid into court. Upon an order classifying claims, the clerk reported that the claims for towage and necessaries were entitled to rank that of Martin Bogle, for breach of contract of affreightment.

F. H. Canfield, for original libellant.
H. H. Swan, for libellant Bogle.

BROWN, District Judge. The sole question involved in the exception relates to that of priority, as between the claims for towage and necessaries, and that for a breach of contract of affreightment. The question is alluded to in only one American case, viz. The America [Case No. 288], the syllabus of which indicates that the court assigned the lien of the freighter to the lowest class, but I do not find the point decided, or even discussed in the opinion. There is an entire absence of English authority upon this point. Valin, in discussing the French law upon this subject, says that "the right of the merchant who would seek to make this privilege available, ranks low in the order of precedence of privileged claims against the ship. The legal expenses attending a sale, the demands for pilotage and custody of the vessel, for stowage of furniture and apparel, for repairs at the last port, for the wages of master and mariners, accrued during the

last voyage, for moneys borrowed by the master on his last voyage, for purchase money of ship furniture and stores remaining unpaid, for sums due to material men, shipwrights and lenders on bottomry before her last departure from port, and for premiums of insurance, being most of them justly preferred to it. The privilege of the ship-owner against the goods for his freight is of a more beneficial character." In the Commercial Code of France (article 191), in that of Spain (article 599), and in that of Portugal (article 1307), claims of this kind are assigned to the lowest rank, immediately following those for premiums of insurance. Emerigon, in his work upon Bottomry Loans, objects to this classification, and observes that "shippers whose goods have been lost or injured by other causes than perils of the sea, ought to be ranked first, even before seamen, seeing that similar losses and damage are often occasioned by the act of the crew." It seemed to him that they ought at least to have precedence over those who have made loans before the departure of the ship, because they have no knowledge of the necessaries and moneys furnished in the way of equipment. But he says: "It has pleased the ordinance (of Louis XIV.) not to place them in this rank." Dufour (Droit Mar. vol. 1, p. 325), thus treats of this classification: "We remark, nevertheless, that this classification is founded upon reasons more solid than simple caprice. It may be, indeed, that the fault of the crew sometimes contributes to the loss and damage of the merchandise, but we should not forget that his labor and courage often save that which remains of the pledge to which the liens attach. For this reason, in the most ancient maritime customs, the lien of mariners has always ranked that of merchants. As to lenders and material men, their co-operation in the safety of the pledge is perhaps less directly manifest, and less certain in fact, but we know that in law the presumption which militates in their favor is the same. I do not see, then, that the criticisms of Emerigon are well founded. There is, perhaps, a single class of liens against which this ought on principle to be protected, viz. that of the underwriter for the amount of his premium. For, as I have already observed, insurance is only a private affair of the debtor. Its object is the interest of the owner rather than that of the ship. Nevertheless, we can understand that the wish to encourage insurance, this gigantic lever of maritime commerce, has been able to temper in their favor the rigorous deductions of reason." In passing upon novel questions like these, and in the absence of English and American precedents, I think the maritime law of continental Europe furnishes a safe guide. It is for the interest of commerce that its laws be uniform. The exceptions are overruled.

Case No. 14,334.

The UNCLE ABE.

[9 Ben. 502.] [1]

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

COLLISION AT PIER—DAMAGES—REPAIR BY WRONG-DOER—RIGHT OF ACTION BY MASTER FOR INSUFFICIENT REPAIR.

1. The master of a vessel having charge and custody of her at the time of a collision may maintain an action to recover the damages caused by the collision, it appearing that the bringing of the action has been authorized and approved by all interested. The master's right of action in such case is not affected by the fact that underwriters upon the vessel have paid the cost of the repairs, which constitute a part of the demand sued for.

2. Where a party, while denying liability for a collision, offers to repair the damages, and that offer is accepted, and afterwards suit is brought on the ground of insufficient repair, the court will not be astute to discover unimportant particulars, in which the condition of the vessel differs when repaired from her condition before the collision.

3. When the wrong-doer takes the injured vessel into his possession to repair the injury he has done, he will be required to show that the boat, when returned, was in substantially as good condition as before the accident. Where in such a case the boat, when returned, appears to have been repaired in an imperfect manner, and the owner had refused to accept the repairs as satisfactory, the wrong-doer will be *held* liable for all the additional work necessarily done upon the boat, to put her is as good condition as she was before the accident.

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.

C. E. Crowell, for claimant.

BENEDICT, District Judge. This action is brought to recover for the damage caused to the barge Wilson by a collision that occurred in the East river on the seventh day of December, 1877. At the time of the accident the barge was being towed across the river from Brooklyn to pier 4, New York, by the tug Titan, upon a hawser. She had reached within about 150 feet of pier 4, was heading sharply on to the pier, and awaiting the departure of some tugs from the end of the pier, when the tug Uncle Abe, coming around the Battery up the East river, ran into her, striking her upon the port side, and doing the damage complained of.

The questions to be determined are, first, whether the suit is properly brought in the name of the libellant; second, whether the Uncle Abe was guilty of any fault rendering her liable for the damage; and third, whether the damage caused by the collision has not been fully repaired by the owners of the Uncle Abe.

The facts bearing upon the first question are these: The libellant was, and is, the master of the barge Wilson; he is also owner of one-sixth of her, and he is also the holder of a chattel mortgage upon the remaining five-sixths, executed by one Warford, which

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

mortgage is past due, but has never been foreclosed. Warford himself is called as a witness for the libellant and testifies that the suit was, with his knowledge and assent, brought in the name of the libellant. The cost of repairs incurred by the libellant has been paid by underwriters who had insured the vessel, and who authorized this suit to be brought by the libellant for their benefit so far as it relates to those repairs.

These facts are sufficient to enable the libellant to maintain the action. Being the master of the vessel, and his action in bringing the suit being authorized and approved by all interested, he may, by virtue of his position as master, having charge and custody of the vessel at the time of the accident, maintain an action to recover damages sustained by his vessel. Nor is his right of action affected by the circumstance that the underwriters upon the vessel have paid the cost of the repairs which constitute a part of the demand. It is as competent for the underwriters to institute such an action in the name of the master as it is for the owners. The master of a vessel acts in the matters of the vessel for whom it may concern; and certainly when his action is known and approved, not only by the owners but the underwriters, it is a bar to any future action on their part for the recovery of the same amount.

As to the merits of the collision there can be no doubt. The account given by those on board the Uncle Abe convicts her of fault. According to this account the Titan, with the barge Wilson in tow, was crossing from Brooklyn to New York, and was about 150 feet from the end of pier 4, moving slowly towards the pier, whither, as it elsewhere appears, she was bound, her engine having been stopped but her headway not killed. The Uncle Abe coming up the river along the piers saw the Titan and blew two whistles, apparently expecting the Titan to stop and allow her to pass ahead. No reply was received to this signal. Nevertheless the Uncle Abe kept her course as well as speed, and as she approached nearer to the Titan again blew two signals, which signals also received no reply. When close to the Titan the Uncle Abe ported, and stopped and backed her engine, but too late to prevent her coming in contact with the port side of the barge, doing the damage complained of. According to this account,—which differs somewhat from that given by those on the Titan, but which, as against the Uncle Abe, may be taken to be true,—the Uncle Abe was in fault for keeping her speed and course when she saw that the Titan did not answer her signals, and continued to move towards the pier. It was her duty, under the circumstances to port in time, and thus pass under the Titan's stern, or, if that was impossible, then to stop.

The principal question of the case remains to be disposed of, and that arises out of the following facts. After the collision, it was arranged between the claimant and the owners of the injured boat that the boat should be taken to the claimant's yard, and there the injuries caused by the collision be repaired by the claimant. In accordance with this arrangement the claimant took the boat and put upon her certain repairs which it is insisted fully repaired all the injuries caused by the collision. Objection was made to the extent and nature of the work so done upon the boat, and after she was surrendered by the claimant further and additional repairs were done upon her, including the removal at considerable expense of a large part of the work done by the claimant. It is in regard to the liability for this additional work done that the main dispute has arisen.

The desire of the court is to encourage parties to take such a course in regard to damages caused by collision as will reduce the actual loss to the minimum; and where, as in this case, a party while denying liability offers to repair the damage, and that offer has been accepted, there is no reason why the court should be astute to discover unimportant particulars, in which the condition of the vessel when repaired differs from her condition as it was before the accident. Nevertheless justice requires that when under such circumstances a wrong-doer takes the injured boat into his possession for the purpose of repairing the injury he has done, he should be required to show that the boat when returned was in substantially as good condition as before the injury. In the present instance it is impossible for me to find that the repairs done by the claimant put the libellant's boat in as good condition as she was before the collision. Among other things it seems plain that the method adopted to repair the injury to the clamp, which was broken by the collision, was not proper. It also appears that some injury was done to the bottom that was not repaired by the claimant; and there may be other particulars disclosed by the evidence in which the work done was defective,—if so, they can be ascertained on the reference that must be ordered. Those I have mentioned are the main items over which controversy has been had.

It having thus been found that the repairs done by the claimant were not such as constitute a proper repair of the boat, I am unable to avoid the conclusion that the claimant must be held liable for all the additional work necessarily done upon the boat to put her in as good condition as she was before. The result will doubtless be a very considerable increase in the amount of loss entailed upon the claimant by the collision. This result is one much to be regretted. But the claimant consented to undertake to repair the damage without having a previous definite understanding as to what was required to be done to make the damage good, and of course he took the risk of determining for himself what was necessary to accomplish

that end. He is entitled to have his determination fairly considered, but upon the proofs in this case it is impossible to uphold it. Neither can it be claimed that any action on the part of the owners of the boat induced the claimant to repair the vessel in the manner adopted by him. On the contrary the proof is clear that the carpenter to whom the claimant entrusted the work of making the repair was expressly notified that the method being pursued in repairing the damage was not the proper method, and that the work would have to be taken out. It was open to the claimant upon such objection made either to abandon work and surrender the boat, leaving the libellant to his legal remedy, or to conform to the notification that had been given. He did neither, but went on with the work according to his own judgment in respect to his legal liability, and of course at his own risk.

Nor can it be contended that the work done by the claimant was ever accepted on the part of the owners of the boat. On the contrary, the boat was received from the claimant by the owners under circumstances which forbid the conclusion that there was ever an acceptance of the boat as having been properly repaired.

In regard to the claim for injury to the libellant's watch caused by the collision, the evidence is not sufficiently definite to warrant a recovery for such injury. The claim for personal injury to a deck-hand caused by his being thrown down by the collision, must also be rejected, as the proof is not sufficient to warrant the conclusion that the collision was the immediate cause of the temporary disablement of the man for which a recovery is sought.

The determination therefore is, that the libellant is entitled to a decree for the damages caused by the collision in the pleadings mentioned, and a reference is directed to ascertain and report the amount of work and materials necessarily done and expended upon the boat, after she was surrendered by the claimant, in repairing the injury to the boat caused by the collision.

UNCLE SAM, The (CAMPBELL v.). See Cases Nos. 2,371 and 2,372.

UNCLE SAM, The (WEST v.). See Case No. 17,427.

Case No. 14,335.

The UNCLE TOM.

[10 Ben. 234.] [1]

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

SEAMAN'S WAGES—REGISTERED OWNER—SET OFF.

1. O. M. bought a schooner at Bermuda, took command of her, and brought her to New York. As she needed repairs, he obtained an advance of the necessary funds, agreeing to give a mortgage on her as security therefor. It was found that she could not be registered in the name of O. M., and he made a bill of sale of her to his brother, E. M., for the nominal consideration of five dollars, and procured E. M. to execute the mortgage. The mortgagees were told by O. M. that he had sold the vessel to his brother, and they had no notice that the sale was not a valid sale, except knowledge of the consideration stated in the bill of sale. After the mortgage O. M., who continued to control the vessel, shipped E. M. as cook and sailed on a voyage to Cuba and back to New York, where the vessel was libelled and sold for seaman's wages. The mortgagees intervened as claimants and objected to the payment of the claim of E. M.: *Held*, That, although the claim of the mortgagees to the proceeds was superior to that of E. M. as owner, the claim of E. M. as a seaman was superior to that of the mortgagees, and there was no reason why it should not be recognized and enforced.

2. The liability of E. M. for a deficiency on the mortgage could not be set off against his claim for wages.

In admiralty.

H. Heath, for libellant.
Edward S. Hubbe, for claimant.

CHOATE, District Judge. In this case the vessel has been sold on a libel for seaman's wages, and the question is whether one of the seamen, Edwin Meyer, is entitled to his wages out of the proceeds. His claim is opposed by mortgagees of the vessel, who have appeared as claimants and who hold a mortgage executed by the said Edwin Meyer, as owner of the vessel. Sometime prior to the making of the mortgage, the schooner was purchased at Bermuda, by one Otto Meyer, who took command of her and brought her to New York. As she needed repairs he contracted with the claimants to furnish the funds required for her repair, agreeing to give a mortgage on her therefor. When the vessel had been repaired it was found that she could not be registered in the name of Otto Meyer. He therefore made a bill of sale of her to his brother, Edwin Meyer, for the nominal consideration of five dollars, and she was registered in the name of Edwin Meyer. But Otto Meyer continued to manage and control her and had entire possession of her. In pursuance of the agreement to give a mortgage, Otto Meyer procured his brother to execute a mortgage to the claimants, telling them that he had sold the vessel to his brother. The claimants had no notice that the sale was not a real sale for value, unless knowledge of the fact that the consideration expressed in the bill of sale was five dollars, was such notice. The proceeds are insufficient to pay the mortgage, and the claimants take the point that the registered owner of a vessel cannot have a lien on his own property. After the mortgage was given, the vessel sailed on a voyage from New York to Cuba and return, under command of Otto Meyer. Edwin Meyer shipped as seaman, and served till the end of the voyage, as cook.

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

I think it clear, that his claim is superior to that of the mortgagees. The claimants took their mortgage plainly enough subject to the superior claim that might attach against the vessel for the wages of the crew upon future voyages. And it is a matter of entire indifference to the mortgagees, so far as their interest was concerned, who the crew should be or what their relation to the vessel might be, or whether they might have an interest in her or not. There is, therefore, no equity in the claim that, because the cook happens to be the registered owner, he is any the less entitled to his wages as cook, as against these mortgagees. But for the accidental circumstance of his holding the legal title, his claim for wages would not and could not have been disputed by them. The vessel must have seamen, and there was nothing incompatible between the positions of seaman and registered owner. It is very true that the claimants' title as mortgagees to the proceeds is superior to that of the cook as owner; but the claim of the cook as seaman is superior to that of the mortgagees, and there is no reason why it should not be recognized and enforced. Under the English statute which gives the master a maritime lien for his wages and disbursements the same objection was taken to the libel of the master, who was a part owner, that is taken in this case; but Sir R. Phillimore held the objection untenable, both on the general ground that the nature of the maritime lien was such that an owner or part owner could have and enforce such a lien against the ship, and also on the ground that the statute, having given masters of ships in general terms a lien for their wages and disbursements, the court could not by construction engraft on the statute an exception, namely, in case of masters, who happened to be part owners. The Feronia, 17 Law T. [N. S.] 620. "Nor could it be contended," says the learned judge, "that under the old law a common seaman who was also a part owner (and such cases may often have happened) could have been on that account deprived of his maritime lien for wages." Our statute, which recognizes the maritime lien of the seamen for wages, and provides for its speedy enforcement, is no less explicit than the English statute giving such lien to the master; and although an interest on the part of a seaman in the vessel is not so common as on the part of a master, there is no consideration of public policy or of reason for engrafting such an exception on our statute. See Rev. St. §§ 4546, 4547. The further objection that this libellant cannot recover because he is liable to the mortgagees for a deficiency on the mortgage, seems to be based on the theory that such a claim in contract can be set off against a claim for wages; but the nature of the claims is entirely different, and they are not the proper subject of set off. And such ground for withholding wages is in effect inconsistent with those provisions of our law which are designed to secure to the seamen their absolute right to their wages. See Id. §§ 4535, 4536.

Decree for libellant with costs.

Case No. 14,336.

The UNDAUNTED.

[2 Spr. 194.] [1]

District Court, D. Massachusetts. Nov., 1862.

AFFREIGHTMENT—LIEN FOR CHARTER MONEY—VESSEL LET TO UNITED STATES—PRIZE CARGOES.

1. The owners of a vessel let to the United States for a transport, in time of war, have no lien for their charter-money on goods the United States may put on board.

2. In the absence of an agreement to that effect, it is not to be presumed that the United States intends to charge captors with the expense of sending prize cargoes to port for adjudication, in vessels belonging to, or in the service of, the United States.

3. Prize cargoes sent in for adjudication in a transport chartered by the government, are not chargeable with the payment of freight or any part of the charter-money, in favor of the owners of the vessel

In admiralty.

The petitioners, pro se.

R. H. Dana, Jr., U. S. Atty., for the United States and captors.

SPRAGUE, District Judge. Application has been made to me, by the owners of the ship Undaunted, to allow them $1200 out of the proceeds of certain prize cargoes condemned and sold by the court. The Undaunted was let to the United States, through Captain Paul George, a quartermaster, by a charter made at this port, for an undefined period of time, at the rate of $6000 per month. The vessel went to Ship Island with soldiers and stores, and there discharged her cargo. Invalid soldiers and stores were put on board for her return cargo. At the same time, by order of General Butler, the cargoes of certain small vessels captured by our cruisers in the Gulf were put on board, to be brought to this district, and delivered to the officers of this court for adjudication. On the arrival of the Undaunted in Boston, Captain McKim, who had succeeded Captain George as quartermaster, took out the men and stores of his department, and gave notice to the owners that the charter was terminated, paid the charter-money to the time of the notice, and informed them that he would not be responsible for the hire of the vessel while the prize cargoes were being taken out and delivered.

The owners asserted a right to detain the prize cargoes until this additional charge should be paid or secured, and the marshal, who had a warrant from the court to take possession of the goods as prize, agreed, in order to get possession of them, to be responsible,—not, I suppose, personally, but in his official capacity; and the goods were de-

[1] [Reported by Hon. Richard H. Dana, Jr., and here reprinted by permission.]

livered to him. They have since been condemned and sold; and this claim is made for $1200, which is the charter rate for the six days that the vessel was detained to unload and deliver the prize goods.

The first question is whether this six days' use of the vessel was under the charter. The charter, though made through a quartermaster, is made to and with the United States; and there is no limitation as to the kinds of goods that may be put into her, or as to the department of the government for which she may be used. The United States had as good right to put on board prize crews, prize goods, and men of the navy, as soldiers or military stores; and the owners are not confined to the quartermaster's department for their pay, but can look to the general government as the party with which they contracted.

These prize goods, then, being lawfully put on board, were on board under the charter; and it was the duty of the owners not only to transport them, but to unload and deliver them. On the other hand, the charter subsisting until the goods were out, the owners could claim of the government charter-money until that time. The attempt of the quartermaster to terminate the charter while the vessel was actually detained for the purpose of discharging the cargo, was nugatory.

The United States, then, are liable to the owners for the $1200, but can the court take it out of the prize goods? The prize belongs one-half to the captors; and if this fund must pay it, the captors lose their proportion. The inquiry therefore arises, whether the captors can so be charged.

It is not the custom of the government to charge captors with a contribution toward the expenses the government is subjected to in bringing in prizes for adjudication, by their own vessels or seamen. Expenses incurred by the employment of other persons, as pilots, and the charges of custody after arrival and delivery, are charges on the fund. But I know of no case where the government, bringing in prizes or prize cargoes in government vessels, has called for a contribution from the captors towards the wages or provisions of the men, or has made a claim in the nature of freight or hire for the use of the vessels. This ship, at Ship Island, was in the employ of the government, as a transport. There is no evidence or even suggestion that there was an understanding, when these cargoes were put into the Undaunted, that the captors or the goods should be charged with any payment for their transportation and delivery. In the absence of any agreement to that effect, I cannot think the captors expected, or the government intended, that they should contribute towards the charter-money of the Undaunted; and it was as much the duty of the owners of the ship, under the charter, to unload and deliver the prize cargoes as to transport them.

But the petitioners claim the payment from this fund, on the ground that, having a lien on the goods, they waived it upon the marshal's agreement that the lien should be paid, which, they say, gives them a claim in equity on the proceeds of the goods. The difficulty with this argument is that they had no lien. It cannot be supposed that persons who charter vessels to the government, as transports or supply ships, especially in time of war, are to have a right to detain the public property put on board until their demands for freight are paid, or the right to arrest the goods under a libel in court. Not only is this inconsistent with public policy, but the government cannot allow it to be supposed that its own credit is not sufficient security. It is noticeable, too, that the charter, while it contains the usual clause pledging the vessel, omits the usual clause reciprocally pledging the cargo. Not that such a clause is necessary to give a lien, but the omission of it, in a manner apparently intentional, indicates that both parties understood that a lien could not be allowed on such a contract. It was therefore the duty of the owners to deliver the goods to the marshal, without terms, when he applied for them under his warrant. There was no consideration for his promise; and, moreover, he had no right to affect the goods with a charge to which they were not subjected either by the law, or by a necessity the law recognizes.

The government owes the petitioners the $1200, but I have no funds of the government which I have authority to charge with its payment, and in my opinion it is not chargeable on the prize goods.

See The Nassau, 4 Wall. [71 U. S.] 634.

UNDERHILL, The. See Case No. 2,332.

UNDERHILL (CATLIN v.). See Cases Nos. 2,523 and 2,524.

UNDERHILL (LOW v.). See Case No. 8,561.

Case No. 14,337.

UNDERHILL et al. v. PLEASONTON.

[8 Blatchf. 260.] [1]

Circuit Court, S. D. New York. Feb. 18, 1871.

INTERNAL REVENUE—BREWERS—SPECIAL TAX AS WHOLESALE DEALERS—SALE AT PLACE OF MANUFACTURE.

1. The provision, in section 59 of the internal revenue act of July 20th, 1868 (14 Stat. 150), declaring that no brewer who has paid his special tax as such, and who sells only malt liquors of his own production, at the place of manufacture, in the original casks or packages in which they are placed for the purpose of affixing the tax stamps, shall be required to pay the special tax of a wholesale dealer, left subject to such special tax brewers selling elsewhere than at the place of manufacture; and the act of April 10th, 1869 (16 Stat. 42), did not relieve brewers from taxation as wholesale dealers in respect of sales made elsewhere than at the place of manufacture.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

2. Under these acts, therefore, a brewer selling at another place than the place of manufacture, is liable to taxation as a wholesale dealer.

[This was a suit by Edward Underhill, Jr., and others, against Alfred Pleasonton, to recover for taxes alleged to have been illegally exacted.]

Thomas Harland, for plaintiffs.

Thomas Simons, Asst. Dist. Atty., for defendant.

WOODRUFF, Circuit Judge. By the act to reduce internal taxation, &c., passed July 13th, 1866, in section 48 (14 Stat. 164), a tax was imposed upon beer, ale and other similar fermented liquors, and, by section 47, every brewer was required to execute a bond to the United States, conditioned for the payment of the tax on all beer, ale, &c., before the same should be sold or removed for consumption or sale, with this proviso: "That no brewer shall be required to pay a special tax as a wholesale dealer, by reason of selling at wholesale, at a place other than his brewery, malt liquors manufactured by him." This proviso operated in favor of brewers, as a modification of subdivision 4 of the amendments of section 79 of the previous law (same act, at page 116), which declared, that wholesale dealers in distilled or fermented liquors should pay a special tax, and that every person who should sell, or offer for sale, any distilled spirits, fermented liquors, &c., in quantities of more than three gallons or over, at one time, to the same purchaser, or whose annual sales, including sales of other merchandize, should exceed twenty-five thousand dollars, should be regarded as a wholesale dealer in liquors. There was, therefore, a special tax on wholesale dealers; a definition of wholesale dealers in liquors; a tax upon brewers for all that they manufacture; and a proviso that a brewer should not be required to pay a special tax as a wholesale dealer, by reason of selling at a place other than his brewery.

On the 20th of July, 1868, an act was passed, entitled, "An act imposing taxes on distilled spirits and tobacco, and for other purposes" (14 Stat. 125), dealing very largely with distillers, but, in many particulars, also applied to brewers. In section 59 of this act (page 150), the subjects above provided for are revised, and a definition is given of wholesale liquor dealers, and the tax which they shall pay is declared. After prescribing the tax, it enacts: "Every person who sells or offers for sale distilled spirits, wines, or malt liquors, whose annual sales shall exceed twenty-five thousand dollars, shall be regarded as a wholesale liquor dealer. But no distiller or brewer who has paid his special tax as such, and who sells only distilled spirits or malt liquors of his own production at the place of manufacture, in the original casks or packages in which they are placed for the purpose of affixing the tax stamps, shall be required to pay the special tax of a wholesale dealer." Here is a substituted enactment, covering the subject of the provisions of the former law—a prescription of the tax, a definition of the wholesale liquor dealer, and the proviso, now limited to those who sell at the place of manufacture, in the original casks or packages—a proviso which, I think, is an amendment of, or a substitute for, the proviso to the former definition of a wholesale dealer, and confining it not only to sales at the place of manufacture but to sales in the original casks or packages. The declaration, that every person who sells, or offers for sale, malt liquors, whose sales amount to the specified sum, shall be regarded as a wholesale liquor dealer, is sweeping, and clearly covers brewers selling malt liquors at any place, in any packages; and, when congress declare the exception of sales at the place of manufacture, and in the original packages, they exclude therefrom sales at any other place, on the familiar principle, "Expressio unius est exclusio alterius." The language, "every person specified except those who sell at the place of manufacture, and in the original casks or packages, shall be regarded as a wholesale liquor dealer," is inconsistent with the claim, that brewers who sell at a place other than the place of manufacture, are not to be regarded as such dealers; and, to make it plain that it was not intended to allow any other exception than the one actually declared, the act of 1868, in section 105 (page 166), declares, that "all acts and parts of acts, inconsistent with the provisions of this act, are hereby repealed." The result is, therefore, inevitable. Every person specified is to be regarded as a wholesale liquor dealer, except brewers selling at the place of manufacture, in the original casks or packages. Any act, proviso, or part of an act, which purports to create any other exception, is inconsistent with this act of 1868, and is repealed. If, therefore, no subsequent legislation relieved the plaintiffs from the tax for sales made at a place other than the place of manufacture, the tax in this case was lawfully imposed and collected.

It is claimed that the change made in the law by the act of April 10th, 1869 (16 Stat. 42), operates to relieve the plaintiffs from the tax. I think not. The sales which formed the basis of the assessment were made between the 20th of July, 1868, and the 1st of May, 1869, and the assessment of the tax was on the 20th of May, 1869. This is expressly agreed in the statement of facts submitted. The change made by the act of April 10th, 1869, did not relieve brewers from taxation as wholesale dealers in respect of sales made elsewhere than at the place of manufacture. On the contrary, the limited exception of sales made at the place of manufacture in the original casks or packages, was not only not extended so as to also except sales made at another place, but

was even narrowed, so that it was confined further to casks or original packages on which the tax stamps had been actually affixed. It was in this last respect only that the exception was altered. The rule of taxation was altered, but the case submitted and facts agreed to do not state, nor is there any complaint, that the assessment was for too large an amount. Indeed, the agreed case expressly states, "that the amount of sales between the 20th of July, 1868, and the 1st of May, 1869, was such, that, if made by a person liable to be assessed as a wholesale liquor dealer, such person would have been rendered liable thereby to be assessed for taxes in the said sum of $257.78," which sum is the precise amount paid, and for the recovery of which this suit is brought.

Whether tested by the act of 1868, or by the amendatory act of 1869, the plaintiffs were wholesale liquor dealers under the law, upon the grounds above considered. The tax was, therefore, legal, and was properly collected. Judgment must be entered for the defendant, with costs.

Case No. 14,338.

UNDERTAKER'S CARGO.

[Cited in Eight Hundred and Fifty-Eight Bales of Cotton, Case No 4,318. Nowhere reported; opinion not now accessible.]

UNDERWOOD (HOWE v.). See Case No. 6,775.

Case No. 14,339.

UNDERWOOD v. HUDDLESTONE.

[2 Cranch. C. C. 76.] [1]

Circuit Court. District of Columbia. June Term, 1813.

EVIDENCE—WRITTEN NOTICE—NOTICE TO PRODUCE.

The contents of a written notice cannot be given in evidence, unless notice has been given to the party to produce it.

[Cited in Bank of Washington v. Kurtz, Case No. 950.]

Assumpsit against the indorser of Roddy's note. The notary testified that he gave notice by letter.

Mr. Law, for defendant, objected to evidence of its contents, because the defendant had not been called upon to produce the letter, and cited Chitty, 210; 1 Peake, Ev. 112; 2 Peake, Ev. 221; 7 East, 385; Shaw v. Markham, Peake, 165.

Mr. Jones, contra. The practice has always been otherwise. Saunderson v. Judge, 2 H. Bl. 509.

THE COURT (nem. con.) refused to permit evidence to be given of the contents of the letter, because the plaintiff had not given notice to the defendant to produce it before the trial, and refused to allow the plaintiff now to give the notice.

Verdict for the defendant.

New trial granted on payment of costs. Bank of Washington v. Kurtz [Case No. 950].

[See Case No. 14,340.]

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

Case No. 14,340.

UNDERWOOD v. HUDDLESTONE.

[2 Cranch, C. C. 93.] [1]

Circuit Court, District of Columbia. Dec. Term, 1813.

NOTES — ACTION AGAINST INDORSER — NOTICE OF NON-PAYMENT—MISNOMER.

Notice of the non-payment of a note signed by John, is not notice of the non-payment of a note signed by James, unless the party had good reason to believe that the note of James was intended.

Assumpsit, against the indorser of James B. Roddy's note. The notice given to the defendant was of the non-payment of a note signed John B. Roddy, &c., describing the note correctly as to every circumstance, except the signature John, instead of James.

THE COURT (THRUSTON, Circuit Judge, doubting,) said that if the jury should be of opinion, from the evidence, that the defendant had good reason to believe it to be the note in the declaration mentioned, the jury ought to presume that the defendant had reasonable notice, &c.

Mr. Jones, for plaintiff.

Mr. Law, for defendant.

THE COURT had before instructed the jury, that notice of the non-payment of a note signed by John B. Roddy, was not notice of the non-payment of a note signed by James B. Roddy; but that opinion was founded upon the naked statement of the fact that the notice was of a note signed John. B. Roddy.

[See Case No. 14,339.]

UNDERWOOD (JACOBS v.). See Case No. 7,163.

UNDERWOOD (RIDGEWAY v.). See Case No. 11,815.

Case No. 14,341.

The UNDERWRITER.

[4 Blatchf. 94.] [2]

Circuit Court, S. D. New York. Sept. 17, 1857.

SALVAGE—AMOUNT OF COMPENSATION—APPORTIONMENT—COSTS.

1. In this case, the service was a salvage service, and is entitled to a salvage compensation.

[Cited in The Williams, Case No. 17,710.]

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

[2] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

2. Reasons stated, why the compensation allowed by the district court was too large.

3. The character of the evidence as to the injury suffered by the salving vessel, commented on.

4. Apportionment of the salvage.

5. No costs allowed on either side, in this court.

[Appeal from the district court of the United States for the Southern district of New York.]

This was a libel in rem, filed in the district court by the owners of the steamship Delaware, against the ship Underwriter, to recover salvage for contributing to the rescue of the Underwriter, which was stranded on Squam Beach, in April, 1854, laden with a cargo and passengers. The Delaware had started on one of her usual trips from the city of New York to the city of Philadelphia, and, on the morning of the 17th of April, discovered the Underwriter in distress. The storm had subsided, but the wind was fresh from the land, and the sea was rolling heavily upon the vessel. She had on board between six and seven hundred passengers. Efforts were being made from the shore to communicate with her by lifeboats and otherwise, but without success. The master of the Delaware neared her, and sent a boat to communicate with the captain and ascertain if he desired assistance. The hands in the boat succeeded in the communication, and learned from the captain that he desired the Delaware to remain and furnish all the assistance in her power. Efforts were made to get lines attached to a hawser, but without success. The boat, in the course of her service, capsized, from the violence of the sea, but all the hands were saved except one, by a life-boat from the shore. The Delaware remained at the place during the day and succeeding night and until the next morning, when assistance was sent down from the city by the owner of the Underwriter, and the master of the Delaware was told that his services were no longer required, and she left. The Underwriter was finally saved by taking off her passengers, and transferring her cargo of goods and merchandise to lighters, and by the aid of pumps and heavy anchors, and the power of steam-tugs, all of which occupied some five or six days. The crew of the Delaware consisted of some thirty hands. The Underwriter, it was agreed, was worth $56,000; the Delaware about $80,000, and her cargo $90,000. There was also some evidence that the steamer was damaged by means of the deck freight, and otherwise, from remaining at anchor in a heavy sea. The district court held the service rendered by the Delaware to have been a salvage service, and awarded to her owners and crew the sum of $5000. The claimant appealed to this court.

George J. Cornell, for libellants.

Francis B. Cutting, for claimant.

NELSON, Circuit Justice. I agree with the court below that the service of the Delaware might properly be regarded as a salvage service; and that the compensation was rightfully made in conformity with the principles applicable to such a service. There appears to have been great excitement and confusion among the passengers on board of the Underwriter at the time of the arrival of the steamer; and her presence, the advice given to the captain, and the consent to remain and render all the assistance practicable, together with the efforts made for the purpose, until the means of assistance arrived from the owner, may well have contributed somewhat to the saving of the vessel, and furnish a claim to compensation beyond that of mere labor and service. But, comparing this assistance of the steamer and her hands, including her detention and damage, with the service and expense which were subsequently required and rendered by the owner before she was rescued, I cannot but think that the compensation awarded was too high, and that the rate, if extended to the efficient service and expense in the saving of the vessel, would, in the aggregate, constitute a salvage allowance beyond the principles generally admitted as governing cases of this description. I think, also, that the injury to the steamer, claimed to have been occasioned while she was detained, has been greatly exaggerated. No repairs seem to have been made upon her for a month after the alleged injury occurred, the vessel being, in the meantime, engaged in her usual trips; and the bills of repairs have not been produced, nor is it pretended that the cost approached the estimate furnished. The shipwright states that he repaired her but partially, and then gives us a general estimate of what it would have cost to repair her thoroughly. He states the expense at $2500 or $3000. Another witness states that it would have cost $800 or $1000 to put her joiner work in good order. All this is very unsatisfactory, and subject to abuse in making up an account to the extent of the injuries to the vessel.

I think $2500 in this case a liberal compensation to the owners, master and hands of the Delaware for the detention and service, including the injury to the vessel, and shall modify the decree so as to reduce it to this amount, without costs on either side in this court, and apportion the $2500 as follows: $2000 to the owners of the Delaware; $100 to the master, and the same to the mate; and the residue to be divided equally among the representatives of Leland, and the other persons composing the crew of the vessel.

Case No. 14,342.

UNDERWRITERS' WRECKING CO. v. The KATIE.

[3 Woods, 182.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1878.

MARITIME LIENS—DEBT FOR WORK AND MATERIALS—NOVATION—PRIORITIES OF LIENS—MORTGAGE.

1. Where a creditor receives, in satisfaction of his debt, the note of or a draft upon a third person, it is a novation of the debt, which is thereby extinguished, with all its accessory rights and privileges.

[Cited in Gest v. Packwood, 34 Fed. 375.]

2. The owner of a steamboat in process of construction drew drafts in favor of the builder upon a third person, who accepted them. The builder received the drafts in payment and receipted his account for work and materials; the drafts were renewed and the renewed drafts protested for non-payment, but no steps were taken to charge the indorser. *Held*, that the debt for work and materials was novated.

3. A lien given by the local law of Kentucky upon a steamboat for work and materials furnished in that state for her construction will be postponed by a United States court sitting in Louisiana, to a subsequent mortgage, duly recorded according to the act of congress, in New Orleans, where she was registered and enrolled, and which was her home port at the date of the mortgage and of its registration.

[Cited in The General Tompkins, 9 Fed. 621; The Rapid Transit, 11 Fed. 332.]

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

The steamboat Katie was built by one J. M. White, her owner, at Louisville, Kentucky, in the year 1870. After she was launched, John B. Davis performed labor and furnished materials in equipping the boat with boilers, engine, etc. His bill amounted to somewhat more than $50,000. His contract with White was that he was to be paid mainly in cash and the residue in drafts on one J. Pinckney Smith, of New Orleans. After the work was done by Davis, he received drafts on Smith, which Smith accepted, for the balance due on his account for labor and materials, and receipted the account in full. The drafts were not paid at maturity, but were renewed. On March 7, 1872, White sold the Katie to one Miles Owen, who substituted his own drafts on J. Pinckney Smith for a portion of those drawn by White and held by Davis. These and the renewed drafts still held by Davis were not paid at maturity. They were protested for non-payment, but no notice of demand and non-payment was given, so far as appeared to the drawers. At the time that Davis furnished the materials for and performed the work above spoken of, on the Katie, the laws of Kentucky gave mechanics and others a lien on steamboats, etc., for work and materials done or furnished towards the building and equipping of such steamboats within the state of Kentucky, "with a preference or priority over any other debt of the owner except to the officers and hands, and over all other liens thereafter contracted." Before the steamer was sold to Miles Owen she was enrolled in the office of the collector of customs for the port of New Orleans, and New Orleans continued to be her home port until her sale by the order of the court of admiralty. On August 29, 1872, Miles Owen, who was then the owner of the Katie, acknowledged by writing of that date his indebtedness to a large number of firms and individuals for supplies, etc., furnished his boat, and promised said creditors to pay them the sums due them respectively, and to secure such payment, he executed a mortgage on the Katie which, on August 30, 1872, was filed for record in the office of the collector of customs for the port of New Orleans, where it was soon after recorded. On November 29, 1872, the Katie was libeled in the district court for salvage. On January 11, 1873, she was sold by the order of the district court and brought, after the payment of costs and general admiralty liens, the sum of $20,922.86. John B. Davis, on April 10, 1876, and June 10, 1876, filed interventions asking that his debt for work and materials which he alleged was represented by the drafts above mentioned might be paid out of said proceeds, and claiming to have a lien by the law of Kentucky therefor on said proceeds. On April 13 the mortgage creditors named in the mortgage of August 29, 1872, filed their petition claiming that their mortgage was the only lien on the proceeds of said steamboat, and praying that said proceeds might be applied to the payment of their claims, secured by said mortgage. The district court, after hearing the evidence submitted by these conflicting interveners, dismissed the interventions of Davis, and decreed that the proceeds of the sale belonged to the mortgage creditors. [See Case No. 13,426.] From this decree Davis appealed to this court.

Thomas Hunton, for John B. Davis.

Charles B. Singleton, R. H. Browne, and B. Egan, for Wilson, Fagan & Co., and other mortgage creditors.

WOODS, Circuit Judge. A consideration of the evidence in this case satisfies me that the debt due to Davis for his work done and materials furnished for the Katie was novated by the taking of the drafts of White on J. Pinckney Smith. The only parties to the contract for furnishing engine and boiler for the boat were J. M. White, her owner, and J. B. Davis. Davis was not examined, but White, who was, testified distinctly and repeatedly that the drafts drawn by him on J. Pinckney Smith were received by Davis in payment and settlement of the balance due Davis, and that their contract was that such balance was to be paid in that way. All the circumstances corroborate this view. Davis acknowledged payment of his account against White for labor and materials by receipting

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

it in full. The drafts on Smith were all renewed at least once, and afterwards Davis received the drafts of Miles Owen on Smith in substitution for a large portion of the drafts of White. All these drafts were protested for non-payment, but no steps were taken to charge White, the drawer, and no claim of a lien upon the proceeds of the sale of the Katie was ever made by Davis until April 10, 1876, more than three years after her sale. It is true that J. Pinckney Smith testifies that the debt due to Davis was not to be considered as paid until the drafts were paid. But the weight of the evidence is decidedly in favor of the proposition that the taking of the drafts by Davis was intended both by him and White to be a novation of the debt—that Davis intended that his account should be settled and paid by the drafts.

When a creditor receives in satisfaction of his debt the note of or a draft upon a third person, it is a novation of the debt, which is thereby extinguished with all its accessory rights and privileges. Hunt v. Boyd, 2 La. 109; Walton v. Bemiss, 16 La. 140; Cammack v. Griffin, 2 La. Ann. 175; White v. McDowell, 4 La. Ann. 543; Wallace v. Agry [Case No. 17,096]; Maneely v. McGee, 6 Mass. 143; Watkins v. Hill, 8 Pick. 522. It follows, if my view of the facts is correct, that Davis has no lien against the proceeds of the sale of the Katie. But, conceding that there was no novation of the debt and that Davis had a lien by the law of Kentucky for the work and materials supplied by him in that state in the construction of the Katie, the question still remains whether that lien is to take rank in the distribution of the proceeds of the sale by this court, sitting in Louisiana and administering the laws of this state and of the United States, over a subsequent mortgage of the steamboat executed at this port, where the boat was registered, and enrolled and recorded according to the act of congress. If Davis had any lien on the Katie, it was by virtue of the local law of the state of Kentucky. The Lottawanna, 21 Wall. [88 U. S.] 558; The Edith, 94 U. S. 519.

Generally speaking, the courts of one country recognized the existence and validity of liens created by the law of foreign countries, but according to Mr. Justice Story this is not to be confounded with the giving them a superiority or priority over all other liens and rights justly acquired in the country where the court sits under its own laws. Story, Confl. Laws, § 323. In Harrison v. Sterry, 5 Cranch [9 U. S.] 289, Chief Justice Marshall says: "The words of the act of congress which entitle the United States to a preference do not restrain that privilege to contracts made within the United States or with American citizens. To authorize this court to impose that limitation on them, there must be some principle in the nature of the case which requires it. The court can discern no such principle; the law of the place where a contract is made is, generally speaking, the law of the contract; that is it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies, and where the court sits, which is to decide the case." Under the law of this state the debt of Davis has no lien upon the Katie, because here registration is necessary to the validity of a lien. In the case of Lee v. His Creditors, 2 La. Ann. 599, the supreme court of this state held that privileges established by the laws of another state for work and labor furnished for the construction of a steamboat form no part of the contract itself, and cannot follow the property into this state, when no such privilege exists here. And in the later case of Swasey v. The Montgomery, 12 La. Ann. 800, the same court refused to recognize a lien upon a steamer given for tolls by the law of Alabama.

Without going so far as these decisions and denying Davis any lien whatever, I think it clear that the lien granted to him by the local law of Kentucky should not in this forum be allowed to override a lien authorized by a law of the United States, and perfected according to that law, over property situate within the jurisdiction of this court. I should feel bound to respect his lien, but I should also feel bound to postpone it to the lien of the mortgage creditors, under the facts of this case. The result is that the proceeds of the sale must be first applied to the payment of the claims of the mortgagees, and as the proceeds will be largely insufficient to pay those claims the intervention of Davis must be dismissed.

UNGER (HALL v.). See Case No. 5,949.

UNGER (UNITED STATES v.). See Case No. 16,595.

Case No. 14,343.

UNGEWITTER v. VON SACHS.

[4 Ben. 167;[1] 3 N. B. R. 723 (Quarto, 178); 1 Am. Law T. Rep. Bankr. 224; 3 Am. Law T. 195.]

District Court, S. D. New York. May, 1870.

BANKRUPTCY—BREACH OF TRUST—RIGHTS OF ASSIGNEE—PREFERENCE.

1. U. requested S. & Co. to invest his funds in their hands in a certain stock. They informed him that they had done so, but in fact took the shares in their own name, and soon afterwards hypothecated them to a bank, as security for a loan. They subsequently failed, and on the day of their failure deposited with B. L. & B. certain securities with which to release the stock hypothecated. The bank refusing to return the stock, the securities were sold, the proceeds remaining in the possession of B. L. & B. S. & Co. having been adjudged bankrupts and an assignee appointed, U. filed a bill in equity against the assignee and B. L. & B., to recover those pro-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permisison.]

ceeds, as representing the stock. *Held*, that, with respect to other creditors, S. & Co., when they became insolvent, were merely debtors to U. for the value of the stock.

2. No lien or trust arose in respect to the securities deposited with B. L. & B., or their proceeds, that was not revoked by the appointment of the assignee, to whom the property in them passed, free of any charge in favor of U.

[Cited in Hosmer v. Jewett, Case No. 6,713.]

3. To hold the contrary would be to give U. a preference contrary to the provisions of the bankruptcy act [of 1867 (14 Stat. 517)].

[This was a suit by Edward L. Ungewitter against William Von Sachs, assignee of the firm of Schepeler & Co., and the firm of Bowdoin, Larocque & Barlow.

[See Cases Nos. 12,452 and 12,453.]

B. Roelker, for plaintiff.

T. C. T. Buckley and J. K. Hill, for assignee in bankruptcy.

W. W. McFarland, for Bowdoin, Larocque & Barlow.

BLATCHFORD, District Judge. This is a final hearing, on pleadings and proofs, in a suit in equity. The suit is brought to determine whether the plaintiff, or the assignee in bankruptcy of Schepeler & Co., is entitled to certain moneys in the hands of the defendants Bowdoin, Larocque & Barlow. The plaintiff, being a resident of Wurzburg, in Bavaria, and having funds in the hands of Schepeler & Co., requested them, in 1862 and 1863, to invest for him in the stock of the Metropolitan Gas Light Company, a New York corporation, sufficient of those funds to amount to $5,600 at par of such stock. They did so, subscribing for 56 shares of the par value of $100 each, and advising him that it was an investment for his account, and speaking of the 56 shares, in their letters to him, as his shares. They collected dividends from time to time on the 56 shares, and advised him of such collection. They in fact took the 56 shares in their own name, but he was not advised as to whether the shares were in his name or not. They made a single subscription, in their own name, for 98 shares, of which the 56 shares formed a part, 29 shares belonging to another party, and 13 shares to themselves. The 98 shares stood in their own name on the books of the company at all times, and they received a certificate for 98 shares in their own name from the company in 1863. As early as October, 1864, Schepeler & Co. hypothecated their certificate with the Phenix Bank of the city of New York as security for money then loaned by that bank to them, and it always afterwards remained in the possession of that bank, or of its successor, the Phenix National Bank, under a pledge for money loaned, the loan being renewed from time to time. The last renewal was in May, 1868, a loan which never was paid in full, but amounted to $67,500 at the time of the failure of Schepeler & Co.

Schepeler & Co. failed on the 15th of May, 1869. On that day, and at a time when they were insolvent and knew themselves to be so, or else were contemplating insolvency as inevitable, one of the firm went to the office of Bowdoin, Larocque & Barlow, the legal advisers of the firm, and, after making known to them the state of their pecuniary affairs, and the fact that the Phenix National Bank held on pledge the 85 shares of the Metropolitan Gas Light Company stock and other securities, which really belonged to other persons than Schepeler & Co., put into the hands of Bowdoin, Larocque & Barlow certain securities, which, or the proceeds of which, he requested should be used to replace or repurchase the 85 shares of stock and the other securities so really belonging to other persons, and also signed and delivered to Bowdoin, Larocque & Barlow a written order on the bank, requesting them to deliver to Bowdoin, Larocque & Barlow the 85 shares of stock and certain other specified securities. The 85 shares of stock were not delivered up by the bank and were not replaced or repurchased. Bowdoin, Larocque & Barlow applied to the bank, and offered to redeem such stock, a few days after the failure of Schepeler & Co., and to pay the highest market price for it, but the offer was refused. The offer was renewed a week or two later, and refused again. The securities so placed in the hands of Bowdoin, Larocque & Barlow having been sold, there remained in their hands, of the proceeds, after deducting what was expended in the redemption of the other securities which were to be redeemed, a sum of money which, with interest to the 11th of November, 1869, amounted, on that day, to $11,981 99. That sum was, on that day, deposited by Bowdoin, Larocque & Barlow in the New York Life Insurance and Trust Company, to their own credit, payable after ten days' notice, with interest at 4 per cent. per annum, and they received therefor a certificate of deposit, which they hold, subject to the decree of this court as to who is entitled to the money which it represents.

The claim of the plaintiff is, that the money in the hands of Bowdoin, Larocque & Barlow represents the 85 shares of stock, and that the proportion of it which represents 56 shares ought to be paid to him, and ought not to go to the assignee in bankruptcy.

However great a breach of trust was committed by Schepeler & Co. towards the plaintiff, yet, on the facts of the case, Schepeler & Co., when they became insolvent, were merely debtors to the plaintiff for the value of the 56 shares of stock, as against their other creditors, now represented by the assignee in bankruptcy, and as respected the rights of such other creditors, under the bankruptcy act. The securities themselves, whose sale has resulted in the proceeds in question, never belonged to the plaintiff, and, so far as appears, were not, prior to the time when the rights of the assignee in bankruptcy intervened, put into the hands of the plaintiff, or of any agent of his, or of any person with his

assent or privity, nor was the placing of such securities in the hands of Bowdoin, Larocque & Barlow made known to the plaintiff, or adopted or ratified by him, prior to the transfer of the title to them to the assignee in bankruptcy. The property in them was in no manner changed, nor did any legal or equitable lien, or interest, or trust, or charge, arise in respect to them, which would not have been revocable by Schepeler & Co. themselves, at least, at all times before the transaction was made known to the plaintiff. It was not made known to the plaintiff, or to any agent of his, until some time after the appointment of the assignee in bankruptcy. Such appointment must, on the facts, be considered as a revocation of anything done by Schepeler & Co., if any such revocation were needed.

Moreover, the delivery of the securities having been made for a specified purpose, and the purpose not having been carried out, because of the refusal of the bank to deliver the shares, the property in the securities remained in Schepeler & Co., and passed to the assignee in bankruptcy, free and clear from any charges in favor of the plaintiff.

Independently, however, of these views, the court is in fact asked to do, in favor of the plaintiff, what the bankruptcy act expressly forbids. It is asked to give to the plaintiff, as a creditor, a preference. If Schepeler & Co. had given directly to the plaintiff himself, the securities which they placed in the hands of Bowdoin, Larocque & Barlow, they being then insolvent, or acting in contemplation of insolvency, and intending to prefer the plaintiff, and he having the knowledge which Bowdoin, Larocque & Barlow had, the transaction would have been a fraud on the act and void, and the assignee could have recovered back the securities, or their value, from the plaintiff. The bill must be dismissed, with costs.

UNICORN, The (MORRISON v.). See Case No. 9,849.

UNION, The. See Case No. 10,297.

Case No. 14,344.

The UNION.

The SUPERIOR.

[7 Ben. 296.] [1]

District Court, S. D. New York. May, 1874.

COLLISION IN EAST RIVER—STEAMBOATS CROSSING—LIGHTS—SPEED—BURDEN OF PROOF.

1. The ferry-boat S. was coming down the East river on an ebb tide, at the rate of twelve miles an hour, at night. She discovered, off her port bow, the tug U., which was crossing the river from Brooklyn to New York, and her pilot, blowing one whistle, ported her helm. The U. blew two whistles and starboarded, and the vessels came in collision. The U. had no green or red lights set. She had a feeble light set on a pole aft, and she had in a box in her kitchen window, under her pilot-house, a white light. *Held*, that the U. was in fault in not having set the lights required by the 47th section of the act of February 28, 1871 (16 Stat. 454).

2. The burden, therefore, was on her to show that this fault could not have contributed to the collision, and that she had not shown this.

3. The U. was also in fault in not having sooner stopped and backed.

4. The S. was in fault in going at too great a speed, after dark, in a crowded part of the harbor.

In admiralty.

W. R. Beebe, for the Superior.

D. McMahon, for the Union.

BLATCHFORD, District Judge. These are cross-libels growing out of a collision which took place in the East river, on the evening of the 12th of October, 1872, between the steam ferry-boat Superior and the steamtug Union. The Superior was on a trip from her slip at South Seventh street, Brooklyn, to her slip at Roosevelt street, New York. The Union was on her way from the Atlantic Basin, in Brooklyn, to a slip in New York at the foot of Market street, East river, to lay up for the night.

The libel in the suit brought by the owner of the Superior against the Union, was sworn to by E. D. Chappell, the superintendent of the company owning the Superior, on the 29th of October, 1872, and was filed the next day. It alleges, that the Superior left her slip at 6:50 p. m., having all her regulation lights set and brightly burning, and having a competent and skillful pilot at the wheel, and a competent lookout forward, both of whom were carefully attending to their respective duties; that, at the time, the tide was running strong ebb; that, when about abreast the foot of Market street, and about one-third of the way from the New York shore towards the Brooklyn shore, two whistles were heard by those on the Superior, and a tug, which turned out to be the Union, was discovered, without any lights set, off the port bow of the Superior; that the pilot of the Superior saw, at a glance, that, in the then state of the tide, any attempt on his part to cross the bows of the tug would result in the Superior's striking the tug about amidships and sinking her, and probably drowning or otherwise injuring all those on board (the tug having, without waiting for an answering signal, starboarded, so as to change her course more on to the Superior), and the pilot of the Superior at once blew a single whistle, and forthwith put his wheel hard a-port, and stopped and backed, so as to throw her head to the northward and westward, and across the tide, and thus more rapidly deaden her headway; that the tug, instead of porting and changing, kept her starboard wheel, and kept on, striking the Superior on her port bow, and then, ranging ahead, struck and carried away the forward rudder of the Superior, and also broke her

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

stern-post and otherwise damaged her; that the collision occurred through the negligence of those navigating the tug, in running, after dark, without the proper lights being set and burning, in giving two whistles, when on the port side of the Superior, and attempting to pass to the left, in changing her course without waiting for an answering signal, in not answering the single whistle, when she received it, in not porting when she received it, and in not stopping and backing; and that, the courses of the boats being crossing, and the tug having the Superior on her starboard hand, the tug was bound, by the act of congress, to take the necessary measures in time to avoid the Superior. The claim is $286.61 for repairs and $200 for four days' demurrage.

The answer of the Union avers, that the night was clear moonlight, the moon being nearly full; that objects could be descried at a great distance; that there was no wind; that the tide was strongly ebb, running from three to four knots per hour; that the Union, on her trip, proceeded out into and along the middle of the river, eastward, toward her destination; that, when she was about the middle of the river, at a distance half way between the Fulton ferry slips, those in charge of her first noticed the Superior coming down the river at the rate of 12 or 15 knots an hour, somewhat on the Brooklyn side or shore therof, above Catharine street ferry, and about one-third of the way across from the Brooklyn side, and between 800 and 900 yards off; that the Union was then heading northerly, for her berth at Market street; that the pilot of the Union, on so observing the Superior, blew his steam-whistle twice, as a signal to the Superior that each vessel should starboard her helm and pass to the left; that the pilot of the Superior answered, by blowing his whistle twice, meaning thereby to assent to such courses; that, immediately thereupon, the Superior, instead of starboarding, changed her course, heaving her helm a-port and sheering towards and on the Union; that the pilot of the Union again blew his whistle twice, as a further signal to the Superior to go to the left; that the Superior again responded by two whistles, but those in charge of her did not change her course after taking said sheer on her port helm, but continued such course, after sheering, until she struck the Union, which she did about abreast of her engine, between her engine and boiler, about two-thirds of the way aft on the starboard side of the Union; that, at the time of the collision, the Union was only about 150 feet from the end of pier No. 36, East river, and the Superior was entirely and unnecessarily out of her usual ferry track; that the pilot of the Union, finding the Superior coming directly for him, kept his wheel hard a-starboard, so as to avoid the blow; that those in charge of the Superior made no effort to stop their vessel; that, if they had starboarded in time, or kept their course, when first signalled by the Union, no collision would have occurred; that the Union had a competent and skilful pilot at her wheel, and a competent lookout forward, and all the lights required by law for her to carry, set and burning brightly; and that the collision occurred through the negligence of those navigating the Superior, in these respects: 1. The pilot of the Superior did not take the course indicated by her whistles. 2. He did not keep his course, while, if he had done so, there would have been no collision, as the Superior would have passed 300 feet off from the Union. 3. The Superior did not starboard her helm or stop, and the Union could not stop, as the Superior would then have struck her in the boiler and sunk her. 4. The Superior was proceeding at a dangerous and unlawful rate of speed for that vicinity, and in the then state of the tide, while the Union was going at a much less rate of speed than the law and prudence allowed her to go. 5. That the Superior was out of her usual ferry route, and not in the course pointed out by law.

The libel by the owners of the Union against the Superior claims damages to the amount of $3,100. Its averments are the same as those of the answer to the libel of the Superior. The statement, in the answer of the Superior to the libel of the Union, of the circumstances of the collision, is the same as that given in the libel of the Superior.

I have arrived at the conclusion, in this case, that both vessels were in fault, and that the damages must be divided. The evidence is very voluminous, and there is much conflict of testimony on various points, but none of those which I regard as controlling to determine the faults of the respective vessels.

The Union was in fault in respect to her lights. The statute in force in regard to the lights she was bound to carry and exhibit, at the time of this collision, was the 47th section of the act of February 28, 1871 (16 Stat. 454), which provides as follows: "Every coasting steamer, and every steamer navigating bays, lakes or other inland waters, other than ferry-boats and those above provided for, shall carry the red and green lights as provided for ocean-going steamers, and, in addition thereto, a central range of two white lights, the after light being carried at an elevation of at least fifteen feet above the light at the head of the vessel, the head-light to be so constructed as to show a good light through twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the vessel, and the after light to show all around the horizon." The Union had no red light and no green light. She had a light hoisted on a pole aft, but, on the evidence, it must have been a feeble one. She had in a box in the kitchen window, under her pilot-house, a white light. This was intended for a head-light, but it was not "at the head of the vessel." It was a long distance back from the head of the vessel, and it was

so arranged, that, instead of showing as far back as abeam and two points abaft thereof, on either side, the wooden sides of the box prevented its being seen as far back as abeam. How much it was cut off from being seen forward of abeam, cannot be told. Now, in the way in which the Union was approaching the Superior, it was very important for the Union to show a green light on her starboard side, and a white light at her head. She had no green light, and it is extremely probable her white light in the kitchen window was cut off to the view of the Superior. The absence of these lights was a fault in the Union. It is for the Union to show not merely that such fault might not have been a cause contributing to the collision, or that it probably was not, but that it could not have been. The Union has not shown this. I also regard the Union as in fault in not having stopped and backed as soon as she should have done so.

I find the Superior to have been in fault in going at too great a rate of speed, with the tide, after dark, in a crowded part of the harbor.

There must be a reference to ascertain the damages, and an apportionment.

Case No. 14,345.

The UNION.

[2 Biss. 18,[1] 2 Chi. Leg. News, 121.]

Circuit Court, N. D. Illinois. June, 1868.

MARITIME TORTS—REMOTE DAMAGES.

The libellant had left his tug and taken refuge in another at the time of a collision, and was injured in regaining his tug. *Held*, the collision was the remote, not the proximate, cause of the injuries to libellant, and he cannot recover.

[Cited in Cardwell v. Republic Fire Ins. Co., Case No. 2,396; The Nereus, 23 Fed. 457.]

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

This was a libel filed by Peter Nolan, one of the crew of the tug Dole, for damages caused by the crushing of his leg at the time of a contact between the tugs Dole and Union, he claiming that it was on account of the negligence of the latter tug.

The facts appear in the opinion.

Bates & Towsley, for libellant.

Waite & Clarke, for respondent, cited in support of the position that the damages were too remote to be recovered: Pearson v. Duane, 4 Wall. [71 U. S.] 605; Insurance Co. v. Tweed, 7 Wall. [74 U. S.] 50; Milton v. Hudson River Steamboat Co., 37 N. Y. 210; Miller v. Trustees of Mariners' Church, 7 Greenl. 51; Shannon v. Comstock, 21 Wend. 457; Clark v. Marsiglia, 1 Denio, 317; Spencer v. Halstead, Id. 606; Loker v. Damon, 17 Pick. 284; Ryan v. New York Cent R. Co., 35 N. Y. 210; Waite v. Gilbert, 10 Cush. 177; Hill. Torts, 424; Denny v. New York Cent. R., 13 Gray, 484.

DRUMMOND, District Judge. The tugs Union and Dole collided outside of Chicago harbor, May 28, 1867, no special damage being done, but several of the men on the Dole, the master and libellant among the rest, fearing that she would fill and sink, left her and took refuge on the Union. The tugs shortly afterward separated. The Dole soon righted, and those of her crew on board the Union wished to return. The Union then approached the Dole to put them on board, and after two efforts all were put on board except libellant. He was sitting upon the rail with his legs hanging over the side, and when the tugs came in contact one of his legs was crushed.

This being so, the question arises, whether the fault, if fault there was in the Union, in the first instance was the proximate cause of the injury to the libellant. Admitting that there was fault on the part of the Union, and that the collision was the result of that fault, was he injured by that collision in such a way as to entitle him to damages? I think he was not.

It is true, as is argued by the counsel, that if the tugs had not come together in the way that they did, if these men had not been frightened as they were and taken refuge on board of the Union, the result would not have happened. In that sense the collision was the cause of the injury, but in the sense of the law I think it was the remote cause; the remote, and not the proximate cause of the injury. The proximate cause of the injury was the two tugs coming together afterwards, and the libellant putting his legs over the rail of the Union in the effort to return on board of the Dole. It was this last contact, not claimed to be a fault on the part of the Union, together with the position of the libellant, that were the proximate causes of the injury to the libellant, and therefore, without deciding whether in point of fact, under the evidence, the Union was in fault or not, I think that the libellant cannot recover. The libel will therefore be dismissed.

Case No. 14,346.

The UNION.

[4 Blatchf. 90.][1]

Circuit Court, S. D. New York. Sept. 15, 1857.

PRACTICE IN ADMIRALTY — DISCHARGE ON STIPULATION—SALE—RIGHTS OF PURCHASER—ORDER FOR REDELIVERY—MISTAKE AND FRAUD.

1. Where, in a suit in rem against a vessel, after she had been discharged on a stipulation for costs and value, the latter in $4,000, the amount claimed in the libel, the libel was amended by claiming $8,000, and subsequently a decree was entered in favor of the libellant, for $7,834.75, with interest, with a provision that the stipula-

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[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

tors pay into the registry the amount of the stipulation, and afterwards the district court made an order that the claimant redeliver the vessel to the marshal, but that, it being represented that she was beyond his control, he pay into the registry $10,000, part of the purchase money of the vessel on her sale by him subsequently to her discharge, and that that be taken as a sufficient compliance with the order to redeliver, *held*, on appeal, that the order for the redelivery of the vessel, or the payment of the $10,000 into the registry, was erroneous.

[Cited in The Wanata, 95 U. S. 605.]

2. The vessel, after being so discharged, returned into the hands of her owner subject to all previously existing liens or charges, the same as before her seizure, except that on account of which she was seized; and she was also subject to any subsequently accruing liens or charges in the hands of her owner, or in the hands of any person to whom she might be transferred.

[Cited in The Thales, Case No. 13,855; The Old Concord, Id. 10,482; The William F. McRae, 23 Fed. 558.]

3. A redelivery of the vessel would be one subject to all these existing or subsequently accruing liens, and also to the rights of any bona fide purchaser, in case of a sale of her in the meantime.

[Cited in U. S. v. Mackey, Case No. 15,696.]

4. In this case, the vessel had, after her discharge, been sold and passed into the hands of her purchaser; and his title was undoubted.

5. In case of any mistake or fraud committed in entering into the stipulation, and of the improvident discharge of the vessel, it would be competent for the court to relieve the parties concerned, on an application within a reasonable time, by ordering the vessel back into the custody of the officer.

[Cited in The White Squall, Case No. 17,570; The Jack Jewett, Id. 7,121; The Favorite, Id. 4,698; Roberts v. The Huntsville, Id. 11,904; U. S. v. Ames, 99 U. S. 42; The Two Marys, Case No. 14,300; The H. F. Dimock, 52 Fed. 600; The Haytian Republic, 8 C. C. A. 182, 59 Fed. 478; The Haytian Republic, 154 U. S. 126, 14 Sup. Ct. 994.]

[Appeal from the district court of the United States for the Southern district of New York.]

This was a libel in rem, filed in the district court, by the owners of the ship Charles, against the steamship Union, for a collision, which occurred off Cape Hatteras, on the 3d of February, 1854. The libel claimed $4,000 damages. The owners of the Union appeared as claimants, to defend, and two of them, Spofford and Tileston, entered into the usual stipulation for costs and the value of the vessel, the latter to the extent of $4,000, the damages claimed in the libel, upon which the vessel was discharged from the arrest, by an order of the court, on the 7th of March, 1854, and passed into the hands of her owners. On the 27th of May following, the libellants amended the libel, claiming eight thousand instead of four thousand dollars damages. On the 13th of April, 1855, the district court entered an interlocutory decree in favor of the libellants, which was general in its terms, condemning the steamship Union in the amount of the damages sustained by the collision in the pleadings mentioned, and referring the case to a commissioner to ascertain and compute the amount. A great deal of evidence was taken before this officer, upon the question, and, on the 19th of May, 1856, he reported the amount at $7,834.75, with interest. Exceptions were taken to the report, but they were overruled, and a final decree was entered on the 10th of June, 1856, for the amount reported. That decree further provided, that unless an appeal should be taken from the decree, the stipulators should pay into the registry the amount of the stipulation for costs and value, and the clerk should distribute the proceeds. On the 3d of December, 1856, a motion was made in the district court, on behalf of the libellants, that the claimants bring the ship or her proceeds into court, or that, in default thereof, the stipulation be increased, and a decree of the court be entered thereon, for the full amount of the damages decreed. The claimants opposed that motion, and read an affidavit showing that, after the vessel was discharged from the arrest on the stipulation, and about the middle of March, 1856, she sailed for Europe, and was delivered to a company who had purchased her, and that the claimants had had no interest in her since. On the 20th of December, 1856, the district court ordered that the claimants redeliver to the marshal the vessel, that she might be taken to satisfy the decree rendered in the cause, but that, it being represented that she was beyond their control, the claimants pay into the registry the sum of ten thousand dollars, a part of the purchase money of the ship, and that the same be taken as a sufficient compliance with the order to redeliver. The claimants then appealed to this court.

Edwin W. Stoughton and Daniel D. Lord, for libellants.

Francis B. Cutting, for claimants.

NELSON, Circuit Justice. Upon the proofs, I am satisfied that the decree of the court below in favor of the libellants was correct and should be affirmed. The questions presented on the appeal relate more particularly to the amount of damages. It is to be observed, in the first place, that this is a proceeding in rem, the owners appearing to defend, as claimants, on entering into the usual stipulation. Therefore, no decree can be rendered personally against them, except as stipulators in the suit; and, of course, only to the amount provided for in their stipulation. Hence, the decree in this case, so far as it affects the owners personally, is properly limited to that amount, and, also, to the two owners, Spofford and Tileston, who were the only parties to the stipulation. In other words, the decree as against them is for the $4,000 and costs.

The question, therefore, as to any further liability, turns upon the validity of the subsequent order to redeliver the vessel into

the custody of the marshal, or, in default thereof, to pay into the registry the sum of $10,000. This order assumes that the discharge of the vessel from the seizure, and her delivery to her owners, was not absolute, but that she is still subject to the exertion of the power of the court for the purpose of satisfying any decree. No case has been furnished in which this power of the admiralty has been exerted; and, on principle, I do not well see how it can be maintained. The vessel, after being discharged from the arrest upon the giving of the bond or stipulation, returns into the hands of her owner, subject to all previously existing liens or charges, the same as before the seizure, except as respects that on account of which the seizure was made. She is also subject to any subsequently accruing liens or charges in the hands of her owner, or in the hands of any person to whom she may have been transferred. The redelivery, therefore, of the vessel, if permitted, or enforced, must necessarily be a redelivery subject to all these existing or subsequently accruing liens, and, also, to the rights of any bona fide purchasers, if a sale has in the meantime taken place. The complication and embarrassment growing out of the exercise of the power, if sanctioned, are apparent, and this, doubtless, accounts for the absence of any precedent in the books. In the present case the vessel has been sold, and has passed into the hands of the purchaser, and his title is, I think, undoubted. It is so for the reason that, on the discharge of the vessel, on the giving of the bond or stipulation, she is thereby discharged from the lien or incumbrance which constituted the foundation of the proceeding against her, the security taken being the substitute for the vessel.

This view is strengthened by the provisions of the act of March 3, 1847 (9 Stat. 181), which provides that, in case of a warrant against the vessel, or other process in rem, it shall be the duty of the marshal to stay the execution of the process, or to discharge the property arrested, if the same has been levied on, on receiving from the claimant a bond or stipulation in double the amount claimed by the libellant, &c. According to the terms of the act, the tender of the proper security in time would seem to prevent even the arrest of the vessel, and, of course, in such a case there could be no claim to a redelivery.

I agree, that if there has been any mistake or fraud committed in entering into the stipulation, and the vessel has been improvidently discharged, it would be competent for the court to relieve the parties concerned, on an application, within a reasonable time, by ordering the vessel back into the custody of the officer. But that is wholly a different question from the one now under discussion.

Then as to that part of the decree or order which requires the claimant to pay in a portion of the purchase money. If the vessel is not subject to the exercise of this power of the court, to be redelivered into the custody of the marshal, to be applied to the payment of the damages, it follows that the proceeds of a sale are not. They cannot, in this respect, be distinguished from the vessel herself.

I must, therefore, reverse the decree or order directing the redelivery of the vessel, or the payment of the $10,000 into the registry, and affirm the decree against the stipulators.

Case No. 14,347.

The UNION.

[Blatchf. & H. 545.] [1]

District Court, S. D. New York. Sept. 17, 1836.[2]

SEAMEN—WAGES—DESERTION—ACT OF CONGRESS.

1. Under the maritime law, there can be no desertion by a seaman, working a forfeiture of wages, unless there is an abandonment of the ship and of her service, with an intent not to return.

[Cited in The John Martin, Case No. 7,357.]

2. The act of congress of July 20th, 1790 (1 Stat. 131), varies that qualification of the offence, supplies a new definition of it, prescribes the manner in which it must be proved, and fixes an inflexible punishment.

[Cited in The John Martin, Case No. 7,357; The Elwin Kreplin, Id. 4,427.]

3. Under the maritime law, courts of admiralty could mollify the penalty of absence without leave, and of desertion, and could do so upon evidence mitigating the offence, or showing the repentance of the deserter, at any reasonable time after the offence.

[Cited in The Swallow, Case No. 13,664; The Balize, Id. 809.]

4. The statute inflicts an absolute forfeiture of wages in both cases.

5. The construction of the statute, considered.

6. The mode of proof appointed by the statute must be strictly followed, in all particulars.

[Cited in Gifford v. Kollock, Case No. 5,409.]

7. A seaman has, under the statute, forty-eight hours to return to his vessel, after having absented himself from her without leave, and does not incur a forfeiture of wages if the vessel departs from the place before the expiration of the forty-eight hours

8. If a seaman has permission from the second mate to go on shore, and acts in confidence upon such permission, he is not absent without leave from the commanding officer, although the chief mate or master is, at the time, on board.

9. Such permission to go ashore may be implied from the acquiescence or silence of the officers in command, or of the master on shore.

10. Where a seaman goes ashore temporarily, intending to return immediately, and makes all reasonable efforts to do so, if the master, knowing that he is on shore, prevents his reaching the ship, and the seaman is thus left in a foreign port, he is entitled to recover full wages for the voyage.

[Cited in Worth v. The Lioness No. 2, 3 Fed. 925.]

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

[2] [Reversed in Case No. 14,348.]

11. He can also recover the value of his wearing apparel and effects left on board the ship, and taken away in her, and not restored to him.

In admiralty. This was a libel in rem, by Peter Johnson, Harman Retan and William Brown, three of the crew of the ship Union, for wages for a voyage from New-York to Liverpool and back, and for the value of three chests of clothing. The libellants alleged, that they performed the voyage out, doing their duty in all respects, and unloaded the vessel at Liverpool, and loaded her for her return; that, whilst lying at Liverpool, the crew boarded on shore; that, on the 11th of August, 1836, the libellants had permission from the first officer, the master not being on board, to go on shore for their dinners; that they returned after an absence of twenty or thirty minutes, and found that the vessel had left the pier, and was lying off and on a short distance from it, and so near that they could distinguish persons on board; that they made signals to the vessel, and applied to the boat tending her to put them on board; that the boatmen refused, saying, that the master had given orders not to take them on board; that they remained on the pier, making all possible exertions to get to the ship, till she made sail, leaving them behind, and taking away all their clothing; and that the American consul took charge of them, and they returned to New-York by the way of Savannah, working their passage, and receiving no wages.

The claim and answer admitted the hiring for the voyage out and back, and the service and good conduct of the libellants on the voyage out, and on board until the 11th of August, and alleged, that while the master was on shore that day, making arrangements for the sailing of the vessel, the libellants went on shore and left the vessel, without the permission or consent of the first officer, and were forbidden by him to go on shore, and went with his knowledge, but in disobedience of his orders, and not intending to return. The claim and answer further alleged, that the cook and steward deserted the vessel the same morning; that, when the libellants left, there was no dinner cooked for them, but dinner was prepared on board at about two o'clock in the afternoon; that, at about half past eleven o'clock in the forenoon of that day, the vessel had hauled out of the dock to the pier-head, had all her sails hoisted, took a pilot on board, and was ready for sea, only waiting for the master to come on board; that the libellants well knew this, and also the necessity for leaving the port when the wind and tide were favorable, as both then were; that, at about twelve o'clock, the libellants left the vessel; that, at about one, she was ordered off the pier by the dockmaster; that, at half past one, the master came on board, and was informed of the absence of the libellants; that, in consequence of their absence, the vessel lay to in the stream, backing and filling, and waiting for them, till near three o'clock; that nothing detained the ship but their absence; and that she would have put to sea immediately on the master's coming on board, but for that absence. The answer also denied that the libellants returned to the pier-head within half an hour after they left the vessel, and averred that the claimants did not believe they returned whilst the vessel lay off and on in the stream; that the master returned to the pier-head at a quarter past one, and that neither of the libellants was then there, nor did he hear of their having been there. The answer also denied that the libellants hailed the vessel or made signals, as, from the situation of the vessel, the signals could not but have been seen, especially as a telescope was used for the purpose of ascertaining whether the libellants were in sight. The answer also denied that the libellants endeavored to get a boat or be put on board, as they could easily have procured a boat. It also denied that any boatmen refused to put them on board, and that the master gave orders to any boatmen not to bring them off. It further averred that the master gave the shipping-master, who went ashore in the boat, orders to bring the libellants off, and, if they could not be found, to get others in their places; that no particular boat tended the ship; that the master was put on board only a few rods from the pier; and that, on the same day, the mate made an entry in the log-book, as follows: "At twelve, Pet. Johnson, Harman Retan and Will. Sands left the vessel without permission, after being forbid so to do." The answer also denied that anything was due to the libellants or to either of them, on account of wages, or that they had a right to receive anything for wages or clothing, as was sought and prayed by the libel, and insisted that the libellants had, by their desertion, forfeited all their wages and clothing, and all other things claimed by them, and all right to recover for the same.

Voluminous proofs had been taken in this country, and under commissions to England, in a suit between the United States and the present claimants, for not fulfilling the stipulations of the bond executed by them at the custom-house in New-York, for the return of the libellants in the ship. That cause had been tried before this court and a jury, and a verdict had been rendered in favor of the United States at the present term, and it was agreed by the counsel for the respective parties in this case that the proofs and arguments adduced on that trial should be regarded as addressed to the judge on this hearing, and be considered as applying to this case. The testimony and depositions thus adduced were, in many respects, discordant with those taken in the present case, and were in direct conflict upon the point as to whether the libellants had leave from the first mate to go ashore.

The proof was, that at the time the libellants left the vessel, the master was on shore, but the first and second mates were both on board. The second mate testified that the men asked him for leave to go on shore and get their dinners, and that he gave them leave, ordering them to come immediately back. Evidence was offered to show that the libellants applied to the first mate, and that he expressly forbid their going. Coffin, the first mate, swore that the libellants did not ask his leave to go ashore; that he forbade their going, when they were not more than twenty feet off; and that they heard him. The pilot, who was a witness for the claimants, did not hear any permission or orders given by either of the mates, but himself ordered the libellants to remain on board. The deposition of Edmonston, a bystander, on the part of the claimants, asserted that he heard the pilot and chief mate forbid the libellants' going ashore. On his cross-examination, he said that they "requested" the men to remain on board; that they replied to the mate that they would not be gone long, as they were only going for a glass of grog; and that he gave Johnson a sixpence for that purpose. Jones, another witness for the claimants, saw the libellants leave the vessel, did not hear permission given them, but heard one of the mates call out to them and ask them where they were going, and they replied that they would not be gone more than twenty minutes, and ran off.

On the trial at the suit of the United States, Retan, one of the libellants, testified that Johnson asked leave of both the mates; that the libellants all left the vessel publicly in sight of the crew; and that the first mate did not say a word, though he might have spoken to Brown Johnson testified to the same effect, and also that the second mate told him that if he came back in half an hour it would be in time. Holmes and Kriegman, seamen on board, also testified that the libellants asked and obtained leave of absence from the first mate. Smith, the second mate, also swore that he heard the first mate give Johnson leave to go ashore, and that the other two men accompanied him. It further appeared, by the evidence of the claimants' witnesses, that the master met the libellants on shore as they were going from the vessel, and asked them where they were going; that they replied, "for a glass of grog;" that he told them to be back immediately, as he was going to sea directly; and that he then went to the ship and told the mate to get all ready and go out into the stream, and he would go and look for the men. There was much conflict in the testimony as to the length of time the libellants were absent, but the claimants' witnesses stated that the master returned without the men, and put off from the pier in a boat, and that soon afterwards the men came down, and were upon the wharf when the boat returned. The first mate testified that the master gave the boatmen orders to bring off the libellants; that nothing detained the vessel but their absence; and that he, the first mate, was on the look-out for them, and within hailing distance of the wharf, but could not see them. Edmonston, who was upon the pier, swore that the libellants were in fault in not returning. On the other side, the two boatmen swore that they received positive orders from the master not to bring off the libellants, and that one of them jumped into the boat for the purpose of returning, and was ordered out. Some of the crew and passengers swore that the men were seen by all on board, and that the general understanding was, that the vessel was waiting for a cook and a steward, and for some other men. The entry in the log was made on the same day, after the vessel had got under weigh and had left the port.

Washington Q. Morton, for libellants.
Elijah Paine, for claimants.

BETTS, District Judge. The purport of the pleadings between the parties, is, on the part of the libellants, to claim wages for the entire voyage stipulated in the articles, and also the value of their wearing apparel carried off in the ship, and not restored to them, on the ground that performance of the contract by them was prevented by the fault of the master; and, on the part of the claimants, to bar both demands, because the libellants had deserted the ship and had thus forfeited their wages and their clothing left on board. The controversy in the cause turns upon this defence; for it is not disputed that the libellants performed their duty during the voyage out, and were left in Liverpool by the departure of the ship.

There is a conflict in the testimony as to the manner in which the libellants were separated from the ship. It is a question to be decided by the evidence, whether the forfeiture demanded can be maintained either upon the general principles of the maritime law, or under the special provisions of the act of congress of July 20, 1790 (1 Stat. 131). The allegations in the answer, although not technically adapted to either branch of the defence, are substantially sufficient to put those points in issue, and to authorize a decree for the claimants, if they have sustained the defence by proof, and if the law entitles them to a judgment of forfeiture. The efforts of the defence have been mainly addressed to the point, that the libellants wilfully deserted the ship, and the testimony is to be first applied to that branch of the case.

Desertion is, by the law maritime, an unlawful and wilful abandonment of a vessel, during her voyage, by her crew, without an intention of returning to their duty. It is not a mere unauthorized absence from the ship without leave. Molloy, bk. 2, c. 3, pp. 248, 249; Abb. Shipp. (Ed. 1829) 134, 135;

3 Kent, Comm. 198. The one is an act of deep turpitude and disloyalty, evincing premeditation and criminality of purpose; the other often springs out of the improvidence and thoughtlessness which are incident to the habits and character of sailors. I have examined carefully the evidence produced by the claimants to establish the first charge, and no part of it, in my opinion, fixes upon the libellants an intention to abandon the ship. If the libellants went away from the ship without the permission of the officer in command, their going on shore at the time was disorderly and culpable. But the claimants show by their own proofs, that the libellants left the ship for an innocent object, and returned so soon to the place where they left her, and made such urgent exertions to get on board again as to demonstrate that they had no design to abandon her. This strips their act of the essential ingredient of a desertion under the maritime law. That is a high crime in all maritime codes. 1 Valin, Comm. sur l'Ord. de la Mar. bk. 2, tit. 7, art. 3, p. 534. Some of the early laws placed the desertion of a sailor from the merchant service, particularly if accompanied with a larceny, in the same rank with desertion from a ship of war, and subjected the offender to the punishment of death. Laws of Wisbuy, art. 61. By other laws, he was, for mere desertion, branded or imprisoned as a felon. Laws of the Hanse Towns, art. 43, cited in Malynes' Lex Mercatoria, App. 20. And, in the more humane usages and legislation of later times, desertion is punished by imprisonment of the deserter or confiscation of his wages and effects, or by both. Abb. Shipp. (Ed. 1829) p. 134. And, in England, the punishment is prescribed by act of parliament (Act 2 Geo. II. c. 36, §§ 3, 4; Act 31 Geo. III. c. 39, §§ 3, 4). In my opinion, the evidence disproves the charge that the libellants were guilty of desertion, as that offence is defined and punished under the maritime law.

If, then, the claimants show legal cause in bar of the action, and for the forfeiture of the demands sued by the libellants, it is under the other branch of the defence—that their absence constituted the offence called "desertion," in the act of congress of July 20, 1790 (1 Stat. 131), and made punishable as such. Under the maritime law, the courts exercised a discretion, in punishing malfeasances on the part of seamen, in derogation of their duty to the ship and of the authority of the master, but not amounting to wilful desertion, by a subtraction of wages, or by personal fine or imprisonment. Laws of Oleron, art. 20; Laws of Wisbuy, art. 17; Laws of the Hanse Towns, art. 40. The British parliament, to guard against severe punishments disproportioned to the offence, limited, by statute, the kind and degree of punishment which might be inflicted on mariners for leaving a vessel on a coasting voyage or in a home port, without permission of the officer in command. Molloy, bk. 2, c. 3, p. 249; Act 31 Geo. III. c. 39. The act of congress adopts, in almost the same words, the description of the offence of absence from the ship without leave of the officers, which is found in the English statute. But, creating a new method of proof, it declares an absence, so proved, to be a "desertion," carrying with it a forfeiture of the wages and effects of the seaman, and thereby raises what is a minor offence under the maritime law and the English statute to one of high magnitude under our statute, and makes no discrimination between absences at home, absences in coasting voyages and absences in foreign voyages. This court has always regarded our statute as not only determining the punishment which alone can be applied to this offence, but as intended to define "desertion," and to appoint the method by which that crime must be proved, before the serious consequences denounced against seamen can be incurred. It has, accordingly, been held, that every absence of a seaman from his ship, which is set up as a forfeiture of wages, must be proved in the manner directed by the statute, whether the leaving the ship was with the intention to desert or not. This principle is involved in the cases of The Cadmus [Case No. 2,280]; The Martha [Id. 9,144]; The Elizabeth Frith [Id. 4,361]; and several others. The doctrine deduced from that view of the law was, that acts of negligence or malfeasance in a crew, in respect to their remaining with the ship, could no longer be visited with a forfeiture of wages and effects, upon the common principles of the maritime law, nor unless the proof was made out in the way prescribed by the statute. As a necessary corollary from that doctrine, it was held to be indispensable to a conviction, to produce every particular of the proofs demanded by the act. It was also held, that the record in the log-book must declare the beginning and continuance of the absence, must be entered the day the seaman left the ship, and must assert that his absence was without the leave of the officer in command. A case decided by the circuit court for the First circuit has since been made public, which gives a different construction to the statute, and holds, in effect, that a new offense has been created and superadded by it to those existing under the law maritime, and that seamen remain liable, as before, to a confiscation of their wages, for abandoning their vessel with intent not to return to her, and may be convicted of that offence upon oral evidence alone. Cloutman v. Tunison [Id. 2,907]. This decision is high authority, and might have controlled the opinion of this court, if known to it at the time of the former adjudications; but I am not so convinced of the justness of the interpretation put by it upon the statute, as to retract the

previous views of this court and adopt that opinion in their place. I think that the case of Cloutman v. Tunison [supra] overlooks the probable policy which led to this enactment, and gives it an operation especially beneficial to ship-owners and injurious to seamen, without any compensatory privileges to the latter. The proneness of seamen to leave their ship whenever the opportunity presents itself, is as notorious as their characteristic restlessness of disposition and heedlessness of obligation. Their consequent exposure to sacrifice all their earnings by unauthorized absences from their vessel was apparent to congress. Ship-masters or owners, irritated by suits for wages, were accustomed, after voyages were ended, to oppose the actions, by setting up such absences, on oral proof, as acts of desertion, although they were overlooked and considered of no importance at the time. The rights of the men were thus placed at the discretion of the courts. Some tribunals, disposed to look with leniency upon their doings, would exact very clear evidence of wilful fault on their part, and of injury to the ship, and would demand clear proof that no disposition had been shown by the seamen to make amends or to return to duty, and would be inclined to impose the mildest punishment the case would warrant. Other judges, with a sterner eye to subordination, to discipline and to fidelity in the service, would call for a rigid compliance by seamen with every duty, and would, on slender proofs, adjudge the highest penalty of the law for absences of a venial character, even where the seamen had been anxious to return to their duty. For, although the law accorded to a seaman the privilege of repenting of his misconduct, and of being reinstated in the ship, on proffering proper amends, yet it left it to the discretion of the court to say whether repentance had come in due time and had been satisfactorily manifested. The sub-officers of the ship, harassed with actions by the seamen for alleged misusage on their part, or bearing grudges for personal indignities or wrongs received on the voyage, would be willing witnesses, at remote periods afterwards, to furnish evidence of absences or desertions during some period of the voyage. The act of July 20, 1790 (1 Stat. 131), operates to correct the unrestrained discretion of courts and the loose rules of evidence in relation to this subject; and it is reasonable to suppose that congress intended, by remedying those evils, to secure some equivalent to seamen for the new advantages conferred on ship-owners by the act, in rendering any casual absence by a seaman from his ship, for over forty-eight hours, without any intention to desert, cause for an absolute and unremittable forfeiture of wages.

Another prominent mischief in the existing law was, the want of a fixed rule, defining the offence of desertion and determining the time within which a seaman might repair his error by returning to the ship, and the master or owner be compelled to accept his return. It is hardly to be supposed that congress, in view of the state of the law maritime, as it then existed, and the class of men they were legislating about, passed the act in question with the idea that the public interest demanded that a sailor, who, in a spirit of frolic or heedlessness, dodges his officers and goes ashore for a spree, or gets into one after leaving the ship, and keeps away for more than forty-eight hours, should be subjected to no less a mulct than the absolute forfeiture of his wages and clothing, whilst his comrade, who, clandestinely, with premeditation, or openly, in defiance of the authority of the ship, abandons her, declaring his intention not to return, might come back at the end of a week or more, and, at the discretion of the court, and against the remonstrances of master and owner, be reinstated in his place, with a full right to his wages. I think it more reasonable to suppose that the statute was intended to reduce to certainty the loose rules respecting the signification and consequences of the crime of desertion, in order that masters, owners and mariners might know by what law they were governed, than to suppose that a legislation so formal, and burthened with such onerous forfeitures against seamen, was considered as called for, or was meant to be applied solely to the commonplace misdemeanor with seamen, of absence from the ship without leave. It is not my purpose to discuss the question as to the true construction of the provisions of the statute. These suggestions are made as an apology for adhering to the interpretation adopted by this court, until an exposition of the law shall be given by the supreme court or by the circuit court for this district, which will be conclusive upon this court. In my judgment, then, the departure of the libellants from the ship, whether alleged against them as a wilful desertion or as an absence without leave, must, in order to subject the libellants to a forfeiture of their wages and property, be established by the evidence and in the manner prescribed by the statute.

The preliminary or documentary proof by the log-book, demanded by the statute, is sufficiently made out in point of form, in respect to two of the libellants—Peter Johnson and Harman Retan. The other libellant, William Brown, is not mentioned in the log. His name is in the articles. William Sands is named in the log, with Johnson and Retan, but the mate does not prove, if such testimony could be competent, that the entry was intended to be "Brown" instead of "Sands." In regard to Brown, therefore, the evidence is vitally defective in this particular, and, accordingly, no forfeiture of wages and clothes, under the provisions of the act of congress, can be set up as to him.

I think, also, that there is a cardinal de-

fect in the claimants' evidence in respect to the other libellants. The ship went to sea within two or three hours after the men had left her and of course they could not have returned to her within forty-eight hours. It may, perhaps, be open to debate, whether, in case of a faulty absence, the seaman is not to take the risk or peril of being able to get back to the ship within the time limited. Whether this would be so in the case of a disability solely personal to the seaman, need not now be considered. For, in the present case, the preventive cause existed in the ship and in her officers alone. The statute grants to seamen who improperly leave their ship, a locus penitentiæ of forty-eight hours. Until the completion of that term, no cause of forfeiture comes into existence. This would be the reasonable interpretation, if the penalty had been declared for the mere act of absence for so many hours. But the language of the statute makes it plain, that it intended the seaman should have the benefit of every hour out of the forty-eight, to return to the ship, and that no forfeiture arises unless that time has been allowed him. The enactment is: "If such seaman shall return to his duty within forty-eight hours, he shall forfeit three days' pay for every day he shall so absent himself, to be deducted out of his wages; but, if he shall absent himself for more than forty-eight hours, at any one time, he shall forfeit all the wages due him," &c.—that is, he is subject to a fine of six days' pay, and no other punishment, if his absence continues the whole forty-eight hours. The forfeiture does not begin to attach before forty-eight hours of absence have expired, within all which time the seaman must have neglected to return to his duty. This necessarily imports that the ability to return was not withheld from him for that time. But if within three hours the vessel went to sea, and put it out of the power of the libellants to return to their duty, it seems to me that the owners cannot be permitted to make the volition and act of the master change the fine of six days' pay appointed by the statute for an absence of two days, into an instant forfeiture of wages for perhaps as many months, or for a year, already earned. Had the ship been destroyed by fire in the harbor, or been sunken there before the forty-eight hours ran out, could a forfeiture be exacted of these men? Yet, in respect to their right to elect to return within the time limited, it is the same whether the ship was physically destroyed, or was removed out of the way, so as to render it impracticable for them to join her. If the claimants demand a forfeiture under this act, they must show the commission of the offence within the terms of the law. In respect to the punishment now sought to be inflicted under this statute, the case stands as if the law had granted an absolute furlough or leave of absence to the libellants, at Liverpool, for forty-eight hours, independently of the consent of the master or officers, and without the limitation or condition that the vessel should remain so long in that place. Clearly, the master could not, at his own volition, by removing the ship and thus preventing the return of the libellants at the end of the furlough, convert that privilege into an offence which should carry with it the confiscation of the wages and wearing apparel of the men. The act provides, in effect, for a statutory furlough or leave of absence, with the limitation that the seaman may, at the option of the master, be compelled to pay three days' wages for each day's privilege of absence. In the present case, the privilege was defeated by getting the ship off, without the assent or knowledge of the seamen, before the expiration of the time allowed them to redeem the forfeiture, if a technical one had been incurred, and thus a punishment not authorized by congress is imposed upon them.

The argument that the libellants went on shore in their own wrong, knowing the ship was to go to sea immediately, and thus by their misconduct caused a delay of the voyage and other injuries, does not obviate the objection to the forfeiture now demanded. That act of irregularity may bring them within the penalties of the law maritime, but it is not the offence made punishable by forfeiture of wages under the act of congress; and no punishment greater than that which is directed by the statute, can be inflicted because of the wrong motives of the men. The statute does not make the intent or purpose with which the forbidden act is done, a constituent of the offence; but, assuming that the crew leave the vessel wrongfully, it allows them the full period of forty-eight hours within which to avoid the forfeiture.

I am satisfied, therefore, that the statutory judgment of forfeiture is not incurred in this case, because the means of returning to their duty on board were withheld from the libellants by the act of the master. It does not follow that a dereliction of duty will pass unpunished because an entire forfeiture of wages and effects is not imposed. The compensation which the owners may demand and obtain may be equal to or beyond the amount of the wages. But it is important, in respect to the powers of the court and even the principle upon which punishment is to be decreed, to ascertain the operation and meaning of the statute. For, though the injury be ever so trivial and the amount of wages due be ever so great, yet, when the case is brought within the statute, the court can pronounce no other judgment than one of forfeiture; whereas, if the case be one of misconduct, in violation either of the shipping articles or of the duty of the mariners under the maritime law, the court can apportion the compensation according to the nature and consequences of the offence and of the injury.

The remaining inquiry relates to the truth of the entry in the log; that is, whether the defence that the libellants were absent from the ship without leave, is supported. It is proved that the libellants had leave from the second mate to go on shore for their dinner; and, if they went upon that authorization alone, I think their case is taken out of the interdiction of the statute of "absenting themselves from the ship without leave of the master or officer commanding on board." The master was on shore at the time, and the first and second mates were on board. Of course, the permission of the master need not be shown. In the merchant service, the master, when present, and after him the mates, pursuant to their grades, are to be regarded as "commanding on board," according to the order and discipline of the service. There can be no doubt that the authority of those officers, when exercised by them according to their grades, must be obeyed by the crew. Still, it will rarely be the fact that the master, even when on board, actually exercises the command in all particulars at any time, or that the orders of the mates are not to be observed, whether they emanate directly from the master or are unknown to him. The phraseology of the statute is not to be understood as having relation to the ultimate authority on board. Each officer is "commanding on board" in his particular department, although all are present. No vessel could be navigated if this were not so; and, as a sailor could never refuse obedience to an order of a mate, in the proper business of the ship, on the ground that it did not come from or was not known to the master, so, in relation to relief from duty, he would be well justified in acting under the authorization of a mate merely, if the order was not superseded by a superior officer. It must necessarily be that the mates will have the principal charge of the employment and relief of the men; and, as either of the mates may set them to work when the business of the ship requires it, so, also, each is impliedly clothed with sufficient authority to grant them an excuse from work or the indulgence of absence. Seamen are not bound to know the manner in which commands are distributed amongst the officers on board, unless they are specifically notified. As each officer is entitled to their full obedience, so, also, are they well justified in looking to each as competent to accord them privileges and indulgences in respect to their duties. Unless, therefore, there is a standing order to the contrary, or the individual is, in the particular case, otherwise directed, a sailor who obtains permission from any officer to go ashore, cannot be proceeded against as absent without leave, within the purview of the statute. Regarding it as implied upon the proofs, that no order had been given to the crew of this vessel that they should ask leave of absence only from the first officer on board at the time, I think the permission of the second mate was a sufficient justification to the libellants. He was "commanding on board," in so far as to be authorized to give them the temporary leave of absence they requested.

Evidence, however, is offered to show that the first mate expressly forbid the libellants to leave the ship. If a conflict of orders between the officers occurs on board, no doubt the seamen are bound to obey the one highest in command; and the chief mate, as an ordinary rule, would have authority to revoke any permission to go ashore given to the men by the second mate. It is alleged that such revocation was made in this case, in two ways—first, in refusing leave to the men, when they afterwards applied to the first mate; and secondly, in ordering them back to the ship after they had got on shore. There is no witness but the chief mate who proves a direct refusal of leave. The pilot, who was standing by, does not confirm him; and several other witnesses, examined by the libellants, heard no such command. The evidence of Edmonston, when taken together, rather imports the consent of the chief mate, as the refusal first testified to is softened down to a request to the men to remain on board, accompanied by a donation of sixpence, asked by one of the men for the purpose of getting grog on shore. The proof may be equivocal as to whether the sixpence was given by the chief mate or by the witness; but if by the latter, as it was at the moment the men were saying to the mate they were only going for grog, and, as they thereupon went off without anything further being said by him, his acquiescence may be fairly implied. The same inference would arise from the testimony of Jones. The evidence on the part of the libellants, giving it the least possible weight, puts the matter so far in doubt, that the court cannot satisfactorily say, upon the proofs, that the libellants went ashore without the leave of the first mate. As the two mates swear in direct contradiction upon this point, that conflict, if there was nothing in the proofs demanding credit for the one above the other, would place the cause in a situation where a judgment of forfeiture could not be properly awarded. But I think the collateral evidence is corroborative of the second mate's account, and adverse to that of the first mate. There is evidently a coloring in the first mate's testimony, hostile to the libellants. He asserts that the master told the boatmen to bring off the libellants in particular, while both boatmen swear that the orders were directly the contrary. He also says, that nothing detained the vessel but waiting for the libellants, and that he was on the look-out for them, but saw nothing of them on the pier after the vessel cast off, though she came up within hailing distance. It is very clear that it was well understood on board that

the men were on the pier, and that they were seen by the master and the pilot, and were also pointed out by one of the mates to a passenger, who, though near-sighted, saw one of them. It is scarcely credible, therefore, that the first mate could be on the look-out for them, and yet be ignorant of what was so generally known on board. There is, also, upon the proofs, the strongest reason to believe that the vessel was not lying to solely for these men; and it is difficult to suppose that the first officer thought that that was the reason of the delay.

If, then, the case stood solely upon these proofs, I should be of opinion that no ground for a forfeiture of wages had been established against these libellants. But the evidence by the claimants' witnesses, as to the master's meeting the libellants on shore as they were going from the vessel, is equally fatal to the defence. What then occurred between the master and the libellants was a direct assent by the master to their going. The same testimony is also cogent to show, that there was then no suggestion made by the mate that the men had deserted or gone off without permission, and that he must have well known of the master's acquiescence in their absence. In either aspect of the case, the entry in the log, that the libellants were absent from the ship without leave, was not warranted by the facts, and the allegation of their desertion and forfeiture of wages is clearly rebutted.

The remaining consideration is, whether the libellants, by such departure from the ship, were guilty of misconduct injurious to the owners, entitling the latter to claim a compensation for damages or a subtraction of wages. If the proofs were satisfactory, that the men left the vessel in disobedience of the orders of the first mate, or even privately, without permission of any officer, I should regard such conduct as rightly depriving them of all claim to wages subsequent to that time, and also as rendering them responsible, out of their anterior wages or their effects, for the damages occasioned by their absence, notwithstanding the statutory proofs are of no avail against them, it being competent for the court, under the maritime law, to recompense the ship for wrongs done by the crew, either by imposing a fine or a subtraction of their wages. Cons. del Mare, c. 169; Laws of Oleron, art. 5; Laws of Wisbuy, art. 17. But it seems to me that the preponderance of evidence is clear, that the libellants had the sanction of the proper officers to their going ashore, or that, even if the first mate did refuse them leave, which I do not consider as proved, his order was superseded by the subsequent assent of the master to their being on shore.

There is, as would naturally happen, a wide difference between the witnesses, in their estimate of the time the libellants were absent. Had their stay been unreasonably protracted, that would of itself be ground for damages or compensation to the owners. But I think that the witnesses for the claimants state facts which show that the libellants' return followed closely upon that of the master. All the detention the vessel need have incurred, if she was waiting for the libellants alone, would have been to allow time for the boat to make a trip from the vessel to the shore and back, a distance not exceeding a mile in the whole, and one easily rowed in a few minutes. It is certain that the libellants made efforts to reach the vessel in that manner, the moment the boat touched the pier. The statement of the boatmen in respect to the master's orders is more likely to be accurate than that of the mate or that of a casual bystander like Edmonston. Indeed, the evidence very strongly imports that the master intended to desert the men, with a view probably to save the expense of their wages home. If that was not his purpose, his conduct evinced, at least, that he meant to put himself upon the strictest point of right, and to leave the libellants to get back to their duty at their peril. If, ordinarily, he might have had a right so to do, it was not allowable in this case, he having sent to the libellants a message signifying unmistakably that he did not mean to permit their return. After they learned from the boatmen the master's orders, they were excused from any further exertions to join the vessel. The master placed himself in the wrong, and, both by his orders and his conduct, prevented the libellants from performing their voyage, which they were ready and anxious to do. They are, therefore, entitled to full wages for the voyage out and back, and also to an indemnity for the value of their property left on board. A decree will be entered in conformity to this decision, with a reference to the clerk to ascertain the amounts due.

Decree accordingly, with costs.

[On appeal to the circuit court, the above decree was reversed. Case No. 14,348.]

UNION, The (DEARBORN v.). See Case No. 3,714.

Case No. 14,348.

The UNION v. JANSEN et al.

[2 Paine, 277.] [1]

Circuit Court, S. D. New York. 1837.[2]

SEAMEN—WAGES—ABSENCE WITHOUT LEAVE—DESERTION—STATUTORY PROVISIONS.

1. The 5th section of the act of congress of 1790 [1 Stat. 133], relative to the absenting of seamen from the vessel in which they shall have shipped, without leave of the officer commanding, is a statutory provision, applying to cases of unlawful absence, or absence without leave,

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [Reversing Case No. 14,347.]

and is to be distinguished from desertion according to the general principles of the maritime law. [Cited in The John Martin, Case No. 7,357.]

2. Where, therefore, seamen left their vessel with the intention to return, but without the permission of the officer on board who was authorized to give such permission, and remained away more than forty-eight hours, it was *held*, that though their misconduct did not amount to desertion, it was an unlawful absence within the foregoing act, and that they had forfeited their wages.

3. In such case, the seamen, by leaving without permission, took upon themselves the hazard of getting back, and it was no part of the captain's duty to see to getting them on board.

[Appeal from the district court of the United States for the Southern district of New York.]

The libel was for wages, on a voyage from New York to Liverpool and back; and the question will be, whether there was a forfeiture of wages by desertion, or the libellants leaving the ship at Liverpool. The libel alleges, that on the 11th of August, the libellants, by the permission of the first officer—the captain being on shore—went on shore for the purpose of getting their dinner; that they had not been on shore more than twenty minutes or half an hour, before they returned and found the ship had left the pier and was lying off and on in the stream: that they made signals and endeavored to get on board; but that they were refused by the ship's boat, saying they had orders from the captain not to take them. The answer admits the shipping of the men, and their proceeding on the voyage, doing their duty at all times until the 11th of August; and alleges, that libellants on that day went on shore and left the vessel, but denies that they did this by the permission or consent of the first officer, but were forbidden to go on shore, and went in disobedience of his orders; believes they went with intention not to return, as the cook and steward had done that morning; no dinner prepared on board until two o'clock; the ship all ready for sea—only waiting for the captain to come on board; the difficulty of getting out of port; ship obliged to leave the pier-head, and fall out into the stream, the dock-master requiring it to be done; that master, on coming on board, found the men absent, and ship lay out in stream for them at distance of from a quarter to half a mile until nearly three o'clock; denies that the men returned to pier-head whilst the ship lay off and on in the stream; denies, or believes no signals were made; no signals seen, or hailing heard; a glass used to see whether men were in sight; denies that they endeavored to get a boat, or prevail on any one to take them on board, or that orders were given by the captain not to take them on board; but alleges, that the captain gave orders to the shipping-master, who went on shore in the boat that carried the captain on board, to bring the men on board if he could find them, and if not, to get other men; denies there was any boat that tended the ship—no necessity for one; vessel lay by the dock, and employed a boat but once to take captain on board. Entry made in log-book A. The answer alleges, that Jansen's clothes were put in charge of second mate, to deliver to him, and that they were delivered to some person in New York, who brought an order for them. Brown's clothes were of little value, and were given by second mate to their boys. Answer denies any wages due, but have been forfeited by the desertion of the vessel; alleges that Jansen is a foreigner and not a citizen; that he shipped fraudulently.

Decree of the district court: That libellants recover their wages and the value of their clothes, and case referred to the clerk to ascertain the amount; and on coming in of the report, which was confirmed, final decree entered. [Case No. 14,347.]

Jansen for wages	$49 50	
" clothes	26 00	—$75 50
Ritan, for wages	49 50	
" clothes	40 50	— 90 00
Brown, for wages	54 50	
" clothes	36 75	— 91 25
Decree		$256 75

Together with costs to be taxed.

THOMPSON, Circuit Justice, in reversing the foregoing decree, said: There is certainly, in this case, much conflicting and contradictory evidence upon many of the allegations brought under consideration by the libel and answer; and if it was material to the decision of the cause to decide upon all these matters of fact, I should be much in doubt as to the conclusion which ought to be drawn upon many of them. But I think the decision of the case does not require a minute examination of all these questions, or a conclusion as to the truth of all the matters brought in contestation. The result, in my judgment, must turn upon the question whether the libellants left the ship by permission, express or implied, from the officer on board who was authorized to give such permission, and the inquiry is reduced down to a strict question of right and duty.[3] There is no question, from the whole of the evidence on both sides, that although the ship was hauled off into the stream, she lay there between two and three hours, at a distance not exceeding half a mile; and that there was ample time for the libellants to have got on board and boats plenty at the dock to have taken them on board. If they left the vessel by permission of the proper officer, there was no violation of duty on their part if they did not wait an unreasonable time, and the captain ought to have seen to getting them on board. But if they absented themselves without permission, it was a violation of duty on their part, and they assumed upon themselves the hazard of getting on board.

I do not think that the libellants are to be considered as deserters, according to the general principles of the maritime law. The evi-

[3] See note at end of case.

dence does not warrant the conclusion that they left the ship with the intention of abandoning her; they most likely intended to return. There was plausible ground for their barely going on shore to get their dinners, as the cook and steward had deserted and no dinner prepared for them at the usual time on board: but they knew the ship was ready and on the eve of sailing, and the evidence is uncontradicted that she was obliged to leave the dock. She was ordered off by the dock master, and there can be no pretence that she hauled off with any view to prevent or embarrass the libellants in getting on board. Nor is there any reason to conclude that the captain wished to leave them. Their services were wanted on board, and no complaint whatever was made against them. They allege, in their libel, that they had faithfully discharged their duty on the outward voyage, and up to the very day the vessel sailed; and this is fully admitted in the answer; and the trifling disparity between their wages, fifteen dollars a month, and that given to other seamen, twelve dollars and fifty cents, could not have furnished any inducement to the captain to leave tried men, who had proved good and faithful, for the hazard of untried men.

But although there was not a desertion within the general principles of the maritime law, there may be a forfeiture of wages created by statute. The 5th section of the act regulating seamen in the merchant service (Act 1790, c. 29, § 5) provides that, if any seaman, &c., shall absent himself from the ship or vessel in which he shall have shipped without leave of the master or officer commanding on board, and the mate or other officer having charge of the log-book shall make an entry therein of the name of such seaman, &c., on the day he shall so absent himself, and if such seaman, &c., shall return to his duty within forty-eight hours, such seaman, &c., shall forfeit three days' pay for every day for which he shall so absent himself, to be deducted out of his wages. But if any seaman, &c., shall absent himself for more than forty-eight hours at any one time, he shall forfeit all the wages due to him and all his goods and chattels on board, at the time of his desertion, &c. This section of the act applies to cases of unlawful absence, or absence without leave, and is to be distinguished from desertion according to the general principles of the maritime law, and is to be considered a statutory provision for a particular case The entry of the absence without leave was duly made in the log-book, according to the requisitions of the act. This is the view of this statute, and the distinction between a desertion according to the general principles of the maritime law, and a statutory forfeiture of wages for absence without leave, taken by Mr. Justice Story in the case of Cloutman v. Tunison [Case No. 2,907], and which I consider the correct view. And this brings me to what I consider the turning point in the cause. Did the libellants absent themselves from the vessel without leave? If they did, it was a violation of their duty, and the failure to return on board within forty-eight hours worked a forfeiture of their wages. It is not a reasonable inference to be drawn from the evidence, that it was not in their power to get on board of the ship. They allege, in their libel, that the ship had left the pier when they returned, and was lying off and on some distance from the shore, but not so far distant but that they could, from the end of the pier, distinguish the persons on board, and made signals that they wished to get on board the ship; and, from the answer and proofs, it is clear that the ship was not to exceed half a mile from the pier, and lay there between two and three hours, and a great number of small boats lying at the pier, and that they could have been put on board for about a shilling apiece. The allegation in the libel is, that they went on shore to get their dinner, with the permission of the first officer, the captain being on shore. Any permission given by Smith, the second mate, must be laid out of view, because, in the first place, he had no authority to give any such permission whilst the first mate was on board, and, secondly, proof of absence by permission of the second mate is not according to the allegation in the libel. Coffin was the first mate, and he swears that the libellants did not ask of him permission to go on shore, and that he did not give them any such permission, but, on the contrary, forbid them to go; that they were about twenty feet distant from him and heard him forbid them. Smith, the second mate, says that Jansen asked permission of him to go on shore, which he gave, instructing him to return as soon as possible; and that the two other men accompanied Jansen; and that he heard the chief mate give Jansen permission, and did not hear the pilot say anything on the subject. Here the first and second mate stand directly opposed to each other. The former swears that he gave no permission, and the latter swears that he heard him give permission; but, even according to Smith's evidence, permission was only given to Jansen. The evidence upon this point is somewhat contradictory, but the weight of evidence is clearly that the libellants left the ship without permission of the first mate, he being the officer in command at the time, the captain not being on board. A brief reference to what the witnesses have said on this point will be sufficient to show where the weight of evidence lies; and, in the first place, what is the evidence that any permission was given by the first mate. Ritan, one of the libellants, says that Jansen asked permission of the first and second mates, and that all three went publicly, so as to be seen by the mates, pilot and all others about there. In his examination before the commissioners the question is put to him: "Did you go on shore with the permission of

the mate?" To which he answers: "The mate stood close by us when we went on shore from the bows; did not say a word one way or the other; he might have spoken to Brown or Jansen." And Jansen, in his examination in the civil suit, says he went ashore to get his dinner; asked leave and was told by the second mate if he was back in an hour and a half it would be in time. In his examination before the commissioner he says, he asked the mate and pilot if he might go on shore to get his dinner. The mate said he might go, but must not stay long. It is not easy to reconcile this witness with himself, and it is almost incredible that he could have been told that if he was back in an hour and a half it would be in time. At all events, this permission was given by the second mate, who had no authority to give it. Brown, the other libellant, says that he, with Jansen and Ritan, went on shore to get their dinner, but says nothing about having permission for that purpose. Kreigsman, a seaman on board, says he had permission from Coffin, the mate, to go on shore and get some grog. He saw Jansen speaking to the mate just before he and Ritan and Brown went on shore, but he does not state what was said. Holmes, a boy about seventeen years of age, says he heard Jansen ask permission of the mate to go on shore and get dinner; the three men were together; the mate said they might go; they said they would not be away over twenty minutes. He does not say which mate it was who gave this permission.

This is all the evidence on the part of the respondents, to show that any permission was given them to leave the vessel; and it is extremely doubtful, whether even from this any permission was given, except by the second mate. But admitting that it affords a reasonable presumption that lawful permission was given, this is fully met and overbalanced by the evidence on the part of the appellants. Coffin, the first mate, not only denies giving any permission, but says he expressly forbid them to go on shore. Corwin, the pilot, says the three libellants were in a state of intoxication; he saw them leave the ship at about a quarter or half-past twelve o'clock, but did not hear permission given for them to go on shore; that he did himself order them to stay on board, and to go below and go to bed, but did not hear either of the mates give them any orders. Although the pilot might not have had authority to forbid their going on shore, yet this evidence is in conflict with that of Jansen, who says he asked the mate and pilot if he might go on shore to get his dinner. Edmonson, the tailor, a witness on the part of the libellants, says he heard both the mate and pilot request them to remain on board. Although this was not in terms a positive order not to go on shore, it is a direct denial of any permission having been given by the mate. William Jones, the rigger, says he saw them leave the ship while she lay at the pier-head; did not hear permission given them to leave the ship, but heard one of the mates, does not recollect which, call out to them, and ask where they were going: their reply was they would not be gone more than twenty minutes, and they ran off. This must have been the first mate, for the second mate swears that he gave them permission to go, and it is noways likely that he would after that have called out in the manner represented by the witness; and it is negativing any permission given by the first mate. Libby, the boarding-house keeper, was going down with the captain, when he was going on board of the ship, and they met the three men, and Captain Mahan asked them where they were going: their reply was, only to get a glass of grog; when he said they must come back immediately, as he was going directly to sea. This reply of the captain may, perhaps, be considered somewhat equivocal. From the terms used, however, the order was positive to return immediately. And no explanation appears to have been asked the witness, in what sense he understood it. And it is to be observed, that they told a falsehood by saying they were only going to get a glass of grog, whereas, from all the evidence, it appears that they were going to get their dinner.

From this comparison of the evidence, I cannot resist the conclusion, that these men left the ship, at all events, without permission of the proper officer, and I think the better conclusion is, that they went in violation of the orders of the first mate. And if so, it was clearly an absence without leave of the master or officer commanding the ship, within the sense and meaning of the act of congress. I do not think the evidence warrants the conclusion, that they left the ship with intention to desert, and not return; they left their clothes on board, and the evidence is very satisfactory that they did return to the pier, after the ship left it. But they were evidently not very anxious to get on board, for the ship was within less than half a mile from the pier, and lay there between two and three hours, and some twenty or thirty boats laying there, which might have put them on board at the expense of about one shilling each; and it is hardly conceivable that they could have been so destitute of money and credit as to be obliged to abandon the ship on this account, if they had been very desirous to get on board; the boatman would most likely have trusted to the captain's advancing this trifling sum for them when they got on board. And, besides this, two witnesses, Libby and Kelly, swear that they each offered to procure them a boat to put them on board the ship. They seem, however, to have acted on the assumption that it was the duty of the master to send a boat for them; and that they meant to put themselves upon what they considered their strict legal right; and if they had left

the ship with the permission of the proper officer, they would have been right, and the captain ought to have sent for them. But if, as I think, the evidence shows they left the ship without leave of the master or officer commanding the ship, they assumed upon themselves the risk of not being able to return on board within the time limited by the act of congress. They left the ship upon the very eve of her leaving the pier, and with full knowledge that she was ready for sea; and concluding, probably, that if left in a port like Liverpool, there would be no great difficulty in shipping on board some other vessel. There is no reason to suppose that the ship put off with any design of leaving these men; she was ordered off by the dock-master. But the captain probably thinking that the men had done wrong in leaving the ship in the manner they had done, and particularly as he had ordered them to come back immediately, considered himself justifiable in leaving them to get on board as well as they could; putting himself upon what he thought his strict right, and their duty. And his rights, in this respect, would not be changed, admitting it to be true that he told the boatman who put him on board not to bring off the men. This was not the ship's boat, but a shore boat, in no manner under the authority and command of the captain, nor had it been in the employ of the ship, except to put the captain on board at that time. Had it been in a port where no other boat could have been procured, it might have been considered harsh and severe in the captain, if no more; but there were a great many other boats they might have obtained at the trifling expense of about one shilling each. Under these circumstances, I think it is a case turning upon the strict legal rights of the parties; and as the evidence, in my opinion, proves that the libellants left the ship without leave, they were bound to return within forty-eight hours, in order to save a forfeiture of their wages. I am, accordingly, of opinion that the decree of the district court be reversed, and a decree entered for a forfeiture of the wages; each party paying his own costs.

NOTE. Ward v. Ames, 9 Johns. 138. Ames brought an action of assumpsit in the court below, against Ward, as master of the ship Margaret, to recover his wages as a seaman on board of the said ship, on a voyage from New York to Cadiz, and back to New York. The defendant pleaded non assumpsit, and that the plaintiff had forfeited his wages by desertion. The plaintiff had signed the articles, in the usual form, for the voyage, and performed his duty as a seaman on board the ship until the 22d February, 1810, when the ship was lying in the harbor of Cadiz. The plaintiff was ordered by the mate to strap a block, and while doing it, was asked by the mate why he did not tar the rope, and was answered that he had done so; the mate then struck the plaintiff violently and repeatedly. He knocked him down several times, and beat him in a cruel and unjustifiable manner. The plaintiff, after he had been so treated, struck the mate with a marling spike, and cut his head. The defendant was on the quarter-deck during the time, but did not interfere until after the plaintiff struck the mate, when he came up and struck the plaintiff. The mate went on board a British ship of war lying in the harbor, and had the wound in his head dressed, and shortly after, a midshipman with a boat's crew came from the British ship on board the Margaret, and demanded the plaintiff. The midshipman was invited into the cabin by the defendant, who permitted the British seamen to search for the plaintiff, who kept concealed and was not found. The visit and search for the plaintiff, by the British officer and men, was twice repeated, without any opposition on the part of the defendant; and plaintiff concealed himself each time, so as to avoid discovery. On the night of the 22d February, the plaintiff left the Margaret, and got on board of another American vessel, and worked his passage home, without wages, and arrived in New York the May following. The court below gave judgment for the plaintiff for the whole amount of his wages, being eighty dollars.

Per Curiam: The question arising on this case is, whether the plaintiff below was not compelled to leave the ship, and actually forced out of the service by cruel treatment, and the danger of impressment, through the agency of the master. The court below must have drawn that conclusion. The seaman was, in the first place, and without any justifiable cause, cruelly beaten and abused by the mate, in the presence, and by the tacit consent of the master. He was provoked to strike in his defence, and the mate was wounded in the head. With the knowledge, and, it is to be presumed, by arrangement with the captain, the mate went on board of a British man-of-war, lying in the harbor of Cadiz; a boat belonging to that ship, with a midshipman and crew, soon after came on board the Margaret, and demanded the plaintiff, Ames. They made repeated searches for him, and with the apparent approbation of the captain; and on the same night the plaintiff left the ship. This is a strong case of an escape coerced by ill usage and danger of personal safety. No explanation of the transaction was given by the master upon the trial of the cause, and the court below were warranted in their deduction, that this conduct was equivalent to an unjust and forcible removal of the seaman from the ship, and that he did not, therefore, forfeit his wages. It is an acknowledged principle in the marine law, that if the master unjustly dismiss a seaman during a voyage, he is entitled to his full wages for the voyage. Abb. Shipp. p. 4, c. 2, § 1; Poth. Louage des Matelots, n. 206; Laws of the Hanse Towns, art. 42. And it has been considered and held, that if a seaman is obliged to fly from a service, by extreme ill usage and danger of his personal safety, arising from the master, who is bound to protect him, it is not the case of a voluntary desertion, but comes within the reach of the above principle. Rice v. The Polly & Kitty [Case No. 11,754]; Thorne v. White [Id. 13,989, note]. If the facts did not absolutely require, they were at least sufficient to uphold, this deduction, and the competent tribunal having drawn it, there is no just ground for our interference. The judgment below must be affirmed.

Webb v. Duckingfield, 13 Johns. 390. Duckingfield brought an action in the court below against Webb, to recover his wages as a seaman on board of the ketch Maria, of which Webb was master, on a voyage "from Savannah to Rotterdam, or one more port in Europe, and from thence to her port of discharge in the United States." The plaintiff below performed his duty on board the vessel during the voyage, and until she arrived in New York, her last port of discharge, and was safely moored in port, when he left her, refusing to remain on board, or to assist in discharging the cargo, though he and the rest of the crew were requested to remain. The plaintiff below never returned to the vessel, and the master was obliged to hire persons to discharge the cargo. The mate, on the day the

plaintiff below left the vessel, and on each day until the cargo was discharged, made the following entry in the log-book: "All the crew absent without liberty." The court below being of opinion, that, as the voyage was ended by the arrival and safe mooring of the vessel in her port of discharge, the plaintiff below could not be deemed a deserter, so as to incur a forfeiture of his wages; and further, that, to create a forfeiture, the name of the particular seaman who was absent without leave must be entered in the log-book; and they therefore, gave judgment for the plaintiff below, for 180 dollars, being the amount of wages due to him on the day he left the vessel. The articles signed by the parties contained the following clause: "The said seamen severally promise, &c., not to neglect or refuse doing duty by day or night, nor shall go out of the said vessel &c., until the said voyage be ended, and the vessel be discharged of her loading, without leave first obtained of the captain or commanding officer on board." "That no officer or seaman, belonging to the said vessel, shall demand, or be entitled to, his wages, or any part thereof, until the arrival of the said vessel at her above-mentioned port of discharge, and her cargo delivered." "Provided, nevertheless, that if any of the said crew disobey the orders of the said master, or other officer of the said vessel, or absent himself, at any time, without liberty, his wages, due at the time of such disobedience or absence, shall be forfeited, and in case such person or persons, so forfeiting wages, shall be reinstated, or permitted to do further duty, it shall not do away such forfeiture."

Van Ness, J., delivered the opinion of the court: All the seamen belonging to the ship, whose last port of delivery was New York, deserted her at that place as soon as she was moored, and refused to assist in unloading the cargo; and the question is, can they recover their wages up to the time of the desertion, or not? The determination of this question has nothing to do with the mate's making an entry in the log-book of the desertion. Such entry, if it had been made, would have been prima facie evidence of that fact; but, as it is fully proved by the other testimony, that is sufficient, without the log-book. The reasons for making these entries in the log-book are accurately stated by Judge Peters,—Malone v. Bell [Case No. 8,994],—and have no application to this cause. By the 6th section of the act of congress for the government and regulation of seamen in the merchants' service (1 L. U. S. 140 [1 Stat. 133]), it is enacted, "that, as soon as the voyage is ended, and the cargo, or ballast, be fully discharged at the last port of delivery, every seaman, or mariner, shall be entitled to the wages which shall be then due, according to his contract," &c. From this, as well as the reason and propriety of the thing, the contract with a seaman continues in force until the cargo is finally discharged, and, if he leaves the ship without justifiable cause, before that is accomplished, he has no right to recover any part of his wages. The shipping articles contain an express stipulation by which the wages are forfeited, in this case, in the very event which has happened; but the counsel for the seaman supposes this stipulation to be illegal, because it forms no part of what is provided shall be contained in the contract between the master and crew, by the 1st and 2d sections of the act before referred to. The master has no right to insert any stipulation, or agreement, repugnant to, or inconsistent with, the statute; but there can be no objection to superadding any provisions harmonizing with it. Such is the provision in question, which only follows the 6th section of the act, which may be considered as a legislative definition of what shall be deemed to be the termination of a voyage, so as to entitle the seamen to their wages. The principle upon which the two cases of McMillan v. Vanderlip, 12 Johns. 166, and Jennings v. Camp, 13 Johns. 94, were decided, is strictly applicable to this case. The judgment below must be reversed.

UNION BANK (CHESAPEAKE & O. CANAL CO. v.). See Cases Nos. 2,653 and 2,654.

Case No. 14,349.

UNION BANK v. COOK et al.

[2 Cranch, C. C. 218.] [1]

Circuit Court, District of Columbia. Nov. Term, 1820.

NOTES—ALTERATION OF DATE.

An alteration of the date of a promissory note, whereby the time of payment is prolonged, does not make the note void as to the maker.

[See Bank of Washington v. Way, Case No. 957.]

This was an action against the makers of a promissory note, payable to Francis Adams or order, dated 14th August, 1818. The defendants [Cook & Clare] offered evidence that the date was altered by the payee, from the 13th to the 14th of August, to make it fall due on the discount day of the Union Bank; and contended that the note was thereby made void.

But THE COURT (THRUSTON, Circuit Judge, absent,) was of opinion that the alteration, prolonging the time of payment, being for the benefit of the defendants, did not make the note void as to them.

Mr. Swann, for plaintiff.

Mr. Taylor, for defendant.

Case No. 14,350.

UNION BANK v. ELIASON.

[2 Cranch, C. C. 629.] [1]

Circuit Court, District of Columbia. Dec. Term, 1825.

PLEADING—PRACTICE—RULE-DAY—PLEA OF LIMITATIONS.

1. The statute of limitations must be pleaded strictly within the rule-day, unless the court, for good cause shown, shall permit it to be pleaded afterwards.

2. Ignorance of the practice of the court may be an excuse for an attorney recently admitted to the bar, which, with other circumstances, may be good cause for admitting the statute to be pleaded after the rule-day.

Assumpsit. The plea of limitations was filed after the rule-day.

Mr. Dunlop, for plaintiffs, had instructed the clerk not to make up an issue on that plea; but, under the general practice of the bar to suffer the clerk to enter the pleadings and make up the issues, it is probable that inadvertently he made the entry on the docket, "non ass't., lim's. and issue."

Mr. Key, for plaintiffs, now moved the court to strike out the plea of limitations.

Mr. Coxe, for defendant, stated (his affidavit not being required by the plaintiff's counsel,) that he was employed by the defendant to appear for him at the return-term of the writ; which he did, and at the same

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

time had a conversation with the defendant, in which it was determined between them that the statute of limitations ought to be pleaded. That he (Mr. Coxe,) had recently come to this bar, and never had heard that there was any rule of this court, or of any other court, that required the plea of limitations to be filed before the expiration of the rule to plead.

Mr. Jones had also been employed as counsel, by the defendant, at the return-term, but was not consulted until after the plea-day.

THE COURT (nem. con.) ordered the plea of limitations to be stricken out. The court was referred to the case of Wetzell v. Buzzard [Case No. 17,471], at October term, 1821.

Mr. Coxe, on a subsequent day, moved the court to reinstate the plea of limitations, and produced the defendant's affidavit stating that the note on which the suit is brought is dated in 1814. That the defendant made a deed in trust to Mr. Bowie, to secure the bank, who took possession of the property, enjoyed the profits, and ordered the property to be sold by the trustee; bought it in, themselves, and hold it; and that it was worth more than the debt. That the plaintiffs never demanded of the defendant payment of the note after 1814, and that he had considered the debt as paid. This affidavit was in addition to the facts before stated by Mr. Coxe, on the motion to strike out the plea of limitations.

Mr. Dunlop and Mr. Key, contrà: If the defence stated in the affidavit be good it needs not the aid of the statute of limitations. The affidavit ought to state facts to show that the plea is necessary to the justice of the case, such as loss of evidence, &c.

Mr. Jones, in reply: The debt is paid in equity; and perhaps the defence cannot be sustained at law. The principle of the case of Wetzell v. Buzzard [supra] applies to this. Mr. Coxe states that there is no rule of court as to the time of pleading the statute of limitations. The only rule is that pleas shall be filed by the rule-day. The practice of the court was not known to Mr. Coxe, which requires that the plea of limitations must be filed strictly within the rule.

THE COURT (THRUSTON, Circuit Judge, doubting, but not dissenting,) said: It is within the discretion of the court to admit or refuse any plea offered after the expiration of the rule to plead. The plaintiff has then, strictly, a right to judgment by default. This right is controlled only by the practice of the court. By that practice, long established, all fair pleas to the merits have been admitted after the rule-day; but, by the same practice, the plea of the statute of limitations cannot be admitted, unless facts be stated showing it to be necessary to support the justice of the case, such as the loss of evidence, or some just defence of which the defendant is unable to avail himself at law, and the like; or unless some other good cause be shown to the court for admitting the same. In the case of Wetzell v. Buzzard, at October term, 1821, in this court, although there was an affidavit of merits, yet the court relied principally upon the ground that the attorney for the defendant had been instructed, before the plea-day, to plead the statute of limitations; but it being the first term of that attorney's practice in this court, and not being acquainted with the practice of this court to require the plea of the statute of limitations to be filed before the expiration of the rule to plead, be omitted to file it until the imparlance term after the plea-day. In the present case, Mr. Coxe, the defendant's attorney, had, at the time he was employed by the defendant, been recently admitted to practice in this court, and was as ignorant of the peculiar practice of the court in regard to the statute of limitations as the attorney was in the case of Wetzell v. Buzzard; and the affidavit of merits is perhaps as strong in this case as in that. The defendant had a right to plead the statute. He was in no personal default in not pleading it in due time. He has stated in his affidavit that he was ignorant of the practice to require the plea to be filed before the plea-day. If he should lose his case for want of the plea, it is doubtful, perhaps, whether, under the circumstances, he could make his attorney responsible for his loss. We see no difference in principle between this case and that of Wetzell v. Buzzard, and therefore think that the plea ought to be admitted.

[See Case No. 14,355.]

UNION BANK (GAREY v.). See Case No. 5,241.

Case No. 14,351.

UNION BANK v. NEW ORLEANS et al.

[5 Am. Law Reg. (N. S.) 555.]

Provisional Court,[1] State of Louisiana. 1866.

LOST INSTRUMENTS—MUNICIPAL BONDS—COUPONS—PAST DUE—BONDS WRONGFULLY WITHHELD — ADVERTISEMENT.

1. On the occupation of New Orleans and the neighboring parts of the state by the federal forces, in April, 1862, the officers of the rebel state government fled from Baton Rouge, the capital, to other parts of the state still held by the rebels, claiming to carry the government with them. The auditor of the state carried with him the public bonds belonging to the banks, deposited with him, according to law, as security for their circulation. These securities were held by him without warrant of law, as against any one claiming through the federal government.

[1] [This court was established by an executive order of the president of the United States, October 20, 1862, a copy of which is given in Case No. 16,146. See, also, The Grapeshot, 9 Wall. (76 U. S.) 129. The records of the provisional court were transferred to the district court by act of July 28, 1866 (14 Stat. 344, c. 310).]

2. Securities, so withheld within the lines of the enemy, are lost, within the meaning of the law authorizing a recovery on instruments lost, without producing them.

3. Money, whether principal or interest, coming due on such securities, is due to the actual legal owner of them, and not to the person who wrongfully holds them.

4. Coupons are negotiable evidences of debts for interest, and are, in substance, promissory notes, payable at a specified time. If taken by any person, after they are due, they are taken subject to all the equities which properly attach to them in the hands of the previous holder.

5. A recovery may be had by the owner for the interest due on bonds, without producing the original coupons, on its being shown that they are wrongfully withheld from him in the territory of an enemy, and are therefore inaccessible to him, and also that they were so held when they became due, so that no one, hereafter to appear, can have the rights to them of a bona fide holder, for value, without notice.

6. Securities so withheld by the rebel state auditor, their locus being shown, are not lost within the meaning of the article of the Civil Code of Louisiana requiring that securities lost shall be advertised before a recovery can be had on them.

This was a suit, commenced by the Union Bank of Louisiana, to recover the sum of $90,000, being the amount of interest due on five hundred bonds of the consolidated debt of the city of New Orleans, under the following circumstances: The said bonds, with the coupons attached, were deposited with the auditor of public accounts, at Baton Rouge, in 1854, by the plaintiff, to secure the redemption of the circulating notes of the plaintiff, issued in conformity with the free banking laws of 1853, of the state of Louisiana; to be transferred and returned by the auditor to plaintiff upon its application, accompanied by a delivery to him of cancelled circulating notes to an equal amount or pro rata. On the capture of New Orleans and that part of the state in 1862, the officers of the insurrectionary government fled to avoid falling within the federal lines, first to Opelousas and then to Shreveport, continuing to exercise their official functions at the places of their flight; the auditor carried with him the bonds so deposited. Under a special pass from Gen. Banks, the plaintiff did, by an agent, deliver cancelled notes to the amount of $252,600 to the rebel auditor at Shreveport, and applied for the return of an equal amount of bonds with their coupons; the said auditor refused to deliver the same, and was prohibited by the rebel legislature from doing so. The plaintiff, finding it impossible to obtain the coupons, then applied to the mayor of New Orleans, and to the First National Bank of New Orleans, the fiscal agent of the city, with which were deposited, as required by law, certain revenues of the city, dedicated exclusively to the payment of these bonds, to pay the interest due on them, without the production of the coupons, which was refused by them, and this suit was thereupon commenced. On the trial all the above facts were either proved or admitted.

William H. Hunt, for plaintiff.

Christian Roselius and Sullivan, Billings & Hughes, for defendant, the city of New Orleans.

Miles Taylor, for defendant, the First National Bank of New Orleans.

PEABODY, Provisional Judge. The plaintiff was the owner of bonds of the city of New Orleans to the amount of $500,000. The bonds are not yet due. The interest on them was payable semi-annually in July and January of each year. The principal and interest are expressly stipulated to be paid on the face of the bonds themselves. There were also separate from the bonds, coupons for the interest—one for the interest on each bond for each half year. These coupons are separate, or separable by the holder, from the bonds, and show, each of them, how much interest is due, and the particular time at which it is due according to the tenor of the bond to which it relates. Each bond is payable to bearer, and each coupon for the interest on it is also payable to bearer. These bonds and coupons were by plaintiff deposited with the auditor of the state of Louisiana. He was to hold them as security for the redemption and payment by plaintiff of certain bills issued by it. Whenever those bills or notes should be paid and cancelled, he was to return the bonds and coupons to plaintiff, and so pro rata when any part should be paid. This deposit was made under a law of the state under which plaintiff organized and obtained its corporate powers; and being a matter between the plaintiff and the bill-holders as parties in interest, it is much the same as if it had been done by compact between them. Two hundred and fifty-two thousand dollars of the bills or notes of the bank, for which the bonds or coupons were pledged, have been paid and cancelled. Those notes have been returned to the person with whom the bonds and coupons were deposited as auditor, and plaintiff has demanded and sought to obtain from him the bonds and coupons held as security for them, but has been and is wholly unable to recover them by legal process or otherwise. Moreover, the man with whom, as auditor, they were pledged (Mr. Peralta) has ceased to be an officer of this state, and has fled beyond the jurisdiction of the authorities thereof, and for all practical purposes, out of the state, taking the securities with him. Both the man and securities are entirely beyond the reach of plaintiff and beyond all process of courts or of the government itself. He is moreover an alien enemy of the United States, and he and the securities with him are within the lines of the enemy, in territory held by them jure belli, and therefore in law as well as in fact inaccessible to plaintiff, and incapable of being dealt with by it.

Money for the payment of the interest due has been deposited by the city, the debtor.

with the defendant "The First National Bank," the legal fiscal agent of the city, and is held by it for that purpose, and for that purpose alone. That interest the bank is willing to pay if the coupons are produced, but it refuses to pay it until they are produced, on the ground that it is authorized to pay only on the surrender of the coupons, and that the coupons being outstanding may hereafter appear in the hands of some one who can compel payment from one or the other of the defendants to him. Plaintiff claims to recover the interest due; he claims to do this without producing the coupons, on the ground that they are placed beyond his power to produce by the unwarranted action of the recreant trustee, being detained by him wrongfully within the enemy's lines. The claim is, that as plaintiff is the actual owner of the securities (bonds and coupons), it has a right to be paid what is due on them, and that as they were both in the hands of Mr. Peralta after the interest sought to be recovered, and the coupons for it had become due, and no one had any right to them then, no one can now have, or can hereafter acquire a title to them which will enable him to recover on them after payment made to plaintiff. Of the matters discussed on the trial, many of them at very great length, these are all that are material to the case, in the view I have taken, and most of them were substantially conceded, and nearly all the rest are very easily deduced from the evidence.

On these facts one question arises: Are the coupons for the interest, which plaintiff claims to recover, shown to be so situated that no one hereafter to appear can have the right to them of a bonâ fide holder for value without notice? If they are, plaintiff must recover; if they are not, it is not so easy to say how he can recover. If they are so situated, at any rate there is no difficulty in deciding that he may recover. The mere fact that they are in the territory of the enemy of the United States, with which no legal intercourse can be had, in the hands of an alien enemy there, is quite sufficient to warrant a recovery without the production of them in a proper case, and whether the holder is an auditor or not an auditor, or whatever he is, "quocunque nomine gaudet," and whether in law they may be deemed lost or not lost, it is plain that they are within the familiar principle of law, applicable to securities lost or wrongfully withheld, and which authorizes a recovery without the production of them. It is equally clear that if their locus there is shown, they are not lost within the rule of the Code—one of evidence merely—that before a recovery can be had on securities as lost, they must be advertised, &c. They are there, and they are beyond the power of the plaintiff, without his fault, and that is all that is necessary to warrant a recovery without the production of them in a case proper in other respects.

The bonds and not the coupons are the basis of the right to recover, the coupons being each a mere memorandum of the interest due from time to time on each bond, and of the time when such amount by the terms of the bond becomes due. The bonds are not intended to be surrendered when the interest is paid, but the coupons, if within the power of the owner, are ordinarily surrendered when the sums due on them are paid; and in this manner the coupons in the hands of the debtor become vouchers of the fact of payment, as they had previously, in the hands of the creditor, been evidence of the debt, and also that the amount stated was due, not to the holder of the bond (unless the same person held both bond and coupon), but to the holder of the coupon itself. In this manner they are made to answer probably three purposes; they make each separate half year's interest on each bond negotiable by itself, separately from the rest of the bond, and answer the purposes of evidence in the hands of the creditor and of the debtor in turn, as above stated, in the one evidence of debt and in the other evidence of payment. The bonds claimed to the amount of $252,000 and the coupons attached, beyond all question, are the property of plaintiff, and are relieved from all right of possession in the present custodian, and so indeed, I think I may add, are all the rest of the half million in his hands. He is a mere wrongdoer as to all, and has no right to any part of them; I think, even if he were in law and in fact the auditor of the state, it would make no difference. A fugitive from the state and the securities with him, he would have no right to retain them I think as against the bank, in his flight and away from his post of duty. It would be abundantly easier to hold that he might rightfully withhold them, a fugitive in the land of the Dey of Algiers, that distinguished potentate being at peace with this country, than to hold that he had a right out of the territory held by this government, and within the territory of an enemy where no citizen of this country could have access, to retain them there. But he is not auditor of the state in law or in fact, and would have no right to retain them anywhere —not even in the state, and at a proper place for an auditor to be at for the performance of his duties as such officer; and under the circumstances he surely has no right at all to hold them, or any of them.

But the question recurs, and it is the only one remaining to be considered: Are the coupons shown to be so situated that no one else can now have or hereafter acquire a title to them, which shall enable him to maintain an action on them? For it is not doubted that they are in their nature negotiable, like promissory notes, and a person who takes them before due for value, without notice of a defence in the hands of a previous holder, takes them discharged from all defences which might exist against them in the hands of any party through whom he derives title. The plain-

tiff, in his petition, alleges that they (the coupons in question, at any rate to the amount of sixty thousand dollars), remained in the hands of Mr. Peralta until after the time at which they became due. He says: "The coupons for the interest due on the 1st July, 1862, the 1st of January and the 1st of July, 1863, and the 1st of January, 1864, amounting to sixty thousand dollars, were in the possession of the auditor (Mr. Peralta), at Baton Rouge, after the same matured and became due." The answer of the city takes issue on this, in a very general way, by denying in general terms the allegations of the petition not therein specially admitted. It suggests no alteration in their position, and, indeed, makes no allusion to this allegation of the petition at all, but is content with a general sweeping denial of all, not expressly admitted in the answer, more or less. This, however, is sufficient to change the burden of proof, and throws it on the plaintiff. The answer of the city takes issue in a different manner, and denies pointedly and specifically whatever of the plaintiff's allegations it seeks to put at issue. After treating several other allegations of the petition, it answers to the allegation above stated, in substance, that the coupons to the amount of $60,000 remained and were in possession of the auditor after they became due, not by denying that they were so, but by denying that they were in his hands at the time they became due "or are so now," that is, at the time the answer was made. It says: "It (meaning the city) denies that the coupons which matured on the 1st day of July, 1862, or the 1st day of January, 1863, or the 1st day of July, 1863, or the 1st day of January, 1864, or any other coupons, the property of the Union Bank, were in the possession of said auditor at the time of their maturity, or now are." This is not a denial that they have ever been so since they became due, and nothing less than that will put the very material averment of the plaintiff in that respect in issue.

The evidence in the case seems to sustain the allegation of the petition. Very slight evidence would be sufficient for the purpose in the existing condition of the case. The First National Bank does in a formal manner deny it, and as to it evidence would be necessary if it were in a condition to make such an issue. But it is at least doubtful if the First National Bank has an interest that permits it to make such an issue. That institution, as the fiscal agent of the city, and the depository agreed on between the plaintiff, the owner of these securities, and the city the debtor, is but a trustee for the benefit of the city and the plaintiff, and the parties in interest being both parties to this suit, and bound by the judgment herein, it is at least doubtful, whether the bank, their trustee, should be heard to make an objection which neither of the parties in interest deigns to interpose. It is not material to the bank to whom it pays. In the disbursements of moneys belonging to the city it would perhaps incur no responsibility, except to the city, and the city being a party to this suit, will take care of its own interests and will be bound by the decision herein. It is not certain, however, and I will not assume that the bank would not, under any circumstances, be liable to the holders of the coupons in question, if any should be able to establish a right to recover on them. The bank will be protected beyond all doubt by the judgment herein as against the plaintiff and its co-defendant, the city of New Orleans.

How stands the case on the evidence? First. They are shown to have been deposited, as above stated, with Mr. Peralta, then auditor, and there is no proof or allegation that they have gone from his possession into that of any one else, and I am not aware that any presumption of such a change arises in the absence of proof and allegations to that effect. It is true that they should have gone from him to his successor in office, Mr. Torry, and, perhaps, that should be presumed in the absence of evidence; but that gentleman was called as a witness, and testified that they did not so come, and any such presumption is sufficiently negatived; and when it is recollected that the same Mr. Peralta still claims to be auditor of the state, and is exercising (although in his own wrong) the functions of that office at Shreveport or elsewhere, the omission to transfer to Mr. Torry, as his successor, the books, papers, and property of the office is accounted for, and the presumption that they still remain with him (Mr. Peralta) is not a little strengthened. Add to this the fact that he could not legally or without crime transfer or dispose of them to any one else, and that presumption becomes stronger still. Moreover, this Mr. Peralta, although no officer, and having none of the rights of one, is nevertheless claiming to be so, and conducting himself as such; and although, as I have said, he has no right to these securities, and in withholding them is acting without warrant of law, still the fact is that he professes and attempts to play that character, and actually believes that he is doing so, and perhaps that he has the right so to do; and these securities in his hands are perhaps no more likely to be diverted by his criminal act to purposes wholly foreign to those for which they were deposited, or fraudulently sold or put in circulation in violation of duty, real or fancied, and of honesty and good morals, than they would be if he were actually and de jure auditor of the state, as he claims to be and to act, and as he no doubt is and has long been de facto of that large portion of the state held in occupation by the enemy; no more likely to be criminally converted to private purposes by him now than they were when held by the same person when he was (as all concede he was at one time) actual and bona fide auditor of the state de jure as well as de facto.

When the plaintiff applied to Mr. Peralta for these securities, by its agent, Mr. Gordon,

Mr. Peralta claiming to act as auditor, received the cancelled notes and was about to deliver to him bonds to a corresponding amount, but was dissuaded from doing so, and was finally overruled in his determination; and admitting that he still retained them, and that they belonged to plaintiff, and ought to go to him, yielded to adverse influence and refused to let plaintiff have them. He did not pretend that he did not still hold them, but on the contrary admitted the reverse, and wished to restore them to plaintiff by delivering them to Mr. Gordon.

But, aside from all evidence introduced as such at the trial, the conduct of this person, claiming to be auditor of this state under the rebel government, in reference to these public securities, in the case of the plaintiff and those of several other public institutions similarly situated, has become almost matter of public or historical information, and we are all of us informed in the premises. And while with the strict non-intercourse maintained with the enemy, and all within his lines, by reason of the war, it is difficult to procure testimony from witnesses having personal knowledge on the subject, still intelligence on the subject, as reliable as can ordinarily be had in such a case, is possessed and by everybody fully relied on, that these securities are retained by the person claiming to be auditor, exactly as if he were really auditor, and by him kept out of circulation or use in any manner; and no one I believe doubts the fact. Mr. Peralta is in no just legal sense a public officer in our estimation, although he assumes to act as such, and is performing the role of auditor. If he were in law, as he and those associated with him claim he is—and we all know that he is de facto, as to a large part of the state, a public officer—auditor of public accounts, the evidence would seems different; but as it is, it seems to carry conviction to the minds of all. On the trial no real doubt seemed to be entertained by any one what in point of fact was the actual condition of these securities, and it was almost assumed. If the securities had gone out of the possession of Mr. Peralta into the hands of a bona fide holder, or in such manner that they were liable to get there before they became due, that fact would be vital to the defence and fatal to the plaintiff; and yet, if I recollect correctly, nothing of the kind was intimated; nothing of the kind was alleged in the proceedings or shown, or attempted to be shown in evidence, or claimed or suggested on the argument of the case. They were abundantly shown to have been placed there, and the evidence that they had not been removed or taken away was as good and convincing as proof of a negative often is. There is, in my judgment, evidence enough, under the circumstances, to establish the fact against the denial of it by the defendants as to the $60,000, and to make it highly probable as to the remaining $30,000.

On the whole, I think that the plaintiff should be allowed to recover the sum claimed by the petition as due January, 1862, and January and July, 1863, and January, 1864, to the amount of $60,000. And as to the amount claimed as due July, 1864, and January, 1865 ($30,000), he may recover that on giving defendants good security, to be approved by the court, to save them harmless from all persons hereafter to claim to recover the same.

UNION BANK (POTOMAC CO. v.). See Case No. 11,318.

UNION BANK (SCHOLFIELD v.). See Case No. 12,475.

Case No. 14,352.

UNION BANK et al. v. SMITH.

[4 Cranch, C. C. 509.] [1]

Circuit Court, District of Columbia. March Term, 1835.

ADMINISTRATORS — MINGLING ASSETS — WHEN CHARGEABLE WITH INTEREST.

1. The orphans' court may charge the administrator with interest in certain cases.

2. If the administrator mingled the assets with his own funds, upon which he drew indiscriminately for his own purposes, he must be presumed to have applied them to his own temporary use and profit, and is chargeable with interest thereon for the whole time the assets were thus mingled and used indiscriminately; and the orphans' court ought to have so decided.

This was an appeal from the orphans' court upon a plenary proceeding by libel and answer. The principal question in the cause, was, from what time the administrator should be chargeable with the interest upon the sum of $8,390.01½ the amount of assets in his hands as administrator of the estate of Samuel Robinson.

The case was fully argued by Mr. Dunlop and Mr. R. S. Coxe, for the appellants; and by Mr. Marbury and Mr. Jones, for the appellee.

Mr. Dunlop cited the following authorities on the subject of interest: Gwynn v. Dorsey, 4 Gill. & J. 453, 460; Perkins v. Baynton, 1 Brown, Ch. 375; Schieffelin v. Stewart, 1 Johns. Ch. 620; Newton v. Bennet, 1 Brown, Ch. 359; Brown v. Rickets, 4 Johns. Ch. 303; Grandberry's Case, 1 Wash. [Va.] 246; Carter's Case, 5 Munf. 240; McCall v. Peachy, 3 Munf. 303.

Mr. Marbury and Mr. Jones, contra, cited Adams v. Gale, 2 Atk. 106; Child v. Gibson, Id. 603; 7 Har. & J. 42; Wilson v. Wilson, 3 Gill. & J. 20; Burch v. Gittings, in Montgomery county, Maryland; Granberry v. Granberry, 1 Wash. [Va.] 249; Fitzgerald v. Jones, 1 Munf. 150; Lewis v. Bacon, 3 Hen. & M. 89; Lightfoot v. Price, 4 Hen. & M. 431; Sheppard v. Starke, 3 Munf. 29; Cavendish v. Fleming, Id. 198; Hall's Index, Append. 631, 645,—as to modes of charging interest.

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

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). The libel states that on the 10th of April, 1827, the respondent settled his first administration account of the estate of Samuel Robinson, leaving a balance in his hands of $8,390.01½ to be distributed among the creditors, being less than fifty per cent. of the whole amount of claims. The libellants aver that the respondent ought to be charged with interest upon that sum from the time he received it, until the distribution, because he has used and employed it, and it has produced interest. That he ought, within thirteen months after the date of his letters of administration, to have paid to the libellants their proportion of the assets; and, not having done so he is liable for the interest from that time, although he may not have used the assets, and although they may not have earned interest. They also insist that he ought to have invested the assets in productive funds, and therefore is chargeable with interest; but he has refused to charge himself with interest, or to account therefor; wherefore they pray that he may be cited to account in the orphans' court and be decreed to charge himself with interest and to pay the libellants their respective proportions of the principal and interest, &c. The answer of Mr. Smith admits the amount of assets in his hands, as charged; and states that the Bank of the United States gave him notice of their claim, and insisted that it was entitled to priority of payment; that Mr. Thompson, another of the libellants, also insisted that his claim was entitled to a preference; that these claims amounted to more than all the assets; and that these creditors gave him a written notice and request that the said assets should not be distributed until their right to priority of payment should be decided by the judgment of a court of equity in a suit then forthwith to be instituted; that the Union Bank denied the right of priority of payment claimed by those other creditors, and notified the respondent that they would contest the same; that in a suit brought by that bank against the respondent, to try the right of priority, which was contested by those other creditors, judgment was finally rendered by the supreme court of the United States at January term, 1831, (Smith v. Union Bank, 5 Pet. [30 U. S.] 518), against the right of priority; that he was always ready with the funds to pay the creditors, from the time limited by law for the distribution, until he did distribute, in the year 1832, if the creditors could have agreed among themselves as to the priority of payment. He denies that he was in any default, and that he is chargeable with interest, having been always ready to pay, and has been only hindered by the litigation of the creditors among themselves. He denies that he was under any obligation to invest the assets in productive funds, and avers that he never did so invest them, or in any property from which he derived any profit, benefit, or advantage; nor did he lend the same for profit. That he placed them to his private account in the Farmers' and Mechanics' Bank of Georgetown, among his own funds, and drew on that account, as usual, when his convenience required. That he always had resources at his command, by which he could, at any time have paid the libellants, and was always ready and willing to pay them. This answer having been excepted to, Mr. Smith, in a further answer, says that the sum of $8,390.01½ was placed to his debit (credit?) in the Farmers' and Mechanics' Bank of Georgetown, on the 27th of March, 1827. That it appears by successive settlements of his accounts with that bank, that from that time to May, 1830, "a list of which is hereunto annexed as part of this answer," there were to the credit of his accounts, balances, whenever settled, of much larger amount than the assets, except for a short period in 1827 and 1828, "so that the said assets do not appear to have been used, (with the said exception,) before May, 1830," from which period, until the decision of the supreme court, he admits that the fund was used by him in his trade.

The list of balances, referred to, is not a list of balances in the respondent's account, but in the joint account of W. & C. Smith with the bank. It does not appear who W. & C. Smith were, but if it should appear that they were a mercantile firm, and that the assets were placed in the bank subject to their use and control, and mingled with their funds, I should think the respondent was chargeable with interest for the whole time the money was at their disposal, although they might have always had credit enough in bank to answer for it. It was a fund, when thus placed, which either partner had a right to draw out at any time; and it was as much liable to the creditors of W. & C. Smith, as to those of S. Robertson, and perhaps more so. If W. & C. Smith had failed, indebted to the bank, the bank would have retained it, and it would have been lost to the estate of Robertson. Although W. & C. Smith may not actually have used the money, yet it gave them credit with the bank, so that they might more readily obtain discounts. In the case of Treves v. Townshend, 1 Brown, Ch. 384, the defendant contended that he ought not to be charged with interest, because "he always kept an equal sum at his banker's, ready to answer to it." But to this Lord Loughborough answered: "The money of a merchant, at his banker's, does not lie idle; it is part of his stock in trade."

In the present case, it does not appear that W. & C. Smith were not stockholders in the bank; and if they were, they derived a benefit from the deposit which the bank had a right to use in its ordinary business of discounting bills and notes. It has been suggested that, although a court of equity could charge the respondent with interest, yet the orphans' court, which is of limited jurisdiction, cannot; for it can only charge the administrator with the actual in-

crease of the estate in his hands. But that point seems to be settled by the court of appeals in Maryland, in the case of Gwynn v. Dorsey, 4 Gill. & J. 461. That case also decides the point, that, if an administrator has applied the assets to his own use and profit, he is chargeable with interest from the time he received them; and if he kept them by him, or omitted, without reason, to distribute them, he is chargeable with interest from the time limited by law for the distribution, whether he made profit by them or not. Mr. Smith placed these assets in a situation where they may be presumed to have produced him profit, and if they did not, it was his own fault. It is true, that he was in no default for not having distributed the assets sooner than he did, but having mingled them with his own funds, upon which he drew, without discrimination, for his own purposes, or for those of the firm of W. & C. Smith, he must be presumed to have applied them to his own temporary use, and profit.

The libel complains of the commission of five per cent. paid to a collector, and of ten per cent. claimed by the respondent, as commissions. These complaints, however, seemed to have been abandoned at the argument, as matters within the exclusive discretion of the orphans' court. See Wilson v. Wilson, 3 Gill. & J. 20. This cause seems to have been set for hearing on bill and answer; Mr. Smith's answer, therefore, is to be received as evidence in his favor. He there says, "When the money was payable by law, and at all times since, this respondent has been fully prepared, ready, and willing to settle the said estate, and pay over to the petitioners their shares of the said estate." "That he never did invest the said assets in any stock or other property from which he derived profit, benefit, or advantage; neither did he ever lend the same to any person for profit by the loan thereof." "That when the assets belonging to the estate of Robinson were paid to him, he placed them to his private (account?) with the bank, and among his own funds, supposing they would be called for, and paid out, at the expiration of the year as appointed by the order of the court. That when the said assets so stood to the credit of his private account, he drew on that account, as usual, when his convenience required; and even, when considerable sums were lying in his desk, and which he could as readily have used as the funds to his credit on the books of the bank." "This respondent avers that he always had resources at his command, by which he could at any time have paid the said petitioners, and that he was always ready and willing to have paid them." And by his supplemental or further answer he says, "that the said sum of $8,390, was placed to his debit" (credit) "in the Farmers' and Mechanics' Bank of Georgetown as aforesaid, on the 27th of March, 1827. That it appears, by successive settlements of his account with the said bank between that period and the month of May, 1830, a list of which is hereunto annexed as part of this answer, that there was, to the credit of his account, balances, whenever settled, of much larger amount than the amount of the said assets, except for a short period in the years 1827 and 1828; so that the said assets do not appear to have been used, with the said exceptions, before May in the year 1830. From this period (May, 1830) until the decision of the supreme court aforesaid, the respondent admits that the said fund was used by him in his trade; but whether the same produced profit or loss, it is impossible for him to say, because he cannot tell to what purchases the said fund was applied; mingled with the mass of his accounts there was no specific application of it. This respondent, however, says that as soon as the decision of the supreme court in the case between the said parties was made known to him he was provided with funds to pay, the said several parties libellants, their respective dividends of the said assets, and they were so notified," &c.

It may be observed that the respondent does not aver that these assets were not used by him for his own purposes; he only says that he did not invest them in productive property, nor lend them for profit. Nor does he aver that they were always lying at his banker's; he only avers that it appears by successive settlements of his account with the bank, that at the times of those settlements, except in 1827 and 1828, there were balances in his favor to a larger amount than the assets; and the list of balances referred to, is not a list of balances of his private account, but of that of W. & C. Smith. It appears, then, from his own answer, that he was in possession of this fund, in money, from the 27th of March, 1827, till some time in the year 1832; that he mingled it with his own funds at his banker's, and used the same indiscriminately with his own, for his own purposes, or for those of the firm of W. & C. Smith. According to the list of balances there were several long periods during which it does not appear how the account stood; but even if there was always enough in bank to the credit of W. and C. Smith to meet the assets when called for, I think the administrator was chargeable with interest for the whole time the money was mingled with his funds, or with those of W. & C. Smith, in the bank, and used indiscriminately with their own funds for their own purposes; and that the judge of the orphans' court, having the same evidence before him, ought to have so decided. The precise time, when the administrator distributed the assets, does not appear in this record, but must appear upon his accounts settled with that court.

I think, therefore, that the decree of the orphans' court should be reversed, and the

cause remanded with instruction to that court, in settlement of the administration account, to charge the administrator for interest upon $8,390, at the rate of 6 per cent. per annum from the 27th of March, 1827, till the time or times respectively of his distributing the principal among the creditors. See also Hunter's Ex'rs v. Spotswood, 1 Wash. [Va.] 145; Lomax v. Pendleton, 3 Call, 538; Miller v. Beverleys, 4 Hen. & M. 415, 416; Beverleys v. Miller, 6 Munf. 99; White's Ex'rs v. Johnson, 2 Munf. 285; McCall v. Peachy's Adm'r, 3 Munf. 288.

UNION BANK OF GEORGETOWN (ARMAT v.). See Case No. 535.

Case No. 14,353.

UNION BANK OF GEORGETOWN v. CORCORAN.

[5 Cranch, C. C. 513.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.

STATUTE OF FRAUDS—DEBT OF ANOTHER—NOTES—PAYMENT—USAGE.

1. The defendant's note for $7,400, made payable directly to the plaintiff's, on demand, with interest, but not payable to order, and upon which there is an indorsement stating that it is held by the plaintiffs as collateral security for the defendant's obligation upon a previous note of Thomas Corcoran, senior, deceased, is not void under the statute of frauds as being a promise to pay the debt of another, without a consideration therein expressed.

2. In an action upon such a note, with such an indorsement, the burden of proof is on the defendant to show that the former note or some part of it had been paid.

3. If a bank discounts a note made payable directly to the bank, and takes the interest in advance, for the time the note has to run, it is not usury, such being proved to be the usage of the banks.

Assumpsit upon the following promissory note: "$7,400. Georgetown, May 3d, 1832. On demand we jointly and severally promise to pay the president and directors of the Union Bank of Georgetown, $7,400, with interest from the 1st instant, for value received. James Corcoran. T. Corcoran." Upon which note was this indorsement: "The within note is given as collateral security for our obligation to the Union Bank of Georgetown, on a note of Thomas Corcoran, deceased, for $7,400, and is held by said bank only as collateral security for said note; when, therefore, said note with the interest thereon shall have been paid, this is to be returned to us, or cancelled by said bank. T. Corcoran." And the following indorsement: "I reassume and reacknowledge the within note, and agree not to avail myself of limitations as a bar. T. Corcoran." 30th April, 1835.

Mr. Marbury, for defendant, objected that this was a promise to pay the debt of another, and that it did not express the consideration, and therefore the plaintiffs could not recover.

But THE COURT (nem. con.) overruled the objection, the plaintiffs' counsel, in opening the case to the jury, having admitted that certain property had been assigned to a trustee to be applied to the payment generally of the debts of Thomas Corcoran, senior, and that $1,800 had been paid into the plaintiffs' bank, to be so applied, a proportion of which was applicable to the note of Thomas Corcoran, senior, mentioned in the indorsement aforesaid.

Mr. Coxe, for defendant, objected to the admissibility in evidence of the note upon which this action was founded.

But THE COURT overruled the objection, and the note was read. Whereupon the defendant's counsel prayed the court to instruct the jury that upon this evidence the plaintiffs were not entitled to recover; or if entitled to recover, not more than nominal damages, without first showing the note of Thomas Corcoran, senior, as described in the said indorsement, and showing further what amount of money is now due thereon. Chitty, 154, last edition. But THE COURT, (THRUSTON, Circuit Judge, absent,) refused to give the instruction, and the defendant's counsel took a bill of exceptions.

The defendant's counsel then objected that the note of Thomas Corcoran, senior, being made payable directly to the president and directors of the Union Bank of Georgetown, or order, and discounted by the bank to the credit of Thomas Corcoran, senior, the transaction was a direct loan, and not a mercantile discount, and that taking the interest in advance for the time the note had to run, was usurious; and that the note in suit, being given as a security for that loan, was void under the statute of usury.

R. J. Brent, having suggested that the same question would arise in another case now on the trial docket of this term, in which he was concerned as counsel, was permitted to argue the point to the court. He contended that there is a difference between a loan and a discount. The taking of the interest in advance can only be justified upon a real mercantile discount of negotiable paper actually negotiated, or by the usage of the banks, known to the legislatures at the time of granting the privilege of banking. Com. Usury, 86; Ord, Usury, 68; Marsh v. Martindale, 3 Bos. & P. 154; Bank of Washington v. Thornton, 3 Pet. [28 U. S.] 38; 3 Serg. & L. 95, note; Law Md. 1836, c. 272, authorizing the discount of notes made payable directly to the banks; Bank of Kentucky v. Brooking, 2 Litt. (Ky.) 42.

On the other side, it was said that such notes are discounted in Boston daily. There cannot be usury without an intention to take usurious interest. Bank of U. S. v. Waggener, 9 Pet. [34 U. S.] 399; Fleckner v. Bank of U. S., 8 Wheat. [21 U. S.] 354; Chitty.

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

100; Bank of Kentucky v. Brooking, 2 Litt. (Ky.) 42; Wood v. Dummer [Case No. 17,944].

THE COURT (CRANCH, Chief Judge,) giving no opinion, not having examined the authorities cited,) decided instanter that the transaction was usurious.

Case No. 14,354.

UNION BANK OF GEORGETOWN v. CRITTENDEN.

[2 Cranch, C. C. 238.] [1]

Circuit Court, District of Columbia. April Term, 1821.

JUDGMENT—MOTION TO SET ASIDE—DEFAULT—RULE TO PLEAD.

1. The court, at a subsequent term, will set aside a judgment irregularly obtained, and quash the execution issued thereon.

[Cited in Reiling v. Bolier, Case No. 11,671.]

2. A judgment by default, for want of plea, before the expiration of the rule to plead, is irregular, and may be set aside, on motion, at a subsequent term.

3. The Maryland act of 1763, c. 23, § 4, does not dispense with the rule to plead, although the declaration be sent and served with the writ twenty days before the appearance court.

The declaration, in this cause, had been sent out with the writ, and served twenty days before the appearance term, according to the Maryland act of 1763, c. 23, § 4, and the defendant entered his appearance in proper person. At the next term a rule was laid on the defendant to plead by the plea day, which was some day after the end of the term. The judgment by default, for want of plea, however, was entered at the same term (June term, 1820), before the expiration of the rule to plead; and an execution was issued thereupon, returnable to the present term.

Mr. Redin, for defendant, now moved to quash the execution and set aside the judgment for irregularity, and, in support of his motion, filed the defendant's affidavit, stating that, at the last term, before the judgment was entered, he had requested Mr. Lookerman, one of the attorneys of this court, to enter his appearance, and attend to the suit, which he promised to do. That Mr. Lookerman directed the clerk to enter his appearance, which was done, by mistake, in one suit only, there being two between the same parties. It also stated the grounds of his defence, upon the merits of the cause, being sued as indorser, and not having had due notice of nonpayment by the drawee of an inland bill, and that the drawer had become insolvent. Mr. Redin cited 1 Tidd, Prac. 515; 2 Tidd, Prac. 1089; Fox v. Money, 1 Bos. & P. 250; Davis v. Owen, Id. 344; Barlow v. Kaye, 4 Term R. 688; Act Md. 1787, c. 9, § 6; Wood v. Cleveland, 2 Salk. 518; Gerard v. Basse, 1 Dall. [1 U. S.] 119; Carrew v. Willing, Id. 130.

Mr. Jones, contra. There is no case in which the court will correct its own judgment after the term. If the record does not show the true judgment of the court, it may be corrected; but, if the court itself has irregularly rendered judgment, it has never been the practice to correct it after the term. But this judgment is not irregular. The copy of the declaration having been served on the defendant twenty days before the return of the writ, the return term was, by the act of assembly, the trial term of the suit; and no rule to plead was necessary. The defendant was not entitled to an imparlance, nor to a rule to plead. Mr. Jones cited Boote's History of a Suit at Law, 92; 1 Tidd, Prac. 101, 356; Act Md 1763, c. 23, § 4; Act Md. 1721, c. 14, § 2; Act Md. 1787, c. 9, § 2.

THE COURT (nem. con.), having taken time to consider, quashed the execution, set aside the judgment, and reinstated the cause.

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

Case No. 14,355.

UNION BANK OF GEORGETOWN v. ELIASON.

[2 Cranch, C. C. 667.] [1]

Circuit Court, District of Columbia. May 13, 1826.

PLEADING AT LAW—ASSUMPSIT—PROMISE TO PAY—NOTES—PLEAS.

Non assumpsit infra tres annos, is not a good plea to an action against the maker of a promissory note payable sixty days after date. It ought to be actio non accrevit.

[See Bank of Columbia v. Ott, Case No. 879.]

Assumpsit against the maker of two promissory notes, each payable sixty days after date, and indorsed by the firm of E. Eliason & Hersey, and discounted by the plaintiffs for the accommodation of the defendant; one dated March 29, 1814, for $2,700, and the other, April 26, 1814, for $1,000. After stating the notes and indorsements with the usual averments the declaration proceeded thus: "By reason whereof and by force of the statute in such case made and provided, the said defendant became liable to pay the said sums of money, in the said notes mentioned, to the said plaintiffs, according to the tenor and effect of the same, and the said indorsements thereon; and being so liable, in consideration thereof, then and there" (that is, on the 26th of April, 1814, the date of the last-mentioned note), "undertook and promised to pay the same to the said plaintiffs according to the tenor and effect thereof, and the indorsements thereon, whenever afterwards he should be thereto requested." Then followed the usual money counts, all averring the promises to be made "on the same day and year aforesaid" "yet the said defendant, the said several sums of money

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

herein mentioned, or any part thereof (although often thereto requested, namely, on the day and year aforesaid, at the county aforesaid, and often afterwards,) hath not paid, but the same, or any part thereof, to pay has hitherto wholly refused and still does refuse, to the damage of the plaintiffs in the sum of five thousand dollars," &c. To this declaration the defendant pleaded non assumpsit, and non assumpsit infra tres annos, and the plaintiff demurred generally to the last plea, and joined issue upon the first. Union Bank v. Eliason [Case No. 14,350].

R. S. Coxe and Mr. Jones, for defendant, in support of the plea of non assumpsit infra tres annos, contended that the setting out of the two notes, and the concluding averment of liability thereon, (that is, on the two,) and the promise, in consideration thereof, to pay on demand, all necessarily form one count, winding up with the last mentioned promise, as made in consideration of the premises. The notes are the inducement; the promise the gist of the action. It seems impossible, according to any rule of pleading, to treat the setting forth of the two notes as a distinct count upon each; the concluding promise, founded upon the two, consolidated the two contracts (originally separate and distinct as they were) into one; that is, as the aggregate consideration of the one contract or promise.

The conclusion of the declaration, setting out the breach of the promise, is entirely conformable to this construction of the averments of the declaration. It lays a breach, specifically, of the promise to pay on demand; and, assuming, as the plaintiff's counsel is compelled to do, the time, referred to, to be the date of the note or notes, it is bad as an assignment of the breach of the written promise contained in the notes. The rule cited from Chitty on Bills requires that the request and refusal should be laid on a day subsequent to the falling due of the note. The general averment that he has always refused, and still refuses, &c., is common to every declaration, and cannot possibly be understood as fulfilling the rule of pleading referred to. The cases all show that the general principle is that when the promise is upon a past or executed consideration, the plea is non assumpsit, and not actio non accrevit. The declaration avers a new promise to pay on demand. The demand must be alleged to be after the day for the payment of the note. "The day and year aforesaid." refers to the day of the date of the note, and therefore avers a breach before the note became payable. Chit. Bills, 629; Perkins v. Burbank, 2 Mass. 81; Collins v. Benning, 12 Mod. 444, 3 Salk. 227; Selw. N. P. 121; Gould v. Johnson, 2 Salk. 422, 2 Ld. Raym. 838; 2 Saund. 63c, note 6.

Dunlop & Key, contra, relied upon the decision of this court in the case of Bank of Columbia v. Ott [Case No. 879], at May term, 1825. The promise averred in the declaration is a promise to pay according to the tenor and effect of the note; that is, in sixty days after date. The plea must be good as to all the counts, or it will be bad on demurrer. 1 Chit. Pl. 522, 533; Puckle v. Moor, 1 Vent. 191.

Judgment for the plaintiffs, on the demurrer, May 13, 1826.

[See Case No. 14,350.]

Case No. 14,356.

UNION BANK OF GEORGETOWN v. FORREST et al.

[3 Cranch, C. C. 218.] [1]

Circuit Court, District of Columbia. Dec. Term, 1827.

MASTER AND SERVANT—BANK TELLER—BOND—CONSTRUCTION—USAGE—SURETIES.

1. The condition of a teller's bond "faithfully to perform all the duties assigned to him in said bank, and make good to the said bank all damages which the same shall sustain through his unfaithfulness, or want of care," comprehends damages arising from his want of care, as well as from his unfaithfulness.

[See Bank of U. S. v. Brent, Case No. 910.]

2. The words "six months" in the fourth section of the act of congress of the 2d of March, 1821 [3 Stat. 619], "To extend the charters of certain banks in the District of Columbia," mean six calendar months.

3. The teller's bond, executed under the original charter, covered defalcations arising under the extended charter; and after the time when the charter would have expired but for such extension.

4. It was not necessary that the teller should be appointed yearly, and from year to year; and an interval of three days, during which the teller continued to act as such without being reappointed, did not destroy the plaintiffs' right of action upon the bond, for damage incurred after such interval, by the teller's want of care.

5. Under the condition of this bond, the defendants are bound to save the plaintiffs from all loss arising from any want of care of the teller, if by any degree of care on the part of the teller it might have been avoided.

6. The neglect of the cashier to settle the daily accounts of the teller according to the by-law of the bank does not discharge the sureties.

[Cited in People's Building & Loan Ass'n v. Wroth, 43 N. J. Law, 76.]

7. The usage of other banks requiring only reasonable care and diligence, cannot affect the express condition of the bond.

Debt on the teller's official bond, against George P. Forrest, the teller of the plaintiffs' bank, and Washington Bowie and Nathan Lufborough, his sureties. The condition of the bond was: "That whereas the said George P. Forrest has been appointed to the office of teller in the said bank: Now, if the said George P. Forrest shall faithfully perform all the duties assigned him in said bank, and make good to the said bank all damages which the same shall sustain through his unfaithfulness or want of care, then this obligation shall be void, otherwise

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

to be and remain in full force. It is understood that the teller is appointed, or elected from year to year, and that this obligation shall continue in force so long as the said George P. Forrest shall act as teller in said bank." The breach assigned in the declaration was, the not making good to the plaintiffs the sum of $1,893.76, being the damages which the plaintiffs aver they have sustained by reason of the teller's want of care in performing the duty assigned him of accounting for and paying over to the plaintiffs the moneys which came into his hands as teller between the 16th of November, 1818, and the 23d of January, 1822.

There were seven pleas. Issue was joined on the first, second, and fifth, and demurrers to the third, fourth, sixth, and seventh. The third plea averred that the said G. P. Forrest did, during the time of his continuance in the said office of teller, faithfully perform the duty of accounting for and paying over to the plaintiffs, all the moneys put into his hands as teller, "without this that the said George P. Forrest failed to account for and pay over the said sum of $1,893.76, in the said declaration mentioned, through, or by reason of any unfaithfulness, dishonesty, evil design, purpose, or intent of the said George P. Forrest in the performance of the duties assigned him as aforesaid; and this the said defendant is ready to verify," &c. The fourth plea averred that the said G. P. F. did, during, &c. "faithfully perform the duty of accounting for and paying over to the plaintiffs, all the moneys put into his hands as such teller. But the said defendant, admitting that in the course of accounting as aforesaid, the said sum of $1,893.76, of the moneys put into his hands, as such teller as aforesaid, did appear to be unaccounted for and unpaid by him to the plaintiffs, and was not accounted for and paid over to the plaintiffs, yet the defendant says that the said failure so to account for and pay over the said sum of money, did not arise from any unfaithfulness, dishonesty, evil intent, design, or purpose of the said G. P. Forrest, in performance of the said duty, to account for and pay over, to the plaintiffs, the moneys put into his hands as teller, in manner and form, as the plaintiffs have complained, &c. and this he is ready to verify," &c. The sixth plea averred, "that during the time, &c. it was by the president and directors of the said bank, made the stated duty of the said G. P. F. as teller, to receive from the customers of the said bank, payments and deposits of money in the same, and to pay out to the bearers of checks upon the said bank, the amount of such checks, out of certain moneys of the said bank therein kept for that purpose by the said G. P. Forrest, during the usual hours of business in the said bank, viz. from 9 a. m. to 3 p. m., and on the closing of the bank from day to day, to account with the cashier of the said bank, for all moneys received by him, the said G. P. F., as teller, in the course of such day, and for all moneys paid out by him, as teller, upon checks; and upon such accounting from day to day to count over the said money so kept in the said bank, under the care and custody of the said G. P. F. as aforesaid, or the balance remaining of the same, together with the moneys received by him as teller, in the course of each day, as aforesaid, after deducting from the same all moneys paid out upon checks by him, as such teller, in the course of each day, as aforesaid; and to leave, under the exclusive care and custody of the said cashier thereof, at the closing of the said bank for each day as aforesaid, the entire balance of the said moneys so counted and remaining as aforesaid, without the said G. P. F.'s having any care or custody of the said moneys, or any concern with, or any responsibility for the same, after the closing of the said bank as aforesaid, until the opening of the same on the next succeeding morning. And the said defendant, in fact, says, that the said G. P. F. did daily, and from day to day, during, &c. at the closing of the bank on each day, as aforesaid, faithfully account with said cashier, for all of the said moneys as aforesaid, and faithfully turn over to the said cashier, and leave in the said bank, under his exclusive custody and care, the entire balance which appeared upon such daily counting and accounting as aforesaid, and was then and there found by the said cashier to be remaining of the said moneys as aforesaid; and upon such accounting for, counting, and turning over of the said moneys to the said cashier daily, and from day to day as aforesaid, the said cashier daily, and from day to day as aforesaid was satisfied with, and accepted as just and satisfactory, the daily accountings, settlements, and turnings over of the said moneys by the said G. P. F. as aforesaid; and the said defendant in fact says, that the said daily accountings, settlements, and turnings over of the said moneys were honestly and faithfully made by the said G. P. Forrest in all things on his part and behalf to be therein done and performed, in the faithful discharge, by the said G. P. F. as such teller as aforesaid of his duties as such teller. Without this, that any sum or sums of money, the property of the said plaintiffs, during the time and times aforesaid, came or were put into the hands of the said G. P. F., in any other manner, or for any other purpose, than as hereinbefore mentioned, and set forth, and this the said defendant is ready to verify," &c. To this plea there was a special demurrer for duplicity.

The seventh plea was pleaded by Mr. Lufborough, one of the sureties, for himself alone, and averred, that before the commencement of the plaintiffs' action aforesaid viz. on the 4th of March, 1821, the act of

congress, entitled "An act to incorporate the Union Bank of Georgetown," had expired by its own limitation, without the president and directors of the said bank having filed, at any time within six months from the passage of the act of congress of the 2d of March, 1821 (3 Stat. 618), "To extend the charters of certain banks in the District of Columbia," their declaration in writing, assenting to and accepting the extension of their charter, under the terms, conditions, and limitations contained in the said act; and without having complied with the condition contained in the fourth section of the act, whereby the corporate body created by the name of the "President and Directors of the Union Bank of Georgetown," who are the plaintiffs in this action, was, on the 4th of March, 1821, and before the commencement of this suit, dissolved, and utterly extinct. To this plea, the plaintiffs replied, in substance, that they did, on the 21st August, 1821, comply with, and accept the terms of the act of the 2d of March, 1821, extending their charter. The defendant rejoined that the 21st of August was more than six months after the passage of the act of the 2d of March, 1821, and so not within the time limited for the acceptance of the extension of the charter. To this rejoinder the plaintiffs demurred.

To the third and fourth pleas the demurrer was general.

J. Dunlop, for plaintiffs. These two pleas rely upon the ground, that fidelity alone is an answer to loss by want of care. Upon this point he was stopped by the court. As to the sixth plea, he said it does not answer the allegation of damage by the want of care. An honest account is not sufficient; nor is the cashier's acquittance. This plea does not state that the teller paid over all moneys which he was bound to pay, but only the money which remained in his hands. The declaration is sufficiently explicit; it is not necessary to set out in the declaration the particular sums which make up the aggregate amount lost by the teller's negligence. 1 Chit. 512, 513, 520, 523, 624; Barton v. Webb, 8 Term R. 459; 2 Chit. 622; Shum v. Farrington, 1 Bos. & P. 640; 1 Tidd, Prac. 618, as to duplicity in pleading.

Mr. Jones, contra. The condition consists of two branches: fidelity and care. The declaration states no breach of duty, which is not answered by fidelity. A simple failure to account for money is the only breach whereby the plaintiffs sustained damage to the amount of $1,893.76, through the want of care of the teller in performing the duty so assigned to him, that is, accounting. The sixth plea states a special performance,—a special accounting. The demurrer brings before the court the sufficiency of the inducement. The plea is not double, nor is it bad because the traverse is special. Stephens, Pl. 188.

Mr. Key, in reply. The defendant had a right to stipulate against inevitable casualties, as well as against his dishonesty. He has bound himself to make good all loss which the plaintiffs might sustain by his want of care. Fidelity is no answer to this. The breach assigned in the declaration is, that he did not make good the damage which the plaintiffs sustained by his not paying out, or repaying the money he received. The manner in which the loss happened is mere inducement. It was not by not accounting, but by not paying. The sixth plea is liable to the same objection as the third and fourth, that is, that it does not answer the breach assigned. If the first part, that is, accounting satisfactorily to the cashier, be a defence, the residue of the plea makes it double. If it be not of itself a defence, it is not aided by the residue. The duty of the defendant, as averred in his plea, was to repay to the cashier, every night, the money he received in the morning, except what he should have correctly paid out in the course of the day. But the averment of the performance is, that he repaid to the cashier what remained in his hands.

THE COURT (nem. con.), on the 7th of June, 1827, rendered judgment for the plaintiffs upon the demurrers to the third, fourth, and sixth pleas.

The seventh plea was not filed until the subsequent term, namely, December 17, 1827. The question arising upon the demurrer to the rejoinder to the replication to this plea was, whether the six months given to the bank, in which to accept or reject the extension of their charter, by the act of the 2d of March, 1821, were lunar months or calendar months. If calendar months, the acceptance was in due time; if lunar, it was not, and the charter had expired. From the 2d of March to 21st of August is 172 days; six lunar months, of four weeks each, is 168 days only. The question arose out of the fourth section of the act of congress of the 2d of March, 1821, c. 18 (3 Stat. 618), entitled "An act to extend the charters of certain banks in the District of Columbia," by which it is enacted, "that unless the president and directors, for the time being, of each of the banks respectively whose charters are hereby extended, shall, on behalf of their stockholders, and in virtue of an authority from them, or a majority in interest and number of them, file their declaration, in writing, in the office of the secretary of the treasury, within six months from the passage of this act, assenting to and accepting the extension of the charter hereby granted, under the terms, conditions, and limitations contained in this act, such bank shall forfeit all title to such extension of charter."

J. Dunlop, for plaintiffs. In the case of Lacon v. Hooper, 6 Term R. 224, Lord Kenyon regretted that the old decisions obliged him to say that it must be understood to be lunar months. This was upon an act of parliament giving premiums to certain vessels

who should remain out upon fishing voyages, in certain high latitudes, for a time not less than fourteen months from their clearing out. But the act of congress, extending the plaintiffs' charter, is upon a mercantile subject; and even in England, in a statute upon such subjects, the computation is by calendar months. 2 Bl. Comm. c. 9, p. 141, Christian's note. So in ecclesiastical cases, respecting presentations, because the church calculates by calendar months; and one reason given by Lord Coke is, that it may support right. Catesby's Case, 6 Coke, 62. In Maryland, from the year 1715 to the year 1779, the six months for the enrolment of deeds had been considered as calendar months, as appears by the preamble to the act of November, 1779, c. 10, which was enacted to remove the doubts which had "arisen in some of the courts of justice" in that state; and declares, "that in all cases where the enrolment of deeds is directed by law to be made within six months from the day of the date of the same deeds, the said months shall be deemed and taken, and are hereby declared to be calendar months." The same mode of computation prevails in Pennsylvania. In New York, however, the computation is by lunar months. But in South Carolina, Massachusetts, Kentucky, and Tennessee, the computation is by calendar months. Starkie, pt. 4, p. 1398, note; 2 Mass. 170, note; Avery v. Pixley, 4 Mass. 460; Brudenell v. Vaux, 2 Dall. [2 U. S.] 302; Com. v. Chambre, 4 Dall. [4 U. S.] 143; Loring v. Halling, 15 Johns. 119; Stackhouse v. Halsey, 3 Johns. Ch. 74.

Mr. Worthington, contrà. The meaning of the word "month," at the common law, has been settled by a long course of judicial decisions, from the earliest times. 2 Bl. Comm. c. 9, p. 141; Tullet v. Linfield, 3 Burrows, 1455; Lacon v. Hooper, 6 Term R. 224; King v. Adderley, Doug. 463; Talbot v. Linfield, 1 W. Bl. 450. This is the general rule; the other cases are exceptions. Catesby's Case rests on the word "half-yearly." So in the cases where the word quarterly is used. Leffingwell v. White, 1 Johns. Cas. 100; Jackson v. Clark, 7 Johns. 217; Biddulph v. St. John, 2 Schoales & L. 521; Rex v. Bellamy, 1 Barn. & C. 500. In Pennsylvania, the court decided upon the phraseology of the statute. In acts of congress, generally, the legislature has distinguished and expressly mentioned calendar months, when they meant calendar months; as in the collection act of March 2, 1799, § 75 (1 Stat. 627); the act of April 20, 1818, c. 124, §§ 1, 2, 3 (3 Stat. 466); the act of April 10, 1816, § 3 (3 Stat. 266), incorporating the Bank of the United States; and the original charter of the plaintiffs' bank, February 18, 1811, § 4 (2 Stat. 636).

Mr. Jones, on the same side. The act of 1779 confines the construction to the old act of enrolment of 1715. There is in law no lunar year. Parts of a year, such as a half or a quarter, mean parts of a solar year. The subject-matter of the statute cannot control the general rule. Catesby's Case depended upon the words tempus semestre, which, says Lord Coke, "being spoken in the singular number, (as it appears by the dictionaries,) signifies half a year, or six months, namely, such six months as make half a year; and there is a great difference in our ordinary speech between the singular number, as a twelvemonth includes all the year, according to the calendar; but twelve months shall be reckoned according to twenty-eight days to each month." Another reason for the judgment in Catesby's Case, as stated by Coke, is, that "'verba accipienda sunt secundum subjectam materiam'; and because this computation of months concerns those of the church, there is great reason that the computation should be according to the computation of the church, which they best know." If this new charter had spoken of months in relation to the discount of notes, &c., there might be some ground for the exception. But this language is not applied to a mercantile act, and has nothing to do with the law-merchant. Congress, in legislating upon commercial subjects and mercantile persons, still use the word calendar, when they mean calendar months; leaving the inference that "month' alone means lunar month.

Mr. Key, in reply. This is an American act of congress, legislating for this District as a substituted legislature for that of the state of Maryland. It is true that, in an English act of parliament, the word "month" means, generally, a lunar month; but that is no reason why the same construction should be given to an act of congress, there being no common law of the United States. Under a Maryland statute, the computation would be by calendar months; as in the case of supersedeas under the act of 1791, c. 67, § 1, where the two months and the six months have always been construed to mean calendar months. So also in the statute of enrolment of deeds; so also in the charter of the Bank of Columbia, &c. If the construction be doubtful, it ought to be against a forfeiture, and in affirmance of the right. One of the reasons for the judgment of the court, as stated by Lord Coke (6 Coke, 62a), is, that "when the computation is doubtful, it is good to determine it for the relief and remedy of him who hath right, and, for the advantage of right, to give him the longest time, to the end that he lose not his right."

THE COURT (nem. con.) was of opinion that the legislature meant to give the bank six calendar months to file their acceptance of the extension of their charter; and CRANCH, Chief Judge, in delivering the judgment of the court, observed, that it is probable that the common law construction of the word months, as meaning lunar months, was never adopted in Maryland, and that it seemed to be quite obsolete, in regard to the common business of life, in this country; that the act of congress is addressed to bankers, mercantile men, who always com-

pute by calendar months; and that it is probable that the legislature intended to allow the same kind of months as they had mentioned in the original charter.

Upon this demurrer THE COURT rendered judgment for the plaintiffs.

Upon the trial of the issues, after the plaintiffs had given in evidence the teller's bond, and proved the deficit of his accounts to the amount of ——, and the acceptance of the extension of the charter,

Mr. Jones, for defendant, moved the court to instruct the jury that the plaintiffs could not recover upon that evidence; and contended that the bond, being given under the original charter, did not cover any defalcations occurring under the extended charter; and that it was necessary to prove the appointment of the teller by the acts of the president and directors.

But THE COURT (nem. con.) refused to give the instruction; being of opinion that there was sufficient evidence of the acceptance of the extension of the charter, under the acts of May 4, 1820, and March 2, 1821, and that the condition of the bond extended to defalcations occurring in January, 1822; and that the Union Bank, in 1822, was the same Union Bank which existed at the date of the bond.

THE COURT permitted evidence to be given by the defendant, to show that there might be an apparent balance against the defendant, and yet the plaintiffs not damnified; it being possible that such apparent balance might arise from error in accounting, and not in the actual transaction.

Mr. Jones, for defendant, then prayed the court to instruct the jury, in effect, that the appoinment of teller must have been from year to year, and that an interval of three days between the end of one year and his reappointment for the next year, (during which three days however he continued to act as teller,) destroyed the right of the plaintiffs to recover upon the bond for damage incurred, after such interval, by the want of care of the defendant; and also that the obligation of the bond ceased on the 4th of March, 1821, the day on which the charter of the bank would have expired if it had not been extended by the acts of 1820 and 1821.

But THE COURT (nem. con.) refused to give the said instruction.

Mr. Key, for plaintiffs, then moved the court to instruct the jury that the defendants are bound under their contract with the plaintiffs contained in the said bond, to save them from all loss arising from any want of care of the said teller; and that if mistakes were made by the said teller, in his business as teller, by which the said money was lost, and which loss, by any degree of care on the part of the said teller, in his office, could have been avoided, the defendants are liable therefor on the said bond.

Mr. Jones, contra. The degree of care is not stated in the bond. It means reasonable care; such as a prudent man would use in his own affairs; such as a bailee for hire is bound to use.

Mr. Worthington, on the same side, cited the following authorities, as to the obligation of a bailee for hire. Finucane v. Small, 1 Esp. 315; 1 Gow, 30; Peake, 114.

THE COURT (MORSELL, Circuit Judge, doubting) gave the instruction as prayed, observing that in the cases of bailment, the parties are supposed not to have made any express contract as to the extent of the liability of the bailee, and therefore the law fixes his liability for him. But here the parties have entered into an express contract upon the subject; and the court can only construe that contract according to its legal force and effect.

To this instruction the defendant's counsel took a bill of exceptions, which stated that the defendant objected to the instruction, "understanding it to be intended so to construe the bond as to exact of the defendant a kind and degree of care, beyond the reasonable and proper care which a prudent, cautious, and careful man would have exerted, or should be presumed to exert in his own affairs in the like case; and therefore the defendants requested the court so to modify the instruction requested by the plaintiffs, as to have it understood by the jury that a neglect of no other or higher kind or degree of care than the ordinary and reasonable care which a prudent, cautious, and careful man would have exerted, or should be presumed to exert, in his own affairs, in the like case, could be imputed to the defendants in this action, in so far as the plaintiffs seek to charge them for a loss occasioned by want of care. But the court, being of opinion that the condition of the bond stipulated for a different and higher degree of care than the ordinary care required of agents, clerks, or bailees, who have not expressly contracted to be liable for want of care, therefore gave the instruction requested by the plaintiffs as above, without modification; and rejected the modification proposed by the defendants as above, to which also the defendants excepted.

Mr. Jones then prayed the court to instruct the jury in effect, that the neglect of the cashier to settle the daily accounts of the teller, whereby the risk of error was increased, discharged the sureties in this bond. U. S. v. Van Zandt, 11 Wheat. [24 U. S.] 187; People v. Jansen, 7 Johns. 332.

Mr. Key, contra, cited U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720, and U. S. v. Nicholl, 12 Wheat. [25 U. S.] 509.

THE COURT (nem. con.) refused to give the instruction.

Mr. Jones then moved the court to instruct the jury, "that if they find from the evidence that according to general bank usage, no other or higher kind or degree of care was required of tellers or other bank officers, in the transaction of the bank business, than what

a prudent, cautious, and careful man would exert in his own affairs, and in the like case; and that the plaintiffs themselves had, for several years before the claim was set up by them in this case, tolerated and accepted of the said Forrest without complaint, a discharge of his duty as teller, with no other or higher kind or degree of care than as aforesaid; then it is competent for the jury to presume that the plaintiffs dispensed the said Forrest and his sureties from any other or higher kind and degree of care than as aforesaid; and in such case the plaintiffs are not entitled to recover in this action, any loss, as for the want of care of the said Forrest; unless they prove to the satisfaction of the jury that he failed in the instance complained of, in such reasonable and proper care as a prudent, cautious, and careful man would have exerted, or should be presumed to exert, in the like case."

But THE COURT (nem. con.) refused the instruction, because the evidence, as they thought, did not warrant the jury in inferring such usage, or such toleration; and because such usage, if proved in regard to banks who have not taken security against damage sustained by "want of care" of the teller, would not control the express stipulation to indemnify a bank for such damage, and because the instruction prayed would throw the burden of proof of negligence upon the plaintiffs, the bank, after they had shown that he had received money which he had not accounted for.

Verdict for the defendants; motion for new trial overruled; judgment for the defendants.

Case No. 14,357.

UNION BANK OF GEORGETOWN v. GEARY.

[See Case No. 5,241a.]

Case No. 14,358.

UNION BANK OF GEORGETOWN v. GOZLER.

[2 Cranch, C. C. 349.] [1]

Circuit Court, District of Columbia. Oct. Term, 1822.

USURY—BANK DISCOUNT.

It is not usury in a bank to take the discount for sixty-four days, upon a sixty-day note.

[See Bank of Alexandria v. Mandeville, Case No. 850.]

Assumpsit upon the joint and several note of the defendant and two others, with a memorandum to credit the first drawer, who was Vincent King. The defence was usury in taking sixty-four days' discount upon a sixty-day note.

Mr. Key, for plaintiff.

Mr. Jones, for defendant.

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

THE COURT (THRUSTON, Circuit Judge, absent) decided without argument, that it was not usury to take by way of discount, interest for sixty-four days on the amount of the note; the point having been before decided both here and in Alexandria. See Bank of Alexandria v. Mandeville (at Alexandria, July, 1809) [Case No. 850]; Bank of Washington v. Eliot (unreported).

Case No. 14,359.

UNION BANK OF GEORGETOWN v. MACKALL.

[2 Cranch, C. C. 695.] [1]

Circuit Court, District of Columbia. May Term, 1826.

MASTER AND SERVANT—ACTION UPON BANK TELLER'S BOND—RECEIVING INVALID CHECK —AG .EMENT.

1. If the teller of a bank, according to the usage of banks, and of the plaintiffs' bank, receive as cash, the check of an individual of good credit upon another bank, in which it afterwards appeared that he had no funds, it is not necessary for his justification, that he should further show that it was done at the risk and responsibility, and by the authority of his bank, and not at his own risk; and if in taking such a check he did only what was usual in the ordinary course of the trade and business of banking, and the usage of banks in like circumstances, his so taking it was not a breach of the condition of his official bond, "to make good to the bank all damages which it should sustain through his unfaithfulness or want of care."

2. If the teller of a bank, after receiving, as cash, an invalid check upon another bank, consents to take it as his own, and look to the drawer of the check for payment of it, he cannot afterwards, without the consent of his bank, return the check and throw it upon them.

3. If the plaintiffs' teller, according to the usage of banks, has received, as cash, a check of an individual of good credit, upon another bank, and the check is not paid, and he agrees to take the debt upon himself, yet the plaintiffs cannot recover the amount in an action upon his official bond, the only breach assigned being the receipt of the check as cash.

Debt upon the official bond of [Leonard Mackall] the teller of the Union Bank of Georgetown, the condition of which was, that "he should faithfully perform all the duties assigned to him in said bank, and make good to the said bank all damages which the same shall sustain through his unfaithfulness or want of care." The only breach assigned was, that the defendant, as teller of the bank, received C. P. Beeding's check on the Bank of Columbia, for $405, which was not paid. The defence was, that Beeding was, at the time, in good credit, and that it was the usage of the banks in this District, and of the plaintiffs' own bank, to receive, as cash, the checks of individuals of good credit, upon other banks. Evidence was offered by the defendant, of such usage. And the plaintiffs offered evidence that the defendant had obtained an attachment in

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

Montgomery county, in Maryland, in his own name, against Beeding, the drawer of the check; in order to obtain which, he made oath that Beeding was indebted to him in the amount of the check. But it appeared, also, that he first applied to the clerk of that county for an attachment, in the name of the bank, but was told by the clerk he could not get one, as teller, but he might obtain one in his own name; whereupon, he did so. Evidence was also offered by the plaintiffs, that the defendant, as teller, had received, as cash, the check of C. P. Beeding, upon the Bank of Columbia, for $405, which was not paid, the drawer having no funds there to meet it.

Whereupon, Mr. Key, for plaintiffs, prayed the court to instruct the jury "that the general usage of the tellers of banks, and of the Union Bank, given in evidence by the defendant, to take, as cash, checks of individuals, does not, of itself, though believed by the jury, bar the plaintiffs' right to recover; but the defendant must further show that the taking of such checks, as cash (which turned out to be bad), by the tellers, was an act done at the risk and responsibility, and by the authority, of the bank, and not at the risk of the teller."

Which instruction THE COURT (THRUSTON, Circuit Judge, contra) refused to give, but instructed them that if they should be of opinion, from the evidence, that the defendant, as teller of said bank, in receiving, as cash, the said check of the said Beeding, in manner aforesaid, did only what was usual in the ordinary course of trade and business of banking, and the usage of said banks, in like circumstances, it is not a breach of the condition of his said bond. See Russell v. Hankey, 6 Term R. 12.

Mr. Key, for plaintiffs, then prayed the court to instruct the jury, that if they believed, from the evidence, that the defendant, after taking the check in question, consented to take it upon himself, as his own, and look to Beeding for the payment of it, then the defendant could not, afterwards, without the consent of the bank, return the said check and throw it upon the plaintiffs.

Which instruction THE COURT gave; but, at the prayer of the defendant's counsel (Mr. Jones), further instructed them, that, if they should find, from the evidence, that the defendant brought the said suit in Montgomery county, upon which the plaintiffs rely, as evidence of the consent above imputed to the defendant, with the concurrence of the president of the bank, as agent, and for the advantage of the bank, and with an express understanding that it should not affect his liability as teller, for the receipt of the said check, and that, at the time when the said check was received, and when the said suit was brought, the said defendant was not bound to make good the said check to the plaintiffs, but had taken the same under the usage aforesaid, as sanctioned by the bank, then the circumstance of his so having treated the check as his own, does not entitle the plaintiffs to recover in this action.

The verdict and judgment were for the defendant. The plaintiffs took a bill of exceptions, but no writ of error was prosecuted.

Mr. Key, for plaintiffs.

Sampson & Jones, for defendant.

Case No. 14,360.

UNION BANK OF GEORGETOWN v. MAGRUDER.

[2 Cranch, C. C. 687.] [1]

Circuit Court, District of Columbia. May Term, 1826.[2]

NOTES—DISHONOR—NOTICE AND DEMAND—ADMINISTRATOR.

If the maker of a promissory note die before the note becomes payable, and the indorser administers upon the estate of the maker, no demand or notice is necessary to charge the indorser.

Assumpsit against the indorser of George B. Magruder's note for $643.21, dated November 8th, 1817, and payable to the defendant, or order, seven years after date, with interest. The maker died in August, 1823. The defendant became his administrator before the note became payable. No demand of payment of the note was made upon the defendant as administrator of the maker.

Key & Dunlop, for plaintiff, contended that it was not necessary to make any such demand in order to charge the defendant as indorser. It could be of no use, as the defendant himself was the party bound to pay, and could not be injured by want of notice.

R. P. Dunlop and Mr. Coxe, contra, contended that the obligation of the indorser was only conditional, &c.

THE COURT (CRANCH, Chief Judge, contra) was of opinion that no demand of payment of the note was necessary upon the defendant, as administrator of the maker, to charge the defendant as indorser of the note.

Reversed by the supreme court of the United States. 3 Pet. [28 U. S.] 87.

Case No. 14,361.

UNION BANK OF GEORGETOWN v. RIGGS.

[2 Cranch, C. C. 204.] [1]

Circuit Court, District of Columbia. June Term, 1820.

CONTINUANCE—SUPPLEMENTAL AFFIDAVIT—ABSENT WITNESS.

1. The court will not receive a supplemental affidavit, to obtain a continuance of the cause.

2. The affidavit for a continuance, on the ground of the absence of a witness, must state

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

[2] [Reversed in 3 Pet. (28 U. S.) 87.]

that the affiant believes that the cause cannot be tried with safety to the party applying for the continuance, without the attendance of the witness.

The defendant's affidavit, did not aver that he verily believed that the cause could not be tried with safety to himself, without the attendance of the absent witness.

Mr. Key, for plaintiff, objected to the continuance, upon the ground that the affidavit was imperfect by reason of the omission of that averment.

Mr. Jones, for defendant, contended that that averment is only matter of form, and that it is to be inferred from the facts stated.

Mr. Swann, on the same side, stated that it was by his inadvertence that the averment was omitted.

The defendant, being in court, offered an additional affidavit containing the averment.

Mr. Key objected that it was too late; that supplemental affidavits were dangerous, &c.

Mr. Jones contended that it was not too late, as the court had not given its opinion that the affidavit was insufficient.

THE COURT (CRANCH, Chief Judge, contra) refused to continue the cause, because the affidavit, without such an averment, was insufficient; and said they would not receive a supplemental affidavit, after the original affidavit had been laid before the court, and the defect has been pointed out by the opposite counsel; on account of the strong temptation it would hold out for perjury.

Case No. 14,362.

UNION BANK OF GEORGETOWN v. SMITH.

[4 Cranch, C. C. 21.] [1]

Circuit Court, District of Columbia. Aug. 2, 1830.

ADMINISTRATORS—ORDER OF PAYMENT OF DEBTS—LEX FORI.

In the administration of the estate of a deceased person, debts are always to be paid according to their respective dignity, as regulated by the law of the country where the representative of the deceased acts, and from which he derives his powers; not by the law of the country where the contract was made.

[Cited in Tyler v. Thompson 44 Tex. 497.]

The case agreed states that "Samuel Robertson, a native of the state of Maryland, a purser in the navy of the United States, and as such, purser for several years before his death, stationed and domiciled at Norfolk, in the state of Virginia, died in the year 182–, at Bedford, in Pennsylvania, insolvent, and indebted to the plaintiffs residing in the District of Columbia, on simple contract entered into there, which debt still remains due and unpaid; and also died indebted to one —— Thompson, residing in Virginia, upon a specialty executed there, in a sum exceeding the whole amount of assets in the hands of the defendant [Clement Smith] to be administered. The said Robertson having died possessed of personal assets in Washington county, in the District of Columbia, the defendant obtained letters of administration upon his estate, in that county, and has collected, and now holds the sum of $8,390.01½. The plaintiffs claim a dividend of the assets, according to the laws of administration in force in that county. The defendant resists payment, upon the ground that the said Thompson claims a priority of payment, as holder of a debt due by specialty, according to the laws of administration in Virginia, where, it is contended, the deceased was domiciled, at the time of his death, and where the debt was contracted, and the obligation given."

J. Dunlop, for plaintiffs.

His residence in Virginia was as purser of the navy-yard, at Norfolk, in public employ. This is not a domicil, within the meaning of that term, in the cases where distribution is to be according to domicil. That principle is founded on public policy—comity between nations—to encourage foreign commerce. The cases are where the parties claim under the bounty of the deceased, or as heirs and distributees. Bempde v. Johnstone, 3 Ves. 200; Somerville v. Lord Somerville, 5 Ves. 786; The Venus, 8 Cranch [12 U. S.] 253. There is no case in which the creditors, citizens of the country, have been excluded or postponed to foreign creditors, under a foreign law. The contract is to be expounded according to the lex loci contractûs, but the remedy is to be according to the lex fori. The Virginia creditor must come here for his remedy. In Harvey v. Richards [Case No. 6,184], there was no conflicting law of the state that prevented Mr. Justice Story from decreeing according to the principles of the law of nations. There were no debts to be paid. The question was wholly as to the rights of foreigners residing abroad. As between them, the law of their country was to be the rule of decision. The opinion of Mr. Justice Story (11 Fed. Cas. p. 760) is a mere dictum. His attention was not drawn to this particular point. He was contemplating only the surplus, after payment of the debts.

Mr. Dunlop also cited the testamentary system of Maryland, in force in this county (section 2); c. 3, § 11; c. 8, § 17; c. 5, § 2; Harvey v. Richards [supra]; Richards v. Dutch, 8 Mass. 506, 515; Stevens v. Gaylord, 11 Mass. 257, 264, 269; Hunter v. Potts, 4 Term R. 182, 186, 189, 191, 194; Sill v. Worswick, 1 H. Bl. 690; De Sobry v. De Laistre, 2 Har. & J. 224; U. S. v. Harrison, 5 Cranch [9 U. S.] 299.

Mr. Lear, contra. Domicil depends upon circumstances. If his residence be for his private purposes, it is a domicil. But the domicil is admitted in the state of the case. The question is not open.

THE COURT said they did not consider the question of domicil open under the words of the case, as stated.

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

Mr. Lear. The law of the domicil is the law of the contract; and the law of priority of payment, in cases of deceased insolvents, is part of the contract; and creditors in Virginia take a bond rather than a note, because the bond-debt has priority of payment. They have, therefore, a right to the same priority, in all countries. Pipon v. Pipon, Amb. 25; Sill v. Worswick, 1 H. Bl. 690; Philips v. Hunter, 2 H. Bl. 402–406; Thorne v. Watkins, 2 Ves. Sr. 35; Bruce v. Bruce, 2 Bos. & P. 229.

R. S. Coxe, on the same side. Personal property has no locality; it follows the person, and must be transferred and transmitted according to the law where the owner is. This is the foundation of the rule of the law of domicil. Harvey v. Richards [supra]. If a man die, leaving goods in twenty-four states, there must be twenty-four administrations, if each is to administer according to the law of the place where goods are found. If the Virginia creditor had taken out letters of administration in Virginia, he might have come here and obtained these assets and taken them to Virginia, where they would have been liable to the Virginia law of priority. Stevens v. Gaylord, 11 Mass. 263 (Judge Jackson's opinion). Every administration, not taken out in the place of domicil of the deceased, is an ancillary administration, although no administration should be ever taken out in the place of domicil. In De Sobry v. De Laistre, 2 Har. & J. 224, there was no question as to the rights of creditors. The general rule is, that the effects must be distributed according to the law of the domicil. It is incumbent on the plaintiffs to show the exception in favor of creditors. If the law of the domicil made the debt primarily chargeable upon real estate, could the creditor come here and charge the personal property, in the first instance?

As to preference of our own citizens, Mr. Lear cited Folliott v. Ogden, 1 H. Bl. 130, 131; and Mr. Coxe cited Toll. Ex'rs (Am. Ed.) 259; Brodie v. Barry, 2 Ves. & B. 130; Drummond v. Drummond, 6 Brown, Parl. Cas. (New Ed.) 601; Decouch v. Sevitier, 3 Johns. Ch. 190, citing Huberus, De Conflictu Legum; Holmes v. Ramsen, 4 Johns. Ch. 460.

Mr. Key, in reply. The administrator is bound by his oath and by his bond, to administer the effects according to law; and the law directs that all creditors, except judgment creditors, should be paid pari passu. This is a suit by a creditor domiciled here; the debt was contracted here, and it may be presumed, upon the credit of the funds here; but a Virginia creditor says his claim is superior in dignity, and must be first paid, according to the law of Virginia. Suppose he assigns his Virginia bond to a citizen of the District of Columbia, it is conceded, by the opposite counsel, that the priority would be assigned with the bond. Suppose the bond had been made here and assigned to a Virginia assignee, it would upon the same principle, be equally entitled to priority, because the effects here must be distributed according to the law of the domicil. So, if a Maryland creditor of a Maryland debtor were obliged to go into Virginia, and sue the Virginia administrator there, he would be entitled to an equal distribution, although there should be also bond debts. This priority cannot exist in the lifetime of the debtor; it is only given by the positive law of the country where the fund is found. By comity, the nation in which the fund is found, if it be not the nation of the domicil of the deceased, will distribute that fund according to the law of the domicil, among such as are entitled to the succession. Personal property originally extends only to goods in possession. When the owner dies the possession is gone, and is no longer evidence of property. At common law no individual had a right to it; there was no right of succession. It is a right depending entirely on positive municipal law. The owner had no natural right to dispose of it after his death. Neither his creditors nor his children had any natural right to the goods after his death. The law makes a will for him if he does not make one for himself. The law of the domicil regulates this matter. The statute of distribution is a mere substitute for his will. The distributees are as much the objects of his bounty as if they claimed under his will. By not making a will he shows his intent that the distributees shall inherit. He might have cut them off. This comity is only applicable to the right which the owner has voluntarily to dispose of his effects, where such disposition is not contrary to his contract, nor to the rights of creditors, nor to the municipal laws of the country, where the fund is; made for the security of creditors, or for the due administration of the fund. The reason of the principle applies only to the distribution of the fund to be distributed among those who are entitled to the succession. So are the cases, Pearsall v. Dwight, 2 Mass. 84; so Chancellor Kent, in 4 Johns. 478, says, "If there be no law of the country against it," &c., and in page 471, "it is admitted in all cases," &c., "where no positive law intervenes." So in quoting Huberus, "sine suo, suorumque prejudicio;" and again, "except in cases where it is not against the positive law," &c.

THE COURT (nem. con.) stopped Mr. Key, and said they were, at present, satisfied. CRANCH, Chief Judge, said he would look into the cases, and if any doubt should arise, he would mention it to the counsel.

CRANCH, Chief Judge. If I understand the argument in support of this defence, it is this: Every contract is to be expounded, and to have effect, according to the law of the place where, or in reference to which, the contract was made. By the law of Virginia where this specialty contract with Thompson was made, it is entitled to priority of

payment out of the effects of the deceased debtor. That those effects are to be administered according to the law of the place of domicil of the debtor at the time of his death, although found in a jurisdiction where a different rule of administration prevails. That as all the rights in relation to personal property depend upon the law of the place of domicil of the owner, the effects here must either be transmitted to that place of domicil for distribution, or must be distributed here according to the laws of that place. Therefore, either upon the ground that the priority of payment is a privilege annexed to, or is part of, the original contract, and therefore accompanies it wherever it is to be enforced; or upon the ground that the personal estate of the deceased is to be distributed, or disposed of, according to the law of the domicil, it is contended that this debt due by specialty, to the Virginia creditor, is entitled to priority of payment out of the assets in the hands of the defendant.

The principal case cited in support of this defence is Harvey v. Richards [Case No. 6,184], decided by Judges Story and Davis, in the circuit court for the district of Massachusetts, in the year 1818; and this is relied upon, not for any point decided in the cause, but for certain dicta which fell from the learned judge who pronounced the opinion of the court. Mr. Justice Story, speaking of the opinion of the supreme judicial court of Massachusetts in the cases of Richards v. Dutch and Dawes v. Boylston, infra, in which that court had decided that the personal effects of a foreign testator, collected there, must be sent to the foreign tribunal for final settlement and distribution, says, "But no reasons are given for this particular doctrine." "There is, too, a qualification of its doctrine in favor of creditors, the ground of which it would be most desirable to ascertain. Why should not legatees and distributees be entitled to recover out of the assets here, as well as creditors? It is true that legatees claim by the bounty of the testator; but it is a legal right as fixed and vested as the right of a creditor; and as to distributees the case is still stronger; for that rests not on the bounty of the intestate, but on the law of the land, which at the same time enables the creditor to receive his debt out of the assets, and the next of kin to claim the residue. If it be said that it belongs to the public policy of the country to sustain the claim for debts due to its citizens, it seems to me no less to belong to that policy to sustain any other claims of its citizens which are founded in justice and law. If it be said that the assets are to be distributed by a foreign law, and it is very difficult and laborious to learn what that law is, and to apply it correctly, the same objection applies to the payment of debts. The priority of debts, the order of payment, the marshalling of assets for this purpose, and the cases of insolvency, the mode of proof as well as distribution, differ in different countries. And if, in case of debts, the court here is to apply the lex domicilii, the same embarrassment will arise as in other cases of distribution to the next of kin. There is no more difficulty in the order of payment of legacies than of debts; and courts of law must, in these cases, ascertain and apply the foreign law, precisely as they do in other cases. I pressed the learned counsel for the defendant, at the argument for a solid ground on which to sustain the distinction in favor of creditors, either upon principles of national comity or public convenience, or substantial justice. I heard no vindication of it in either view. And cases may readily be imagined in which such a distinction might work injustice. Suppose that by the lex domicilii the debts are primarily a charge upon the realty, and not on the personal estate, shall the creditor here be permitted to exhaust the personal assets here, when the succession to the real and personal estate may be different in the foreign country. Suppose the assets abroad and at home have a different order of succession and distribution, shall the creditor here be permitted to defeat that order? If not, then the court here must apply the lex domicilii to protect the heirs, and must ascertain the nature and extent of that law; and if so, why not proceed to distribute the property among those who are the cestuis que trust entitled to it?" And he says, "I confess myself unable to admit the distinction in favor of creditors, without admitting, at the same time, the like rights in favor of legatees and heirs; nor have I been able to find that distinction sustained, or adverted to, in any other authorities."

The argument, drawn from these expressions of the judge, is this: It is admitted on all hands that the surplus of a deceased foreigner's movable goods, after payment of his debts, is to be distributed according to the law of the domicil. The judge cannot perceive any reasons to distinguish between the case of distributees and that of creditors. If there be none, then the personal effects found here, if insufficient to pay all his debts, must be apportioned among his creditors according to the law of his domicil, and not according to the laws in this country. But the question before the judge was whether his court had a right to distribute the surplus, or was bound to send it for distribution to a foreign tribunal; and he argues from the admitted right of the court to order the debts to be paid out of the fund, that it had also a right to distribute the surplus. The rule, by which the distribution of the surplus should be made, was admitted. There was no question as to the rule by which the debts should be paid. The argument, that because the court had a right to order the payment of the debts, it had also the right to order the distribution of the surplus, cannot be converted into an argument.

that because that distribution is to be made according to the law of domicil, therefore the order of the payment of the debts of the testator is to be regulated by the same law. The rule that the succession of movables is to be regulated by the law of the domicil of the deceased is now a well-settled rule of the law of nations and will prevail wherever it does not interfere with the municipal law of the place where the effects are found. It results from the principle, that the owner of personal goods has a right to dispose of them wherever they may be. Every sovereign is interested in the wealth of his subjects, wherever situated, because in proportion to that wealth will be his capacity to raise a revenue for the support of his government. Vatt. Law Nat. Bk. 2, c. 7, § 81. An alien friend has a right, by the law of nations, to withdraw his funds whenever he may please. If he is restrained by the government of the country it becomes a national affair, to be settled by negotiation or war. The sovereign of the owner of the goods, having such an interest in them, has a right, (in case his subject shall not in his lifetime have directed the succession of the goods,) to provide for that succession by law; for the goods composing part of the wealth of the nation are always under the protection of the sovereign. Id. Bk. 2, c. 8, §§ 109, 110. But the sovereign of the country, in which the goods are found, is equally bound to protect the wealth of his subjects; and if the foreign owner of the goods die indebted to his subjects, he may insist that such debts shall be paid before the goods are withdrawn from his jurisdiction. Every civilized nation is bound to afford to all persons within its jurisdiction the means of obtaining justice; but whoever applies to the tribunals for justice, is bound to receive it according to the forms, and subject to the regulations of the country to whose forums he resorts. We are bound by the comity, if not by the law of nations, to afford to foreigners, as well as to our own citizens, the means of obtaining payment of the debts due to them; and if the funds of a foreigner are found here, they may, by the municipal law of the country, be made liable for the payment of such debts; but those who resort to the funds, whether they be foreigners or citizens, must be content to take their remedy in such manner, and to such extent, as the municipal law will permit. It is not for a foreigner to say, that if the funds were in his own country his debt would have a preference, unless, indeed, a lien shall have attached before the funds shall have been subjected to the municipal law of this country; in which case he might, perhaps, be considered as owner to the extent of such lien. But with regard to the distribution of the surplus, the sovereign of the country in which a foreigner's goods are found, has no concern. He has no interest but to protect it as he is bound to protect all the other property of strangers within his jurisdiction. He cannot, consistently with the law of nations, detain it from the country to which it belongs. Hog v. Lashley, 6 Brown, Parl. Cas. 580, 581. But if the subjects of that country come to his tribunals for aid to assert their rights, he is bound by the comity of friendly nations, to grant it; and in granting it, his tribunals will decide upon those rights according to the laws of the country to which the property belongs, and under whose laws they derive their title. Hence results the difference between the rule for the order of payment of debts, which must be according to the lex loci rei sitæ, and the rule for the order of distribution of the surplus, which must be according to the lex loci domicilii. See Hog v. Lashley, ut supra.

All the cases cited by the defendant's counsel are cases of distribution, or disposition of the surplus; which, in truth, is the only part of the property subject to the lex domicilii; for all that part of the property which goes to the payment of debts is to be disposed of according to the lex loci rei sitæ; it being made liable only by the municipal law of that place. The law of nations only decides the question, what law shall regulate the succession of that property, of which the deceased could have disposed in his lifetime; it does not decide the question by what law his property shall be applied to the payment of his debts. In this country, and probably in most other civilized countries, the personal estate of a deceased person cannot be lawfully administered without some special authority derived from the municipal law of the place where the property is found; and, in general, security is required, that the executor or administrator should administer it according to certain rules prescribed by that law. Such authority and such security are required by the laws in this country. After payment of judgments and decrees against the deceased, the other debts are to be paid pari passu, whether due by specialty or by simple contract. A foreign creditor cannot participate in this fund unless in conformity with these municipal regulations. He must take his dividend according to the rule prescribed. None of the authorities which show that the distribution is to be made according to the lex domicilii, allege that the same law applies to the payment of debts; but almost all of them exclude from the operation of the rule, cases in which the rule is contravened by the municipal law of the country in which the property is found. Thus, in Hunter v. Potts, 4 Term R. 186, Mr. Law, arguing in favor of the validity in a foreign country, of an assignment under the English bankrupt acts, says, "Both Lord Talbot and Lord Mansfield recognized the right of suit by the assignees in foreign countries; to admit which is to admit the substitution as made by the lex loci, which always takes place as to movable effects, except as far as it is contravened by the mu-

nicipal laws of those countries where the character is to be exercised." And Mr. Bower, who argued the same case on the other side, in pages 189, 190, says, "Governments so act with confidence to each other, that they will recognize one another's laws, provided they do not clash or interfere with their own, or injure their own subjects." Lord Kenyon, in delivering the opinion of the court in the same case, says, "Therefore the only question here is, whether or not the property, in that island, passed by the assignment, in the same manner as if the owner, the bankrupt, had assigned it by his voluntary act. And that it does so pass, cannot be doubted, unless there were some positive law of that country to prevent it. Every person, having property in a foreign country, may dispose of it in this; though, indeed, if there be a law in that country, directing a particular mode of conveyance, that must be adopted." In Sill v. Worswick, 1 H. Bl. 691, Lord Loughborough, in delivering the opinion of the court, and speaking of the rules of personal property being governed by the law which governs the person of the owner, says, "But it may happen, that in the distribution of the law in some countries, personal property may be made the subject of securities, to a greater or less extent, and in various degrees of form. It is in those cases only that any difficulty has occurred." And in page 693, he says, "It by no means follows that a commission of bankrupt has an operation in another country against the law of that country." So in the case of Philips v. Hunter, 2 H. Bl. 405, the court said, "This being the principle of those laws " (the bankrupt laws), "it seems to follow, that the whole property of the bankrupt must be under their control, except in cases which directly militate against the particular laws of the country in which it happens to be situated." "It is true," (say the judges in that case,) "that the laws of the country where the property is situated, have the immediate control over it, in respect to its locality, and the immediate protection afforded it; yet the country where the proprietor resides, in respect to another species of protection afforded to him and his property, has a right to regulate his conduct relating to that property." "The property, which this country protects, it has a right to regulate." And in page 409, they say, "When it is argued, that in many instances the bankrupt laws of this country do not operate in another, it is to be observed, that though to some purposes they do not, yet to all civil purposes they do, when such purposes are neither repugnant to the law of the particular state, nor to the general law of nations."

Lord Kames, in his Principles of Equity (Bk. 3, c. 8, § 3, p. 275), says, "Movables, on the other hand, occasionally in Scotland, belonging to a foreigner, are held to be foreign effects, not regulated by the law of this country. The occasional connection with this country yields to the more intimate connection with the proprietor who is a foreigner. For this reason, a foreign assignment of such movables, formal according to the lex loci, will be sustained by the court of sessions acting as judges in foreign matters. And for the same reason, an executor named by the proprietor, will have a good claim to such movables, provided he complete his title secundum consuetudinem loci. And even though the proprietor here occasionally fall sick and die, the court of session will prefer those who are next of kin according to the law of his country, and if he be an Englishman, for example, will sustain letters of administration from the prerogative court, as the proper title." "The nomination of an executor by will, is, it is true, an universal title, effectual jure gentium, which, therefore, ought to be sustained everywhere; but letters from the prerogative court of Canterbury, for example, will not be sustained here even though granted to the next of kin. The powers of that court are confined within its own territory, and therefore the next of kin must be confirmed here." In page 277, he says, "With respect to process, as well as with respect to legal execution, no circumstance is regarded but locoposition merely, however occasional or accidental. A judge has authority over every person and every legal subject within his territory; and to whatever country goods may belong, the proprietor, or a creditor, must claim them from the court to which they are subjected for the time. No other judge can give authority to apprehend the possession, or to seize them by execution for payment of debt." And in section 4, p. 278, he says, "Deliberating upon this matter, it appears evident, that as payment must be demanded in the forum of the debtor, the form of the action which is brought against him, the method of procedure, the execution that passes upon the decree, and what person is liable as heir in place of the debtor dying before payment, must all be regulated by the law of the debtor's country. On the other hand, with respect to titles derived from the creditor, whether inter vivos, or by succession, these naturally are regulated by the law of the creditor's country. Thus, an assignment, made in Scotland according to our form, of a debt due by a person in a foreign country, ought to be sustained in that country as a good title for demanding payment. And a foreign assignment of a debt due here, regular according to the law of the country, ought to be sustained by our judges." "The same of succession. If a man make a settlement of his effects, according to the forms of his own country, that settlement ought to be sustained everywhere And if he die intestate, the heir that is called to succeed him by the law of his own country, ought to be entitled to his movable effects, wherever situated, and to demand payment from his debtors, wherever found. The reason is, that

when a man forbears to make a deed regulating his succession, it is understood to be his will, that the law of his own country take place. If he be satisfied with the heir whom the law calls to his succession, he has no occasion to make a settlement." In 1 Atk. 19, Lord Hardwicke says, that although the chancellor has no power over the persons of foreigners any longer than while they are in England, yet he may lay his hand on any property they may have there in stocks, &c. In Potter v. Brown, 5 East, 131, where the question was whether a discharge of a citizen of Maryland, under the insolvent law of Maryland, was a bar to the action of an English creditor suing in England, Lord Ellenborough said, "It is every day's experience to recognize the laws of foreign countries as binding on personal property; as in the sale of ships condemned as prize by the sentences of foreign courts, the succession to personal property, by will or intestacy of the subjects of foreign countries. We always import, together with their persons, the existing relations of foreigners as between themselves according to the laws of their respective countries; except indeed where those laws clash with the rights of our own subjects here, and one or other of the laws must necessarily give way, in which case our own is entitled to the preference. This having been long settled in principle and laid up among our acknowledged rules of jurisprudence, it is needless to discuss it any further." That cause (Potter v. Brown) was decided upon the principle that as the Maryland law clashed with the rights of the English subjects; and that, as one or the other of those laws must give way, the preference was to be given to the English law.

In Hog v. Lashley, 6 Brown, Parl. Cas. 579, the counsel who argued in support of the power of the owner of the property to transfer it, wherever situated, said, "A man may, no doubt, alienate his property of whatever kind, provided he does not thereby transgress the law of the country where it is situated." And again in page 582, it is admitted by the counsel, that "it is a general rule with respect to process and execution, as well as making up legal titles to any subject, that the forms of the country where the proceedings are instituted, must be observed." Vatt. Law Nat. (Bk. 2, c. 7, § 85) says, "In the same manner the validity of a testament, as to its form, can only be decided by the judge of the domicil, whose sentence, delivered in form, ought to be everywhere acknowledged. But, without affecting the validity of the testament itself, the bequests contained in it may be disputed before the judge of the place where the effects are situated, because those effects can only be disposed of in conformity to the laws of the country;" (that is, as I understand it, agreeably to the forms of transfer required by those laws.)

In the case of Richards v. Dutch, 8 Mass. 515, although the court held that legatees of a foreign testator must resort to the courts of the testator's country for payment of their legacies, yet that the administrator here is bound to pay the debts of the testator; and that the defendant here might set off against the claim of the administrator any legal claims which they could establish as creditors of the estate of the deceased; but could not set off legacies. And in Dawes v. Boylston, 9 Mass. 355, 356. Mr. Justice Sewall, in delivering the opinion of the court, said, "The administration granted in this state has been justly styled ancillary in respect to the administration in the jurisdiction of the prerogative court. The defendant has an authority to collect, and to pay. debts, and is liable for the contracts and duties of the testator, recoverable, and which may be enforced within this jurisdiction; but is not liable to the court of probate upon any partial account to be there rendered and adjusted, to a decree either of payment or of distribution, whether for a legacy, or to any claiming by a supposed succession of the deceased's effects." And in the case of Selectmen of Boston v. Boylston, 4 Mass. 324, the same judge, in delivering the opinion of the court, says, "The administration granted to the respondent, with the will annexed, of Thomas Boylston, is to be considered not only as a means of collecting the effects of the testator within this jurisdiction, but of answering, according to the rules of the same jurisdiction, the demands of creditors, and all legal liens on those effects."

In Harvey v. Richards [Case No. 6,184], the counsel for the respondent, who was contending that the surplus should be remitted to the forum domicilii for distribution, says, "This state, influenced by the comity which exists between different countries upon this subject, invests the person pointed out by the original administrator, with authority to collect these effects; and in return for this indulgence, requires that the debts due to its own citizens shall be paid, (before these funds are withdrawn,) either ratably or fully according to the laws of that country." Mr. Webster, on the other side, said, "It is difficult to perceive the reason why debts are to be paid and legacies not paid, or the surplus not distributed. By the law of England, assets are to be marshalled, and judgments and bond debts are to be paid before debts by simple contract. If a simple contract creditor be found here, his debts having been contracted in India and with reference to the laws of that country, may he obtain satisfaction out of the funds here, and have judgment creditors and bond creditors unpaid in India? It would seem at least to be equitable, that debts contracted in India should be paid according to the laws of India, wherever the fund might be found. A general rule that all debts, asserted here, wherever contracted, should, in all cases, be paid out of the funds here, would seem to be as objectionable as the supposed rule that lega-

tees and next of kin, must in all cases resort to the forum of the domicil." In the same case, Mr. Justice Story, in delivering the opinion of the court, said, "That there ought to be no universal rule on the subject; but that every nation is bound to lend the aid of its own tribunals for the purpose of enforcing the rights of all persons having title to the fund, when such interference will not be productive of inconvenience or conflicting equities." And again he says, "I utterly deny that the administrator here cannot be compelled to account to any competent tribunal for all the assets which he has received under the authority of our laws." Again, he says, "Each of these administrations may be properly considered as a principal one with reference to the limits of its exclusive authority; and each might, under circumstances, be deemed an auxiliary administration." And again he says, "The administrator here is not a mere agent of the administrator abroad. He collects and receives the assets in his capacity as administrator generally; and so far as it may be wanted for payment of debts and legacies, he holds it in trust for the creditors and legatees, and, as to the residuum, for the next of kin." "Could the administrator abroad sue the administrator here to recover the assets collected here? I suppose not. The creditors, legatees, and heirs are the only persons competent to sue in respect of their own interests; and the administrator, as such, could have no remedy." And he says, "The administrator here is not the less administrator because he is not clothed with the same character abroad." "It is sufficient that he is the exclusive representative of the deceased, as to those assets."

In the case of Selectmen of Boston v. Boylston, 2 Mass. 388, it is said to be a rule of law well established, "that the rights of parties to property are governed by the lex loci, but the remedy, or form of recovery, by the law of the country where that remedy is sought, or where process is issued for its recovery." And in Pearsall v. Dwight, 2 Mass. 84, 89, which was an action in Massachusetts upon a note made in New York, Mr. Chief Justice Parsons, in delivering the opinion of the court, said, "The party claiming the benefit of this note, has sued it originally in a court of this state. The law of the state of New York will therefore be adopted by the court, in deciding on the nature, validity, and construction of this contract. This we are obliged to do by our own laws. So far the obligation of comity extends; but it extends no further. The form of the action, the course of judicial proceedings, and the time when the action may be commenced, must be directed exclusively by the law of this commonwealth. These are matters not relating to the validity of the contract; and to permit the laws of another state to control the court in its proceedings concerning them would intrench upon the authority of our own laws unnecessarily, and for no principle of common utility. Cases may be supposed in which this permission might be injurious to our citizens." The chief justice had before said, in the same case, "It is a general rule, that personal contracts entered into and to be performed in any one state, and which are there valid, are to be considered as valid in every other state." "This rule is subject to two very important exceptions: First, that neither the state in whose court the contract is put in suit, nor its citizens may suffer any inconvenience by giving the contract effect; and, secondly, that the consideration of the contract be not immoral." Huberus, in his title De Conflictu Legum (volume 2, lib. 1), says, "Præscriptio et executio non pertinent ad valorem contractûs, sed ad tempus et modum actionis instituendæ, quæ, per se, quasi contractum, separatumque negotium, constitit; adeoque receptum est, optimâ ratione, ut in ordinandis judiciis, loci consuetudo ubi agitur, etsi de negotio alibi celebrato, spectetur." And, with regard to this principle of comity of nations, he says, "Rectores imperatorium id comiter agunt ut jura cujusque populi, intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis, ejusque civium, præjudicetur. Verum tamen non ita præcise respiciendus est locus in quo contractus est initus, ut si partes alium, in contrahendo, locum respexerint, ille non potius sit considerandus. Nam, contraxisse unusquisque in eo loco intelligitur, ne quo ut solveret, se obligavit." Dig. 7, 21, 44. And again he says, "Effecta contractuum, certo loco initorum, pro jure loci illius alibi quoque observantur, si nullum inde civibus alienis creetur prejudicium in jure sibi quæsito;" In which case he says, "Magis est, in tali conflictu, ut jus nostrum, quam jus alienum, servemus." These passages are cited by Mr. Fonblanque with approbation in his note to the Treatise of Equity, Bk. 5, c. 1, § 6, vol. 2, p. 442. And Mr. Chief Justice Marshall, in delivering the opinion of the supreme court of the United States in the case of Harrison v. Sterry, 5 Cranch, [9 U. S.] 298, says, "The words of the acts which entitle the United States to a preference, do not restrain that privilege to contracts made within the United States, or with American citizens. To authorize this court to impose that limitation on them, there must be some principle in the nature of the case which requires it. The court can discern no such principle. The law of the place where a contract is made, is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic; and is rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the cause. In the familiar case of the administration

of the estate of a deceased person, the assets are always distributed according to the dignity of the debt as regulated by the law of the country where the representative of the deceased acts and from which he derives his powers; not by the law of the country where the contract was made." See, also, Fenwick v. Sears's Adm'r, 1 Cranch [5 U. S.] 259, and Dixon's Ex'rs v. Ramsay's Ex'rs, 3 Cranch [7 U. S.] 323, 324. So in the case of Lewis v. Fullerton, 1 Rand. (Va.) 23. The court of appeals in Virginia say, in regard to the lex loci contractus, "If, then, this contract, made in Ohio, had an eye to the state of Virginia for its operation and effect, the lex loci ceases to operate. In that case it must, to have its effect, conform to the laws of Virginia. It is insufficient under those laws to effectuate an emancipation, for want of due recording in the county court. It is also ineffectual, within the commonwealth of Virginia, for another reason. The lex loci is also to be taken subject to the exception that it is not to be enforced in another country when it violates some moral duty, or the policy of that country; or is inconsistent with a positive right secured to a third person or party by the laws of that country in which it is sought to be enforced. In such a case, we are told, magis jus nostrum quam jus alienum servemus. That third party, in this case, is the commonwealth of Virginia." So, also, in the case of Holmes v. Remsen, 4 Johns. Ch. 472, Chancellor Kent says, "The true question is whether it be not wise and politic, and just, where no positive law intervenes, and where it is not repugnant to the essential policy and institutions of the country, to adopt the rule of international law which other nations apply to us, and which impairs no right, but promotes general justice, and is founded on the mutual respect, comity, and convenience of commercial nations. Huber has placed this subject on proper grounds when, speaking of the effect of the law of the foreign domicil operating upon property in another jurisdiction, he says, 'Non vi legis immediatâ, sed accedente consensu potestatis summæ in alterâ civitate, quæ legibus alienis in loco suo exercitis, præbet effectum, sine suo, suorumque præjudicio, mutuæ populorum utilitatis respectu; quod est fundamentum hujus doctrinæ.' Lib. 1, Tit. 3, De Conflictu Legum, § 9." See, also, the case of DeSobry v. De-Laistre, 2 Har. & J. 224, to the same effect.

These authorities are perfectly satisfactory to show, that even if this were a question as to the construction of the original contract by the lex loci contractûs, the law of Virginia would not prevail in a conflict with the laws of this district, in a court of this district. But it is not a question as to the construction of the original contract. The right of priority forms no part of the contract, and could only arise in case the debtor should die insolvent, before payment of the debt. The contract itself does not provide for that case. The law of Virginia, which gives the priority, relates only to the remedy of the creditor in case such an event should happen, and could operate only upon such effects of the deceased, as should be found in that state. The law of that state, as such, cannot operate upon property out of its territory. If other states, in which the property of a citizen of Virginia may be found, permit the succession to go according to the law of Virginia, it is because it is part of the law of such states that the succession should be regulated as it would have been regulated by the law of Virginia if the property had been found there. But if the laws of those states should provide that the debts of the deceased shall be first paid out of the property, in a certain ratio, those laws must prevail, because all property, within the limits of a state, is subject to the laws of that state; and if a foreign law be permitted, in any manner to regulate the disposition of such property, it is because the state, in which the property is found, permits it as a matter of comity. This is expressly stated by Huberus, in a sentence next following one of those already cited, where he says, "Ex quo liquet hanc rem non ex simplici jure civili, sed ex commodis, et tacito populorum consensu, esse petendum."

Upon the first opening of this case the court had not the least doubt upon the point, and nothing but respect for the learned counsel who have raised the question, and the ingenuity of the argument founded upon what we suppose to be a misapprehension of the observations of a very learned judge, could have induced this court to give its reasons for the opinion it has formed upon what it deemed to be a well-settled point of law, namely, "That in the administration of the estate of a deceased person, the assets are," as stated by Chief Justice Marshall, in Harrison v. Sterry, 5 Cranch [9 U. S.] 298, "to be distributed according to the dignity of the debt as regulated by the law of the country where the representative of the deceased acts, and from which he derives his powers, not by the law of the country where the contract was made."

Judgment for the plaintiff on the case agreed.

UNION BANK OF LOUISIANA (BANK OF TENNESSEE v.). See Case No. 899.

UNION BUTTON-HOLE & EMBROIDERY CO. (SINGER SEWING MACH. CO. v.). See Case No. 12,904.

UNION CAR SPRING MANUF'G CO. (NATIONAL SPRING CO. v.). See Case No. 10,051.

UNION CITY (HOLLY v.). See Case No. 6,624.

Case No. 14,363.

The UNION EXPRESS.

[1 Brown, Adm. 516.] [1]

District Court. E. D. Michigan. Sept., 1874.

SALVAGE—CONTRACT WITH OWNER OF CARGO.

Where a barge without small boat, provisions, sails or other means of propulsion, was adrift upon Lake St. Clair, although she had come to anchor, and the weather was good, *held*, that she was in a situation to have salvage services rendered her, but that an adjustment of the same made by the owner of the cargo, was not binding upon the vessel.

[Cited in Maltby v. Steam Derrick Boat, Case No. 9,000; Cope v. Vallette Dry-Dock Co., 16 Fed. 926.]

This was a libel in rem by Alexander Tregent, owner of the tug Gem, for towage and salvage services, on the nights of June 17th and 18th, 1873. On the 17th of June the barge took on a cargo of 250 cords of slabs at Belle river, on Lake St. Clair, in the province of Ontario, for transportation to Sandwich, on Detroit river, in the same province, for one John Holgate. She had no sails or other means of propulsion of her own, and no small boat. After taking on her cargo, she broke loose from her moorings, and, with her crew on board, drifted out into the lake, what distance from shore did not appear, and finally came to anchor in about twelve feet water. The slabs constituting the cargo belonged to one Mather, but Holgate, in whose name they were shipped, held a contract, in writing, by which Mather agreed to sell them to him for six shillings per cord, but to remain the property of Mather until paid for. After the barge had gone adrift, and in the afternoon of the same day, Holgate, not then knowing the whereabouts or situation of the barge, except that she had gone adrift with her cargo on board, applied to libellant to send his tug Gem to her rescue, and bring her and cargo into Detroit, which libellant consented to do; and it was then agreed that the compensation for that service should be at the rate of $7 per hour for the time necessarily spent, and that libellant should look to the cargo and barge for his security. The tug left Detroit on that service the same evening, and returned to Detroit with the barge and cargo between five and six o'clock the next morning. At just what hour the tug left Detroit did not clearly appear. All that appears is that it was "after tea," which would make the time of leaving probably six, or between six and seven o'clock. Although the night was dark, the tug had no difficulty in finding the barge; and after lying by her one or two hours, to give the men on her time to prepare and take supper from provisions furnished them from the tug, the barge having no provisions on board, she took the barge's line and proceeded at once to Detroit. When the tug came up to the barge, her master, Moses Robarsh, who was also equitable owner, then on board of her, said to the master of the tug, he was glad he had come for them, and on being informed that the tug was at work by the hour, at once passed his line to the tug, and as soon as the men were ready, the journey to Detroit was at once commenced and carried to the end without further trouble or delay. It did not appear that Robarsh was informed of the rate of compensation agreed on, but only that the tug was at work by the hour. Mather, the legal owner of the cargo, was with Holgate when the bargain for the tug was made, but whether he took any part in it or not did not appear; but it did appear that he was informed and knew of the terms agreed on. After the barge was brought to Detroit, and on the same day, Holgate gave to the master of the tug an order or draft on John Pridgeon, to whom the cargo was soon after transferred, for $98, being for 14 hours' services at $7 per hour, but payment was refused. Before this writ was brought, both vessel and cargo had been transferred to the said John Pridgeon, and he is the claimant in, and is defending this suit. There was some testimony tending to show that Holgate was intoxicated so as to be incapacitated to do business when he made the bargain with libellant for the use of the tug, but not at the time he gave the order on Pridgeon. Some further facts in the case will appear in the opinion of the court.

H. H. Swan and J. W. Finney, for libellant.

Alfred Russell and S. Larned, for respondent.

LONGYEAR, District Judge. The first question that will be considered is, whether the service rendered by the tug was a salvage service. I think the barge and cargo were in a situation to have a salvage service rendered for them. They were adrift and utterly helpless, and night was coming on; and, although the barge came to anchor, she was in danger of being broken by any storm which might come on; the men were without provisions, and they had no small boat or other means of escape to the shore. It is true, there was no particular peril to the tug or her crew, nor any special difficulty or enterprise in the undertaking; but those considerations do not necessarily determine the character of the service as a salvage service or not; they bear more directly upon the quantum or measure of compensation to be allowed, where more has been agreed on. I hold, therefore, that, the service being a salvage service, libellant has a lien therefor on both vessel and cargo enforceable in this court, independent of any effect that might be given to the contract between libellant and Holgate.

It is not important or necessary to consider whether Holgate's agreement with libellant was valid or invalid, or whether, if valid, it bound both vessel and cargo, or cargo only

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

if either; because, as already seen, a lien exists upon both independently of it; and for the further reason that I am satisfied that $7 per hour, the rate of compensation agreed on, is a fair and reasonable compensation on a quantum meruit. All that remains, therefore, is to determine the number of hours for which libellant is entitled to compensation. It was concluded that the draft given by Holgate was evidence of a settlement and of an adjustment of the amount in controversy. While that is correct, it is equally true that it is prima facie only, and it is not even that as to the vessel, for Holgate was interested in the cargo only, and he had no power to bind the vessel in that manner. And, in addition, it appears by libellant's own testimony, that the data upon which Holgate made the adjustment were erroneous. He allowed the tug for 14 hours. The longest time that can be made by the testimony, is from 6 p. m. to 6 in the morning, which would be 12 hours. I think the most reasonable data, from the testimony, are 6½ p. m. to 5½ in the morning—eleven hours instead of fourteen as allowed by Holgate. The distance was only 18 or 19 miles, and notwithstanding the tug was obliged to run at a low rate of speed after she arrived in the vicinity where it might be expected the barge would be found, and also that she laid by the barge an hour or so waiting for the men to get supper, I think even eleven hours an unreasonable time. The only explanation of the extraordinary amount of time consumed is that, owing to some derangement of the tug's boiler, a sufficient amount of steam could not be made to enable her to make better time. But the time lost on that account must be held to be the loss of the tug, and therefore cannot be charged to the vessel and cargo, especially in the absence of all proof that the condition of the tug was known to the parties interested when she was engaged and her services accepted. I think nine hours a liberal allowance as to time, and libellant's recovery must be upon that basis.

9 hours' service at $7 per hour.....	$63 00
Int. June 18, '73, to date, Sept. 14, '74, at 7 per cent.....	5 48
Making a total of.....	$68 48

For which amount libellant must have a decree, with costs. Decree for libellant.

Case No. 14,364.

The UNION EXPRESS.

[1 Brown, Adm. 537.] [1]

District Court, E. D. Michigan. Sept., 1874.

MARITIME LIENS—MONEY ADVANCED ON REQUEST OF OWNER—NECESSARIES FURNISHED IN HOME PORT.

1. A maritime lien exists for moneys advanced to purchase or pay for necessaries supplied to a ship wherever it would exist for the necessaries themselves.

2. Such lien exists for necessaries furnished upon request of the owner wherever it is shown affirmatively they were furnished on the credit of the vessel.

[Cited in Stephenson v. The Francis, 21 Fed. 722; The Chelmsford, 34 Fed. 402; The Allianca, 63 Fed. 732.]

3. Where money was advanced by one who held the legal title to the vessel under a bill of sale given to him as security for the indorsement of a note which had been paid by the maker and the bill of sale thereby extinguished, *held*, the lien was not thereby defeated.

4. Where, however, libellant was jointly interested with the equitable owner in the profits of one trip, *held*, he could not recover for advances made during that trip.

5. Parties may stipulate for a lien for necessaries, notwithstanding that no such lien is implied by the law of the place where such necessaries are furnished.

[Cited in The General Tompkins, 9 Fed. 621.]

6. By the general maritime law a lien exists for necessaries furnished a domestic vessel, even though by the law of the place there may be no jurisdiction to enforce it.

This was a libel in rem brought by John H. Eakin against the barge Union Express, a Canadian vessel, for moneys advanced by him to procure and pay for necessaries supplied to the barge, partly at Detroit, in this state and district, and partly at Windsor, in the province of Ontario, the home port of the vessel.

J. W. Finney and H. H. Swan, for libellant.

(1) Money advanced for the purchase of supplies constitutes a lien upon the vessel, equally with the supplies and repairs furnished directly to the vessel. Thomas v. Osborn, 19 How. [60 U. S.] 28; The Lulu, 10 Wall. [77 U. S.] 203; The Grapeshot, 9 Wall. [76 U. S.] 141; The Emily B. Souder [Case No. 4,454]; The Kalorama, 10 Wall. [77 U. S.] 204.

(2) Libellant is not deprived of his lien by the fact that the advances were made to the owner, since credit was not given to him. The Guy, 9 Wall. [76 U. S.] 758; The Kalorama, 10 Wall. [77 U. S.] 213.

(3) This lien exists for advances made in Canada. See brief in preceding case. [Case No. 2,583.]

Alfred Russell, for claimant.

(1) Granting that Eakin was not the owner, but that Robarsh was, we say that no lien is implied from contracts made by the owner in person. Conk. Adm. 7, 59; The St. Jago de Cuba, 9 Wheat. [22 U. S.] 416, 417; Beldon v. Campbell, 6 Eng. Law & Eq. 473; Pratt v. Reed, 19 How. [60 U. S.] 361; The Sophie, 1 W. Rob. Adm. 369; Thomas v. Osborn, 19 How. [60 U. S.] 29, 38, 40, 43.

(2) A person who loans money to be used in repairing a vessel is not a material-man, and can have no lien upon the vessel. Law-

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

son v. Higgins, 1 Mich. 225; 2 Pars. Shipp. & Adm. 148, note 4.

(3) Credit given to the builder or owner creates no lien. The Abby Whitman [Case No. 15].

(4) For all advances on this side the river libellant took notes of Robarsh, which are not produced or surrendered to be canceled. 2 Pars. Shipp. & Adm. 153, note 1.

(5) Charges for telegrams are not liens. The Jos. Cunard [Case No. 7,535]. As to the necessity which will give a lien for borrowed money, see Bulgin v. The Rainbow [Id. 2,116]; The Perseverance [Id. 11,017]; The Maitland [Id. 8,979].

LONGYEAR, District Judge. The position of respondent's advocates, that there is no lien by the maritime law for moneys advanced to purchase or pay for necessaries supplied to a ship in any case, has been fully disposed of against the proposition by numerous decisions of the supreme court; and it may be regarded as well settled law, that a maritime lien exists for such advances, in all cases where it existed for the necessaries themselves. Thomas v. Osborn, 19 How. [60 U. S.] 22, 28. In this case, Mr. Justice Curtis, delivering the opinion of the court, says: "It is not material whether the hypothecation is made directly to the furnishers of repairs and supplies, or to one who lends money on the credit of the vessel, in a case of necessity, to pay such furnishers." And since that decision, the same doctrine has been frequently reiterated and applied by that court, down to a very recent period. The Grapeshot, 9 Wall. [76 U. S.] 129, 141; The Lulu, 10 Wall. [77 U. S.] 192, 203; The Emily B. Souder [Cases Nos. 4,454 and 4,456].

The position of respondent's advocates that no lien arises or is implied for necessaries supplied on request of the owner, has also been fully settled against the proposition by the same high authority; and it is settled law that a lien may arise or be applied as well in such a case as where they were supplied on request of the master, in the absence of the owner, the only difference being that where supplied on request of the owner, the facts that the supplies were necessary and that they were furnished on the credit of the vessel as well as of the owner, must be made to appear, while in the other case those facts are presumed. The Guy, 9 Wall. [76 U. S.] 758; The Kalorama, 10 Wall. [77 U. S.] 204, 213. In the case of The Kalorama, the court say: "Implied liens, it is said, can be created only by the master; but if it is meant by that proposition that the owner or owners, if more than one, cannot order repairs and supplies on the credit of the vessel, the court cannot assent to the proposition, as the practice is constantly otherwise." "Undoubtedly," say the court, "the presence of the owner defeats the implied authority of the master, but the presence of the owner would not destroy such credit as is necessary to furnish food to the mariners, and save the vessel and cargo from the peril of the seas." "More stringent rules," they say, "apply as between one part owner and another, but the case is free from all difficulty if all the owners are present, and the advances are made at their request or by their direction, and made on agreement, express or implied, that the same are made on the credit of the vessel." See, also, Taylor v. The Commonwealth, Eastern District of Missouri [Case No. 13,788].

In the present case, the proofs showed the following facts: That the repairs, materials, &c., to pay for which libellant's advances were made, with two or three unimportant exceptions, were necessary to enable the barge to prosecute her business; that Robarsh, the person on whose request the advances were made, was the equitable owner as well as master, during the whole time the advances were being made, although the legal title was in another person; that Robarsh was utterly irresponsible and without credit; that libellant made the advances on the express understanding and agreement with Robarsh that he should have a lien on the barge therefor, and the advances were accordingly charged by libellant, upon his books, directly to the barge, by name. Here are all the elements combined necessary to create a lien. See authorities above cited.

It was claimed that libellant held the legal title of the vessel, as security, by a bill of sale or mortgage, and it was contended that therefore any lien he may have was not a maritime lien, enforceable in this court. The facts in that regard are as follows: Previous to the transactions here in question, Eakin had indorsed Robarsh's note for $150, and to secure himself had taken a bill of sale of the barge from one Shipley, in whom the legal title then stood. The note was afterwards paid with Robarsh's money, and Eakin never became liable or suffered any loss on account of the transaction. Afterwards, when the advances here in question were in contemplation, Eakin refused to make them on Robarsh's personal responsibility, and it was agreed that he should have a lien upon the barge for the same. The bill of sale, although extinguished by the payment of the $150 note, still remained in Eakin's possession, and Robarsh indorsed upon it a sort of release to Eakin of all his interest, right and title in and to the barge, both parties supposing and intending that the Shipley bill of sale was thereby made a continuing security to Eakin; and so matters remained during the whole time the advances were being made. After the advances had all been made, Robarsh, without the knowledge or consent of Eakin, sold the barge, and caused her to be duly and legally conveyed to John Pridgeon, claimant and respondent in this suit, and he claims to own the barge free and clear of any lien whatever in favor of Eakin. The

grounds upon which this claim is based are: (1) That by virtue of the bill of sale from Shipley to Eakin, the latter was legal owner of the barge while the advances were being made, and no lien could accrue to the owner; or (2) if not owner, he was at least a mortgagee for security of the advances, and his only remedy is by foreclosure of his mortgage, which cannot be accomplished in this suit or court.

In the first place, the bill of sale being for security merely, it was extinguished and ceased to be of any force or effect whatever by the payment of the note to secure which it was given; and, in the second place, it was not in Robarsh's power to revive it or confer upon Eakin any right or title under it, as mortgagee or otherwise, without the co-operation and deed of the person who held the legal title. The transaction, however, makes it evident that it was the understanding between Robarsh and Eakin that the advances in question were made by the latter on the credit of the barge, and so it supports Eakin's claim to a maritime lien, and a right of action in rem in this court. The Kalorama, 10 Wall. [77 U. S.] 213, 214. As master and equitable owner, it was competent for Robarsh to bind the vessel to that extent, but he could convey no legal title by way of mortgage or otherwise, because he had none himself.

The proofs show that during a portion of the time the advances were being made, Eakin was jointly interested with Robarsh in the operations of the barge. The joint interest, however, extended to only one trip and cargo. The items of libellant's claim arising out of that joint transaction amount in the aggregate to $136.23. This amount was withdrawn by libellant at the hearing, and must be deducted from libellant's claim. The amount so withdrawn includes an item for tonnage duties, and nearly all the items for telegrams embraced in libellant's account, and on account of which it was claimed no lien could arise; and it also includes the only item for which Robarsh's note was taken by Eakin, and not delivered up at the hearing, and therefore the questions raised as to all those items have become immaterial. A few items of the same character, mostly for telegrams, remain in the account, but they are insignificant in amount, and although, standing alone, they would probably create no lien, yet they seem to have been intimately connected with transactions for which there is a lien, and they will not be rejected.

A portion of the supplies for which libellant made advances, amounting in the aggregate to $98.50, were furnished at Windsor, opposite Detroit, and in the province of Ontario, and while the barge was at that port. Windsor was the home port of the barge at the time, and it is contended that as to this amount at least libellant had no lien, for the reason that none exists in such cases by the maritime law as administered in England, and that the laws of England were the laws of Ontario; and the argument is, there being no liens for the supplies themselves, there could be none for advances made to pay for them. The conclusion stated undoubtedly follows from the premise stated; but I think the premise cannot be maintained, for two reasons: 1. It was expressly agreed between Eakin and Robarsh, who, as we have seen, was entirely competent to make the agreement so as to bind the vessel, that Eakin should have a lien upon the barge for all advances made by him to pay for supplies, without any exception or limitation as to the place or places where the supplies themselves should be furnished or the advances should be made. 2. By the general maritime law there is a lien for necessaries supplied to a domestic as well as a foreign ship, the only difference being that, in regard to a domestic ship, the necessity and the fact that the supplies were furnished on the credit of the ship must be proven, while, in regard to a foreign ship, those matters are presumed. See authorities before cited, and especially Taylor v. The Commonwealth [supra]. This lien in fact exists in places subject to the laws of England, notwithstanding the jurisdiction to enforce it there is denied. The Champion [Case No. 2,583], decided by this court at the present term. And since the recent amendment of general admiralty rule 12, the general maritime law prevails in and is administered by the admiralty courts of the United States in regard to liens for supplies in a domestic as well as in a foreign port; and this, notwithstanding there may be no jurisdiction to enforce them in the locality where the supplies were furnished. The Maggie Hammond, 9 Wall. [76 U. S.] 435, 481, 482; The Commonwealth and The Champion, supra. It is true, in cases where the parties, the vessel and the place of the contract or port are all foreign, the entertainment of jurisdiction by our courts in any case is a matter of comity, and not a matter of right; and where in such case they are all subjects of the same foreign country, and in which there is no jurisdiction to enforce such liens, and citizens of the United States could not have the same remedies there as are accorded to such foreigners here, our courts will not in general entertain the jurisdiction, but they may do so in their discretion. The Maggie Hammond, supra. In the present case the libellant is described in the libel as a citizen of Detroit, in this district, and no issue was made as to that allegation. The claimant is also a citizen of the United States. From what has been said, it results that the objection to the allowance of a lien for the advances made to pay for necessaries supplied in the province of Ontario is not well taken.

Four items of credit were claimed—one of $300, one of $21, one of $50, and one of $84.68. The item of $300 was satisfactorily shown to have been entered by the book-keeper by mistake, and cannot be allowed. The item of $50 related to the joint adventure, and must

be rejected with the account relating to that matter. The remaining items, amounting to $105.68, must be allowed. The whole amount of advances made by libellant, after deducting the amount arising out of the joint adventure, is $637.17, as proven. Deducting the credits allowed, the balance in favor of libellant is $531.89, on which amount interest must be allowed at seven per centum per annum for one year and nine months, that being a fair average of the time the advances have run.

Balance of debt.....	$531 89
Int., 1 year and 9 months, at 7 per cent.	65 16
Making a total of.....	$597 05

For which libellant must have a decree, with costs. Decree accordingly.

UNION FIRE INS. CO. (SCANLON v.). See Case No. 12,436.

Case No. 14,365.

UNION HORSE SHOE WORKS v. LEWIS.

[1 Abb. U. S. 518.] [1]

Circuit Court, D. Rhode Island. Feb. Term, 1870.

CORPORATIONS—STATE STATUTES—RIGHT TO SUE.

1. In an action brought by plaintiffs, claiming to sue as a corporation, the defendant, by plea, denied the plaintiffs' incorporation; setting up a general statute of the state which prohibited any charter from taking effect until a certain fee should have been paid into the state treasury; and averring that the plaintiffs had not made the required payment. It appeared that the fee was not paid until after the plea was filed. *Held*, that the circuit court was bound to take notice of the state statute, and to enforce it, in the same manner as the state courts would do.

2. Under the statute, the plaintiffs were not competent to sue as a corporation, at the time of commencing their action, by reason of the omission to make the payment required; and the plea must therefore be sustained.

[Cited in Broadwell v. Merritt, 87 Mo. 96. Cited in brief in Slocum v. Providence Steam & Gas-Pipe Co., 10 R. I. 114.]

At law. Hearing upon an agreed statement of facts.

Benjamin F. Thurston, for plaintiffs.

Mr. Essex, for defendant.

KNOWLES, District Judge. I have given to the question presented by the plea filed in this cause due consideration, and would now announce to counsel and parties the results. The plaintiffs, as holders by assignment of certain letters patent, file their bill, May 20, 1869; the defendant makes appearance July 5; and, on July 26 files a plea in abatement of the suit. To this, the plaintiffs reply, September 22, traversing the plea, and upon the issue presented the learned counsel of the parties have been fully heard at chambers.

The plaintiffs' objection to the form of the plea,[2] I adjudge groundless in view of the stage of the cause at which the plea is filed, the nature of the allegation which it embodies, and the rules of equity pleading as set forth in Story, Eq. Pl. §§ 668, 669, and notes, and section 727, and 2 Daniell, Ch. Pl. & Prac. 718.

The question raised by the plea is, were the plaintiffs, a corporation, competent to sue, at the date of the filing of their said bill? The plaintiffs style themselves, "The Union Horse Shoe Works, a corporation duly created by the general assembly of the state of Rhode Island, located and doing business at Providence, in said state and district of Rhode Island;" and it is not questioned that they are bound at some stage of the suit to prove satisfactorily their title thus to describe themselves—at this stage, if required by special plea,—at a later stage, had the defendant negatived the allegation in an elaborated answer. Nor is it questioned, that a failure to establish their title in this regard, were as serious a mischance at one stage as at another. But by interposing this plea, the defendant wisely constrains the plaintiffs now at the outset, to establish their right to call upon him to answer their complaints and interrogatories. He denies that they are a corporation duly created by the general assembly of the state of Rhode Island, and the plaintiffs, in reply, reaffirm the allegation of their bill.

No question was raised as to the burden of proof upon the issue—the plaintiffs seemingly conceding that it was incumbent upon them, on exhibition of the plea, verified by the affidavit of the defendant, to make proof of their capacity to bring and maintain their suit, so far as questioned by the plea. Accordingly, a copy of an act of incorporation, certified by the secretary of state, under the state seal, to be an act of the general assembly of Rhode Island, at its May session, 1867, was exhibited,—the certificate, however, bearing date November 10, 1869. This instrument, the plaintiffs as a first point aver, is conclusive proof upon the issue in their favor. And in this averment I should readily concur, were the secretary's certificate of a date prior to that of the commencement of this suit, and were there not on file an agreed statement of facts to which heed must be given. Among these facts are these:

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

[2] The objection taken to the form of the plea was, as appears from the brief filed by the counsel for plaintiffs, that the plea simply set forth that the plaintiffs were not a corporation, duly organized under the laws of the state, without alleging what particular defect in organization, or in the act of incorporation, was relied on to defeat their corporate existence; thus leaving the plaintiffs unapprized of the objection they were required to meet.

I. That one of the laws of the state, enacted by the general assembly in 1863, and still in force, is the following (chapter 475), entitled, "An act in addition to ch. 12 of the Revised Statutes, 'Of the Revenue of the State:'"

"§ 1. No act of incorporation hereafter granted for any other than for religious, literary, charitable or cemetery purposes, or for a military or fire company, shall take effect until the persons therein incorporated shall have paid to the general treasurer the sum of one hundred dollars, if the capital limited by such act of incorporation is the sum or any less sum than one hundred thousand dollars; and if the capital stock limited by such act of incorporation exceeds the sum of one hundred thousand dollars, one-tenth of one per cent. on the amount of the capital stock authorized by such act of incorporation.

"§ 2. This act shall take effect immediately after the passage thereof. Provided, however, that nothing herein contained shall be construed to require any such payment before the taking effect of any bank charter, when provision is made for specific taxation upon the capital stock of such bank."

II. That the plaintiffs had not, at the date of the filing of defendant's plea, paid the tax or fee required by said act of 1863, but had since, on October 1, 1869, paid the same.

With these facts before me, of the first of which, by the way, I am bound to take notice judicially, I am not warranted in regarding the certified copy of the charter as satisfactory proof of the plaintiffs' averment of personality—of a legal existence—in May, 1869.

I am unquestionably bound to deal with this plea, as it would, in my judgment, be dealt with by the supreme court of the state, and of course to give that consideration to all the state laws which that court, as a co-ordinate branch of the government, or as a branch subordinate to the general assembly, would give to them. And here is brought to my notice a general law of the state, the aim and intent of which is apparent at a glance, and the expediency and importance of which cannot be questioned. It is a parcel of the legislation which provides for the raising of moneys for the thousand uses and needs of the state, staggering under its millions of debt, and cannot be, in my view, either ignored or adjudicated a nullity by the state's judicial servants. And in view of this law of 1863, still in force, the defendant contends that, inasmuch as the payment required was not made until October, 1869, there was in being in May, 1869, no person (a corporation being in law a person) known as, or entitled to claim to be, "The Horse Shoe Works." And this position I am constrained to adjudge a tenable one, in the absence of any adjudication to the contrary by the supreme court of the state, or its co-ordinate or supervisor, the general assembly. So long as the law of 1863 stands unrepealed, the payment it enjoins is a condition precedent of the existence of a business corporation, for any purpose whatever. Until such payment the act is not to take effect—the paper on which it is written or printed is, in contemplation of law, a blank. What the practice of the state's secretary may be, I am uninformed, but I presume it to be what it should be—that is, to withhold from any applicant a certified copy of a charter under seal, until evidence is furnished that the act of incorporation has ceased to be merely a charter in embryo, and become of effect, by payment as prescribed by the parties incorporated. As already intimated, had the date of the secretary's certificate been a few months earlier, I should have received it as plenary evidence, unimpeachable otherwise than in proceedings instituted on behalf of the state. The position taken by the plaintiffs as to this point is well sustained by authority, as a dictate of common sense is usually found to be: but it seems necessary here only to say in regard to it, that under the facts in this case, I arrive at a determination of the mooted question before reaching that position.

The case is strictly sui generis—purely a Rhode Island case; for in no other state, it may safely be assumed, is to be found a general law like that of 1863—like in its terms, its scope, or its purposes. It may be that in some other states legislators are wont to frame and pass acts of incorporation, by scores and hundreds, notoriously of so little worth and so little needed that to compel the parties interested to pay for them a trifling tax to the state, a law like this is indispensable—but the proof hereof is yet to be furnished. For precedents of any practical value, therefore, it is of as little avail to search the court reports of other states as it ever has been, still is, and forever will be, when the point in question arises upon or under Rhode Island's charter from Charles II., or her constitution of 1843, with its section 10 of article 3, or the acts of her general assembly of any date, relating to bodies corporate of any species, the land titles of the aborigines or of the old proprietors, the tide flowed lands within her borders, or, indeed, any other subject of legislative action.

In most, if not in all the states of the Union, it is prescribed by a general law, or by a constitutional provision, at what period after its passage an enactment of the legislature shall take effect; and the case, I apprehend, is not to be found where a court has failed to regard such a law or provision as an inflexible rule of procedure. Section 19 of chapter 6 of the Revised Statutes of Rhode Island ordains that "every statute which does not expressly prescribe the time when it

shall go into operation, shall take effect on the tenth day next after the rising of the general assembly at the session thereof in which the same shall be passed." This provision of the statutes, it is believed, is respected as paramount law by the courts, and the legislators of the state; and that the law of 1863, relating especially to acts of incorporation, is not equally entitled to respect, and equally respected, is yet to be shown.

The point secondly raised by the plaintiffs, —that they are a corporation de facto,—I adjudge not sustainable as made under this plea. The many cases that may be cited from the thousand volumes of American or English reports, seemingly sustaining it, will be found easily distinguishable from that presented in this record. The claim here is, that the Horse Shoe Works is a corporation legally created by the general assembly, by a charter produced and exhibited. This is the question distinctly raised by the plea—the only issue,—and a court which finds upon the facts and law that the instrument relied on was of no effect, at the commencement of the suit, because the parties interested omitted to make payment of the prescribed tax or fee, cannot be expected to adjudge that because, for a year or two, certain persons have wrongly assumed to be, what they are not, a body corporate, created by the state, they are now to be recognized as a corporation either de jure or de facto, entitled to institute and maintain suits in equity for discovery or relief against a tax-paying citizen of that state.

In a word, I adjudge a payment of the tax or fee as required by the act of 1863, to be a condition precedent, with which persons incorporated must comply. Of the intent of the legislature, and of the obligations of a Rhode Island court to conform their rulings to that intent, I cannot entertain a doubt. Says Dwarris on Statutes (page 726), quoted with approval in 1 Kent. Comm. 464: "For the sure and true interpretation of all statutes, whether penal or beneficial, four things are to be considered: What was the common law before the act? What was the mischief against which the common law does not provide? What remedy has parliament provided to cure the defect? And what is the true reason of the remedy? It is held to be the duty of the judges to make such a construction as shall repress the mischief and advance the remedy." I adjudge the plea sustained, and order judgment accordingly. Judgment for defendant.

UNION INDIA-RUBBER CO. (DAY v.). See Case No. 3,691.

UNION INDIA-RUBBER CO. (GOODYEAR v.). See Case No. 5,586.

UNION INDIA-RUBBER CO. (NEW ENGLAND CAR-SPRING CO. v.). See Case No. 10,153.

UNION INS. CO. (BAUDUY v.). See Case No. 1,112.

UNION INS. CO. (BIAYS v.). See Case No. 1,383.

UNION INS. CO. (HOWE v.). See 42 Cal. 529.

UNION INS. CO. (HUMPHREYS v.). See Case No. 6,871.

UNION INS. CO. (HURTIN v.). See Case No. 6,942.

UNION INS. CO. (MARSHALL v.). See Cases Nos. 9,133-9,135.

UNION INS. CO. (QUEEN v.). See Case No. 11,505.

UNION INS. CO. (RUSSEL v.). See Cases Nos. 12,146 and 12,147.

Case No. 14,366.

UNION INS. CO. v. SHAW et al.

EXCELSIOR INS. CO. v. SAME.

[2 Dill. 14.] [1]

Circuit Court, E. D. Missouri. 1871.

SHIPPING—PUBLIC REGULATIONS—NUMBER OF PASSENGERS—CARRYING COMBUSTIBLE MATERIALS.

1. Whether sections 9 and 10 of the act of August 30, 1852 (10 Stat. 61), as to the number of passengers vessels may carry, apply to steamers navigating inland waters, quære? (It was held in this court in 1855, that this portion of the act did not apply to Mississippi steamers.)

2. The act of July 25, 1866 (14 Stat. 227), prohibiting ignitible commodities from being "carried on the decks and guards" of passenger steamers, "unless protected by a complete and suitable covering of canvass or other proper material, to prevent ignition from sparks," construed; and it was *held* that hay in bales piled up in the engine or deck room, back of the engines, and surrounded and protected by a tier of grain in sacks (made of burlaps or jute-cloth) on each side, and two or more tiers on each end, and extending from the floor to the carlings or ceiling, and stripped with plank to make the sacks steady, was a sufficient compliance with this statute.

3. Hay thus placed in the engine or deck room, though the room be enclosed by bulkheads, is upon "the decks or guards" of the steamer within the meaning of the above mentioned act. Per Treat, J.

4. In an action against the owner of a steamboat to recover the value of cargo destroyed by fire, on the ground that the loss was occasioned by the carelessness of the officers of the boat, the burden of proof is on the plaintiff to establish the alleged negligence of the officers, and that it caused or contributed to produce the injury.

These causes are here by appeal from the decrees of the district court for the Eastern district of Missouri.

The respondents were the owners of the steamer Stonewall, which, in proceeding on a voyage from St. Louis to New Orleans, was destroyed by fire on the 27th day of October, 1869. The libellants had insured against fire goods on board of the boat embraced in bills of lading which excepted unavoidable dangers of the river and fire. The goods were destroyed by the fire, and the libellants being liable under their policies paid the shippers

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

the value of the goods thus consumed; and claim that thereby they became subrogated to the rights of the persons thus insured. And these are libels in personam by the insurance companies against the owners of the Stonewall to recover the amount thus paid by them to the shippers or owners of the cargo insured; and the ground of recovery as stated in the libels is, that the "loss was occasioned by carelessness and gross negligence of those having charge of the boat." The respondents deny the alleged negligence, and the cause was submitted to the district court upon the testimony produced by the respective parties, and decrees were entered January 15, 1872, dismissing the libels from which the present appeals are prosecuted.

The following opinion was delivered by the district judge:

"TREAT, District Judge. These are libels in personam against one of the owners of the steamer Stonewall to recover on a contract of affreightment. The cargo was destroyed by fire (one of the excepted perils) during the voyage. It is alleged in the libel that the loss resulted from the carelessness and negligence of the officers and crew.

"Under the recent decisions of the United States supreme court the burden is on the libellant to prove the alleged negligence, inasmuch as the destruction by fire is undisputed. Libellant contends that inasmuch as the steamer had on board at the time of the loss more than the number of deck passengers named in the inspector's certificate, therefore there was a direct violation of a penal statute, and when to that fact proof is adduced that the fire, when discovered, could probably have been extinguished if the passengers had not in their terror rushed over the officers and crew, preventing thereby the prompt use of the hose attached to the engine, the fact not only of negligence should be considered as fully established, but of negligence contributing to the loss. Whether section 10 of the act of 1852 is applicable to river steamers, would, if the question had not been judicially determined, admit of serious doubt. That section provides that 'in those cases where the number of passengers is limited by the inspector's certificate,' &c., certain penalties shall be incurred if an excess of passengers is taken on board. What are those cases—not as a matter of fact, but of law? Is it when an inspector places in his certificate the number of passengers allowed, or when he does so in accordance with the requirements of law? Section 10 evidently refers to section 9; and it was decided by the United States circuit court here as early as 1855, that the 10th section did not apply to steamers on these inland rivers. So long as that ruling remains undisturbed this court ought to follow it. Subsequent legislation seems to confirm that ruling. The fact that there were more than one hundred deck passengers on board—even if such be the admitted fact, does not of itself show an act of negligence, and the rush of passengers to escape an impending calamity cannot be set down as an act of negligence on the part of the officers and crew contributing to the loss complained of. It seems that the steamer had, in what is termed the engine or deck room, over two hundred bales of hay, piled in two tiers in the centre of that room, two bales deep, transversely along either side of the stanchions in the centre, extending from a point some twenty feet from the doctor forward, past the main hatchway aft. The testimony is not entirely in accord as to the manner in which sacks of oats were piled around the hay. The preponderance is, that about two thousand sacks of oats were so placed 'a-burden' as to make at least two rows in front, more at the aft end, and one on either side; that the oat sacks were piled from the deck up to the carlings or ceiling of the boiler deck above; that when the boat started such was the position of the hay, thus protected by sacks of oats, that no access could be had to the hay without first displacing or removing oat sacks. Some witnesses insist that, while the hay was piled up to or nearly to the carlings, the oats were jammed quite close, and even between the carlings, so that no appreciable or observable opening could be detected. Others say that the oats had settled aft so that a man could crawl over the top, and thus pass to the hay. One fact is clear, that when the fire was first detected, one or more persons did pass over the sacks of oats to the hay through an opening on the top of the sacks, caused by the removal or absence of sacks close to the carlings at that point. The fire was first discovered on the hay at a point not far from the main hatchway and near the hog-chain, around which the hay and oats were piled. The first efforts made to extinguish it were by striking at it with the hats of some deck passengers and then attempting to smother it with bed clothing; at the same time an effort was made to pass the hose aft, but the terrified passengers rushed forward with such violence as to run over those in charge of the hose as they were dragging it along the gangway between the oats and a wing-tier of cargo on the larboard side. From the testimony, direct and indirect, the flames spread with great rapidity and violence. The rush of deck passengers to the bow would indicate that that was, apparently, at the moment, the safest part of the steamer. But almost simultaneously with the first alarm of fire, the pilot rounded the vessel to, so that she soon landed on a bar. It being evident then that the boat could not be saved, passengers, officers, and crew looked exclusively to their means of escape with life. Out of the large number on board only a few were saved, the residue perishing either in the flames or in the river. Hence it is obvious that the conflagration was very rapid. In the light of the testimony it does not satisfactorily appear how the fire occurred. One witness swears it was caused by carelessness of a passenger in over-

turning a lighted candle upon the oat sacks; but that account is hardly consistent even with her own testimony as to the instantaneous spread of the flames, or with the testimony of other witnesses.

"Another hypothesis is, that the fire commenced in the hold forward, and after burning there for some time undetected, as the hatchways were closed, found vent at a pump hole near the hog-chain, or at the aft hatches —that probably the suddenness and fierceness of the flames were caused by the bursting of one or more barrels of whisky in the hold with which the fire below had come in contact. This theory is based mainly on the appearance of the hull, decks, and cargo on subsequent examination. Another hypothesis is, that some of the deck passengers had crawled over the oats and reached the hay for the purpose of sleeping there during the night. The fire occurred soon after supper; and it is said that those persons on the hay may have set fire to it by the careless use of their pipes, or in some other way. This is also conjectured. There is no evidence showing satisfactorily that any one of the three hypotheses is correct. The case stands as a loss by fire, the origin of which is unknown. The act of July 25, 1866, requires 'that cotton, hemp, hay, straw, or other easily ignitible commodity, shall not be carried on the decks or guards of any steamer carrying passengers * * * unless the same shall be protected by a complete and suitable covering of canvass or other proper material to prevent ignition from sparks, under a penalty,' &c. The act of 1852, § 7, provided that 'no loose hemp shall be carried on board of any such vessel; nor shall baled hemp be carried on the deck or guards thereof, unless the bales are compactly pressed and well covered with bagging or a similar fabric,' &c. The act of 1866, it will be seen, was designed to provide further safeguards against danger from fire, both in the transportation of hemp, and also in the transportation of hay, cotton, straw, &c. Hemp, under the act of 1852, on the deck or guards, was not only to be baled but well covered with bagging; and under the act of 1866, 'protected by a complete and suitable covering of canvas or other proper material to prevent ignition from sparks.' The same precaution is required for hay under the last named act, the phraseology as to covering it being changed in the two acts. It is not important to criticize the change in phraseology as to hemp, but merely looking at the language as applicable to hay, to determine whether the mode adopted in this case meets the requirements of the law.

"That hay in the engine room or deck room is within the purview of the act of congress seems sufficiently clear. Whether stowed there, or on the forecastle deck, or on the guards, it must be protected by complete and suitable covering.

"What would be suitable in one position might be unsuitable in another. The degree of precaution should correspond with the danger. If these were suits for enforcement of the statutory penalty, such would be the ruling. Now if the hay in the engine room were as completely protected by the sacks of oats as some witnesses testify, the requirements of the statute were met in the light of the testimony of the local inspectors and others. But even if there were a defective covering or protection, yet if such non-compliance with the statute was not at all contributory to the loss, the owners would not be liable.

"The burden is on the libellants to prove contributory negligence, and the evidence leaves it in doubt, first, whether the hay was not fully protected as required, and, secondly, whether any supposed act of negligence on the part of the officers or crew contributed in any degree to the loss by fire. It is not meant that if the hay were properly protected at the commencement of the voyage, the owners would be excused, if it was suffered to become uncovered at any time thereafter during the voyage. Their duties continue in that respect throughout the voyage, and it is for them to exercise all needed care and diligence to that end, as well against the disturbance of the covering by deck passengers as against the blowing of a canvass covering from the hay. It is the duty of a common carries never to relax his watchfulness or care for the safety of the cargo and passengers. In proportion to the recklessness and ignorance of the deck passengers should be the care and diligence of officers and crew.

"If the evidence satisfied the court that the loss was caused by defective covering of the hay, by any act of negligence on the part of the officers or crew, or by defective apparatus—or that such defects or neglect contributed to the disaster—then the defendant would be held liable. But in the absence of such satisfactory proof, the libels must be dismissed."

Sharp & Broadhead and Hendershott & Chandler, for libellants (appellants).

Thomas T. Gantt and Rankin & Hayden, for respondents.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

DILLON, Circuit Judge. Concurring as we do in the main with the views expressed in the opinion of the district judge dismissing the libels, it is not necessary to discuss the questions presented at any considerable length.

Upon the record it is not at all material to determine whether the ninth and tenth sections of the act of August 30, 1852 (10 Stat. 61), in respect to the number of passengers vessels are permitted to carry, apply to steamers navigating inland rivers. It was determined in this circuit, in 1855, that this portion of the act does not apply to steamboats plying on the Mississippi river. But if it

were conceded that it is otherwise, the result in these cases would be the same, for upon examining the evidence we are not satisfied that in fact the boat had more than one hundred deck passengers (that being the number limited in the inspector's certificate) at the time of the disaster. Nor does it appear, on the supposition that there may have been more than one hundred such passengers on board, that this circumstance caused the fire, or that it materially interfered with the efforts to extinguish it, or contributed to the loss of the boat and cargo.

The next question made arises upon the fifth section of the act of July 25, 1866, which provides "that cotton, hemp, hay, straw, or other ignitible commodity, shall not be carried on the decks or guards of any steamer carrying passengers, unless the same shall be protected by a complete and suitable covering of canvass or other proper material, to prevent ignition from sparks, under a penalty of," etc. 14 Stat. 227.

The hay was piled up in the engine or deck room, in the manner stated in the opinion of the district court, reaching from the floor to the carlings or ceiling, and surrounded by sacks of oats and grain, piled up in like manner, and stripped with plank to keep them steady. The hay was not covered with tarpaulins or canvass.

The point is made by the respondents, that the hay being thus placed in the engine or deck room, which was shown to have been enclosed by bulkheads, was not upon "the decks or guards" of the steamer within the meaning of the section of the act of congress above mentioned. The district court expressed on this subject a contrary opinion, and its view has much to recommend it as tending to the security of life and property, which was the object of the legislative provision. But without entering into an examination of this question, we place our judgment of affirmance upon the ground which we shall proceed briefly to state.

The evidence satisfies us that the hay, surrounded and protected as it was by a tier of grain in sacks (made of burlaps or jute-cloth), on each side, and two or more tiers of such sacks on each end, was thereby rendered more secure from fire than it would have been if simply covered with canvass. The act of congress does not prescribe all the modes in which the ignitible commodities shall be protected. The protection must be complete and suitable, whatever mode is adopted. This may be by canvass; but any other mode is sufficient if it affords an equivalent protection and is complete and suitable, that is, adapted to the risk of fire and the degree of exposure. The material out of which these sacks are made is shown not to be easily ignited; it will char, but not burn into a flame when surrounding grain. All the witnesses concur in stating that the hay surrounded and covered by sacks in the manner shown by the testimony was more secure from fire than if it had been completely covered with canvass or tarpaulins.

The evidence leaves the origin and cause of the fire in uncertainty. It either originated in some unknown manner in the hold and thence extended to the hay through the old pump hole, or it was caused by some deck passengers who had displaced, without the knowledge of the officers, some sacks, and had in this way obtained access to the top of the bales of hay. I confess that the circumstances of the burning rather impress me with the conviction that the fire originated in the hold; but it is shrouded in mystery and wholly unexplained.

The libellants base their right to a recovery wholly upon negligence of the officers of the boat, which, they claim, caused the fire, and consequently the loss of which they complain. The burden of proof is upon them to establish the proposition of fact that it was owing to the negligence of the officers of the boat that the fire was caused; and it is our judgment that the evidence falls very far short of doing this. See Transportation Co. v. Downer, 11 Wall. [78 U. S.] 129; Railroad Co. v. Reeves, 10 Wall. [77 U. S.] 176, 190. Affirmed.

NOTE. No appeal to the supreme court was prayed.

The proposition ruled in 1855, upon the act of 1852, mentioned in the opinion, was decided by Mr. Justice Catron and District Judge Wells.

UNION INS. CO. (SIMONDS v.). See Cases Nos. 12,875 and 12,876.

UNION INS. CO. (SYMONDS v.). See Case No. 12,875.

UNION INS. CO. (WINTHROP v.). See Case No. 17,901.

Case No. 14,367.

UNION IRON CO. v. PIERCE et al.

[4 Biss. 327.] [1]

Circuit Court, D. Indiana. May, 1869.

DEBT—PENAL STATUTE—CORPORATIONS—INDIVIDUAL LIABILITY—REPORT OF OFFICERS—CONSTITUTIONAL LAW—STATUTES.

1. Debt will lie upon a penal statute; it lies whenever the obligation is to pay a sum certain, or which may be readily rendered certain, whether the liability arises on simple contract, legal liability, specialty, record or statute.

2. When the charter of a corporation provides that where its officers shall neglect to make and publish certain reports required, they shall be individually liable for all corporation debts contracted while they are officers or stockholders; and when, while they were such, they were guilty of such neglect, and in the mean time the corporation became indebted to the plaintiff by note, —*held*, that he might maintain an action of debt therefor against such delinquent officers.

3. Where the charter of a corporation required its officers annually, between the 1st and 20th of January, to make and publish a certain report,

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

—*held*, that a company incorporated in May, 1867, was bound to make and publish such report in the following January.

4. Declaratory laws, as such, are unconstitutional. They may operate as future rules on subsequent transactions; but, as constructions of prior laws, they are utterly void. The state legislature has no power to construe a statute previously enacted—such construction, as to acts done, is solely for the judiciary.

5. When two statutes of different dates are repugnant, the latter repeals the former to the extent of such repugnancy.

6. Actions on statutes in their nature penal, pending at the time of the repeal of such statutes, cannot be further prosecuted after such repeal.

[Disapproved in Eastman v. Clackamas Co., 32 Fed. 33.]

[Cited in Mitchell v. Hotchkiss, 48 Conn. 21; Kleckner v. Tuck (Neb.) 63 N. W. 473.]

[This was an action at law by the Union Iron Company against Winslow S. Pierce and others. Heard on demurrer.]

McDONALD, District Judge. This is an action of debt. A general demurrer is filed to the declaration; and whether the demurrer ought to be sustained, is the question to be decided. The declaration sets up a claim under an "individual liability" clause of the Indiana statute for the incorporation of manufacturing and mining companies. Gavin & H. 425. The 13th section of that act provides that every company incorporated under it "shall, annually, within twenty days from the first day of January," make and publish a report in a newspaper of the county where the company is established, of the amount of its capital stock, debts, &c. And the 15th section of the act provides that, for any failure to make and publish the report required by the 13th section, all the officers of the company "shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof."

The declaration alleges that under said act, divers persons, among whom were some of the defendants, associated together, and, on the 22nd of May, 1867, became a corporation by the name of the White River Iron Company, and that the association fixed the number of directors at seven, and elected a board of directors accordingly, and chose therefrom a president and secretary. The declaration also avers that it was the duty of the officers of the corporation within twenty days from the first of January, 1868, to make and publish a report of the condition of the company, as prescribed by said 15th section of the act under which they were incorporated, and that they wholly neglected and failed to make and publish such report. It is further alleged in the declaration that on a note dated November 17, 1868, executed by said White River Iron Company to the plaintiff for three thousand six hundred and fifty dollars, payable one day after date, in an action pending in the court of common pleas of Marion county, Indiana, the plaintiff, on the 3rd day of February, 1869, recovered against said White River Iron Company a judgment for three thousand six hundred and ninety-six dollars and eighty-four cents, with costs,—which judgment remains unsatisfied; and that by reason of the premises an action has accrued to the plaintiff to recover of the defendants the amount of said judgment.

In support of the demurrer, it is contended that the action of debt will not lie on the provisions of the statute above cited, under any circumstances; and that as the action has been misconceived the demurrer must be sustained. In support of this view it is said that this is a penal statute and the action it gives is consequently an action in form ex delicto. We do not understand that this consequence follows. We shall hereafter have occasion to inquire whether this is, in the technical sense, a penal statute. We think, however, whether it is such or not cannot settle the form of action to be adopted. For though it be regarded as a penal statute, this circumstance does not tend to prove that debt will not lie on the claim stated in the declaration. The action of debt lies in many cases on penal statutes. At common law, debt is a very extensive remedy. It lies on simple contracts and on specialties for the payment of money. It lies on judgments for money, and on legal liabilities; and it lies for penalties and other liabilities created by statute, requiring the payment of money, when the statute declares no other remedy, and where the amount of the liability is certain or may be readily rendered certain. 1 Chit. Pl. 110–112. And we may lay it down as a general rule, that whenever the obligation is to pay a sum of money which, as to amount, is certain or may be readily rendered certain, whether the liability arises on simple contract, legal liability, specialty, record, or statute, the action of debt is a proper form of remedy.

But the defendants' counsel urge that by the 13th section of the act in question, the White River Iron Company were not bound to make and publish their report in January, 1868, as alleged in the declaration, because it had not then been a corporation for one whole year. They construe that section to require this only after the first year of the existence of the corporation. The language is that the officers "shall, annually, within twenty days from the first day of January, make a report," &c. The word "annually" means every year. And the meaning undoubtedly is, that when a company becomes incorporated under this act, it must, whenever a January comes after such incorporation has been organized, make and publish the report in question. The case of Garrison v. Howe, 17 N. Y. 458, is exactly in point on this question, and settles it against the demurrer.

But the Indiana legislature in April, 1869, and after this suit was commenced, passed

an act amendatory of said 13th section. And that amendment declares "that the word 'annually,' as used in section thirteen of said act, shall be construed to mean once a year after such company has been doing business at least twelve months." And it is urged that this legislative construction must govern us. There can be no doubt that the legislature intended, in passing this amendment, to assume the power to construe the 13th section of the act proposed to be amended; and it is equally certain that the Indiana legislature can exercise no such power. The constitution of this state separates the powers of the state government into three departments—the legislative, the executive, and the judicial—and it prohibits each of these departments from exercising the powers conferred on either of the others. Now, to make a law is a legislative function, which no court can assume; and the construction of a law already made is a judicial act, which no legislature can constitutionally perform. The amendment in question is a judicial act in so far as it attempts to declare the meaning of the term "annually" as it occurs in the 13th section of the old act. This amendment may operate as a future rule on subsequent transactions; but it cannot operate retrospectively and on past events. It is a well-established rule of American jurisprudence, that all declaratory laws, as such, are unconstitutional.

But the first section of the act of April, 1869, is not declaratory. It provides that the 15th section of the act for the incorporation of manufacturing and mining companies shall "be amended to read as follows, to-wit: If any certificate or report made, or public notice given, by the officers of any such company, as required by this act, shall be false in any material representation; or if they shall fail to give such notice or make such report, and any person or persons shall be misled or deceived by such false report or certificate or on account of such failure to make such report, and damaged thereby, then all the officers who shall sign the same, knowing it to be false, or fail to give the notice or make reports as aforesaid, shall be jointly and severally liable for all damages resulting from such failure on their part while they are stockholders in such company."

This act was passed and took effect April 30, 1869. The present suit was commenced April 23, 1869. Under these circumstances, the defendants contend that the first section of the amendatory act, above cited, repeals the statute on which this action is founded, and takes away the right of action which the plaintiff had at the time of the commencement of this suit. Two questions arise on this point, namely, 1. Does the first section of the act of April 30, 1869, repeal those provisions in the act of which it is amendatory which gave the right of action on the facts stated in the declaration? 2. If so, does the repeal defeat this action? We will examine these questions separately.

1. As to the repeal. We have already seen that the 15th section of the original act for the incorporation of manufacturing and mining companies provides that if the officers of any such company shall fail to make the report or give the notice required by the 13th section of that act, all the officers so failing shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof. We have copied above the first section of the act of April 30, 1869, which it is insisted repeals said provision of the 15th section of the original act, and on which the present action is founded. It is certain that said first section and said fifteenth section are utterly inconsistent. Each gives a different remedy; and the first section gives no remedy in the case made by the declaration. There is, then, such a repugnancy between the two that they cannot both stand. The amendatory act, indeed, contains no repealing clause. But that is undecisive of the point in question. It is too well settled to require the citation of authorities, that when there are two repugnant statutes of different dates, the latter repeals the former to the extent of the repugnancy. From the nature of the case, this must be so in all systems of jurisprudence. With us this rule has been so long and so well established that it has taken the form of a maxim—"Leges posteriores priores contrarias abrogant." I conclude, therefore, that the act of April 30, 1869, repeals the 15th section of the original act for the incorporation of manufacturing and mining companies, so far as the latter gives an action merely for a failure to report and publish a statement of the condition of the company.

2. As the amendatory act repeals the law on which the plaintiff's claim is founded, does it destroy the right of action which that law gave? It is well settled that the repeal of a penal statute defeats all actions for penalties under such statute pending at the time of the repeal, unless the repealing act, in terms, saves the right to prosecute pending suits. Hunt v. Jennings, 5 Blackf. 195; Yeaton v. U. S., 5 Cranch [9 U. S.] 281; Stephenson v. Doe, 8 Blackf. 509; Butler v. Palmer, 1 Hill, 324. A learned English writer says that "when an act of parliament is repealed, it must be considered—except as to those transactions passed—closed, as if it never existed." Potter, Dwar. St. 160.

The following rules, taken from Smith, St. & Const. Law, pp. 895, 896, appear to me to be sound: 1. If the right acquired under a statute be in the nature of a contract, or a grant of power, a repeal will not divest the interest acquired, or annul acts done under it. 2. If the legislature, ex mero motu, by a statute give a party property belonging to the state, the gift is not defeated by a re-

peal of the statute. 3. If a penal statute be repealed, after an act done in violation of it, the violator is not subject to punishment under it after the repeal. 4. The repeal of a statute, made in restraint of natural rights or the use of property, restores the privileges thus restrained. 5. Where a statute gives a right in its nature not vested but remaining executory, if it does not become executed before a repeal of the law, it falls with it, and cannot thereafter be enforced. An eminent English judge says, "The effect of a repealing statute, I take to be, to obliterate the statute repealed as completely as if it had never passed; and that it must be considered as a law that never existed, except for the purposes of those actions which were commenced, prosecuted, and concluded while it was an existing law. Key v. Goodwin, 4 Moore & P. 341.

In view of these authorities, I think the question resolves itself into this: At the time of the commencement of this action, had the plaintiff such a vested right of recovery upon the facts stated in the declaration, as the legislature has no power to destroy?

What, in the legal sense, is a vested right, it is not easy to define. Perhaps as good a definition as can be given is, that it is a fixed, established right not liable to be defeated by any contingency. A fair construction of the act of April 30, 1869, requires us to conclude that the legislature intended to destroy the plaintiff's right of action in the case at bar. And the only point is, had the legislature the power to destroy it? If the defendants' liability arose out of a contract, the constitution would protect the plaintiff's right against all legislation; and so the right would be a vested right. But the act on which the plaintiff's claim is founded is not in the nature of a contract; it is a statute highly penal. A New York statute contained a provision in the very words of the 15th section of the Indiana act for the incorporation of manufacturing and mining companies; and the court of appeals of that state held that statute not "simply a remedial one," but that the provision was "highly penal." Garrison v. Howe, 17 N. Y. 458. In an action brought for a penalty under the fugitive slave law, it was held that "as the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject matter. And, as the plaintiff had no vested right in the penalty, the legislature might discharge the defendant by repealing the law. Norris v. Crocker, 13 How. [54 U. S.] 429. May we not, in the case at bar, with equal reason say that, as here, too, the plaintiff's right to recover depended entirely on the statute, its repeal destroyed that right? and if in that case it was not a vested right, how could it be so in this? The case of State v. Youmans, 5 Ind. 280, is very much in point on this question. There, the act of 1843 had provided that if any sheriff should "neglect or refuse to return any writ of execution to the court to which the same was returnable, on or before the return day thereof, he should be amerced to the amount, with interest and costs, due on such execution." Pending an action on this statute, it was repealed. The court held that the repeal destroyed the right of action, and said, "The act of 1843 clearly imposed on the sheriff a penalty. * * * It is true that if a party on a prior statute has acquired a vested interest, its subsequent repeal would not affect his rights. But that principle is not applicable to the case at bar; because in a penalty there can be no vested right until it has been reduced to a judgment. A mere penalty never vests, but remains executory."

These authorities seem to me to be decisive of the question under consideration.

But, on the part of the plaintiff, it is insisted that the Indiana legislature could not constitutionally pass the repealing act in question; because the constitution of Indiana declares that "dues from corporations other than banking shall be secured by such individual liability of the corporators, or other means, as may be prescribed by law."

This provision of the constitution evidently requires legislation on the subject to which it relates. And it requires such legislation as may fairly tend to secure dues owed by corporations. But it clearly vests a wide discretion in the legislature. It says that dues from these corporations shall be secured by such individual liability of corporators, or other means, as may be prescribed by law. If the legislature should adopt the policy of making the corporators personally liable it leaves the legislature free to provide for enforcing that liability in any manner that may be thought best and of course to alter the manner and extent of that liability at pleasure. But it does not require the legislature to adopt the individual liability policy. It only requires the adoption of that policy or such "other means," as may secure the corporation debts The legislature therefore is not absolutely bound to adopt any individual liability law; and it would seem to follow that if it is adopted, it may at any time be altered or repealed.

Demurrer sustained.

NOTE. By Act Cong. Feb. 25, 1871 (16 Stat. 432), it is provided, "that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

Case No. 14,368.

UNION MANUF'G CO. v. LOUNSBURY et al.

[2 Fish. Pat. Cas. 389.] [1]

Circuit Court, D. Connecticut. Sept., 1862.

PATENTS—INTELLECTUAL CONCEPTION—MECHANICAL PROCESS—ACT OF CONGRESS—REPRESENTATIONS.

1. The intellectual conception of a possible process, without a potential working of it out, is not patentable.

2. If an inventor merely conceives a mechanical process in his mind, and then sets to work to construct a machine to work out that process, and works it out in no other way, and the machine fails to work successfully, then his claim to be the inventor of a process is as groundless as his claim to be the inventor of a machine.

[Cited in Eastern Paper-Bag Co. v. Standard Paper-Bag Co, 30 Fed. 66.]

3. Where certain representations were made to congress, upon the faith of which a patent was extended by special act, the patentee will be held to his representations.

4. The acquiescence or laches of the patentee, is good ground of defense in a court of equity.

This was a bill in equity filed to restrain the defendants [John D. Lounsbury and others] from infringing letters patent for an "improvement in the machines for forming the web of cloth, of wool, hair, or other suitable substance without spinning or weaving," granted to John Arnold July 15, 1829. This patent having expired July 15, 1843, and the inventor having subsequently deceased, the patent and one granted to John Arnold and George G. Bishop October 20, 1836, were extended, by act of congress [5 Stat. 117], for fourteen years from March 28, 1854. The extended patent having been assigned to complainants, was reissued to them March 18, 1856. The disclaimer and claim of the original patent of July 15, 1829, were as follows: "I do not claim, as my invention, the carding machines, or any part thereof, in common use; but I do claim the combined use of them, as here described, for the purpose of crossing the fibers of the material of which cloth may be made, in the manner and on the principle herein described; and the new machinery necessary to effect that object, particularly the comb carrier, the shears, the fallers and cams, with their several appendages, as hereinbefore described and applied; and, therefore, I solicit an exclusive right by letters patent." The claims of the reissued patent of March 18, 1856 [No. 362], were as follows: "What I claim is the combined use of them, as herein described, for the purpose of crossing the fibers of the material of which cloth may be made, in the manner and on the principle herein described, and the new machinery necessary to effect that object, particularly the comb carrier, the means described for severing the weft or web, and the fallers for placing the weft upon the warp, operated substantially as herein described. I also claim the depositing of the weft in separate sheets, edge to edge, upon the continuous sheet of warp, substantially in the manner and for the purposes described. Stiles Curtis, President."

R. Rowley, C. Hawley, R. J. Ingersoll, C. M. Keller, and B. R. Curtis, for complainants.

R. S. Baldwin, T. B. Butler, and E. W. Stoughton, for defendants.

SHIPMAN, District Judge. In this suit in equity, the complainants seek a perpetual injunction against the respondents, restraining them from infringing a certain patent relating to the manufacture of felt cloth. The patent upon which the bill rests was originally issued to one John Arnold, on July 15, 1829, and purported to secure to him, as his invention, a certain new and useful improvement in the machine for forming the web of cloth, of wool, hair, or other suitable substance, without spinning or weaving. His patent expired by its terms on July 15, 1843. No effort appears to have been made by the inventor to have it extended. He survived the patent nearly five years, and died on May 13, 1848. No application was made, during his lifetime, to have the expired patent revived or renewed, nor is there any evidence in the case that he expected or wished it to be renewed. In January, 1849, about eight months after the death of the inventor, a joint petition was made by George G. Bishop and Peter N. Morgan (the latter being the administrator of the deceased inventor) for the renewal and extension of this patent, and also of another patent which had been granted to the deceased and Bishop, on October 20, 1836. This petition was supported from time to time before a committee of congress with perseverance, and on March 28, 1854, an act was passed reviving and extending both patents for the term of fourteen years from that date.

On April 5, 1854, the revived patent was assigned to the complainants in this bill. They show a title to this, as well as to the patent granted to Arnold and Bishop, and which was also extended by the same act of congress. In January, 1855, the complainants surrendered the patent of 1829, and, on March 18, 1856, received a reissue. It is important, in this place, to distinguish between the original and reissued patents, so far as the scope of the latter is claimed to transcend that of the former. The first clearly describes the invention to be that of a machine, or, to speak more accurately, an organized mechanism for crossing the fibers of the material of which cloth is made in such a way as to produce the same in long or short pieces. This is all that either the specification or claim, or both combined, set forth as the invention. The invention, as

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

set forth, begins and ends with this organized mechanism. No process is described or hinted at independent of the mere function of the machine, or, at most, the mechanical process wrought by the mechanism. The reissued patent makes a further and distinct claim, as an independent ground of monopoly, namely: "Depositing the weft in separate sheets, edge to edge upon the continuous sheet of warp, substantially in the manner and for the purposes described." This is a claim for the process which, it is insisted, was worked by the original machine. There is no evidence that this process, as it is called, was ever wrought in any other way by Arnold, or conceived of by him as capable of being wrought by any other means than the machine, or organized mechanism, invented by Arnold in 1829.

The bill is founded upon the reissued patent, and it becomes a vital inquiry whether or not this patent is valid. If it is not a valid patent, then the suit fails. If it is valid, and the respondents infringe, then they are liable to be enjoined. I have no doubt on this question. The patent of 1829, both in its original form and in that of the reissue, is invalid, because it did not and does not describe a practical invention. The conceptions of the inventor, in all the forms in which he attempted to reduce them to practice, proved useless and abortive until 1836, when the joint invention of Arnold and Bishop was made. The proof of the utter worthlessness of the invention originally made by Arnold, is to be found in the evidence produced before the court from the files of congress, and upon which that body acted in granting the renewal. This evidence was procured and presented to that body by these complainants, and it presents conclusive proof, to my mind, that the original "invention was incomplete." And, after having obtained an act of congress extending the two patents as "one invention," on the express ground that the first one was no complete invention, within the meaning of the patent act, it is too late for these complainants to set up the contrary fact, and seek, by injunction, to protect that which they have solemnly declared to be worthless. The report of the committee, recommending the passage of the act, says: "No inconvenience can result to the public, or injury to any individual, by the renewal and extension of the first patent, because the invention was imperfect, and a working machine could not be constructed except in connection with what is covered by the second patent." This conclusion of the committee is supported by evidence presented by them, and which has been adduced on this trial. After the legislature has acted upon this conclusion, and passed the statute in question for the benefit of these complainants, by granting them rights adverse to the public and to individuals, it would ill comport with the duty of a court of equity to aid them in reversing the facts, and thus working the very hardship which they had satisfied congress could never exist.

Should it be said that this conclusion of the court only applies to the machine, and leaves the original process sheltered by the reissue there are several answers. If this process is any thing more than the function of the machine, it is a purely mechanical process wrought by the machine, and by the machine alone.

If no working machine could be made according to the invention of Arnold, then no process was ever successfully invented by him, for there is no evidence that he worked the process except by the machine. The intellectual conception of a possible process, without a potential working of it out, is not patentable.

If an inventor merely conceives a mechanical process in his mind, and then sets to work to construct a machine to work that process, and works it out in no other way, and the machine fails to work successfully, then his claim as the inventor of a process is as groundless as his claim as the inventor of a machine.

Arnold having failed to work this alleged process, except by his machine, both claims to "invention," in the sense of the patent act, fall to the ground.

But if it appeared that Arnold invented a mechanical process that could be distinguished from the function of his machine, and which could furnish a distinct ground of claim for an invention, still there is, in the judgment of the court, an insuperable difficulty in the way of these complainants availing themselves of it.

They represented to congress, in the most solemn manner, that the invention of 1829 was incomplete and worthless of itself, and of no value except in connection with the subsequent invention of 1836. They must, therefore, be deemed to have repudiated any claim to an invention by Arnold of a mechanical process, and to have abandoned it, if any such claim had ever existed in Arnold or themselves. Congress having passed the act for their relief, based upon the faith of these representations, equity and good conscience demand that they should be held to them.

In these remarks the court has assumed, rather than decided, that had Arnold's original machine, or one constructed in conformity to his invention, successfully worked, he might have been entitled to a monopoly of the process wrought, as well as of the machine which wrought it. The court is well aware of the nice questions involved in this assumption, and has, therefore, only regarded it as valid for the purposes of this case.

There are other and grave questions in this case, which are passed over because those already noticed lead to a decisive result. But if those already decided had appeared doubtful, the court would have no hesitation in

holding, from all the facts which appear in evidence, that the respondents acted, or failed to act, so as to protect themselves in the matter of the extension of these patents by congress, under the assurance from these complainants that in no event should their free use of the original invention made by Arnold be interfered with.

This conclusion would be strengthened, if it needed support, by the allegation in the bill that the respondents had openly used it five years, in the immediate neighborhood of the complainants, without legal interference, in connection with the fact that no motion was made for a preliminary injunction after the filing of the bill. This was forcibly urged on the argument as a good ground for the denial of relief in equity, whatever rights the complainants might have at law. This point would have received more consideration had not the others been deemed conclusive. The bill is dismissed, with costs.

Case No. 14,369.

UNION METALLIC CARTRIDGE CO. v. UNITED STATES CARTRIDGE CO.

[2 Ban. & A. 593; [1] 11 O. G. 1113.]

Circuit Court, D. Massachusetts. April 13, 1877.

PATENTS — EQUIVALENTS — PATENTED MACHINES — USE OF.

1. The machine of the complainants for making cartridges consisted of a mandrel, die and bunter, the shell being held between the die and mandrel, and advanced against the stationary bunter, which thereby formed a flange. The defendants' machine was substantially the same, except that it was operated by the bunter advancing on the die, which is kept stationary: *Held*, that the defendants infringed the complainants' patent.

2. A patentee, without describing equivalents, is entitled to be protected against the use, by others, of devices which are the equivalents of those described in his patent.

3. A purchaser from a patentee may repair and perfect the machines purchased, and use the same, but he may not use machines embracing the patented inventions, which are not the identical machines purchased.

[Cited in Young v. Foerster, 37 Fed. 204.]

In equity.

Browne & Holmes, for complainant.

D. H. Rice, for defendant.

SHEPLEY, Circuit Judge. The machine for making cartridge-cases, described in the letters patent No. 1,948, reissued to Ethan Allen, May 9th, 1865,[2] and subsequently extended, forms a flange on the head of the cartridge for the reception of the fulminate. A mandrel is advanced and inserted into the shell and pushes the shell into a die which surrounds the shell, with the closed end of the shell projecting beyond the die a sufficient distance to afford metal from which the flange may be formed. The outside of the shell in this position is thus supported by the die, the inside by the mandrel, and the edges of the open end of the shell by a shoulder on the mandrel. The mandrel, die and shell then advance together, forcing the closed end of the shell against a bunter, and squeezing the end down so as to form the flange of the cartridge. The mandrel then retreats, leaving the headed shell in the die, retained there by the flange on the outside of the die on that side of the die farthest from the mandrel. The die has a gutter, which is a prolongation of the hole in the die, but open on top, into which gutter the shell is dropped prior to being acted upon by the advancing mandrel. When the mandrel is retracted after the flange has been formed on one shell, a second unflanged shell is placed in the gutter to be entered and forced forward in turn by the mandrel, the advance of this shell on the mandrel driving out the shell which was previously headed and remained in the die; the second shell is then headed as before, and so on in succession. The claims in the patent are for: "First, the mandrel which carries the cartridge shell, in combination with the die D, which admits the same, and against which the closed end of the cartridge shell is headed, substantially as described. Second, the die constructed and operating for the heading of cartridge shells, substantially as described."

In the machine admitted to be used by the defendants are found substantially the same die, mandrel and bunter operating in the same manner to form the flanged head of the cartridge and to expel the shell after being headed, except that in defendants' machine the bunter moves toward the die to head the shell, while in the Allen machine the die moves toward the bunter to head the shell. The fact, as proved, that, especially in the case of cartridges of longer sizes, there is an advantage in having the die stationary while the bunter moves toward it, is not sufficient alone to show that this latter form of the machine is not an equivalent of the other, all the elements of the combination existing alike in both, and operating alike in combination.

It is contended on the part of the defendants that the action of the commissioner of patents, in requiring a disclaimer of so much of the reissued patent as claimed in specific terms the use of the movable bunter and the stationary die, as an equivalent for the movable die and the fixed bunter, before granting an extension, is conclusive upon the complainants, but we do not so regard it. The patentee, without describing equivalents, is entitled to use equivalents and to treat the use of equivalents by others as an infringement, and this upon the evidence in the record appears to be a clear case of such a use.

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

[2] [The original letters patent No. 27,094 were granted to Ethan Allen February 14, 1860.]

There is evidence of a purchase from the patentees of five machines by the defendants. If they have only repaired and perfected these machines, the use of these machines is not an infringement. But the purchase of these five machines would not, as contended by the defendants, authorize the use of five machines embracing the patented inventions, unless they are the identical machines so purchased. The facts with regard to the extent of the infringement can only be determined on the coming in of the master's report. The injunction will be so modified as not to enjoin the use of the original five machines purchased by defendants, until the coming in of the master's report.

Decree for injunction and account, and reference to a master.

[NOTE. Exceptions were filed to the master's report, but the court affirmed the finding of profits as assessed at $40,367.26, and rendered a decree for the complainants. 7 Fed. 344. Subsequently the complainants moved to recommit the case to the master for a further statement of profits, to bring the account down to the time of the final injunction and decree. The petition was denied. 8 Fed. 446. Both parties appealed to the supreme court, where the decree of the circuit court was reversed, with costs to the United States Cartridge Company on both appeals, and the cause remanded to this court with directions to dismiss the bill, with costs. 112 U. S. 624, 5 Sup. Ct. 475.]

Case No. 14,370.

UNION MILL & MIN. CO. v. DANGBERG et al.

[2 Sawy. 450.] [1]

Circuit Court, D. Nevada. Aug. 7, 1873.

WATERS—IRRIGATION—RIGHTS OF SERVIENT TENEMENT—AQUIESCENCE—PUBLIC LANDS—PATENT—HOMESTEAD—ENTRY—REASONABLE USE.

1. No presumption of a grant arises from an adverse use of water, unless the use has been peaceable, and to be peaceable it must have been with the acquiescence of the owner of the servient tenement.

2. If, during the time of alleged use, the plaintiff, the owner of the servient tenement, denied the right of the defendant, the owner of the dominant tenement, to use the water for irrigation to its injury, and remonstrated against such use, this is enough to show that the use was not acquiesced in, and to prevent the presumption of a grant of the right to so use the water from arising

3. There may be an invasion of the right which will justify an action, although actual damage is not shown. But a distinction must be taken between those uses of water which are the exercise of the riparian proprietors' natural right and those which are not; in the former case actual damage must be shown, but need not be in the latter.

4. One who has entered and paid for land and received a certificate of purchase, has the equitable title, and is entitled to riparian rights, although he has not received his patent.

[Cited in Hayner v. Stanly, 13 Fed. 226; Pacific Coast M. & M. Co. v. Spargo, 16 Fed. 350; Hamilton v. Southern Nevada Gold & Silver Min. Co., 33 Fed. 566.]

5. One who has entered land under the homestead act, and continues to reside thereon, is entitled to use water as other riparian proprietors may.

6. A person who entered and paid for his land before the passage of that act, holds the land unaffected by it, since his patent when issued will relate to the date of his entry, the inception of his title.

[Cited in Aurora Hill Consol. Min. Co. v. Eighty-Five Min. Co., 34 Fed. 518.]

[Cited in Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.]

7. The true test as to a reasonable use is whether the use works actual, material and substantial damage to the common right; not to an exclusive right to all the water in its natural state, but to the right which each proprietor has as limited and qualified by the precisely equal right of every other riparian proprietor.

[Cited in Jones v. Adams (Nev.) 6 Pac. 445.]

8. In the exercise of his common right every proprietor may consume so much water as is necessary for his household and domestic purposes and for watering his stock.

Injunction bill. The facts appear in the opinion, and in the case of the same plaintiff against Ferris [Case No. 14,371].

Sunderland & Wood and Williams & Bixler, for plaintiff.

Clarke & Lyon, R. S. Mesick, and Clayton & Davies, for defendants.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

HILLYER, District Judge. Eleven suits were commenced by the plaintiff in the year 1871, against various persons, to restrain them from an alleged wrongful diversion of the waters of Carson river. At the March term of 1872, the case of one defendant, Albert Ferris, was argued and submitted. Several points decided in that case arise in them all, and as our opinion remains unchanged in respect to them, they will not be discussed again now. [Case No. 14,371.] After that decision was announced, decrees were entered in six of the eleven cases, upon stipulation of counsel. The remaining five cases have now been submitted, and such points as were not determined in the case of Ferris will be briefly noticed, with the principles which have controlled the court in the rendition of final decrees.

In the first place the defendants, H. F. Dangberg, H. A. Dangberg, A. Klauber, F. A. Frevert, Jones, Squires and Winkleman, claim that they have a good defense through an adverse use and enjoyment of the waters for the required length of time.

The qualities which an adverse use must have to support a claim of title thereby, are well settled. The user must be neither secret nor forcible, nor by request, but open, peaceable, and as of right.

The user, to be peaceable, must be with the acquiescence of the owner of the servient tenement. A user which such owner opposes by word or deed becomes forcible, and

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

thus lacks an essential element, without which the use gives no title, and raises no presumption of a grant. If, says Mr. Washburne, it should appear that during the period of the alleged acquisition of an easement by use and enjoyment, the owner of the servient tenement resisted such claim or opposed such use, it would negative the claim. Washb. Easem. 154. In Powell v. Bagg, 8 Gray, 441, it was said that the title to an easement rests chiefly on an acquiescence in an adverse use, and evidence which disproves the acquiescence rebuts the title to the easement. By the civil law, any enjoyment or user was deemed forcible to which opposition was offered, either by word or deed, by the owner of the servient tenement, and a thing was never presumed to be burdened with a servitude where a doubt existed. Ang. Water Courses, § 210; Kaufman, Mackeld. Civ. Law, 323. When the owner of the servient tenement frequently remonstrated against the diversion of the water, it was held that there could be no presumption of a grant. Stillman v. White Rock Co. [Case No. 13,446].

The evidence in these cases proves that the plaintiff did not, during the five years of alleged adverse use, acquiesce in any use of the water by the defendants beyond that which they might lawfully make of it as riparian proprietors.

It appears that during that period the plaintiff and its predecessors, owners of the Merrimac Mill, have asserted their right to all the water which their mill-race would carry, that they have denied the right of the defendants to obstruct or divert the water to their injury, and have repeatedly remonstrated with them against their excessive use of the water in irrigation.

During the irrigating seasons of the years 1865, '66, '67, '68 and '69, the owners of the Merrimac Mill, together with other mill-owners on the river, caused a notice to be printed and distributed and posted through the Carson valley, in the vicinity of these defendants, notifying ranchmen and others "that any diversion of or obstruction to the flow of the water of the Carson river, to the injury of any of the mills thereon, will be resisted by all means which the law affords. The rights of said mills to the full flow of the water of said river, as already established by the courts, will be insisted upon and enforced." Men were employed to go through the valley, visit each farmer, distribute these notices, and remonstrate with the farmers against their excessive consumption of the water for the purpose of irrigation. Here we have a denial of the right to use whenever the use was injurious to the plaintiff, and it is impossible to hold that the user was uninterrupted and peaceful, or to presume a grant.

The statute of limitations of this state bars an action to recover real property unless the plaintiff was seized or possessed of the property within five years before its commencement. In analogy to this statute, the length of time necessary to confer title to an easement by adverse use, is fixed at five years by the courts. This is the only operation the statute has in these cases. To ascertain the requisites of an adverse use we still look to the common law, except as to the length of time it must continue, and that we fix in analogy to the local statute. If there has been an adverse use, in the legal sense, for five years, that gives title, and no grant need be produced to establish it; a grant will be presumed. Presuming a grant is in most cases a fiction of law, the court rarely believes the grant ever had an existence. The presumption then is not made because the evidence justifies the court in believing that a grant was once in fact made, but because it shows an adverse enjoyment for the required length of time, and possessing all the other requisite qualities. Therefore evidence which shows that the use of the defendants lacks the essential and indispensable requisite of acquiescence on the part of the plaintiff, prevents the presumption from arising.

That there may be, as argued by defendants, an invasion of the plaintiffs' right which will justify an action without showing actual damage, is not questioned. But in applying this doctrine a distinction must be taken between those uses of the water which are the exercise of the riparian proprietor's natural right and those which are not. Such proprietor has a right to use the water for the purpose of irrigation as incident to his ownership of the land; the right is not acquired by use. The only limitation is, that he must so use the water as to cause no actual material damage to another; and, of course, no cause of action against him arises until such damage has resulted. On the other hand, one proprietor has no right to divert, in the technical sense, any portion of the water permanently from another, so that it either does not return to the stream at all, or not until it has passed the land of him below. Such diversion would be a clear violation of right, and, if continued adversely for the requisite period, would ripen into title. An action, therefore, would lie for an injury to the right without proving actual damage, or showing that the plaintiff was making any practical use of the water. This distinction is important, and will reconcile much that seems conflicting in the books. If the plaintiff had no mill, and was making no practical use of the water, it would seem hardly possible to show that the defendants caused it any material or actual damage by their use of the water for the lawful purpose of irrigation. In this practical age it would be unworthy of a court of justice to notice the fanciful injury resulting from depriving the eye of the gratification of seeing or the ear of hearing the full flow of the water. Those may be injuries in a certain sense, but they are of the kind to which the maxim "De minimis non

curat lex" applies, as it does to the planting of a tree, which, in some degree, obstructs my neighbor's light, or kindling a fire in my chimney which tends to lessen the purity of his air. So long as the plaintiff has enough for its lawful, practical uses, it ought not and cannot be permitted to debar other riparian proprietors from applying so much water as they profitably can to agricultural purposes. It follows that the plaintiff lost no right, and the defendants gained none, by defendants using the water for irrigation. The plaintiff might safely concede the right to use the water for that purpose while it suffered no actual damage.

We have seen that whenever it was damaged, it objected, and denied the right of defendants to use the water to its injury. This is enough to defeat the title alleged to have been acquired by adverse enjoyment.

A point made by the plaintiff is, that some of the defendants, who have entered and paid for their land, and received a certificate of purchase, but no patent as yet, have no title, by virtue of which they can claim and exercise riparian rights. It is true that such defendants have not the strict legal title; but it is settled that the entry and payment and certificate thereof convey the equitable title. Thereafter the land ceases to be public, and the government has no right to sell it again, but holds the legal title in trust for the purchaser. The land is no longer the property of the United States, and may be taxed by the state without violating the compact not to tax United States property. People v. Shearer, 30 Cal. 648; Carroll v. Safford, 3 How. [44 U. S.] 441; Witherspoon v. Duncan, 4 Wall. [71 U. S.] 210; Hughes v. U. S., Id. 232. They have also the actual possession as well as the beneficial estate or interest in the land, and as such possessors and equitable owners are entitled to enjoy all the incidents to the land and its ownership, as well as the land itself. The patent when issued relates back to the original entry, the inception of title, so far as is necessary to protect the purchaser's right to the land. Id., and Gibson v. Chateau, 13 Wall. [80 U. S.] 92. Upon these authorities it is evident that the plaintiff's objection is groundless. The defendants are, to all intents and purposes, the owners of the land, and entitled to riparian rights. So, too, we consider that the defendant who has entered land under the homestead act, and continues to reside thereon, being rightfully in possession in pursuance of a law of the United States, is entitled to use the water of the stream as other riparian proprietors may.

We must also hold, since the patent when issued will relate back to the inception of title, that is, the original entry and payment, that one who entered and paid for his land prior to the passage of the act of congress of July 26, 1866, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," has his land and the water upon it unaffected by that act.

We come next to the inquiry whether or not certain channels, creeks and sloughs, as they are called, are natural water-courses. Without reviewing the evidence here, it is sufficient to state that we find "Brockliss slough," "Cottonwood slough," "Rock Creek slough," the "Old channel," and "Dangberg creek," to be natural water-courses, and that the defendants, through whose lands they pass, have a right to use the water naturally flowing in them in a reasonable manner for irrigation and other lawful purposes.

Referring to "Dangberg creek" and the "Old channel," it appears that in former years so much water naturally flowed from the east fork into them as to flood and injure the farms. To remedy this, obstructions were placed in these channels, at their heads, and the water led into them from other points, in the one case a little above, and the other a little below the old head. This slight change in the channels enables the defendants to control the flow of the water, and prevent injury to their farms, while it in no way damages the plaintiff. We do not regard these channels as any less natural water-courses since this change than they were before.

The next step is to determine what is the test of a reasonable use To state the question in another way: the defendants having a right to make a reasonable use of the water for irrigation, when does their use become unreasonable? Mr. Justice Story has stated the rule as clearly as it can be stated, probably, in the following extract from his opinion in Tyler v. Wilkinson [Case No. 14,312]: "There may be, and there must be, allowed of that which is common to all a reasonable use. The true test of the principle and the extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and it is not betrayed into a narrow strictness subversive of common sense, nor into an extravagant looseness, which would destroy private rights. The maxim is applied, 'Sic utere tuo ut non alienum lædas.'" Chancellor Kent states the principle with equal clearness as follows: "All that the law requires of the party by or over whose land the stream passes is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream." This is the law and

the test by which the question of reasonable use or not is to be tried. As a definition of this "common right" spoken of by Judge Story, the language of Mr. Baron Parke, in Embrey v. Owen, 6 Exch. 353, may be profitably quoted. He says: "This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of all the water in its natural state; but it is a right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side, to the reasonable use of the same gift of Providence." To the same effect is the language of Mr. Justice Nelson, in Howard v. Ingersol, 13 How. [54 U. S.] 426. "No proprietor," he says, "has a right to use the water to the prejudice of other proprietors, above or below, unless he has acquired a prior right to divert it. He has no property in the water itself, but a simple usufruct while it passes along. Any one may reasonably use it who has a right of access to it; but no one can set up a claim to an exclusive flow of all the water in its natural state; and that what he may not wish to use shall flow on till lost in the ocean."

From these authorities it appears that the use which is unreasonable, is such as works actual, material and substantial damage to the common right; no to an exclusive right to all the water in its natural state, but to the right which each proprietor has as limited and qualified by the precisely equal right of every other proprietor. The rule leaves the common right equal in times of plenty and of scarcity. Because the river is low and there is not sufficient water to drive plaintiff's mill, the proprietors above cannot be debarred from all use. They may still use the water, taking care to do no material injury to the common right of plaintiff, having regard to the then stage of the river. And at all times every proprietor may, in the exercise of this common right, consume so much water as is necessary for his household and domestic purposes, and for watering his stock.

Applying the test to the facts now before us, we find that the defendants did, at the time stated in the bills, use the water unreasonably to the injury of the plaintiff. This much we think clear, and it would serve no good purpose to comment upon the many volumes of testimony. We find, also, that the defendants threaten, and will, unless restrained, continue to so use the water; indeed they insist now, and have throughout this litigation, on their right to use so much water as they need during the season of irrigation, without regard to the rights or wants of the plaintiff. This constitutes one of those continually-recurring grievances which only a court of equity can adequately redress.

When we come to consider the terms of the decree, we find it impossible, however desirable such certainty may be, to measure out to the defendants a specific quantity of water in cubic inches flowing under a given pressure as reasonable, or to designate a certain number of acres of land which a defendant may at all times reasonably irrigate, and restrict him to that quantity of water or number of acres. Counsel for the plaintiff, without admitting the correctness of any such standard for determining a reasonable use, was willing to take decrees permitting the defendants each to irrigate one hundred and sixty acres of land, but defendants not consenting to this it could not be done. The changes in the volume of the Carson river during the summer season, which naturally occur, are such that the quantity of water which a proprietor may reasonably consume varies continually. At times the melting snow gives an abundance for all, and the defendants can use it as they please, without any injury whatever to plaintiff. At other times a defendant might easily so apply the water in irrigating one hundred and sixty acres as to waste and diminish it to the injury of plaintiff. Sometimes, indeed, there is so little water flowing in the river, that if none were used by defendants, in consequence of the evaporation and absorption during the passage over the rocky and gravelly bed for fifteen or twenty miles intervening between the defendants' farms and the premises of plaintiff, enough would not reach the plaintiff's mill to be of any practical use. At such time there would seem to be no good reason for saying that the use of the water by defendants is injurious to the plaintiff. For these, among other reasons, we think no such arbitrary standard of reasonable use can be set up.

Our conclusions in the five cases now under consideration are as follows: That the plaintiff is seized and possessed of the lands described in its bill and the mill situated thereon, and as incident thereto, is entitled to the rights of a riparian proprietor in the water of Carson river, flowing through and over said lands; that the defendants, with the exception of Charles Brodt, Godfrey Brodt, John Howard, Warren H. Smith and E. Lytle, are seized and possessed of the lands described in their answers, through and over which the waters of the east or west fork, or some one or more of the natural streams before mentioned, flow in their natural channel, and as incident thereto, are entitled to the rights of riparian proprietors in the waters of the streams naturally flowing over their land, but are not entitled to any exclusive enjoyment of such waters, as against the plaintiff, by virtue of prior appropriation or adverse use; that between the first day of July, A. D. 1871, and the fourteenth day of August of the same year, the defendants, with the exception of E. Lytle, did use the waters of said streams unreasonably, to the injury of plaintiff; and that plaintiff is entitled to decrees against all of said defendants, excepting E. Lytle, perpetually restraining them from diverting the waters of Carson river upon their lands or

elsewhere, so as to prevent the same from flowing freely to the lands and mill of plaintiff, to the extent necessary for the lawful uses and purposes of plaintiff in carrying on upon its said premises the business of reducing metalliferous ores or other lawful business in which it may now or hereafter be engaged; the decrees to contain a proviso in favor of all the defendants, except those named above as not owning lands on the stream; that nothing therein contained shall be construed to prevent them from using the water of said streams, naturally flowing through their land, for the purpose of irrigating said land, or other lawful purposes of a riparian character to such an extent, and so far as such use shall not cause actual, material and substantial injury to the plaintiff in its use of the water, and shall not diminish or materially contribute to the diminution of the water of said streams, so that such diminution shall prejudice, or cause material injury to the plaintiff in its practical application of the water on its said premises; and a further proviso that said defendants may at all times take and use a sufficient quantity of the water for their domestic and culinary purposes, and for watering their cattle. The decrees will also enjoin the defendants to take the water from said streams and apply it to its various uses upon said lands without unnecessary waste, and in the most economical manner consistent with its beneficial use, and return the surplus to the stream whence it was taken in like economical manner, and without unnecessary waste.

The defendant, E. Lytle, answered, denying that he had ever diverted any water, or that he threatened to do so, and there is no proof against him. The decree must therefore be in his favor for costs.

Decrees are to be drawn up in accordance with the views herein expressed, with costs in favor of plaintiff against the other defendants, to be taxed by the clerk, and apportioned by one of the judges of this court, so that each defendant shall be liable for the amount apportioned to him, and no more.

Case No. 14,371.

UNION MILL & MIN. CO. v. FERRIS et al.

[2 Sawy. 176;[1] 16 Int. Rev. Rec. 114.]

Circuit Court, D. Nevada. May 28, 1872.

PUBLIC LANDS—TITLE OF GOVERNMENT—WATERS—APPROPRIATION—ADVERSE USE—PRESUMPTIVE GRANT—IRRIGATION RIGHTS—REASONABLE USE—STATUTES.

1. The government of the United States has a perfect title to the public land and an absolute and unqualified right of disposal. Neither state nor territorial legislation can, in any manner, modify, or affect the right which the government has to the primary disposal of the public land.

2. A stream of running water is part and parcel of the land through which it flows, inseparably annexed to the soil, and the use of it as an incident to the soil passes to the patentee of the land.

[Cited in Ison v. Nelson Min. Co., 47 Fed. 201.]

3. The government as proprietor of land through which a stream flows has the same property and right in the stream that any other proprietor would have.

4. The appropriation of water flowing through the public land confers no right on the appropriator, either against the government or its grantee, in the absence of congressional legislation qualifying the effect of the government patent. And this is so although the customs, laws and decisions of the courts of the state wherein the land lies, recognize and enforce rights acquired by prior appropriation in controversies between occupants of the public lands without title from the government.

5. So long as the title to land, through which a stream of water flows, remains in the United States there can be no use, or enjoyment of the waters of the stream, which will avail the person so using, as a foundation for title by prescription against the grantee of the government. In order that such use may ripen into a prescriptive title, it must continue for the full period required by the statute of limitations after the title to the land has passed from the United States.

[Cited in Wimer v. Simmons (Or.) 39 Pac. 11.]

6. If a proprietor below on a stream has, by reason of an adverse use by a proprietor above, presumptively granted to the upper proprietor, a right to use the water of the stream in a particular manner, such grant affects only the property owned by the proprietor below at the time the presumptive grant must have had its origin, and he may afterwards purchase other lands on the stream and will hold the latter unaffected by such presumed grant.

7. The act of congress of July 26, 1866 (14 Stat. 253), is prospective in its operation, and does not in any manner qualify or limit the effect of a patent issued before its passage.

[Cited in Beaver Brook Reservoir & Canal Co. v. St. Vrain Reservoir & Fish Co. (Colo. App.) 40 Pac. 1069.]

8. If, when the act was passed, the defendant had acquired such a right, by priority of possession, as the act contemplates, that right is confirmed in him, as against one claiming, as riparian proprietor merely, through a patent subsequently issued, and when no right had vested in the patentee before the act became a law.

9. The use of water by a riparian proprietor does not become adverse until it amounts to an actionable invasion of another's right.

10. A riparian proprietor may lawfully divert the water of a stream, for the purpose of irrigating his land, to a reasonable extent. But in no case may he do this so as to destroy or render useless, or materially affect the application of the water by other riparian proprietors.

11. Water for irrigation is not a natural want in the same sense that water for quenching thirst is, which a riparian proprietor may satisfy without regard to the rights and needs of proprietors below.

12. Every proprietor of land by or through which a stream of water naturally flows, may make a reasonable use of the water for any useful purpose. What is a reasonable use depends upon the circumstances of each case.

[Cited in Mason v. Hoyle, 56 Conn. 272, 14 Atl. 786; Jones v. Adams (Nev.) 6 Pac. 445.]

13. Elements which may enter into the inquiry of reasonable use stated.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

14. It seems that a riparian proprietor is only entitled to take the water from the stream on his own land, and must return the surplus to the stream before it leaves his land. At all events, the fact that a proprietor took the water at some distance above, and returned the surplus at some distance below, his land, would have an important bearing upon the question of reasonable use.

Bill in equity to restrain the diversion of water.

Sunderland & Wood, Williams & Bixler, and A. C. Ellis, for plaintiff.

R. S. Mesick and Clarke & Lyons, for defendant.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

HILLYER, District Judge. This suit was commenced on the fourth day of August, 1871, to enjoin the defendant from an alleged wrongful diversion of water from Carson river. Albert Ferris having since the commencement of the suit acquired the interest of Peter Lightle, one of the original defendants, has been substituted as a defendant. Lightle answered separately, and the present decision involves only the questions at issue between the complainant and the defendant Albert Ferris. This is one among several causes instituted by the complainant against numerous residents along the Carson river, in Carson valley, and has been submitted as, in several respects, a test case. It appears that in the spring of 1861, B. F. Wheeler and others located, as a possessory claim, the land upon which the Merrimac mill is situated. In May of that year, the construction of a mill was commenced, and it was completed in September following. A dam and mill-race, for conducting the water to the mill, were made at the same time. The possessory claim to this land, with the mill and water privilege, have been conveyed to the complainant. Since its completion, the mill has been propelled by the water of the Carson river; and, saving temporary stops, has been constantly run for the purpose of reducing metalliferous ores. The complainant is now owner in fee of the land upon which the mill, dam and mill-race are situated, the foundation of its title being patents emanating from the United States. Two of these, for forty acres each, are dated September 15, 1864; and the third, for one hundred and sixty acres, is dated October 10, 1866. The waters of Carson river naturally flow through each of these parcels of land.

In the year 1858, one T. F. Bowmer entered upon a portion of the public land situated about twenty miles above the point where the complainant's mill stands. This possessory claim was after several mesne conveyances finally conveyed to Peter Lightle, the grantor of Ferris. Lightle continued in the actual possession of the land, and on the 15th of June, 1865, obtained a patent from the United States for $158^{33}/_{100}$ acres, and on June 26, 1869, a patent from the state of Nevada for 80 acres. This is arable farming land, and the east fork of Carson river flows naturally through both parcels. In 1860, Lightle and Bowmer, being then joint possessors of this land, diverted a portion of the water of the east fork of the river, and conducted it by means of a ditch on to this land, where it was used for irrigation. Water has been used, to some extent, continuously on this land since that year in the irrigating season. Prior to the issue of the patents therefor, the land of both parties was public, and the property of the United States. The defendant admits a diversion of water, and claims a right to do so on the grounds: Firstly, of prior appropriation and use; secondly, of prescription; and thirdly, of riparian proprietorship.

It is also claimed that the act of congress of July 26, 1866, confirms the right of defendant, acquired by priority of appropriation. We consider it to be entirely clear that before the title to these lands was acquired from the government of the United States, no occupancy or appropriation of the water by either party, no state or territorial legislation, or rule of decision established by the state courts in controversies between occupants of the public land, without title from the government, can in any manner qualify, limit, restrict or affect the operation of the government patent; that the government has a perfect title to the public land and an absolute and unqualified right of disposal; that a stream of running water is part and parcel of the land through which it flows, inseparably annexed to the soil, and the use of it as an incident to the soil passes to the patentee, who can be deprived of it only by grant, or by the existence of circumstances from which it is the policy of the law to presume a grant; that the government, as proprietor of the land through which a stream of water naturally flows, has the same property and right in the stream that any other owner of land has, be it usufructuary or otherwise, and that a statute of limitations does not run against the United States. Upon the foregoing propositions it is not deemed necessary to enlarge. They seem incontestable, and we shall content ourselves with a reference to the case of Vansickle v. Haines, 7 Nev. 249; wherein the authorities are collected, and the law stated in the clearest and most satisfactory manner; and the case of Gibson v. Chouteau, 13 Wall. [80 U. S.] 93. In Vansickle v. Haines, the court held: That the United States is the absolute and unqualified proprietor of all the public land to which the Indian title has been extinguished; that running water is primarily an incident to the ownership of the soil over which it naturally flows; that the government patent conveys to its grantee, not only the land through which a stream naturally flows, but also the stream; that neither territorial nor state legislation can in any wise impair or modify the right of the government to the primary disposal of the soil; that stat-

utes of limitation do not run against the state, so that no use of water while the title to the land is in the government, can avail the defendant, as a foundation of title by prescription, or defeat, or modify the title conveyed to the grantee by his patent. After examination we are constrained to say, in the language of Mr. Justice Garber, in that case, that not only the weight of authority, but all the authorities support these propositions.

We propose now to consider how the question of prescription would stand if the act of congress of July 26, 1866, had not been passed; secondly, the effect of that act; and thirdly, whether there has in fact been any such adverse enjoyment as warrants the presumption of a grant.

And firstly, on September 15, 1864, one David Gammel obtained a patent for what is now the upper portion of complainant's land, consisting of two forty-acre tracts. On October 10, 1866, Oliver Racicot obtained a patent for the lower portion, embracing one hundred acres. The complainant's mill is on the lower premises, the dam and race on the upper. As none of the time during which the defendant used the water prior to the issue of the patents, can be counted as part of his adverse possession, his prescriptive title could have had no legal commencement as against Gammel's title, before September 15, 1864, nor as against the title of Racicot, before October 10, 1866. From September 15, 1864, to the commencement of this suit, is more than five years; and from October 10, 1866, to its commencement, is less. Thus any prescriptive title to the water, must have its origin after September 15, 1864, and before October 10, 1866. Admitting for this argument, that the defendant had acquired by adverse use a right to divert the water as against the Gammel title, can that affect the title acquired from Racicot, the complainant being now the owner of both titles. A very little examination will show that it cannot. What the defendant in effect claims, is, that after Gammel acquired the government title to the upper premises, and before the title to the lower had passed from the government, Gammel made a grant to the defendant of a right to use a portion of the waters of the stream flowing through his land, which, without such grant, he could have insisted should descend to him. At the time this grant must have its origin, the government had not conveyed, but was still the owner of the lower premises. It certainly needs no argument beyond this statement, to show that Gammel could convey to the defendant no interest of any description in the land below, which was then the property of the United States. We may, under certain circumstances, presume a grant, but we cannot presume that such grant conveyed, or attempted to convey something to which the presumed grantor had no title. It follows that Racicot took from the government in October, 1866, a perfect title to his land, unaffected by any grants made by proprietors above him. This is the title by which the complainant holds the lower premises.

But it is said that the right of defendant by prescription as against the complainant, was, in law, a grant by complainant to defendant, at least as against premises conveyed by the patents of 1864, and that the complainant cannot now defeat that grant by the purchase of premises lower down on the stream. This position seems untenable. We have already seen that the titles to the upper and lower premises were distinct at the time the grant must have originated, the upper being owned by Gammel, the lower by the United States. It has also been shown that the easement claimed can be attached only to the upper premises, because there could be no presumption of grant or adverse use as against the lower premises, while the property of the United States. If we admit that the complainant's grantor Gammel, granted, in fact, the water right claimed to the defendant, it was a grant of a parcel of the estate he then had in the upper premises, and the complainant took the upper premises subject to that grant; but it is impossible to see how the purchase by the complainant afterward of another parcel of land, no part of which had been conveyed to defendant, can be said to be an act destructive of the force of the grant made by the owner of the upper premises. The union of the two titles long after the grant was made, cannot operate to enlarge the grant. The defendant has the easement which was granted to him in the upper premises, but as he never had any in the lower, it can make no difference to him whether the latter are owned by the complainant or some other person. In Bliss v. Kennedy, 43 Ill. 68, the complainant purchased from the defendant Kennedy a lot of land upon which there was a factory and a water privilege. Afterward the defendant purchased a tract of land above, built a factory and used the water of the stream therein. The claim of the complainant was, that Kennedy, by his deed to Bliss of the lot and factory below with the "appurtenances," virtually covenanted that his grantee should have the use of the water as it then came to the factory—the flow of the water being appurtenant to the land granted. Kennedy, at the time of making this deed, had no right, title or claim to any land, save that on which the factory was erected. "By his deed," says the court, "he cannot be held to have sold and conveyed anything but the land and factory specified in it, and the appurtenances to that land and factory then belonging. * * * All that belonged to the tract conveyed, and over which Kennedy then had dominion, passed by his deed under the

term 'appurtenances.' Kennedy, when he conveyed the factory and land with its appurtenances to complainant, owning nothing outside the boundaries of the land conveyed, above or below the factory, could convey nothing; and, therefore, no part of the stream above the factory could pass as appurtenant to it." So, in this case, the owner of the upper premises at the time the presumed grant must have had its origin, having no interest in the premises below, could convey none to his grantee. The complainant then, by virtue of his ownership of the lower premises, has a right to have the water of the river flow to these premises, unaffected by any right arising out of an adverse use as against the upper premises, unless there is something in the act of congress qualifying that right in respect to the lower premises.

On July 26, 1866, congress passed an act, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," and it is therein among other things enacted, "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." 14 Stat. 253. Prior to the passage of this act, the policy of congress had been, as shown by its legislation, to grant to purchasers of the public land the bed of a non-navigable stream flowing through the land sold, and the lines of sections were run without reference to the meanderings of such stream; so that the purchaser of land through which a non-navigable stream flowed, took the bed of the stream and such riparian rights to the water of the stream as belong to the owner of the soil. Several attempts had been made to provide by law for the survey and sale of the mineral lands; the survey to be rectangular, as in case of other lands. These attempts had always been successfully resisted by the mining communities, because, among other reasons, such a survey and sale would have been ruinous to the possessors of quartz lodes, which do not descend perpendicularly, but at a greater or less angle. For seventeen years prior to 1866, the mineral land of California and Nevada had been occupied by the citizens of the United States, without objection on the part of the government. Canals and ditches were dug during this time, often at great expense, over the public lands, and the water of the streams diverted by these means for mining and other purposes. Local customs grew up in the mining districts, by common consent, and by rules adopted at miners' meetings for governing the location, recording and working of mining claims in the particular mining district. Possessory rights to public lands, mining claims and water, were regulated by state statutes, and enforced in the state courts. The rules, customs and regulations of the miners were also recognized by the courts, and enforced in trials of mining rights. The courts not applying, in all respects, the doctrine of the common law respecting the riparian owners in deciding between these possessors, none of whom had title to the soil, recognized a species of property in running water, and held that he who first appropriated the waters of a stream to a beneficial purpose, had, to the extent of his appropriation, the better right as against persons subsequently locating on the stream, above or below; and that the first appropriator might conduct the water in canals, ditches and flumes wheresoever he pleased, and apply it to whatsoever beneficial purpose he saw fit, without any obligation to return it to the stream whence it was taken, or preserve its purity or quantity. Kidd v. Laird, 15 Cal. 161; Weaver v. Eureka Lake Co., Id. 271; Lobdell v. Simpson, 2 Nev. 274; Ophir Silver Min. Co. v. Carpenter, 4 Nev. 534. In this posture of affairs, the persons who had constructed these canals and ditches, at an expense of hundreds of thousands of dollars, in many instances, over the public land, saw when the question of the sale of those lands was agitated, that should such sale be made, they, as to these possessory rights, would be at the mercy of the buyer of the legal title, without some protective legislation. The act of 1866, section 9 of which we have quoted in part, was a consequence of this state of things. It gives the possessor of a quartz lode a right of pre-emption, and it declares that the person who has acquired a right to the use of water by priority of possession shall be maintained and protected in the same, if such right is recognized and acknowledged by the local customs, laws and decisions of courts. The policy of this enactment, so far at least as it relates to agricultural districts, may be doubtful, but it is the law of the land, and the courts must carry out what appears to be the intention of the legislature, as therein expressed. And that, as indicated by the act, appears to be to grant to the owner of possessory rights to the use of water under the local customs, laws and decisions, the absolute right to such use, which the government alone could grant. Under this law, when a possessory right to the use of waters is claimed, whether or not such right exists, will be determined by reference to the local customs, laws and decisions, and the question will be determined just as it would have been had it been raised between occupants before the title to the land had passed from the government. When the right is thus ascertained, the statute has the force of confirming it to the person entitled under the local laws and decisions. But the act is prospective in its operation, and cannot be construed so as to divest a part of an estate granted before its passage. If it be admit-

ted that congress has the power to divest a vested right by giving a statute a retrospective operation, that interpretation will never be adopted without absolute necessity. Blanchard v. Sprague [Case No. 1,518]; Vansickle v. Haines, 7 Nev. 249. As this law, being general in its terms, cannot be held to operate retrospectively, it follows that the defendant's patent of June 15, 1865, and the complainant's of September 15, 1864, are in no manner qualified by this act, passed subsequent to their issue. As against these patents, neither can claim any right to the use of the water by virtue of prior appropriation or possession, but in respect to them, their rights to the water must be fixed by the law applicable to them as owners of the soil through which the stream naturally flows.

But if when the act was passed, the defendant had such a right by priority of possession as that act contemplates, upon the construction which must be given, that right is confirmed in him, and he is entitled to protection as against one claiming as riparian proprietor merely, through a patent issued after, and when no right had vested in the patentee, before the act became a law. The statute is, in effect, incorporated into such subsequent patent, and operates as an exception out of the estate granted to the complainant by the patent of October 10, 1866. If we have rightly interpreted the act of congress, and the operation of the patents issued before and after the passage of that act is as we have stated, the case stands in this wise: The defendant's claim by virtue of adverse enjoyment, falls to the ground, because sufficient time has not elapsed since the lower premises were conveyed by the government. He cannot sustain his claim by force of the act of congress, because the complainant's patents of September, 1864, were made before the act was passed, and conveyed the upper premises absolutely, and free from any claims by prior possession merely. We have hitherto been considering the questions of prescription and the act of congress separately, as it was desirable to determine the effect of the act and of the patents upon these water rights. But the complainant having taken the lower premises, subject to such right as the defendant had acquired by priority of possession and the act of congress of 1866, if he had also acquired by adverse use, a right as against the proprietors of the upper premises, to divert and use the same quantity of water in the same manner that he would have by virtue of his prior appropriation, this would be a complete defense to this action, for the complainant's right would not be infringed by the diversion, either as proprietor of the upper or lower premises. It is, therefore, necessary to ascertain whether there has been in fact such adverse use by defendant as affords a presumption of a grant from the proprietor of the upper premises of the complainant.

The answer of this defendant sets out his prescriptive right as follows: "That for more than five years prior to the commencement of this suit, he has, during the irrigating season of each year, under claim of right, openly, continuously and peaceably, and adversely to the complainant and all persons whatsoever, used the waters of said Carson river in irrigating said land, and the crops of grass, grain and vegetables grown thereon, and for stock and domestic purposes; whereby defendant has acquired the absolute and exclusive right to use a part of the water of said Carson river in manner and for the purposes aforesaid."

The claim is of a right to use a part of the water of the river during the irrigating season, for irrigation, stock, and domestic purposes. The bill charges the unlawful diversion to have commenced on the first day of July, 1871, and continued until the commencement of this suit, August 4, 1871. The testimony shows that the irrigating season upon the defendant's land for grain, ends on or before the first of July, and for grass, from the first to the middle of July. Prior to the issue of complainant's patent of September 15, 1864, we have seen the five years could not commence to run in defendant's favor. The patent having been issued after the irrigating season of 1864 was over, the earliest moment the time could begin is the irrigating season of 1865. But the defendant's use is not adverse until it becomes injurious to the complainant, and amounts to an actionable invasion of its right. Holsman v. Boiling Spring Bleaching Co., 1 McCarter [14 N. J. Eq.] 335; Ang. Water Courses, 386; Washb. Easem. 125. It is not sufficient to show a use of the water in a particular way, but it must also appear that such use caused such injury to the complainant as would justify an action for its redress. A thorough reading of the testimony fails to show any such use of the water in the irrigating seasons of 1865 or 1866 (and we need go no further) as amounts to a violation of the complainant's right, or as would have justified an action against the defendant. Lightle testifies that "water was used on the land continuously since 1860 until 1870. The water was used on the land during the irrigating season, and at other times it ran through the ditch." The capacity of the Lightle ditch is the same now as in 1861, but what the capacity was is not shown. Lightle further says that during the years 1861-2-3-4 "a great deal more" water was used on the Lightle land than in subsequent years. How much less in later years does not appear. Nor does it appear what quantity of water was diverted in 1865 and 1866, nor how much was absorbed or lost, nor what surplus found its way back into the river. Nor is it shown that the complainant was injured at its mill in the month of July of those years by lack of water to run its machinery. The witness McGill

states that in 1865 there was not sufficient water to run all the machinery in the mill in August, September and October; that in 1866 the supply was about the same as in 1865, and that in 1867 he don't think the machinery of the mill was much retarded. If any inference could arise, from this lack of water, that the defendant's use was the cause, or partially so, it does not aid the defendant; because the scarcity in those years occurred after the close of the irrigating season, and consequently at a time when the defendant does not claim a right to divert the water and use it for irrigation. It is not shown by the testimony that in these years of 1865 and 1866, the use of the water by defendant during the irrigating season of those years caused any injury to the complainant. It devolves on the defendant to show when his adverse use began, or that it began at least five years before the bringing of this suit. This he has not done. So far as appears, his use of the water during the irrigating seasons of 1865 and 1866 may have been a reasonable and proper exercise of his riparian rights, and entirely consistent with the complainant's full enjoyment of its right to use the water. For without deciding here to what extent water may be used for irrigation, it will not be denied that a riparian proprietor may lawfully make some use of it for that purpose, so that the simple fact that the water was used for irrigation, does not show that the complainant's right was violated. The defendant does not even show that his use of the water in the years mentioned sensibly diminished the water in the river, and if it did not, the complainant was not injured actionably, under the narrowest rule laid down in any case. The adverse use must be under claim of right. Defendant, in his answer, alleges his use to have been under claim of right during the irrigating season, and he must be confined to that period. The burden of proof is on him, and he must establish his adverse enjoyment in the most satisfactory manner, before the court can indulge in any presumption that the complainant granted to him any material portion of the motive power of its mill. For this failure to show, by clear and unequivocal proof, that subsequent to the complainant's patent of September 15, 1864, and five years anterior to the commencement of this suit, the use of the water amounted to an actionable invasion of the complainant's right, the defendant's claim of title by prescription must be denied.

It remains to determine whether the defendant, as alleged in the bill, wrongfully diverted water from the river between the first day of July and the fourth day of August, 1871. A large part of the testimony submitted was taken in other causes, and, by agreement of counsel, used in this, and so much of it has no bearing on this case that it has been found somewhat difficult to arrive at the facts. The following, however, may be stated as bearing on the question now to be decided:

The climate of Nevada in the summer is arid. The year 1871 was an unusually dry one, and less water ran in Carson river than ever before known; and in the latter part of July, and in August and September of that year, there was less water by one half than in ordinary seasons. In the months of July and August, 1871, the complainant's mill could not be operated for want of sufficient water, and had to suspend. One Danberg farmed the Lightle (defendant's) land in 1870 and 1871, Lightle himself having left his farm in 1870. Lightle's land is agricultural, and requires irrigation to make it productive. The Lightle ditch is taken out of the east fork of Carson river, at a point in section 5, township 12, a considerable distance from the Lightle land, which is situated on other sections, and through it water is conducted on to that land. The capacity and grade of the ditch are not stated, but Lightle's answer admits a diversion since the first day of July, 1871, of "about two thousand inches (as it flows)," part of which was used by Danberg on his own land. Danberg says he ran the ditch as full as he could get it in 1871, and at times used one half of the water on Lightle's and one half on his own land; at other times, when not needed on Lightle's land, the whole was carried on to his. The Lightle land embraces two hundred and thirty-eight acres, but how much of it was under cultivation in 1871 does not appear. It lies, in the main, between the east and west forks of Carson river, which unite above the complainant's premises. It appears that a part of the water used on the Lightle land does "find its way" into the west fork and some into the east; but in both cases after it has left the defendant's land. As to the quantity or proportion of the water returned to either fork there is nothing definite. Witness Read, who was there in July and August, 1871, says very little, if any, found its way back to the river. The east fork is on higher ground than the west, and water runs off from it to the west naturally. It does not appear what quantity of water was flowing in the east fork at Lightle's in July, 1871. Many other persons were diverting water from both the east and west forks in July and August of that year. As before said, the "irrigating season" as respects the Lightle land ends, for grain, July 1, or before that; for grass, from the first to the middle of July. Some seasons, Lightle says, he does not need water at all for irrigating grain. It is not shown how many acres of Lightle's land were cultivated for grass or for grain. Danberg says he farmed the Lightle land, and that is all there is on this point. It does not appear that in 1871 any of the water was used on Lightle's land for household purposes, or for watering stock, and as Lightle was not living on the land

this year, probably the water was used for the sole purpose of irrigation.

There can be no doubt, in this case, that the diversion of the water on to Lightle's land, and allowing it to be absorbed there after July 15, when the irrigating season was over, was an unreasonable use of the water, and the complainant is entitled to relief so far. The defendant does not claim a right to so use the water, except during the irrigating season. As to the period from the first to the fifteenth of July, a part of the irrigating season, it is necessary to determine whether the defendant has the right to use the water for irrigation to any extent, and if he has, to what extent. The complainant denies his right to use the water for irrigation to its injury in any degree. The defendant, on the other hand, claims that in a hot and arid climate like ours, water may not only be used for that purpose, but it is a natural want, like the thirst of men and cattle, to satisfy which the riparian proprietor, who has the first opportunity may consume, if necessary, the whole stream, and that such use under the conditions existing here is reasonable.

The law on this subject is stated by Chancellor Kent in the third volume of his Commentaries, and has very frequently been quoted both by the courts of England and America with unqualified approbation. It is this: "Every proprietor of lands on the bank of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct as it passes along. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it This is the clear and settled doctrine on the subject, and all the difficulty that arises consists in the application. Streams of water are intended for the use and comfort of man; and it would be unreasonable and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural and manufacturing purposes, provided the use of it be made under the limitations mentioned; and there will, no doubt, inevitably, in the exercise of a perfect right to the use of the water, be some evaporation and decrease of it, and some variations in the weight and velocity of the currents. But de minimis non curat lex, and a right of action by the proprietors below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of a party by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream." In England it seems that a proprietor is not permitted to use water for irrigation, if thereby he sensibly diminishes the stream. Wood v. Waud, 3 Exch. 748; Embrey v. Owen, 6 Exch. 353. In this latter case, it was said: "Nor do we mean to lay down the rule that it would in every case be deemed a lawful enjoyment of the water, if it was again returned into the river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend on the circumstances of each case. On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden, or allow his family or cattle to drink it. It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application." And it was there held, that as the "diminution of the water was not perceptible to the eye," the use of it by the defendant for irrigation was not unreasonable, or prohibited by law. Actual, perceptible damage, it seems, would give a right of action. In our own country, while any general or unlimited right to use water for irrigation has been denied, it has sometimes been said, that owing to differences in the climate and the size of the streams, a more liberal use is allowed than in England. In Maine, it is held that a proprietor may make a reasonable use of the water for domestic purposes, for watering cattle, and even for irrigation, provided it is not unreasonably detained, or essentially diminished. Blanchard v. Baker, 8 Greenl. 253. In Connecticut, the doctrine is thus stated: "The right of the defendant to use the stream for purposes of irrigation cannot be questioned. But it was a limited right, and one which could only be exercised with a reasonable regard to the right of the plaintiff to the use of

the water. She was bound to apply it in such a reasonable manner and quantity as not to deprive the plaintiff of a sufficient supply for his cattle." Gillett v. Johnson, 30 Conn. 180. The stream in question rose on the defendant's land, and naturally flowed to the plaintiff's, who had a place on his land for watering his cattle, and the whole stream could be run in a half-inch pipe. The supreme court of Massachusetts say: "That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established, as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the water-course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably." Elliot v. Fitchburg R. Co., 10 Cush. 191. In New York, "the defendant has a right to use so much water as is necessary for his family and his cattle, but he has no right to use it for irrigating his meadow if thereby he deprives the plaintiff of the reasonable use of the water in its natural channel." Arnold v. Foot 12 Wend. 330. It would be useless to cite or quote more from the numerous cases on this subject. The result of the authorities appears to be well expressed by Mr. Washburn in the late edition of his work on Servitudes and Easements, in the following language:

"The right of a riparian proprietor, jure naturæ, to divert water from a stream, when reduced to a simple proposition, seems to be this: he may not do it for any purpose except domestic uses, and that of irrigating his land; and whether and to what extent he may do the latter, depends, in each particular case, upon whether it is reasonable, having regard to the condition and circumstances of other proprietors upon the stream, and this is to be determined in all cases of doubt, by a jury. But in no case may he do this so as to destroy, or render useless, or materially diminish, or affect the application of the water by other proprietors." Washb. Easem. (2d Ed.) p 240, § 2 subd. 12. The fundamental principle upon which the authorities all go is this: That every proprietor of land through or by which a stream of water flows, may make a reasonable use of it for any useful purpose. What is a reasonable use, depends on the circumstances of each case, and cannot be stated in a general rule. Every proprietor along the stream has an equal right to its use and benefit. All have a usufruct; none have any absolute property in the water, and no one has a right to use it unreasonably to the injury of his neighbor, above or below. It is sometimes stated that the proprietor above may exhaust the stream for household purposes, and for watering his cattle; and that to this extent, having the first opportunity, he has a preferred right. If this be so, it is still upon the ground that the use is reasonable under the circumstances. No case is recollected where this precise question was necessarily involved; and it may admit of question whether an upper proprietor on a small stream would be permitted to consume the whole of it in watering his cattle, and deprive his neighbor below of sufficient water to quench the thirst of himself and family. In some cases, the wants of riparian proprietors have been divided into natural and artificial; natural wants being primary wants, and such as are absolutely necessary to be supplied, such as thirst of people and cattle; and artificial wants being secondary, and such as are simply for the comfort, convenience or prosperity of the proprietor, and these latter are held to be subservient to the former. Ang. Water Courses, 210, 1. In Evans v. Merriweather, 3 Scam. 496, the supreme court of Illinois make this division of wants, and say that while water for irrigation is an artificial want in Illinois, in a hot and arid climate it would be a natural want. There was no question in that case in regard to irrigation, and the remark is simply dictum. The supreme court of Texas, in Rhodes v. Whitehead, 27 Tex. 304, said upon this subject: "It may be admitted, that the purpose of irrigation is one of the natural uses, such as thirst of people and cattle, and household purposes which must absolutely be supplied; the appropriation of the water for this purpose would therefore afford no ground of complaint by the lower proprietor if it were entirely consumed," and they cite Evans v. Merriweather. The question evidently received no consideration, but the court made the admission, as courts often do, because admitting such a right to use the water for irrigation, the defendant in that case had exercised his right in an unlawful manner, and the case went off on that point.

These two cases are the only ones referred to as sustaining the defendant's claim that water for irrigation is, in this climate, a natural want, and we are asked to class it with the want of water to quench thirst of men and cattle. To put the use of water for irrigation upon the same footing as the use of it to satisfy thirst, is to say that an upper proprietor may take the whole stream, if needful to the growth of vegetation upon his land, and leave those below him without water to drink. This certainly cannot be law in any climate. But "water for irrigation" is not a natural want in the same sense that water to quench thirst is. If it were it could not be made to depend upon the climate. Water is a natural want of man and beast in every country and climate. So water is a natural want of vegetation everywhere, without reference to the climate, for the laws of vegetable growth are the same in Illinois and in Nevada. Irrigation is a mode of applying water to satisfy this want. Hence it does not seem to be entirely accurate to

say that "water for irrigation" is a natural want in Nevada and not so in Illinois. What is true, undoubtedly, is, that there exists in this climate a greater necessity for the application of water to the purpose of irrigation than in countries where the rain falls during the summer months, and this may be a proper fact to consider in determining the question of reasonable use. To lay down the arbitrary rule contended for by the defendant, and say that one proprietor on the stream has so unlimited a right to the use of the water for irrigation, seems to us an unnecessary destruction of the rights of other proprietors on the stream, who have an equal need and an equal right. The more we examine the more we become impressed with the wisdom of the common law rule, that each proprietor may make a reasonable use of the stream, and that what that is depends upon the circumstances of each case. It will also be seen from the rule, as before stated, that the question of reasonable use is not to be determined solely by the wants of the party using the water—whether the amount is reasonably sufficient for his own lawful purposes—but reference must also be had to the rights and needs of other proprietors upon the stream. "The necessities of one man's business cannot be made the standard of another man's rights in a thing which belongs equally to both." Wheatley v. Chrisman, 24 Pa. St. 302; Brace v. Yale, 10 Allen, 447; Hayes v. Waldron, 44 N. H. 583, 584. No more definite rule can be safely laid down which will be of universal application. Under this rule the character of the soil and climate, instead of fixing the right absolutely, become circumstances only to be weighed in determining the question of reasonable use. The climate of Nevada is arid in the summer season, and the soil then needs irrigating to make it productive, but not always to the same extent. In the valley of the Carson river, some of the land needs little or no irrigation, other portions require a great deal. The defendant's land requires less water than that of his neighbor Danberg. Indeed, some seasons he says it needs no water for irrigating in order to raise grain. This must be considered in ascertaining the extent to which Lightle may reasonably use the water. There will also enter into the inquiry the nature and size of the stream, the uses to which it can be or is applied, the nature and importance of the use claimed and exercised by one party, as well as the inconvenience or injury to the other party; the proportion of water diverted, compared with the whole volume of the stream; the quantity lost and absorbed; the manner of taking and conducting the water on to the land; the mode in which it is used there; the quantity of land under cultivation; the kind of crop; the means adopted for returning the water to its natural course; and all other matters bearing upon the question of fitness and propriety in the use of the water. Hayes v. Waldron, 44 N. H. 580; Thurber v. Martin, 2 Gray, 394. And it may occur that a use reasonable one season will become unreasonable at another. When the Carson river is full it is a large stream, and probably every proprietor might then use so much water as he saw fit, for irrigation or any other useful purpose, without affording any ground of complaint to those below him, while at low stages of water such an extensive use might cause great injury, and could not be permitted. When there is an insufficient quantity to satisfy all the wants of all, if it is possible to do so, is it not more reasonable to apportion the water as fairly as may be among the proprietors, than to permit one who happens to be above to satisfy all his wants without regard to those of his neighbor below? In regard to the comparative benefits derived by our community from mining and agriculture, or the injury which it will sustain by fostering one at the expense of the other, they may be questions involved in the consideration of what constitutes a reasonable use. Irrigation must be held, in this climate, to be a proper mode of using water by a riparian proprietor, the lawful extent of the use depending upon the circumstances of each case. With reference to these circumstances the use must be reasonable, and the right must be exercised so as to do the least possible injury to others. There must be no unreasonable detention or consumption of the water. That there may be some detention and some diminution follows necessarily from any use whatever. How long it may be detained or how much it may be diminished can never be stated as an arbitrary or abstract rule. It is now only necessary to apply these principles to the circumstances of the case in hand. After the middle of July, as we have said, the diversion was unjustifiable because the irrigating season had then closed. As to the period from the first to the middle of July, there was manifestly an unreasonable use and waste of water, but the testimony is not so clear and full upon some points as we could wish. We are not informed with any degree of precision what quantity of water was then flowing in the river; what crop was irrigated, although it may be presumed that it was hay or grain, or both; what quantity was diverted beyond the very indefinite admission in the answer of "about 2,000 inches as it flows;" what quantity of water would irrigate the defendant's land, nor how many acres were under cultivation, nor how much water was returned to the river. We do know that the ditch was kept full of water; that a portion of the time one half of the water was used on the Lightle land, and one half on Danberg's, and that at other times, when not wanted on the Lightle farm, it was all used on Danberg's.

It may also result from the principles established by the authorities, that the riparian owner is only entitled to take the water

from the stream on his own land, returning it to the stream before it leaves his land. This point does not appear to have been expressly decided, but whenever the authorities allude to it at all, they speak of taking the water on the land of the riparian proprietor, and returning the surplus before it leaves the land, as though this was a well-recognized condition of a proper use. However this may be, it would not be permissible to take the water at some distance above, and return the surplus at some distance below, the land of the riparian proprietor using the water, if, thereby, a considerable portion of it would be wasted before reaching the land, or after leaving it, and before it is returned to the stream, to the injury of other riparian proprietors below. At all events, this circumstance would have an important bearing upon the question of reasonable use.

The defendant diverts the water at a point considerably distant from his land, and his ditch does not return any of the water to the river, but either conducts it on to Danberg's farm, or leaves it, principally, to find its way through sloughs or down the natural declivity to the west fork, more than a mile distant, some little perhaps to the east fork, whence it is taken. This statement, we think, shows that the use made of the water by the defendant at the period in question was unreasonable, and amounted almost to wanton waste. Certainly, the defendant cannot, by virtue of his ownership of the soil, justify the diversion of twice as much as he needed on his own land, and permit the other half to run upon the land of another. Nor does it seem that the defendant can justify the diversion of so much as 1,000 inches of water "as it flows" to irrigate his grass land. For although this quantity is quite indefinite, it is evident that 1,000 cubic inches of water constantly flowing is a very considerable quantity, even if we admit the grade of the ditch, which is not given, to be slight.

From the testimony of Klauber as to his own land, it appears that 400 inches of water would irrigate 400 acres of land, if kept constantly flowing. But as the grade of the defendant's ditch is not given, we have no means of knowing how much the 1,000 inches "as it flows" exceeds one inch to the acre of defendant's 238 acres, as measured by Klauber.

Upon the case as now presented no final decree, which will properly adjust the rights of the parties, can be entered. The case must be referred to a master to make inquiry and report, whether the defendant has adopted the mode which causes least waste in taking the water from the river, and if not, what mode consistent with the fair and beneficial use of the water by him can be adopted; what means are employed to return the water to its natural channel, and are they the means best calculated to prevent waste, if not or if none have been employed, what method will best effect that object; what amount of water per acre is needed during the irrigating season to irrigate defendant's land; some standard of measurement of the water, and the quantity measured by such standard, flowing in the river and in defendant's ditch at the time mentioned in the bill. Until the court is in possession of these facts it is not possible to determine the extent to which the use by the defendant was unreasonable, and to which he ought to be enjoined. The decree of the court must be drawn up accordingly, and all other matters are reserved until the coming in of the master's report.

Case No. 14,372.

UNION MUT. INS. CO. v. COMMERCIAL MUT. MARINE INS. CO.

[2 Curt. 524;[1] 18 Law Rep. 610.]

Circuit Court, D. Massachusetts. Oct. Term, 1855.[2]

MARINE INSURANCE — REINSURANCE — PAROL ACCEPTANCE—SPECIFIC PERFORMANCE—PLEADING IN CHANCERY—ANSWER.

1. If an answer in chancery admit that a proposal for insurance was made and accepted, but adds that no contract was made, the court will not intend that this denial includes any new matter of fact, but will treat it as only containing the respondent's view of the legal consequence of the facts admitted.

2. A parol acceptance of a written proposal for insurance, admitted by the answer, is a binding contract for insurance, in the absence of any statute requiring such contract to be in writing; and there is no such statute in the state of Massachusetts.

[Cited in Walker v. Metropolitan Ins. Co., 56 Me. 384; Somerley v. Buntin, 118 Mass. 287; Sanborn v. Fireman's Ins. Co., 16 Gray, 453.]

3. A court of equity will enforce a contract to make a policy of insurance; and treating that which was agreed to be done as if actually done, will ascertain the amount due, and enforce payment by a decree.

[Cited in Kerstetter v. Raymond, 10 Ind. 203; Walker v. Metropolitan Ins. Co., 56 Me. 382.]

This was a suit in equity to enforce the specific performance of a contract for a policy of reinsurance. The material facts and parts of the answer bearing on the case are set out in the opinion of the court. But as the decision turned mainly on the responses made to the bill, it is here given, as follows:

"The Union Mutual Insurance Company, a corporation duly established by the laws of the state of New York, doing business at the city of New York, in the state of New York, bring this their bill of complaint against the Commercial Mutual Insurance Company, a corporation duly established by the laws of the commonwealth of Massachusetts, doing business at the city of Boston,

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

[2] [Affirmed in 19 How. (60 U. S.) 318.]

in said commonwealth. And thereupon your orators complain and say, that in and by their charter and by the laws of the state of New York, they were, on the second day of November, eighteen hundred and fifty-three, and ever since have been, authorized and empowered to make insurance, among other things, against loss by the perils of the seas and against loss by fire; that your orators on the said second day of November, underwrote and caused one D. McKay to be insured for whom it might concern, payable in the event of loss to the said McKay, on one eighth of the good ship Great Republic, the said ship having been valued at one hundred and seventy-five thousand dollars, the sum of twenty-two thousand dollars, for the term of one year at and from the second day of November, eighteen hundred and fifty-three, at noon, until the second day of November, eighteen hundred and fifty-four, at noon, against loss from sundry designated risks, and especially from loss from the perils of the seas and from loss by fire, as will more fully appear from a copy hereto annexed and made a part of this bill, of the policy issued by your orators to the said D McKay. Your orators further say, that thereafter the aforesaid insurance so made by your orators upon the Great Republic, and on the night of the twenty-sixth of December, eighteen hundred and fifty-three, the said ship was totally destroyed and lost by fire, one of the perils insured against; that your orators thereupon became liable to pay, and thereafter such loss did pay to the said D. McKay the full sum of twenty-two thousand dollars, the amount so as aforesaid by your orators underwritten. Your orators further say, that after they had insured the said McKay as aforesaid, and before the loss aforesaid of the said ship, and before the commencement of the fire by which its destruction was produced, your orators requested and authorized Charles W. Storey, of Boston aforesaid, insurance broker, to cause and procure your orators to be reinsured in the sum of ten thousand dollars upon the said Great Republic, for the term of six months, against all and singular the risks by your orators theretofore assumed, and especially against loss from the perils of the seas and from fire.

"Your orators further say, that the said Charles W. Storey, as the agent of your orators, in that behalf duly authorized and in their name and behalf, on Saturday, the twenty-fourth day of December, eighteen hundred and fifty-three, made application to the said defendants for the reinsurance by them of your orators upon the said Great Republic, in and for the sum of ten thousand dollars, for the term of six months from the twenty-fourth day of December aforesaid, against such risks as your orators had assumed, and especially against loss from the perils of the seas and against loss from fire; that the said application so made by the said Storey was made at the office and usual place of business of the said Commercial Mutual Marine Insurance Company in Boston; that it was so made in the first instance to the secretary of the defendants, and immediately thereafter, and on the day last aforesaid, to George H. Folger, the president of the defendants, who was duly authorized to receive and act thereupon for the defendants. Your orators further say, that upon the making of the said application the said George H. Folger, after consulting and advising with some person then present, whose name is to your orators unknown, replied to the said Storey, that the defendants would reinsure your orators, in the sum of ten thousand dollars upon the said Great Republic, and would assume the risks proposed for the term of one year, at and for a premium of six per cent. upon the sum to be underwritten; that they would insure against the said risks for the term of six months at and for a premium of three and one half of one per cent. upon the sum to be insured. Your orators further say, that the said Storey, immediately thereafter the said application, communicated to your orators the terms upon which the said defendants would reinsure your orators upon the said Great Republic. Your orators further say, that on the said twenty-fourth of December, your orators upon being advised by the said Storey as aforesaid, directed, authorized, and requested the said Storey, in the name and behalf of your orators, to accept the terms aforesaid, for six months, and to procure for your orators a reinsurance, in accordance therewith, from 24th December aforesaid. Your orators further say, that the said Storey as agent, and in behalf of your orators, on Monday, the twenty-sixth day of the said December, at or about eleven o'clock before noon, at the place of business of the said defendants in Boston, and before any loss or damage had occurred to the said Great Republic, notified the said Folger that your orators had accepted the proposition of the defendants to reinsure your orators for the term of six months from the twenty-fourth of December aforesaid, at noon. Your orators further say, that on the said twenty-sixth of December, and before any loss or damage had occurred to said ship, the above-named Storey, in behalf of your orators, embodied in a paper partly printed and partly written, the terms of the contract of reinsurance, so as aforesaid, on the said twenty-fourth of December, in answer to the aforesaid application, proposed to your orators by the said defendants, and so as aforesaid accepted on the morning of the twenty-sixth of December. Your orators further say, that the said paper was examined, approved, and retained by the said Folger, he in this behalf acting for the defendants, and by him was, in the name of the defendants, assented to, and

thereupon a contract of reinsurance by and between the defendants and your orators was complete and concluded, upon the terms in said paper contained, by force whereof the defendants became and were liable and agreed to and with your orators to pay to them the sum of ten thousand dollars, in the event that the said ship Great Republic should be lost or damaged within six months from and after noon of the said twenty-fourth of December, by the perils of the seas or by fire. Your orators further say, that the said Folger, in behalf of the defendants, and in their name and behalf, agreed with the said Storey, he acting for your orators, that a policy should be prepared and executed by the said defendants, to your orators, at the early convenience of the defendants, and delivered to your orators, containing, with other usual and accustomary clauses, the terms of the contract of reinsurance, so as aforesaid concluded by and between your orators and the defendants, and so as aforesaid embodied, and set forth in the paper aforesaid. Your orators further say, that the said Storey, on the twenty-sixth of December aforesaid, was authorized, ready and willing, in behalf of your orators, to pay to the defendants, or secure to their satisfaction, at their election, the premium so as aforesaid agreed upon for the said reinsurance, but the same was not then paid, because the defendants were accustomed not to receive the premiums by them required in their contracts of insurance until the preparation and delivery of the policies by them agreed to be issued. Your orators further say, that the said Storey, on the said twenty-sixth of December, immediately upon the conclusion of the aforesaid contract of reinsurance, advised your orators of its completion. Your orators further say, that the said Storey, on Tuesday, the twenty-seventh of December aforesaid, notified the defendants that the said ship had been destroyed by fire and was totally lost, and at the same time asked Edmund B. Whitney, secretary, at the time, of the defendants, in the presence and hearing of the said Folger, at the office of the said defendants, if the policy had been prepared for your orators, to which the said Whitney in the hearing of the said Folger, said no, assigning no reason for the delay, or intimating any refusal to execute such policy. Your orators further say, that the said Storey, on Wednesday, the twenty-eighth of December, called a second time at the office of the defendants and asked for the said policy, to which the said Folger replied, he was in doubt whether the contract was complete and obligatory, as it was made on a day regarded as Christmas day, but he, the said Folger, had not made up his mind about it and did not want to talk on the subject then. Your orators further say, that one F. S. Lathrop, on the thirtieth of January, eighteen hundred and fifty-four, in behalf of your orators, made a draft upon the defendants for the sum of nine thousand six hundred and fifty dollars, the amount of said reinsurance, less the premium, payable at sight, to John S. Tappan, your orators' vice-president, which draft was thereafter, and on the first of February, eighteen hundred and fifty-four, presented to the defendants, which they refused to pay or accept. Your orators further say, that the said Storey, in behalf and in the name of your orators, in that behalf duly authorized, on the twenty-sixth of April, eighteen hundred and fifty-four, at the office of the defendants, made demand upon the aforesaid Folger, for the execution and delivery of the policy so as aforesaid by the said defendants theretofore agreed to be by them executed and to your orators to be delivered, and at the same time tendered to the said defendants the sum of three hundred and sixty dollars as and for premium, interest, and cost of policy, with which request the said Folger, in the name of the said defendants and in their behalf refused to comply. Your orators further say, they have applied to the defendants for a copy of the aforesaid paper so left with them on the twenty-sixth of December, which they refuse to furnish. And your orators well hoped that the defendants would have complied with the reasonable requests of your orators.

"To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may, and according to the best and utmost of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are required to answer, that is to say: 1. Whether upon your information and belief, your orators, before the said twenty-fourth of December, caused D. McKay to be insured upon the ship Great Republic, upon the terms stated in a paper hereto annexed, purporting to be a copy of a policy made by the complainants? 2. Whether, upon your information and belief, the said ship was destroyed and totally lost by fire during the night of December twenty-sixth, eighteen hundred and fifty-three? 3. Whether, upon your information and belief, the complainants have paid as and for a loss upon the said ship the entire sum by them underwritten upon said ship? 4. Whether Charles W. Storey, on the aforesaid twenty-fourth of December, applied at your place of business to you, in behalf of the complainants, to reinsure them in the sum of ten thousand dollars upon the Great Republic? 5. Whether your president, George H. Folger, on the said twenty-fourth of December, stated to the said Storey the terms upon which you would reinsure the complainants the sum of ten thousand dollars on

said ship? 6. Whether, on Monday, the said twenty-sixth of December, during the forenoon, the said Storey, at your place of business, said to your president, that the complainants had accepted the terms proposed by your president on said twenty-fourth of December, for a reinsurance by you for the complainants in the sum of ten thousand dollars upon the ship Great Republic? 7. Whether the said Storey, on the said twenty-sixth of December, left with your president, at your office, a paper or memorandum containing the terms of a reinsurance by you for the complainants in the sum of ten thousand dollars, upon the said Great Republic? 8. Whether the said paper was interlined in any respect or word by your president, in the presence and with the consent of the said Charles W. Storey? 9. Whether your president, on the said twenty-sixth of December, assented to the terms and provisions in said paper contained? 10. Whether, upon your information and belief, the said Storey, on the said twenty-sixth of December, advised the complainants that he had procured a reinsurance for them upon the aforesaid ship, at your office, upon the terms which had been proposed by you on the twenty-fourth of December? 11. Whether, on the twenty-seventh of December, eighteen hundred and fifty-three, the fact that the aforesaid Great Republic had been destroyed by fire, was the subject of conversation at your place of business between your president and the said Storey? 12. Whether, on said twenty-seventh of December, the said Storey inquired of your secretary or clerk if a policy had been prepared for the complainants? 13. Whether any reply was made to said inquiry; if so, what reply was made and by whom? 14. Whether the said Storey was at that time informed that the defendants would not execute or deliver a policy to the use and for the complainants? 15. Whether it is your usual or frequent practice, when you make a contract of insurance and after such contract has been entered into, to require some time for the preparation and execution of the policy, before it is ready for delivery? 16. Whether it is usual or frequent, at your office, to delay the payment of the premium until the policy is prepared and ready for delivery? 17. Whether the complainants, by the said Storey, at any time tendered any sum of money as and for a premium upon a reinsurance by you, for the complainants upon the above-named ship, and thereupon demanded a policy; if so, how much was tendered, and when was it made?

"And your orators pray that the defendants may discover and produce the original paper or memorandum, so as aforesaid made by the said Storey, and dated twenty-fourth of December, eighteen hundred and fifty-three, which was so as aforesaid left with their president at their place of business, on the aforesaid twenty-sixth of December. And that the said agreement of the defendants to execute and deliver to your orators a policy of reinsurance, according to the terms of the aforesaid paper, and in accordance with the defendant's contract of insurance as aforesaid, may be specifically performed, your orators hereby offering to perform their undertakings in the premises. And that the said defendants may be deemed to pay to your orators the sum of ten thousand dollars, the sum so as aforesaid by them reinsured to your orators, with interest thereon. And that your orators shall have such other and further relief as the case may require and as shall seem meet to the court, and as shall be agreeable to equity and good conscience. And your orators pray this honorable court to issue a writ of subpœna in due form of law, according to the rules of this court, to be directed to the Commercial Mutual Marine Insurance Company,—a corporation, by the law of Massachusetts, at Boston, commanding them on a certain day and under a certain penalty to be and appear before this honorable court, and to stand to abide and perform such order and decree therein as to this court shall seem meet, and as shall be agreeable to equity and good conscience.

"The Union Mutual Insurance Company, of New York,

"By C. B. Goodrich, Their Attorney.

"C. B. Goodrich, Counsel."

Mr. Goodrich, for complainants.

Choate & Jewell, contra.

CURTIS, Circuit Justice. This is a bill in equity to enforce the specific performance of a contract to make insurance. An outline of those facts, not controverted, or clearly proved is, that on the 24th of December, 1853, Charles W. Storey, as the agent of the complainants, made application to George H. Folger, as the president of the defendants' corporation, for reinsurance on the ship Great Republic. The terms of the application were contained in a paper partly printed and partly written, which was as follows: "Reinsurance is wanted by the Union Mutual insurance Company, New York, for ten thousand dollars, on the ship Great Republic, from December 24th, 1853, at noon, for six months ensuing. This policy is to be subject to such risks, valuations, and conditions, including risk of premium note, as are, or may be taken by the said Union Mutual Insurance Company, and payment of loss to be made at the same time. Three and one half per cent. Binding, ————, President. New York, Dec. 24, 1853." The president, after consulting with one of the directors of the company, declined taking the risk for three per cent. for six months, but offered to take it for three and one half per cent. Mr. Storey replied that was more than he was authorized to give; but whether, he added, that he would transmit the president's offer

to his principals in New York, is among the controverted facts. In point of fact, Mr. Storey did, on the same day, which was Saturday, send to the complainants a telegraphic despatch, in the following words: "To John S. Tappan, Esq., Union Mutual Insurance Company, New York. This risk can be done at three and one half, or six per cent. a year. Charles W. Storey." And on the same day the president of the complainants' corporation answered: "To Charles W. Storey. Do it for six months, privilege of cancelling if sold. John S. Tappan." This answer was received in Boston between six and seven o'clock on Saturday evening, the 24th of December, but did not reach Mr. Storey until about eleven o'clock on Monday, the 26th. As Christmas day fell on Sunday, Monday, the 26th, was generally observed as a holiday by the banks, insurance companies, and many merchants in Boston, but Mr. Storey went to the office of the respondents, and found there their president, who had gone thither to read his letters and newspapers. Neither the secretary nor clerks of the company were present.

At this interview, it is not controverted by the respondents, that Mr. Storey informed the president he was willing to pay three and one half per cent. for the reinsurance described in the paper above mentioned, that he altered the "three" to "three and one half per cent." upon the paper, by adding the figure ½ after the figure 3, and that the president assented to the terms contained in the paper as the terms and provisions of a reinsurance, to be completed and executed by the respondents, by the making and execution of a policy in due form (according to the requisition of the laws of Massachusetts and the by-laws of the defendants' corporation. But the defendants insist that the office of the defendants was not open for business; that the president was there only casually, and not for the transaction of any business; that no contract was then made; and all that was done amounted only to a communication by the president to Mr. Storey, that the terms mentioned in the paper were such as he approved of, and that on the next day he should be able and willing to contract.

It appears that the paper, which I will call the proposal, was left by Mr. Storey with the president, who placed it in his drawer, but not in the particular department of his drawer where accepted proposals are usually deposited, to be taken out by the clerk, who draws up policies thereon. After leaving the office, Mr. Storey, on the 26th, wrote to his principals as follows:—

"Boston, December 26, 1853. John S. Tappan, Esq., Vice-President Union Mutual Insurance Company, New York: Dear Sir,—I have your esteemed two favors of the 24th, and the telegraphic despatch of same date, directing me to effect the reinsurance on the Great Republic, at 3½ per cent. for six months, with privilege of cancelling if the vessel shall be sold. I have, accordingly, made the reinsurance with the Commercial Insurance Company, with the verbal understanding that the policy may be cancelled according to our usage in such cases, which is, to retain enough of the premium to pay for the risk already incurred; as for example, if the ship should arrive at Liverpool and be sold there, they would reserve a fair rate for the passage, if the proportion of the time premium should be insufficient. I have received no encouragement that any further insurance can be made on her, and I believe I have tried every office in the city, except the Manufacturers' and Mercantile, (which only write their own policies,) the Franklin, and the Metropolitan. Very respectfully yours, Charles W. Storey."

The defendants, at the hearing, objected to the use of this letter as evidence. I consider it evidence, to the same extent and for like reasons, that the act of the president in placing the proposal in his drawer, out of the usual place for accepted proposals is evidence. It was an act done by one of the parties, which was immediately connected with the subject-matter of the controversy, and tends to show what the state of mind of the actor then was. On the night of the 26th of December the Great Republic was destroyed by fire, while lying at a wharf in the city of New York, and it is not denied, and is proved, that the complainants were insurers thereon, for the sum of $22,000, the risk having commenced on the second day of November, 1853, at noon; and that they have paid this loss.

The first question which I have to determine is, whether an agreement for a policy was concluded by and between Mr. Storey and the president during their interview on the 26th of December. Such an agreement is stated in the bill. The passages in the answer, bearing directly on this question, are as follows: "That on or about the twenty-fourth day of December, eighteen hundred and fifty-three, Charles W. Storey called at the office of this defendant, in Boston, and presented the application for insurance, a true copy of which is annexed hereto, and desired to obtain reinsurance upon the ship Great Republic, for the amount of ten thousand dollars; that at that time the figure '3' upon said application stood alone, and the president of this defendant declined to take the risk at 3 per cent. for six months, and informed Mr. Storey that the risk was worth 3½ per cent. for six months, and at that rate he was willing to take the risk; that Mr. Storey then said he was not authorized to give so much, and could not do so, and left this defendant's office without any expressed intention of returning, and carried away with him the said application. That on the twenty-sixth day of said December, being Monday, the office of this defendant was not open for business; that the twenty-fifth day of December, being Sunday, the said twenty-sixth day of December was generally observed as Christ-

mas day, and as a holiday, and the banks, insurance offices, offices of brokers and the stores of merchants were closed, and no business, was transacted on that day, and the office of this defendant was closed for business on that day, and neither the secretary of this defendant, nor any of its clerks, nor any of its directors, were at its office; but its president, George H. Folger, went to its office for a few minutes, but not on the business of this defendant, and while he was there, Mr. Story again called, and again presented the application for reinsurance aforesaid, and said he was willing to give 3½ per cent. for six months for said reinsurance, and the figure '½' was then added to the figure '3' by him; that said Folger assented to the terms in said paper contained, but informed said Storey that no business was done at this defendant's office on that day, and that the next day he would attend to it, and said Folger thereupon took said paper from said Storey, and retained the same in the office of this defendant. This defendant denies that any contract for reinsurance was entered into between this defendant and the said complainant."

To a special interrogatory in the bill the defendants further answer: "That its president did assent to the terms and provisions in said paper, as the terms and provisions of a reinsurance to be completed and executed by this defendant, by the making and execution of a policy in due form according to the requisitions of the laws of Massachusetts and the by-laws of this defendant, but they were not assented to as a present insurance." An answer to a bill in equity is to be considered in two aspects,—as pleading and as evidence. Viewed as pleading, its admissions are conclusively binding on the defendants. And if their language is so ambiguous as to be fairly susceptible of two meanings, that interpretation is to be put upon them which is least favorable to the respondents. Turning to the first passage above cited from the answer, I find it admitted, that, on Saturday, Mr. Storey had been informed by the president that the defendants were then willing to take the risk at three and one half per cent. for six months, which Mr. Storey then declined; that on Monday he again presented the application for reinsurance, said he was willing to give three and one-half per cent., added "½" to the "3" which was on the paper, and the president assented to the terms contained in the paper, but informed Mr. Storey that no business was done at the office on that day, that on the next day he would attend to it, and thereupon the president took the paper from Mr. Storey, who departed, leaving it in his possession.

Taking this to be a precise and full statement of what then occurred between the parties, the first inquiry is, what had Mr. Storey a right to understand was meant by the president, when he informed Mr. Storey that "no business was done in the office on that day, and the next day, he would attend to it?" Attend to what? To receiving and assenting to the proposal for insurance? I think this is not the fair meaning, and that Mr. Storey had a just right to understand it otherwise; for the proposal was, in fact, then and there received and then and there assented to. Having already received and assented to the proposal, when he spoke of not doing business on that day, and of attending to it the next day, I consider the effect of what he said was, not that he would do on the next day what he had just before done; but something which remained to be done; and that what was to be attended to on the next day, was not something already attended to and completed, and which, if attended to on the next day, would only be a repetition of what had been done, but something which was to follow thereon, and complete the transaction. Having already received and assented to the proposal, what was to be attended to on the next day, was an accepted proposal, and what was postponed was the necessary action on an accepted proposal. Such, I think, is the just import of what is here stated, and that Mr. Storey had a right so to understand it; and if the president intended Mr. Storey should not so understand it, he was bound to apprise him, that, although he assented to his proposal, he must not consider that any such assent had been given, but must return the next day and renew it. It is not suggested in the answer that any such intimation was given, or even that it was expected by the president that the proposal would be again made, or, that it being left with him as a continuing proposal, he was on the next day to take it up, as one not yet assented to, and then decide whether he would assent to it or not. Nor is there the least ambiguity, taking into view the passage secondly above cited from the answer, as to what was actually intended by the president's assent to the proposal. For, in answer to the ninth interrogatory in the bill, it is there admitted, "that the president did assent to the terms and provisions in said paper, as the terms and provisions of a reinsurance, to be completed and executed by this defendant, by the making and execution of a policy in due form according to the requisitions of the laws of Massachusetts and the by-laws of this defendant." Now let us suppose that these words had been written on the proposal, and that there had been added thereto, "but no business is done at the office this day, and to-morrow it will be attended to," and that the president had signed his name to this writing, I could have no hesitation in saying that this amounted to a promise on the part of the company to issue a policy in conformity with the proposal; and that what the parties had agreed to de-

fer, was not their action on a mere proposal, but their further action on a proposal accepted. That having, in plain language, made a contract for a policy, and fixed all its necessary terms and conditions, including the premium to be paid, the draft and signatures of the policy and the delivery thereof were to be deferred till the next day. It is true these words are not found on the paper. But they are found in the answer; and they evidence what was done, in a manner as conclusive, as if written on the proposal itself, or on another paper referring to and identifying the proposal. They are written on another paper, which refers to and identifies the proposal, and that paper is under the seal of the corporation, and is part of the record of this case. It is true the answer, in terms, denies "that any contract for reinsurance was entered into between this defendant and the complainant." But whether what was, in fact done, amounted to a contract for reinsurance, is a question of law.

This answer undertakes to state what was done and said between the parties. It adds a denial that any contract was entered into. I cannot treat this general denial as importing or including any other matter of fact than those stated. If such existed, it should have been added to the statement of what was done and said. I construe it as intended to put in issue the legal question, whether the facts stated will enable the court to say a contract was made. The answer also subjoins, to the admission of the president's assent, a denial that the terms of the proposal were assented to "as a present insurance." Here, also, it is not made to appear that any matter of fact is intended to be denied, or that it is meant to assert that the president when he assented to the proposal, qualified his assent by a declaration that the terms were not assented to as a present insurance. Nor is there the least reason to suppose from any other part of the answer, or from any evidence in the cause, that any such qualification was, in point of fact, made. But passing over these considerations, and allowing to the denial the fullest extent that can be claimed for it, it does not conflict with the conclusion that a contract for a policy was made. There can be no pretence that a then present insurance was effected. All that is claimed by the bill is, that the parties contracted for a policy, which was subsequently to be issued. The insurance was not to be actually effected until the policy should be issued. Whether, when issued, it would relate back so as to cover risks exhibiting on the 26th of December, would depend on the stipulations of the policy. In this case the proposal was for reinsurance from December 24th, at noon. The risks then commencing, the defendants agreed, that by a policy to be afterwards issued, they would assume. In entire accordance with all this, is the denial that insurance was in fact made on the 26th; for it was then only agreed to be made. And it is only in this way that the answer can be relieved from a charge of inconsistency. To say, in the same sentence, that on the 26th, the defendants assented to the proposal to take the usual risks on the Great Republic from the 24th, at noon, for a period of six months, in consideration of a premium of three and one half per cent., and that the defendants were to execute on their part, by issuing a policy accordingly, but that they did not agree to make insurance covering the risks existing on the 26th of December, would be a plain contradiction in terms. In my opinion, the answer cannot be allowed to have such effect.

I have not been unmindful of the grounds relied on by the defendants, and I will state briefly the views I entertain of the principal of those grounds. It was urged, that if Mr. Storey had believed that a contract was made, he would have signed the proposal and insisted on the signature of the president; and if the president had understood that he was making a contract, he would have put his name to the paper. As respects Mr. Storey, he testifies that, though he had effected upwards of three hundred reinsurances for the complainants during the three years then last past, he had scarcely ever signed a proposal; and that only one, or perhaps two, of the presidents of ten different insurance companies, with whom he had transacted this business, ever signed an application for insurance when accepted. With the respondents he had done no business before the time in question. As respects the president, the usage stated in the answer is as follows: "That it is the usual and frequent custom of this defendant's office, to receive written or printed applications for insurance, which contain the subject-matter, the voyage, the risks, the premium, and by whom insurance is proposed, and for whom; which, if satisfactory, are assented to by its president and handed to the clerk, as the basis for filling up a blank policy to be executed in proper form according to law; that upon the execution of the policy and the making of the premium note agreed on, the insurance is complete; but that until the filling up and execution of the policy by the proper officers, no insurance is complete or binding upon this defendant;—but when similar agreements have been made as to the terms of insurance, and when time is required for filling up the policies, if the applicant desires the insurance to commence immediately, the application is signed by this defendant's president, and the insurance is considered to take effect immediately; and this defendant says it is usual and frequent after such a contract of insurance as the last described has been entered into, to take time to fill up and execute the policy." This is not supported by any evidence. All that relates to it is found in the answer of the president to the twenty-sixth interrogatory. To the twenty-sixth he says: "The only custom I

know of obtaining in Boston, in regard to the binding nature of unsigned applications is, the executing and delivering of the policy itself; and while they remain in the possession of the office, any alteration may be made therein. This is where no agreement for insurance has been mutually signed." But if the usage existed precisely as stated in the answer, it would not prove, that a binding contract for a policy was not made, when the proposal was made and accepted. It is true, it might only amount to a contract to issue a policy on the next day, and the risks might attach only on the date of the policy; and if so, in effect, it would not be a present insurance or an agreement to make one. But no usage can be effectual, to render void an express contract for a valuable consideration. And assuming, what I shall presently consider that a parol contract for a policy is valid in law, I do not perceive what effect could be allowed to the usage stated in the answer, beyond this: that unless there be an express stipulation that the risk is to begin at some particular time, it is to begin at the date of the policy. Here there was an express stipulation. But it is not necessary to determine any thing on this point; because the defendants rely on this usage only to show that the president did not intend to make a binding contract. But parties to such a transaction must be conclusively presumed to intend to do what they actually do, and when the answer admits, that the president accepted the proposal, and does not assert that he did or said any thing which was sufficient to prevent such acceptance from amounting to a contract, no further inquiry as to his intention is necessary or proper. The question is proposed to the president, on cross-examination: "Seventh—Whether or not, on the 26th of December, you said to Storey that no insurance would be considered as made, until the policy or some other instrument should be signed by the officers of the defendants?" To the seventh cross-interrogatory, he says: "I don't recollect to have so stated."

The view I have taken of the answer dispenses with the necessity of an examination of the evidence. As I have already stated, the defendants are bound by that answer. But a careful examination of the evidence has strengthened the conclusions formed from the answer; and the result at which I have arrived upon this part of the case is, that a concluded parol agreement for a policy, in conformity with the proposal, was made on the 26th of December. It remains to inquire whether such an agreement can be enforced by a court of equity. That the court should be cautious in the exercise of such a power, I have no doubt. Specific performance is never decreed while reasonable doubt hangs over the transaction. And especially should this rule be observed, where the right of the complainant rests upon an alleged oral agreement. But where the proposal is in writing, and contains all the necessary terms of the bargain; and where, as here, it is admitted by the answer, that the proposal was made and accepted, the absence of the signature of the president is a formal defect merely. The admission in the answer that he actually assented to the proposal, is as satisfactory evidence of his assent, as would be afforded by his signature to the paper. Unless, therefore, there is some technical rule of law, which requires his signature, its absence is not important in this case. It was at one time much questioned whether the complainant was not entitled to the specific performance of a contract which a statute required to be in writing, and signed by the party charged, if the defendant confessed an oral contract. It is now settled, that he is not, if the defendant insists on the defence given by the statute. Mitf. Eq. Pl. (by Jeremy) 266–268; Story, Eq. Pl. § 763, and notes. But when an oral contract is confessed, and the statute not insisted on, specific performance is decreed; à fortiori, where there is no statute requirement, and where the difficulty is only in making such proof, as satisfies the conscience of the court. It is insisted however, that the contract now in question is required, both by the law merchant and the statute law of Massachusetts, to be in writing. The defendant's counsel has, in his learned argument, adduced abundant authority to show, that in practice, insurance is always made by a written contract, denominated a policy, and that, by many commercial codes, it is expressly required. that the contract of the insurer shall be in writing. And he refers to Mr. Phillips's and Mr. Duer's treatises to show, that they consider that an oral contract for a policy is not binding. But the question whether such a contract is valid, must be determined, in the absence of any statute, by the common law; and I am not aware of any grounds upon which it can be maintained, that the common law requires a contract for a policy of insurance to be in writing. It is not sufficient to say that by the law merchant the insurance must be effected by a written policy. By the law merchant a foreign bill of exchange must be in writing; but I do not doubt that an action will lie on an oral promise, for a valuable consideration, to deliver one in payment for money lent. So a bond must be in writing. and under seal; but a contract to deliver a bond is not required by the common law to be in writing. Land can only be conveyed by a deed, but a parol contract for a deed of land was undoubtedly valid at the common law, and, as we have seen, is enforced now, in equity, when the statute of frauds is not insisted on.

The maritime law of all commercial countries requires the title to vessels to be evidenced by written documents. But an oral contract of sale of a vessel, if delivery be made, or the price paid, transfers the title. And an executory contract to convey, can undoubtedly be enforced, if the statute of frauds is complied with. In Massachusetts,

a corporation can make insurance only by a policy in writing, signed by its president, and countersigned by its secretary. But there is no statute of frauds which includes contracts for policies. It was forcibly urged, that as the statute of Massachusetts requires policies to be signed by the president, and countersigned by the secretary of the corporation, it cannot be supposed that the legislature intended that an oral contract for a policy should bind the company. But it was decided by the supreme court of Massachusetts in New England Marine Ins. Co. v. De Wolf, 8 Pick. 56, that this provision, in an act incorporating an insurance company, applied only to the mode of making a policy, and did not apply to a contract by the company to pay the amount of a loss to an assignee of a policy. Indeed the usage of the defendants, and so far as appears of all other insurance companies here, is to treat this statute provision as inapplicable to contracts for policies; for such contracts are never countersigned by secretaries of the company. The requirement of the signature of the president and secretary is limited to the policy. There may be strong reasons for extending it to contracts for a policy; but it not having been so extended, I have no right to make a statute of frauds for the case. In Sandford v. Trust Fire Ins. Co., 11 Paige, 547, the chancellor did not find it necessary to decide this question, but he intimated an opinion that he should have held a parol contract for insurance valid, if one had been proved. In Hamilton v. Lycoming Mut. Ins. Co., 5 Barr [5 Pa. St.] 339, the supreme court of Pennsylvania held an oral contract for insurance to be binding on the insurers. This seems to me to be in conformity with the common law, and I find nothing in any statute of the state of Massachusetts to conflict with it.

The results at which I have arrived, are: 1. That the answer admits, that the complainants through their agent, made a proposal in writing for insurance, which contained all the necessary terms of a valid contract for a policy; and that the defendants accepted this proposal. 2. That this acceptance made a legal contract between the parties, which it is the duty of the court to order to be specifically performed. 3. That as it is admitted, that the complainants would have a good cause of action at law upon a policy, if issued in pursuance of the contract, there should be decreed to them in this suit, what they would be entitled to recover, if a policy were issued and that which was agreed to be done were actually done. Let a decree be drawn up to this effect.

[Upon an appeal to the supreme court, the above decree was affirmed. 19 How. (60 U. S.) 318.]

UNION MUT. INS. CO. (GRISWOLD v.). See Case No. 5,840.

UNION MUT. FIRE INS. CO. (JORDAN v.). See Case No. 7,522.

UNION MUT. LIFE INS. CO. (CHANCE v.). See Case No. 2,588.

UNION MUT. LIFE INS. CO. (GAY v.). See Case No. 5,282.

Case No. 14,373.

UNION MUT. LIFE INS. CO. v. KELLOGG.

[5 Wkly. Notes Cas. 477; 5 Reporter, 682.] [1]

Circuit Court, E. D. Pennsylvania. April 24, 1878.

RECEIVER—WHEN ALLOWED—FUND—INSURANCE—SUIT AGAINST AGENT—SET-OFF.

1. The corporation plaintiff filed a bill in equity, to determine, inter alia, the ownership of, and recover, a fund held by its agent, the defendant, and which came into the latter's hands as the plaintiff's money. After answer filed, the plaintiff moved for a receiver of the fund. *Held* that, without deciding the merits of the controversy, a receiver might be appointed before the evidence was closed, if the pleadings (coupled with defendant's admissions) showed: (1) The reception by defendant, as agent, of a fund prima facie belonging to plaintiff; (2) probable peril to the fund, if left in the defendant's hands pending litigation; and (3) a presumption that the fund was actually existing under the defendant's control when the bill was filed.

2. And this latter presumption will arise from a statement or admission by the defendant that he has not embezzled any portion of it, and that he can satisfy a decree for the amount, if against him.

3. The bill prayed an account of moneys received by the defendant for the company, and for a receiver to hold the fund pendente lite. The answer admitted the receipt of the money, but averred a set-off for prospective salary and commissions, which the defendant alleged he had been prevented from earning by the plaintiff having illegally terminated his contract of agency; also other smaller items of set-off. The pleadings showed that, even were the smaller items admitted, but the first disallowed, there should be a balance due the plaintiff. The evidence, as far as taken, showed probable peril to the fund if left in defendant's hands. *Held* that, after answer filed, but before the evidence was closed, a receiver should be appointed for such balance, without deciding the merits of the controversy; but quære, whether, in equity, such prospective earnings could, in such a case, be the subject of a set-off against the company by its agent.

Bill in equity, filed in March, 1877, by the Union Mutual Life Insurance Company against the defendant, its general agent for the states of Pennsylvania and Maryland, averring that, by the terms of a written contract annexed to the bill, the company had a right to discharge the defendant upon thirty days' notice, which right it had duly exercised; that the defendant had received, as the company's agent, large sums of money for premiums, of which there remained a balance due to the company, after all deductions to which the defendant was entitled, of over $15,000. The bill also averred that the defendant had refused to account; that there

[1] [5 Reporter, 682, contains only a partial report.]

was danger of his removing from the jurisdiction of the court, and of his taking with him all his property; and that there was imminent danger of a waste of the plaintiff's money, if left in the defendant's hands. The bill prayed for a writ of ne exeat, a receiver, an injunction forbidding the defendant to dispose of any of the company's moneys, and an account.

On the day that the bill was filed, after hearing counsel for the defendant, the writs of injunction and ne exeat, as prayed for, were issued, the amount of the bond in the writ of ne exeat being in the sum alleged in the bill to be due the plaintiff. A short order to plead, answer, or demur in eight days was at the same time granted.

An answer was subsequently filed, in which the defendant stated an account between himself and the company, in which he credited the latter with the amount of money claimed in the bill, and debited it with various disbursements alleged to have been duly made by him for the company, together with certain claims by him against the company, resulting in a balance in the defendant's favor of $1,500. The answer also alleged that the contract of agency was, by its terms, to last till December 1, 1878; that it had been wrongfully and unlawfully terminated by the plaintiff in January, 1877; that by the contract the defendant was entitled to salary and commissions from the actual termination of the agency to the end of the term of service contracted for (January, 1877, to December, 1878); and two items of $7,000 and $5,500 were, inter alia, claimed by way of set-off for such prospective salary and commissions.

A replication having been filed, a master was appointed to state an account, and much testimony was taken, the effect of which, however, was unimportant in the view the court took of the case, except that, coupled with the pleadings, it showed the plaintiff's money to be in peril if left in the defendant's hands. Before the testimony was closed, the plaintiff's counsel moved for a receiver.

S. B. Huey and G. W. Biddle (A. Sydney Biddle and Daniel Magoon with them), for the motion, argued that a motion for a receiver was like a motion for an injunction, which could be made interlocutorily. It rests in the sound discretion of the court, and will be made where it appears, prima facie, that the defendant had money in his hands belonging to the plaintiff, and that the fund was in peril, provided it could be shown by a fair presumption that the fund was in existence when the application was made.

[S. B. Huey and G. W. Biddle, for plaintiff.

[The payment of money into court pendente lite is a provisional remedy, not affecting the merits, but intended merely to secure the fund for the rightful owner. It is analogous to the appointment of a receiver, which always rests in the sound discretion of the court. The cases as to receivers are applicable to the present motion. As to them, see Verplank v. Caines, 1 Johns. Ch. 57; Jenkins v. Jenkins, 1 Paige, 243; Janeway v. Green, 16 Abb. Prac. 215, note. 1 Till. & S. Prac. 731; Sheldon v. Weeks, 2 Barb. 533; Skip v. Harwood, 3 Atk. 564; Chautauqua Co. Bank v. White, 6 Barb. 597; Parkhurst v. Kinsman [Case No. 10,760]; State v. Delafield, 8 Paige, 527. The present application should be granted if we can show trust assets and improper conduct on the part of the trustee. If the defendant declines to state where money is which he admits having received, we can but conclude that he still has it. The course which we ask the court to pursue is not without precedent. Askew v. Odenheimer, U. S. Cir. Ct., E. D. Pa., June, 1830 (unreported);[2] Dillon v. Connecticut Mut. Life Ins. Co. [44 Md. 386]. It is submitted that the admission of having the money claimed for salary is a sufficiently explicit admission of money on hand to justify the court in making the order moved for.

[R. M. Schick (with him B. H. Brewster), contra.

[The only circumstance under which a court will order money to be paid in by an interlocutory order is where the money is unqualifiedly admitted to be in the hands of the defendant, and is not to be ascertained by calculation, except where the amount can be fixed by mere addition or subtraction, and the other circumstances of the case are such as to justify the belief that the fund is in danger. Mills v. Hanson, 8 Ves. 68; McTighe v. Dean, 22 N. J. Eq. 81; Kirk v. Hartman, 13 P. F. Smith [63 Pa. St.] 97; Yelland's Case, L. R. 4 Eq. 350; Ex parte Clark, L. R. 7 Eq. 550; Ex parte Logan, L. R. 9 Eq. 149. In this case, to ascertain the amount to be paid over an account has to be taken, and it would be deciding on the question of salary and commissions due to the defendant. The court will not decide a case piecemeal. Thomas v. Howell, L. R. 18 Eq. 203; East Anglian Rys. Co. v. Lythgoe, 10 C. B. 726.][3]

[Before McKENNAN, Circuit Judge, and CADWALADER, District Judge.]

[McKENNAN, Circuit Judge, held that, while the court would not make an order such as requested, except wherever it appeared that the money was actually in the hands of the defendant at the time of the application, not that it merely had been, and the amount was admitted, or could be ascertained by mere addition and subtraction, the other circumstances leading to a belief that the fund was in danger; yet that, in this case, the amount was so ascertainable, viz., by taking the two contested items of credit, and subtracting the balance claimed by the defendant, and that possession was sufficiently admitted by the admission of an

[2] [See Case No. 587.]

[3] [From 5 Reporter, 682.]

equivalent sum in the defendant's affidavit, he would therefore make the order moved for.] [4]

(CADWALADER, District Judge. If you can show money in the defendant's hands,—not money theoretically in his hands, not money he has embezzled,—but money actually in his hands, we shall be desirous to act interlocutorily. We can do that.)

Messrs. Huey and Biddle, in reply.

This is shown by the bill and answer The defendant admits having received our money, which, to the extent of $12,500, he is not entitled to set off, or, at any rate, if he is, the fund has been shown to be in peril.

(CADWALADER, District Judge. What is the inference from that? Is it not that he corruptly held it and used it? How does that put the money in his hands, so that we can order him to pay it before final decree, or put him in jail for not doing it? Is the inference from these facts that he still has it, or that he has improperly used it? In Askew v. Odenheimer (not reported),[5] a case in which I was counsel, the defendant, in his answer, denied having anything of the plaintiff's. On the mere question of arithmetic it was found that he had several thousand dollars, upon the admitted facts; and, even in that case, we could not get the money paid into court until the answer was filed. But upon the answer it was a question of partnership. He did not divide by two when he ought to have done so, and the consequence was that five thousand dollars was ordered to be paid into court. That was, however, done with great caution, and because these facts appeared in the answer. As Judge McKENNAN suggested to me just now, you appear to be applying for execution before judgment.)

We do not want this money ourselves, we merely want it paid into court. All the facts on which we rely appear in the bill and answer, and therefore the principle in Askew v. Odenheimer was precisely the same as here.

(CADWALADER, District Judge. Precisely, but the facts were the reverse. A partner had cheated his copartner, and had made an assignment to the copartner for his indemnity. The copartner who had been cheated put his foot on the neck of the copartner who had cheated him and would not account. The man who had cheated him filed a bill in this court, and the defendant stated, in his answer, that so much was required to indemnify him. He did not observe that half of that belonged to the partner, and upon the simple arithmetic he was ordered to pay so much into court, by his own admission, upon his own answer, that he had so much money of the plaintiff's in his hands. The receiver will not be appointed until the final decree, unless it appear by the answer that the defendant still holds the fund. I agree to everything you say, if you can show that there is a fund, as contradistinguished from a debt.)

The case is identical with Askew v. Odenheimer [supra]. Here the defendant in his answer expressly charges himself with a large amount of money received for the company as its agent. He sets up counterclaims, which will exhaust that fund, and leave a balance in his favor of $1,500. Two of the items of set-off are for matters which he cannot claim to set off in equity at all. Therefore, after deducting from the total of those items the excess of $1,500, he has acknowledged, unless it is fair to infer embezzlement, a fund to that extent (viz., $11,000) of the company's money in his hands. The case of Dillon v. Connecticut Mut. Life Ins. Co. [44 Md. 386] was this identical case. The items of set-off claimed there were the same as here, and the court appointed a receiver, and this was affirmed in the judgment of the court of appeals.

(CADWALADER, District Judge. Was the receiver appointed there before final decree?)

Yes, before the testimony was closed, just as here, upon bill and answer. It is not fair to infer that the defendant has committed a fraud and embezzled the money.

(McKENNAN, Circuit Judge. I understand you to say that, by the necessary import of this account in the answer, the defendant admits that he has $12,500 in his hands, and that he says he is entitled to retain it, because he has these two claims, amounting to that sum, against the company. I think that is a fair inference from the document. There are two alternatives. In the first place, the defendant admits that he himself received the money, and has it in his hands, but claims to retain it because he says he has certain credits which ought to be allowed him; or else he must say that he is justly subject to the reproach of having criminally embezzled the plaintiff's money, so that I do not think that we ought to seek to get rid of his admission. If we have, by the documents furnished by the defendant himself, by his own answer, distinct admission that he had a certain amount in his hands when the bill was filed, I think we ought to lay our hands upon it. I do not think that there is any question, even of arithmetic, here, as to the indisputable consequences of the admissions in the answer.)

Upon the 25th of April the counsel of the defendant presented the latter's affidavit stating that he had not concealed the $12,500, or any part of it, or embezzled it, or wasted it, or put it out of the way in any sense, to prevent the plaintiff from recovering it, if he could establish his right to recover it; that the defendant was entitled to this money, or, if otherwise, that he had acted in perfect good faith; that he was not insolvent; that he had means out of which the full amount claimed by the plaintiff, if a decree

[4] [From 5 Reporter, 682.]

[5] [See Case No. 587.]

were finally made against him for that amount, could be paid.

(McKENNAN, Circuit Judge. I think the affidavit which has just been read comes pretty close to admitting that the defendant has this money in his hands, and he denies any improper use of it.)

Mr. Shick and B. H. Brewster, contra, argued that there was no admission, in the answer or by the affidavit, that any of the plaintiff's money was in the defendant's hands. On the contrary, by the answer, a balance of $1,500 was shown to be due to the defendant. He had a perfect right to retain that $12,500 to liquidate the damages which he had sustained by his having been wrongfully removed from the agency by the company. Much of this money had been received years before. The affidavit was in no sense an admission that he still had any of the company's money, but a mere denial of the improper use of whatever small balance, if any, was due the company, and which he still had. The decision of McTighe v. Dean, 22 N. J. Eq. 81, was substantially identical with this case. There the receivership was refused. The state of the accounts cannot possibly be determined until final hearing. The evidence is not all in. There is nothing to show that there is any specific fund in the defendant's hands.

(McKENNAN, Circuit Judge. The defendant's affidavit gets us over a matter of some difficulty, that both Judge CADWALADER and I had yesterday; that is, whether the defendant might not have used this money. He denies that. The money that he got, belonging to the plaintiff, he says he has still in his hands.)

We do not deny that there was money of the company which came into our hands, but we claim that we have a right to hold that to meet the damages which we have suffered by their unlawful violation of their contract; but we do deny that there is any admission in the papers as to the amount we hold. This proceeding departs from all the precedents in this, that here you pick out two items from a voluminous account which no one but an expert can unravel, and hold that they admit that amount of the plaintiff's money to be in the defendant's hands.

(CADWALADER, District Judge. I have no doubt it is a great novelty at this stage of the case, and a very important—I do not say dangerous—novelty. There was, however, another case in the court of common pleas (not reported) exactly identical with that of Askew v. Odenheimer.)

We have a right to retain enough of the defendant's money to reimburse us for his wrongful conduct in terminating the agency. Kirk v. Hartman, 13 P. F. Smith [63 Pa. St.] 97; Yelland's Case, L. R. 4 Eq. 350; Ex parte Clark, L. R. 7 Eq. 551; Ex parte Logan, L. R. 9 Eq. 149; Thomas v. Howell, L. R. 18 Eq. 203; East Anglian Rys. Co. v. Lythgoe, 10 C. B. 734. By the English statute unliquidated damages cannot be set off, but in this state unliquidated damages may be.

Eo die, THE COURT (McKENNAN, Circuit Judge). We make the order asked for. The only difficulty that I have had about it, so far as my own views are concerned, was of a twofold character: First, whether there was an admission in the answer, in the exhibits, and in the depositions of the respondent, of any fixed, determinate sum in his hands at the filing of the bill, which was received by him by virtue of his relations with the company as its agent, in the course of the business which he undertook to discharge. That difficulty was removed by the averments in the account contained in the answer, showing an admission by him of the receipt of a certain sum. He claimed to reduce that liability by two items showing that that amount—the aggregate of those two items—had not been expended. The next difficulty was as to whether this money was in such a state that it could be traced and substantially identified; in other words, whether it had been made away with by this man, and was therefore gone as a distinctive fund. That difficulty, again, was removed by the affidavit of the man himself. As I understand it he distinctly disclaims having made any improper use of this money, so that it must be in his own hands, and can be traced there. The fact that this money was received by him as the property of the plaintiff, and belonging to the plaintiff here, is unquestionable. The answer shows that. Now, that he should be permitted to retain that money as security for a claim which he sets up against the company, I cannot see should be any more readily conceded than that the money should be placed in some safe place, where it can be avai ble to be paid wherever in the ultimate result of this litigation, it should be awarded. So that, without intending to establish any precedent, except so far as future cases may accord in their features and circumstances with this case, I think that, under the circumstances of this case, we ought to make the order.

CADWALADER, District Judge. I have no doubt that the order will meet the real justice of this case. I should have been satisfied with an order either way, either allowing or refusing the application; but, upon the general reasons of the administration of justice, I should have been better satisfied, though I do not intend to dissent from the order made, with suspending this order until the final hearing. The precedent will be a dangerous and an embarrassing one. Still it does meet the justice of the case, and as the application was finally put entirely upon the pleadings, upon the bill and answer, with-

out the affidavits or depositions that were originally exhibited, it is sufficiently within the precedent of Askew v. Odenheimer and the Maryland Case, which seems to be the only other authority, for me not to dissent from an order which I think meets the justice of the case.

The following order was then ordered by THE COURT to be entered:

And now, April 27, 1878, upon motion of complainant's counsel, and after argument by counsel, it is ordered that the sum of $11,000 be paid into the registry of the court on or before the 28th day of May, 1878, by the defendant, Edward Kellogg, to abide the final decree of the court in this cause.

NOTE. The sum of $11,000, ordered to be paid into court was obtained by deducting $1,500 (the balance the defendant alleged to be due him by the company on an account stated) from the aggregate of the two items of $7,000 and $5,500 claimed for prospective salary and commissions.

UNION MUT. LIFE INS. CO. (MOORE v.). See Case No. 9,777.

UNION MUT. LIFE INS. CO. (WILKINSON v.). See Case No. 17,676.

Case No. 14,374.

UNION NAT. BANK v. CHICAGO.

[3 Biss. 82; 28 Leg. Int. 300; 3 Chi. Leg. News, 369; 14 Int. Rev. Rec. 77; 5 Am. Law T. 107; 6 Am. Law Rev. 166.] [1]

Circuit Court, N. D. Illinois. Aug., 1871.

TAXATION—STATE TAX ON NATIONAL BANKS—PAR VALUE OF SHARES — UNIFORMITY — NONRESIDENTS — COURTS — FEDERAL JURISDICTION.

1. Under the fifty-seventh section of the national currency act of June 2, 1864 [13 Stat. 99], suits may be maintained by, as well as against, national banks, in the United States courts of the district of their location.

2. Though courts of equity will not enjoin the collection of taxes, on the sole ground of their illegality, the prevention of a multiplicity of suits, or of injury for the redress of which the remedy at law is not so certain, adequate, and complete as in equity, will sustain jurisdiction.

[Cited in City Nat. Bank v. Paducah, Case No. 2,743.]

3. National bank shares cannot be included in the valuation for taxation by or under state authority at more than the par value thereof; the par value is the fixed value for taxation.

4. The reason is, that under the national currency act, as construed by the supreme court of the United States, the limited state taxation permitted is one of the conditions annexed to the grant of the franchise, and the shares are subjected to it without regard to the capital, property, or investments of the bank, and, therefore, such taxation is in the nature of a royalty upon the nominal value of the share.

5. Such taxation above the par value is not merely an irregularity, but renders the whole tax inoperative and void. Taxes levied in the absence of persons or property, are ultra vires and void. Jurisdiction is as essential to valid legislative as judicial action.

6. Shares of stock represent a property interest, separate from the capital and property of the corporation, and, being incorporeal and intangible, are incapable of having an actual situs, save at the owner's domicil.

7. The state law of June 13, 1867, conflicts with the state constitution of Illinois, because it directs taxes to be assessed by the authorities of counties, towns, cities, and districts, upon the shares of the banks in the county or town where the bank is located, without regard to the residence of the owner, or the situs of the shares.

8. Such taxation, being void as to all shareholders not residing in the district where the bank is located, is also void as to those who do reside there.

9. And if the law be not valid as to residents of the state, the shares of non-residents cannot be taxed under it, as that would be in contravention of the laws of congress, and the federal constitution

These were ten bills in equity filed by the Union National Bank of Chicago, and nine other national banks, against the city of Chicago, and the city collector, to restrain the collection of the city tax upon the capital stock of the respective corporations for the years 1867 and 1870.

The averments of the bills were substantially the same in all cases; that the complainants are banking associations created under, and existing and doing business in the city of Chicago, by virtue of the act of congress, approved June 3d, 1864, commonly known as the "National Currency Act" (13 Stat. 99); that the authorities of the city of Chicago, assuming to act under and by virtue of the charter of said city, and in accordance with and by virtue of an act of the legislature of the state of Illinois, entitled "An act to provide for the assessment and collection of taxes on the shares of capital stock in banks and banking associations," approved June 13, 1867 (1 Gross' St. 618), levied a tax for municipal purposes upon all the shares of the capital stock of the complainants, such tax being at the rate of fifteen mills on the dollar of the value of said shares, said value being fixed by the assessor of the South division of the city of Chicago, and that the collector, by virtue of his tax warrant, demands of complainants the aggregate amounts of said tax, to be deducted from any dividends which may be declared upon their capital stock, and threatens to sell said shares of stock by virtue of his warrant, unless his demand shall be complied with. The bills also state that in the assessment roll of personal property in the South division of the city of Chicago, upon which the tax is levied, and in the collector's warrant, the names of all the holders of shares of capital stock are stated separately, and opposite thereto, in appropriate columns, are given the places of residence of the different shareholders, the number of shares held by each, and the assessed value thereof, showing that a number

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 5 Am. Law T. 107, and 6 Am. Law Rev. 166, contain only partial reports.]

of the stockholders do not reside in the South division of the city of Chicago, where the banking association is located.

The complainants claimed that the tax referred to was illegal and void for the following reasons, viz.: 1st. Because it was levied in the absence of the stockholders of the bank not residing in the South division of the city of Chicago, and no jurisdiction was ever obtained of them or of the shares of stock held by them. 2d. Because the act of the legislature of the state of Illinois, approved June 13th, 1867, in accordance with which said tax is pretended to be levied, is void, as being contrary to the constitution of the United States, and the acts of congress for the creation and control of national banks. And, 3d. Because said act of the legislature is contrary to article 9 of the constitution of the state of Illinois.

The special grounds for relief in equity were, that the stockholders refuse to pay said tax, and forbid its payment, threatening a multiplicity of suits against the banks in case the amount of the tax should be paid and deducted from dividends to be declared; and that, upon the other hand, if a sale should be permitted to be made by the collector, as threatened, irreparable damage will result to the bank and its stockholders, for which a suit at law would afford no adequate remedy; and that, in either event, a multiplicity of suits will be prevented by a determination in equity of the question of the liability of the banks and their stockholders to pay the tax.

The defendants filed demurrers to the bills on the several grounds stated in the opinion. By agreement of counsel, all the cases were heard together, upon motions for injunctions.

Melville W. Fuller and Mr. Smith, for complainants, argued in support of the injunction upon the following points and authorities:

I. This court has jurisdiction. Gibson v. Kennedy, 8 Wall. [75 U. S.] 498.

II. Grounds of equity interposition exist. Dows v. City of Chicago, 11 Wall. [78 U. S.] 108.

III. The warrant for 1867 has long since expired, and the present collector cannot execute it. The demurrer admits this.

IV. The levy for the taxes of 1867 is void because value and ownership of shares for that year were referred to a different point of time than that to which all other personal property was. (This was elaborated at length with full citation of authority.)

V. The act of June 13, 1867, is unconstitutional and void. Shares of stock are incapable of situs save at owner's domicil. Williams, Pers. Prop. 191; Ang. & A. Corp. § 458. It is not within legislative authority ordinarily to tax shares of non-residents. Union Bank v. State, 9 Yerg. 490; State v. Ross, 3 Zab. [23 N. J. Law] 517; Conwell v. Town of Connersville, 15 Ind. 150; Dwight v. Mayor, etc., 12 Allen, 322; McKeen v. Northampton Co., 49 Pa. St. 519. The taxing power can only be exerted upon persons and property within its jurisdiction. In the case of non-residents, neither persons nor property within jurisdiction. As to national bank shares this is otherwise (2 Brightley's Dig. pp. 56, 57); but residents can only be taxed in such manner and place as may be lawful, which is in the manner and for the purposes designated in the state constitution. Personal property having actual situs in the city of Chicago can alone be taxed. Append. Pub. Laws, 1867, p. 5. In Illinois the constitutional rules of taxation are: 1st. That taxes shall be by valuation, so that every person or corporation shall pay a tax in proportion to the value of his or her property. 2d. And taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same. State Const. article 9, §§ 2, 5. These provisions are restrictions. 51 Ill. 130; 34 Ill. 267; 42 Ill. 9. The act of June, 1867, conflicts with the constitution because it directs taxes to be assessed without regard to the residence of the owner, or the situs of the shares. This is in disregard of the rule of uniformity in respect to persons and property within the limits of the county, city, town, or district of the shareholder's residence, when other than that of the bank's location (12 Ill. 140; 25 Ill. 561; 30 Ill. 146), and being void to this extent, it is void as to shareholders residing in the place where the bank is; and if as to all residents is as to non-resident shareholders. Van Allen v. Assessors, 3 Wall. [70 U. S.] 579; Const. U. S. art. 4, § 2. See 2 Kent, Comm. 333; Taxation of National Banks, 53 Me. 594; Markoe v. Hartranft, 6 Am. Law Reg. (N. S.) 490; Austin v. City of Boston, 14 Allen, 364; Clapp v. City of Burlington, 42 Vt. 579. Jurisdiction is as essential to valid legislative as to judicial action. St. Louis v. The Ferry Co., 11 Wall. [78 U. S.] 430. The requisite legislative jurisdiction does not exist as to non-residents where the property is in itself incapable of an actual situs. Railroad Co. v. Jackson, 7 Wall. [74 U. S.] 266; City of Dunleith v. Reynolds, 53 Ill. 45; St. Louis v. Wiggins' Ferry Co., 40 Mo. 580; Cooley, Const. Lim. 500. The corporation receives the benefit of protection where it is located, and might well enough be there taxed, but that is merely an argument against the policy of exempting the bank. As to the shareholder, he is taxed where he resides and receives the income from his share. The immediate right to receive dividends, and the remote right to share on winding up, is all a stockholder has. Union Bank v. State, 9 Yerg. 501; Fisher v. Essex Bank, 5 Gray, 373. Residents are subject to taxation upon shares in foreign corporations, and non-resident holders of shares of Illinois corporations are so subjected in their own states. To authorize taxing the latter here is double taxation, and so if other states pursue that rule as to our citizens. The adverse argument is: (1) That the general assembly has power to give bank shares an ac-

tual situs for taxation. (2) That by the act of 1867 this has been done. But the answer is, that it has not and cannot be done. The levy and collection of taxes is a proceeding either in personam, or in rem. The act of 1867 provides purely for levy and collection in personam, except as to non-residents. Decision in National Bank v. Com., 9 Wall. [76 U. S.] 353, shows that state taxes might be collected at place of bank's location, by a proceeding equivalent to one in rem, in the nature of a garnishee process, and sustained by that analogy. Under our system, moneys, credits, and effects are taxed in personam. The warrant is a lien on all the owner's personalty. Hill v. Figley, 23 Ill. 420. The act of 1867 provides for proceedings in personam, and does not purport to change the situs of bank shares, which is only material where the proceeding is in rem, and the res proceeded against the shares themselves. It is true a mode of reaching shares for taxation at the place of the bank's location might be devised, but tangibility cannot be imparted to that which is intangible. The rule that personal property follows the person of the owner is only a fiction when the property is itself capable of an actual situs, because then the fact is contrary to the rule; but as to stock, the rule is founded on the fact, or rather it is the fact, and not the rule, which settles the question. In the original charters of corporations it might be provided that shareholders should take cum onere, that they could exercise the rights arising upon their shares only in the place of the location of the corporation, but unless this were so originally provided, the obligation of the contract would be impaired by any subsequent legislative attempt to accomplish it. Congress, as to corporations created by it, can establish a uniform rule excluding taxation elsewhere than as designated, but state legislatures cannot. Redf. R. R. Supp. p. 493.

VI. The shares cannot be taxed above the par value thereof. Van Allen v. Assessors, 3 Wall. [70 U. S.] 573; Bank of Commerce v. New York City, 2 Black [67 U. S.] 620.

M. F. Tuley, Corp. Counsel, for defendants.

BLODGETT, District Judge. A preliminary objection is raised on behalf of the defendants, that as the banks are located in the Northern district of Illinois, and the defendants also reside there, the court has no jurisdiction to entertain these suits. It has, however, been decided by the supreme court of the United States in Kennedy v. Gibson, 8 Wall. [75 U. S.] 498, that under the 57th section of the national currency act, suits may be brought by, as well as against, associations organized under that act, in the United States courts of the district in which such associations are established. It is true that the word "by" is omitted from the text of this section, but the court hold that reading the section by the light of another of a prior act on the same general subject, the omission is to be regarded as an accidental one. This court can not therefore decline to take jurisdiction because these banks are established, and the defendants reside, in the same district.

It is further objected that these bills are improvidently filed in view of the rule laid down in Dows v. City of Chicago, 11 Wall. [78 U. S.] 108, that a suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal, but there must exist, in addition, special circumstances, bringing the case under some recognized head of equity jurisdiction. Conceding this to be so, it is not decisive of these cases, as the question still remains whether any such ground of equity interposition is shown to exist here. And it appears to me that such grounds do exist.

The banks occupy, as it were, the position of stakeholders. They are the custodians of the property, money and funds of the shareholders, when the latter become entitled thereto, as in case of the declaration of dividends The shareholders insist that their dividends shall be paid to them. The collector demands that they shall be paid to him, or a sufficient amount thereof to defray the taxes. And the banks invoke the aid of a court of equity to determine to which of the parties the funds belong or should be paid. They assert, and the bills upon this motion are to be taken as true, that they are notified by their shareholders that if they pay these taxes suits will be commenced at once against them. At the same time, if they do not, the state law not only, at least so far as non-resident shareholders are concerned, undertakes to make their officers personally responsible for the amount, which would be, perhaps, immaterial if the assessments be invalid, but the collector threatens to sell the shares to make the taxes therefrom.

It is obvious that the latter course, if taken, would operate to prejudice these corporations in the public mind, and lead to further and harassing litigation, working that kind of injury to the corporation which, because the law affords no such beneficial and complete remedy for it as the nature of the case requires, may be deemed irreparable.

Reference to the Case of Dows [supra] confirms this view. Mr. Justice Field, in delivering the opinion, says in regard to the cross-bill filed by the bank in that case, that it presents different features from those of the original bill; that the bank "insists that if it paid the tax levied upon the shares of all its numerous stockholders out of the dividends upon their shares in its hands, which it is required to do by the law of the state, or if the shares were sold, it would be subjected to a multiplicity of suits by the shareholders, and were it an original bill the jurisdiction of the court might be sustained on that ground." This clearly intimates the judgment of the supreme court upon this

branch of the case, and is, to such an extent, authority in favor of the jurisdiction, that I feel bound to follow it.

I find myself compelled then to pass upon the validity of the taxes in question. Courts interfere with the collection of taxes with reluctance, but when questions directly calling for judicial action are presented, there is no alternative but to decide them, although they may involve the legality of revenue proceedings. The provisos to the 41st section of the national currency act of 1864 are as follows (13 Stat. 112): "Provided, that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority, at the place where such bank is located and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: provided further, that the tax so imposed under the laws of any state upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located: provided, also, that nothing in this act shall exempt the real estate of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

And by the 1st section of the act of February 10, 1868 (15 Stat. 34), the words "place where the bank is located, and not elsewhere," are declared to mean "the state in which the bank is located," thereby localizing the authority imposing the tax, but not the assessment of taxes at the place of the location of the bank. It is subject to these limitations that taxes may lawfully be levied by or under state authority.

In three of the cases before the court, complainants insist that the assessment of taxes attempted to be made upon their shares is illegal and void, because the municipal authorities charged with the duty of assessing taxes have placed those shares in the valuation for taxation at a sum above the par or denominational value thereof, varying from ten to twenty per cent. And the question is, can national bank shares be valued for taxation at a higher valuation than the par value of the share?

In Van Allen v. Assessors, 3 Wall. [70 U. S.] 573, it was insisted that in levying taxes upon the shares of national banks, regard should be had to the fact that a part or the whole of the capital of such associations was invested in national securities, declared by the statutes authorizing them to be "exempt from taxation by or under state authority."

In the dissenting opinion of the chief justice (Wayne and Swayne, JJ., concurring), the position is ably argued that these shares can not be subjected to taxation by the state, irrespective of the mode of investment of the capital in securities exempted from taxation, and the chief justice, inter alia, says that what the assessor would have to do is "to ascertain the value of the whole property of the association, and deduct the amount of bonds. The remainder, divided by the number of shares, would give the value of each share to be taxed, and the assessor must value the whole property and divide it by the number of shares, in order to make a true valuation of shares. If he does not do this, he must assess the shares at an arbitrary or speculative valuation. This is not what is required. The law demands true valuation; and true valuation, with deduction of bonds, places the shareholder on exact equality with the holder of other moneyed capital, which the law also demands. No other mode of valuation secures that equality." Page 601.

The majority of the court, however, held that the limited state taxation allowed by the act was but a condition annexed to the enjoyment of the new use and application of the United States bonds, to which they were enabled to be put under the grant of the franchise, and imposed as a burden thereon, and in that aspect, that the interest of the shareholder could be taxed within the limit of the act without reference to the property and capital of the bank; and the learned judge, Nelson, who delivers the opinion, reviews the various sections of the law to sustain this proposition.

The conclusion reached and the reasoning upon which it rests, taken in connection with the language of the dissenting judges, leave no doubt in my mind that the court regarded the tax as in the nature of a royalty for the grant, annexed to the franchise. The ruling is distinctly that taxes by the state are permitted to be imposed wholly irrespective of the character or description of the property or capital of the bank; and this being so, it logically follows that the par value of the share is the fixed value for taxation, whether the shares may be said to have an actual value above or below the nominal amount. These bills allege that the shares in these instances have no market value, and that the assessing authorities have affixed a valuation higher than par, arbitrarily and without resort to any basis of values whatever. It is clear that this cannot be done, and, as we have seen, it is equally true, under the decision just referred to, that the values cannot be determined by reference to the capital, property and investments of the bank; for if this were so, then the deductions must be allowed, which the supreme court has held cannot be done for the reasons given. Reference to the different sections of the act confirm this view. They provide for a certificate of the numbers of the shares; the division of the capital stock into shares of one hundred dollars each; the personal liability

of the shareholder to an amount equal to the sum invested and the par value of the shares held; the casting of one vote for each share; the payment in of the amount of the share in specified installments; a list of the number of shares held by each shareholder, open to the inspection of state tax assessors, etc., etc., and the term "share" is used throughout in the same signification. The personal liability clause is, perhaps, as noticeable as any other, in the way of illustration. The shareholders of the association are held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the amount of their stock therein at the par value in addition to the amount invested in such shares. This provision is not of itself conclusive, but it bears with much weight in favor of the position, and other provisions might be cited more at length than has been done, as tending to sustain it.

It could never have been intended that the assessing authorities should be permitted to exercise an arbitrary and unlimited discretion, and it seems to me that the whole tenor of the act, and of the decisions of our highest judicial tribunal upon questions arising under it, satisfactorily indicate that the state authorities have no power whatever to tax these shares above the value thereof, as fixed by the act itself.

The error in these cases is a fundamental one. It is not a mere irregularity. It goes to the very foundation of the tax, and renders it wholly inoperative and void.

It is also claimed, in all these cases, that the tax attempted to be levied for the year 1867 is void because of the invalidity of the state law of June 13, 1867. Other objections to the legality of this tax are urged, but the view which I take of the main question renders their consideration unnecessary.

I may remark, however, in passing, that I do not, as at present advised, perceive how the present city collector can lawfully proceed upon the warrant issued in 1867. These warrants stand upon the same principle as writs of fieri facias, and it would seem that the common law rule, that the officer receiving the process to execute should complete it, applies. But I need not dwell upon this point, as it becomes immaterial under the circumstances.

The validity of the law of 1867 is questioned upon the ground that its provisions are in contravention of the state constitution. The law was passed, and the assessment of taxes complained of made, under the constitution of 1848.

Sections 2 and 5 of article 9 of that instrument are as follows:

"2. The general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property. * * *"

"5. The corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same. And the general assembly shall require that all the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law."

And by a series of adjudications of the supreme court of Illinois, it has become settled law that these provisions are restrictions upon the power of taxation by the legislature, or any authority under it. All taxes, therefore, assessed by municipal corporate authorities, must be proportionate and uniform within the jurisdiction of the body imposing them. Where there is jurisdiction neither of persons nor property, the imposition of a tax would be ultra vires and void. Jurisdiction is as necessary to valid legislative as valid judicial action.

Shares of stock are incorporeal personal property, and as such are held incapable of having any situs, save at the domicil of the owner. In the eye of the law they have in themselves no locality. They accompany the person of the owner where he goes, and he may deal with them and dispose of them according to the law of his domicil, which, if he die intestate, governs their disposal.

The peculiar character of this class of property is adverted to by Mr. Justice Nelson in the case of Van Allen, already cited. He says: "A striking exemplification may be seen in the case of Reg. v. Arnaud, 9 Adol. & E. (N. S.) 806. The question related to the registry of a ship owned by a corporation. Lord Denman observed: 'It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested, in one sense, in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease, but in no legal sense are the individual members the owners.'"

The shareholders are not the owners of the bonds, investments, surplus and property of the bank. They possess only the intangible right to the dividends, if any, upon their shares, and to the residuum upon the winding up of the corporation. The distinction between such a right and personal property capable of an actual situs is obvious. And it is a distinction which seems to have been borne in mind in the enactment of the city charter which provides for the taxation only of such personal property as has its actual situs within the city, and further, that state laws then in existence, or which might afterwards be adopted, shall govern in municipal assessments, unless in conflict with the provisions of the charter.

The act of June 13, 1867, directs taxes to

be assessed by the authorities of counties, towns, cities and districts upon the shares of these banks in the county or town where the bank is located, without regard to the residence of the owner or the situs of the shares, and in that respect I regard it as a violation of the constitution of the state.

The complainants show, and it is not denied, that their shareholders are scattered over the state, and through other states, and such taxation upon them appears to me a clear infringement of the constitutional requisite that all assessments by the corporate authorities of cities, etc., shall be uniform in respect to persons and property within their limits. This compels the taxation of the stock owned by residents of the state in the county, city, town or district where they reside, for the purpose of collecting county, city, town or district taxes, and a failure to do so destroys the rule of uniformity with respect to property within the limits of the body imposing the taxes, while neither the persons nor property are within the jurisdiction of the taxing power at the place of the bank's location. If, then, this statute is void as to those who do not reside in the district where the bank is located, it must be so as to those who do, because it would be then undeniable that every person would not be obliged to pay a tax in proportion to the value of his or her property, and the taxes for state purposes would not be levied with uniformity. And if the law be not valid as to shares of stock belonging to residents, the shares of non-residents cannot be taxed, because the provisos of section 41 of the act of 1864, inhibit any tax upon non-residents that is not imposed upon residents of the state, and such a regulation would be in conflict with the federal constitution, which says, "the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states." Article 4, § 2. I cannot avoid the conclusion that this law violates the imperative rule of the constitution.

It ought to be observed that, when the act of June, 1867, was passed, controversy had arisen as to the meaning of the words in the provisos to the 41st section of the law of congress, that the shares should be assessed "at the place where the bank is located." The language of the proviso is not perspicuous, and I am inclined to think that the framers of this law supposed congress to have required the shares to be assessed in and for the benefit of the taxing district of the bank's location. It is not unnatural that this view should have been entertained. Courts of the highest respectability arrived at this conclusion, as in Maine and New Hampshire, while others, as in Massachusetts and Pennsylvania, were of a different opinion. In Massachusetts, the law for the assessment of national and other bank shares, provided that this should be done at the residence of the respective shareholders, and the question was raised, that this was contrary to the proviso of the 41st section; but the supreme court of the state held otherwise, and their judgment was affirmed by the United States supreme court, though upon another ground. The subsequent action of congress by the passage of the law of February, 1868, confirmed the correctness of the views of the Massachusetts court, and resolved the doubt in favor of the position that the intention was to localize the authority imposing the tax, and not the assessment of taxes at the place of the location of the bank.

The anomalous provision in the Illinois act of 1867, which gives the collector of the particular taxing locality a kind of "roving commission" to execute his warrant anywhere within the limits of the state, is a sufficient indication of the embarrassment that was felt by the general assembly in framing this enactment.

The defects, however, may be readily remedied by the state legislature. Upon the argument of these applications, it appearing that the questions involved were of sufficient importance to demand, and both parties being desirous of obtaining, the decision by the tribunal of last resort, and there being apparently no substantial dispute as to the facts, I suggested to counsel the propriety of making an agreed case, that a final result might be obtained as speedily as possible; but, as the suggestion was not acted on, I have, in the discharge of my judicial duty, passed upon the questions myself, so far as necessary to determine these preliminary motions.

The injunctions, as prayed, will be granted.

NOTE. After this decision by Judge Blodgett, the supreme court of Illinois considered this question in First Nat Bank of Mendota v. Smith [65 Ill. 44], and held that this taxation was legal and constitutional; that the legislature had the right to fix the situs of incorporeal property, such as bank shares; that the act of June 3, 1867, violated neither the uniformity nor equality of taxation, and was a proper and necessary exercise of the legislative power The court refused to concur in the views of the United States circuit court for the Northern district of Illinois. Upon the rendering of this decision, Judge Blodgett ordered a re-argument of the question in a similar case, brought by the same banks, to restrain the collection of the taxes for 1872, and adhered to his views as expressed in the above opinion, and allowed the injunctions in these cases. By stipulation of parties, one of these ten cases was taken by appeal direct to the supreme court of the United States, where it is now pending, the others to abide the event. The supreme court of Pennsylvania held that the state legislature has the power to tax the capital stock of national banks; that the act of congress of February 10th, 1868, only restricts the rate of taxation, and not the taxation itself; and also that such stock should be assessed for taxation at its current value in the market where the bank is located, and that the owner, not having appealed from the assessment, cannot insist that the tax was illegal because not based on the par value of the stock. Everett v. Louder, 5 Chi. Leg. News, 195. The supreme court has lately passed upon a case somewhat similar to the above, holding, in the "State Tax on Foreign-Held

Bonds," 15 Wall. [82 U. S.] 300, that the power of state taxation is limited to persons, property and business within her jurisdiction; that bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the state in which the company was organized, they are property beyond the jurisdiction of that state: that a state law requiring the treasurer of a company to retain a percentage of the interest on bonds held and payable outside of the state, was not a legitimate exercise of the taxing power, but under the pretense of levying a tax impaired the obligation of the contract between the parties; and that the tax laws of a state could have no extra-territorial operation, nor affect the rights of non-residents under contracts with citizens of the state.

Case No. 14,375.

UNION NAT. BANK v. DOUGLASS.

[1 McCrary, 86.] [1]

Circuit Court, D. Iowa. 1877.

CORPORATION—CAPITAL STOCK—RIGHT OF CREDITOR TO FOLLOW PROPERTY OF CORPORATION—DIRECTOR—STOCKHOLDER.

1. The capital stock, property and assets of a corporation are to be deemed a trust fund sacredly pledged for the payment of the debts of the corporation.

2. Equity recognizes the right of a creditor of a corporation to pursue the property of the corporation into whose possession soever it may be transferred, unless it has passed into the hands of a bona fide purchaser. Stockholders are not entitled to any share of the capital stock nor any profits until the debts of the corporation are all paid.

3. Where a director, who was also a stockholder, of an indebted corporation, as director aided in the passage of a resolution by which, as stockholder, he appropriated certain bonds which were assets of the corporation to his own use,—*held*, that he was liable to the creditors, as trustee, for the value of such bonds.

At the May term of this court the plaintiff recovered judgment against the Missouri & Iowa Construction Company for the sum of $23,914.28. Upon this judgment an execution was returned unsatisfied. Demand was made upon the officers of the corporation to disclose and turn out property. These officers failed and refused to turn out property or show any from which satisfaction could be obtained. It is alleged that the defendant was a holder of fifty shares of stock of $1,000 each, of which sixty per cent. only had been paid. And it is averred that the sum of $6,000 is due on said stock. The petition alleges that defendant was concerned with other stockholders in the diversion of the funds of the company and in the payment of dividends, whereby defendant received $20,000, etc. The answer admits that the defendant is a stockholder to the amount of twenty shares, but denies that there remains unpaid and subject to payment of plaintiff's judgment an amount sufficient to pay off and discharge said judgment, but on the contrary avers that the whole amount of said stock has been paid, and that he is not indebted in any sum whatever to said construction company. Resolutions of the board of directors, of whom [George] Douglass was one, date of June 30, 1873, authorizing the president and treasurer to make an allotment of bonds of the St. Louis, Hannibal & Keokuk R. R. Co. to the stockholders of this company who had paid up all assessments theretofore made at the rate of $1,000 in bonds for each $600 paid in on stock, and at same rate on any new subscription or future assessments as the same are paid; but in order to equalize the payment on old and new subscriptions, and in payment of interest to the original subscribers, the allotment of bonds to them on all subscriptions made prior to January 1, 1873, shall be at the rate of $1,000 in bonds for each $500 paid in on assessments heretofore called in; also that the first three coupons from all of said bonds before they are given out, and that the receipt to be given by the stockholders for said bonds shall contain an agreement that said bonds shall not be offered for sale at less than ninety cents on the dollar without the consent of the president, etc., of the St. L., H. & K. R. R. Also, that an allotment of stock of the St. L., H. & K. R. R. be made to the stockholders of this company, at the rate of eight shares of stock with each one thousand dollar bond, as herein provided. Also, that said president and treasurer be authorized to cancel the remaining unpaid subscriptions of any subscribers who choose to have them so cancelled, on condition that the allotment of bonds to such subscribers shall be at the rate of $1,000 in bonds for each $600 paid in on stock. At another meeting of directors, at Cedar Rapids, August 7, 1875, it was resolved that an assessment of thirty per cent. on the capital stock of the company should be called in, payable as follows, viz.: Ten per cent. on the 1st day of October next; ten per cent. the 1st day of November next; ten per cent. the 1st day of December next. Another resolution, moved by Wisner and seconded by Douglass, was adopted, as follows: "Whereas, this company, by a resolution adopted June 30, 1873, provided for the allotment of stocks and bonds of the St. L., H. & K. R. R. Co. to the subscribers of this company; and, whereas, allotments were made under said resolution; and, whereas, it has been evident that this company cannot procure the means and materials to furnish said road unless said bonds are returned to this company; now, therefore, resolved, that the treasurer is hereby authorized to receive from the stockholders who desire it, the first mortgage bonds of the said St. L., H. & K. R. R., at thirty-seven and one-half cents on the dollar, in payment of said assessment, and stockholders who desire are permitted to pay up the whole thirty per cent. at any time in advance of its becoming due." The secretary of the company, Mr. Buchanan, testifies that the credit of $6,000

[1] [Reported by Hon. Geo. W. McCrary, Circuit Judge, and here reprinted by permission.]

upon the company's books to Douglass was for bonds returned under this resolution. Buchanan further says that the indebtedness of the construction company, June 30, 1873, was about $56,771.11, and this includes the notes payable to H. G. Angle, due in May or April, 1874, upon which the judgment referred to above was founded, and that he knew of no assets that the company had aside from the unpaid stock and work they had done on the railroad in Missouri, except $12,500 of bonds due the company from Lincoln county, Missouri. Also, that the work done on the road in Missouri amounted to $581,215.83. This witness also testified that the construction company owes in the aggregate $175,559.66; that is, at the time B.'s deposition was taken, exclusive of Blair's claim for iron for thirteen miles of the road. Blair's claim is $21,071.64, which added to $175,559.66, gives total of indebtedness. Douglass returned his bonds at thirty-seven and one-half cents on the dollar. Sixteen thousand dollars in bonds were returned by defendant at thirty-seven and one-half cents on the dollar. The bonds were worth fifty cents when allotment was made. Bonds to the amount of $394,000 were alloted under the resolution of 1873.

Nourse & Kauffman, for plaintiff.
Hubbard & Deacon, for defendant.

LOVE, District Judge. No doctrine of equity is more firmly established upon solid foundations of reason and authority, than the principle that the capital stock, property and assets of a corporation are to be deemed a trust fund sacredly pledged for the payment of the debts of the corporation. This doctrine was most forcibly expounded by Judge Story in the case of Wood v. Dummer [Case No. 17,944]. That case grew out of the insolvency of the Halowell and Augusta Bank, in which the defendant, a stockholder, withdrew from the bank his proportion of stock, when the bank was indebted on bills previously issued. Judge Story, among other things, said that he "viewed the stockholders as having the full benefit of the profits made by the establishment, and as being unable to take any portion of the fund until all the other claims on it were extinguished, and that their rights were not to the capital stock, but to the residuum, after all demands were paid; and further, that upon a dissolution of the corporation, although the billholders and stockholders had each equitable claims, yet those of the billholders had the prior equity. On the principle, then," he continued, "that the capital stock was a trust fund, it was clear that it might be followed by creditors into the hands of any person having notice of the trust attached to it, and that as to the stockholders themselves there could be no pretense to say that in law and in fact they were not affected by the most ample notice." Judge Story laid down the same doctrine in Mumma v. Potomac Co., 8 Pet. [33 U. S.] 286.

In Curran v. State of Arkansas, reported in 15 How. [56 U. S.] 304, the supreme court of the United States held that on the dissolution of corporations its effects are a trust fund for the payment of its creditors, who may follow them into the hands of any one not a bona fide creditor or purchaser, without notice; and a state law which deprives creditors of this right, and appropriates the property to other uses, impairs the obligation of their contracts and is invalid; and the fact that a state is the sole owner of the stock of a corporation does not affect the rights of its creditors. And Judge Curtis, in delivering the opinion in this case, quotes with approbation from Story's Equity the following language: "To this head of implied trusts we may refer that class of cases where the stock and other property of private corporations is deemed a trust fund for the payment of the debts of the corporation, so that the creditors have a lien or right of priority of payment on it in preference to any of the stockholders of the corporation; and no stockholder can entitle himself to any dividend or share of such capital stock until all the debts are paid; and if the capital stock should be divided, leaving any debts unpaid, every stockholder receiving his share would, in equity, be held liable pro rata to contribution to discharge such debts out of the funds in his hands." And Judge Curtis adds, that in conformity with this doctrine the following cases were decided in the state courts: Wright v. Petrie, 1 Smedes & M. Ch 319; Nevit v. Bank of Port Gibson, 6 Smedes & M. Ch. 513; Hightower v. Thornton, 8 Ga. 493; Nathan v. Whitlock, 3 Edw. Ch. 215, affirmed by the chancellor in 9 Paige, 152.

In Nathan v. Whitlock, 9 Paige, 152, the case was that the directors of an insurance company agreed among themselves to take a majority of the stock and to give their stock notes for the same, secured by an hypothecation of the stock, and after the company had become embarrassed, one of the directors agreed with the president to give him $6,000 if he would take his stock and substitute his own note in lieu of the stock note of the director, which was accordingly done. It was held to be a fraud upon the creditors of the company and the other stockholders who had paid their stock, and an action was sustained against the director upon the note delivered up. The court held that in all cases where the capital stock or assets of a corporation have been distributed to the stockholders without providing for the payment of the debts, a court of equity will allow the creditor to sustain a bill against the shareholders to compel contribution to the payment of the debts of the company to the extent of the funds obtained by them, whether directly from the company or through some substitution of useless securities for those that were good.

In Sawyer v. Hoag, 17 Wall. [84 U. S.] 610, the court said: "A nominal payment by stockholders is no payment as to creditors." Again, in Sanger v. Upton [91 U. S. 56], the supreme court of the United States held that: "A resolution or agreement that no further calls be made is void as to creditors, and an agreement that stockholders may pay in any other medium than money, is void as a fraud upon other stockholders and upon creditors." And further, that "the capital stock of an incorporated company is a fund set apart for the payment of debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands until such demands are satisfied. The creditors have a lien upon it in equity. If diverted they may follow it as far as it can be traced, and subject it to the payment of their claims, etc. Unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it." But perhaps the strongest application of this doctrine is to be found in the Railroad Co. v. Howard, reported in 7 Wall. [74 U. S.] 392. It will be remembered that in that case, which was a railroad foreclosure, it was quite manifest, and in fact not denied, that mortgaged property was wholly insufficient to pay the bonded debts, and that, in fact, upon a regular foreclosure there would have been nothing whatever to apply in payment of the general and unsecured creditors. The Chicago & Rock Island Railway Company proposed to purchase the mortgaged property for the sum of $5,500,000, if the title could be obtained without delay, so as to enable them to prosecute the building of the road speedily and secure a land grant which might otherwise be lost. As this was a proposition exceedingly favorable to the interests of the mortgage bondholders, they, in order to allay the apprehended opposition of the stockholders to a foreclosure, entered into an agreement to abate a certain percentage from their respective claims, in order to set aside sixteen per cent. of the purchase money for the benefit of the stockholders. The foreclosure and sale having been accomplished, the general or unsecured creditors came into equity and claimed as against the stockholders the fund arising from this sixteen per cent., and this court held without hesitation that the general creditors were entitled to that fund. Upon appeal, it was contended in the supreme court that there was no pretense of fraud as against the stockholders, and that the substantial rights of the general creditors were not in the slightest degree affected, since it was admitted that the mortgaged property was insufficient to pay the secured creditors, and that the sixteen per cent. fund resulted solely from their voluntary agreement to abate in favor of the stockholders a part of what they had a perfect right to demand and appropriate as against the general creditors. The supreme court, however, without dissent, affirmed the decree below. And Judge Clifford, speaking for the whole court, said that "Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosesoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser; and the rule is well settled that the stockholders are not entitled to any share of the capital stock, nor any dividend of the profits, until all the debts of the corporation are paid." The Code of 1873, § 1072, provides that "the payment of dividends that leave insufficient funds to meet the liabilities of the corporation shall be deemed such a fraud as will subject those therein concerned to the penalties of the preceding section, and such dividends, or their equivalents in the hands of individual stockholders, shall be subject to such liabilities." As to the remedy here adopted, see 40 Iowa, 650; Code, §§ 1082–1084.

The defendant in the case now before the court was both a director and stockholder of the indebted corporation. As a director he aided in the passage of a resolution by which, as a stockholder, he appropriated the bonds in question, which were assets of the company, in a certain proportion to his paid up stock. This was a wrongful act on his part. It resulted in diverting to his own use a part of the trust property which he as a trustee was bound to apply to the payment of debts. This he had no right to do, so long as the debts remained unpaid. The diversion of the trust fund was a breach of trust and a fraud upon creditors. As against the creditors he thereby acquired no title to the bonds in question. A trustee can certainly acquire no title to any part of the trust fund for his own use by a breach of trust and a fraud upon creditors. The defendant, notwithstanding the transfer of bonds to himself, stood seized of them, subject to the trust in favor of creditors. The creditors had a perfect right to pursue the bonds in the hands of the defendant, and have them applied in payment of their claims against the corporation. This defendant, in the next place, as a director of the corporation, assisted in the passage of a resolution by which an assessment was made of thirty per cent. upon the capital stock of the company, and another resolution, providing that the treasurer should be authorized to receive from him and others, in payment of this assessment, the very bonds which they had wrongfully appropriated. The defendant did not own the bonds with which he paid up his stock. These bonds were the property of the corporation, in trust for the creditors. The defendant paid what he owed the corporation by the delivery of bonds which belonged to them. He gave to the

company, and to the creditors through them, in payment, a part of the company's own assets—bonds to which he had in equity no title whatever; and this he now pleads as payment. It may be presumed that any delinquent debtor would not fail to pay his debts, if his creditors would furnish the means to do it with. Such a course of dealing would soon bring about a business millenium—a state of absolute freedom from all indebtedness. Now there certainly can be no doubt that the creditors of a corporation are entitled to have the whole of the assets of the company applied to the payment of their debts, and not merely some part thereof. In the present case both the bonds and unpaid stock were assets. The bonds were the result of work which the construction company had done for the railroad company. The money resulting from the paid up stock had been expended in the work, and took the form of bonds. The bonds were beyond question assets, and so was the unpaid stock. Now what did the creditors get by the transaction in question? Did they get both the stock and bonds applied to the payment of their claims? Clearly not. They got the bonds only. The unpaid stock was extinguished by the delivery of the bonds. In other words, the stock was paid with the bonds, and nothing was realized from the unpaid stock except what the company had before, namely, the bonds. It is precisely as if this defendant, by a resolution of his own, had taken cash from the company's treasury, and immediately paid it back in liquidation of his assessment. Suppose the sixty per cent. which had been paid by the stockholders upon previous assessments had remained in money in the treasury, and suppose the directors had ordered the treasurer to deliver of this money so much to the stockholders as would be sufficient to pay the thirty per cent. assessment. What would equity have said to such a transaction? The result of such a transaction would clearly have been the extinguishment of ninety per cent. of the stock by the payment of sixty per cent. In other words, the thirty per cent. assessment would have been paid with the company's own money. It is said that the company was solvent when the allotment of bonds was made. If so, the allotment must have resulted in the insolvency of the corporation, since we find that debts exist, amounting to $196,631.30, for which no provision seems to be made. Such an argument is suicidal. It kills itself. Surely if the law permitted the stockholders of a corporation to pay up their stock, and then appropriate an equal amount of the assets before the payment of debts, it would open the way to the universal insolvency of corporations! Such a doctrine would give absolute impunity to fraud upon the creditors of corporations, and utterly discredit them in the financial world. The truth is that it makes no difference whatever whether a corporation is solvent or insolvent, so far as the doctrine is concerned that the property is a trust fund which cannot be withdrawn or appropriated by the stockholders until the debts are paid. Judgment for plaintiff.

UNION NAT. BANK (PURVIANCE v.). See Case No. 11,475.

UNION NAT. BANK v. THIRD NAT. BANK. See Case No. 4,801.

UNION NAT. BANK (UNITED STATES v.). See Cases Nos. 16,596 and 16,597.

UNION NAT. BANK (WILDER v.). See Case No. 17,651.

Case No. 14,376.

In re UNION PAC. R. CO.

[10 N. B. R. 178; 6 Chi. Leg. News, 355; 8 Am. Law Rev. 779; 31 Leg. Int. 261.] [1]

District Court, D. Massachusetts. 1874.

BANKRUPTCY—RAILROAD COMPANY—MORTGAGE—"TRADER"—ACT OF BANKRUPTCY.

1. It is not an act of bankruptcy for a railroad corporation to convey its property in trust to secure bonds to be issued and sold, and the proceeds to be applied to pay all its unsecured debts; the same being done bona fide with a view to enable the company to continue its legitimate business, though it may be technically insolvent, or likely soon to be so.

2. Such a mortgage is not made invalid by the circumstance that the unsecured creditors are offered the right to take the new bonds, or the proceeds of sale thereof, at their election.

3. It seems that a mortgage for money to pay debts ratably would not be an act of bankruptcy even in a trader.

4. Some distinctions between traders and railroad corporations, in respect to mortgaging their property, pointed out.

5. A railroad corporation giving a mortgage of its franchise, lands, and other property, to a trustee for the equal security, or payment, of all its unsecured creditors, does not thereby commit an act of bankruptcy within the 39th section of the bankrupt act [14 Stat. 536].

6. A common carrier is not a trader, and a mortgage by a railroad company is not an act of unusual character, i. e., out of the ordinary course of its business within the meaning of the bankrupt act.

7. One who is insolvent and undertakes to make a final distribution of his assets must do it through the bankrupt court. A trust to sell all a debtor's property and divide the cash ratably among his creditors, is an act of bankruptcy, but a mortgage by a railroad company to secure all its creditors equally out of its earnings, or to pay such as refuse the security their ratable proportion of the proceeds, is not an act of bankruptcy.

[Cited in Globe Ins. Co. v. Cleveland Ins. Co., Case No. 5,486.]

[Cited in Steel Edge Stamping & R. Co. v. Manchester Sav. Bank (Mass.) 39 N. E. 1022.]

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[1] [Reprinted from 10 N. B. R. 178, by permission. 8 Am. Law Rev. 779, contains only a partial report.]

The petitioner alleged that he was a creditor of the Union Pacific Railroad Company, a corporation created by an act of congress, and having its domicile and usual place of business at Boston, in this district; that the petitioner was the owner of eight bonds of the company payable to bearer for one thousand dollars each, commonly known as income bonds, which were not secured by mortgage, and would be due on the 1st day of September next; that the defendant corporation was possessed of a railroad and of certain lands, easements, and other property, subject to certain mortgages, and being so possessed and being insolvent did, on the eighteenth day of December last, make a transfer and assignment of said railroad and other property to the Union Trust Company of New York, to secure sixteen millions of bonds which purported to be issued in discharge of and exchange for its antecedent liabilities, including said income bonds. A statement of the debts of the company, and the amount of annual interest thereon and of the earnings, was given in the petition to prove the insolvency of the defendants. The mortgage was averred to have been given with intent to delay, defraud, and hinder creditors, including the petitioner and to give a preference to some creditors over others, and to defeat the operation of the bankrupt act. A copy of the mortgage was annexed to one of the affidavits, and purported to transfer all the property of the company subject to existing mortgages for the payment or security of all the unsecured debts of the company, including the ten millions of income bonds. The conveyance was made with the usual defeasance of a mortgage and conditioned for the payment of the bonds to be issued under it, with semi-annual interest, and with a provision for a sinking fund, and in trust for the uses and purposes, and upon the terms, conditions, and agreements, therein set forth. One of the agreements was as follows: "And it is further covenanted and agreed that eleven millions one hundred and eleven thousand one hundred and eleven dollars of the bonds hereby intended to be secured, shall be reserved to be used at the times and in the manner determined by the vote of the directors of the company, in exchange for or the proceeds thereof to be used for the purchase or payment of the bonds known as the ten per cent. income bonds, by the party of the first part; and the said bonds so reserved as aforesaid, or the proceeds thereof, or any part thereof, shall not, at any time or under any circumstances, be applied or appropriated to any other purpose than that hereinbefore declared, until the same shall have been fully redeemed or paid." There was annexed to the same affidavit a copy of a circular issued by the defendant company to the holders of the income bonds, in which an offer was made to exchange said bonds for the new bonds, on certain terms, giving six new bonds for five old bonds to make up the difference in interest, the new bonds carrying a less rate of interest than the old, and this circular announced that the directors had already availed themselves of this offer to the extent of nearly three millions of bonds owned by them. A part of section 3 of the act of congress, approved March 3, 1873, c. 226, was cited, in these words: "The books, records, and correspondence, and all other documents of the Union Pacific Railroad Company, shall at all times be open to the inspection of the secretary of the treasury, or such persons as he may designate for that purpose. The laws of the United States providing for proceedings in bankruptcy shall not be held to apply to said corporation. No dividend shall hereafter be made by said company but from the actual net earnings thereof, and no new stock shall be issued or mortgages or pledges made on the property or future earnings of the company without leave of congress, except for the purpose of funding and securing the debt now existing or the renewals thereof." By consent of parties counsel were heard upon the question whether an order to show cause should issue, a question which is usually decided ex parte.

W. D. Shipman and E. L. Andrews, for petitioners.

S. Bartlett and B. R. Curtis, for defendants.

LOWELL, District Judge. Two most important and interesting questions have been argued in this case. 1st. Whether the petition alleges an act of bankruptcy on the part of the defendant corporation? 2d. Whether the statute which exempts the defendant from the operation of the bankrupt act, is within the constitutional power of congress to enact?

It is admitted to be the better opinion generally, and the settled law of this circuit, that a railroad corporation is liable to be made bankrupt; and within a month last past I have adjudged one to be so for preferences such as would have sufficed in the case of a natural person. So that, as I said before, the first question is whether, in making a mortgage of its franchise, lands, and other property to a trustee, for the equal security or payment of all its unsecured creditors, this company has committed a technical fraud within the 39th section of the bankrupt act. A class of decisions has been referred to in argument as having a close resemblance to this case, in which it was held that a conveyance of all the property of a trader in trust to sell it and distribute the money to creditors proportionately, precisely as it must be divided in bankruptcy, is a technical fraud on the statute. The ablest writer upon the subject has expressed his surprise that this doctrine should ever have been adopted. "It is, however, difficult to understand," said Lord Henley, "how an as-

signment of the whole of a trader's property, though the direct and immediate object of it be for the payment and benefit of all creditors, should have been deemed an act of bankruptcy, as done with an intent to defraud and delay creditors. This doctrine has occasionally met with his disapprobation, and the reasons upon which it is founded are by no means satisfactory." Henley (Eden) Bankr. Law, 28. He admits that at the time he wrote (1832) the authorities were unanimous against his opinion, and there has been no change in the law since that time. I consider the better opinion under our bankrupt act to be the same, that it forbids such a distribution by means of a private trust created by the debtor, unless all his creditors consent.

Various reasons are given, the substance of which is, that if an estate is to be wound up by trustees, they should be appointed by, and be subject to, the order of the courts having jurisdiction of the subject-matter; and that the creditors should have a voice in their appointment. Putting a person into bankruptcy who has undertaken to have his affairs wound up in this way, is scarcely more than a specific performance of the trusts he has himself created. The decisions under the bankrupt act have not been uniform, but the prevailing doctrine agrees with the law of England. But this case does not come precisely within that range of decisions, because we have not here a person admitting that his business must be wound up and his property be sold and divided, but one who undertakes to keep on, in his ordinary and proper business, and divide his earnings equally among all his creditors, with a security upon the principal for the fulfillment of that undertaking. If the defendant were a trader, I should not doubt that a mortgage by which he secured his creditors the payment after a lapse of twenty years' time, of their debts now or soon coming due, would be an act of bankruptcy as delaying them under the guise of security. Stewart v. Moody, 1 Cromp. M. & R. 777; In re Chamberlain [Case No. 2,574]. But a carrier is not a trader, and this mortgage is not a mere trust to pay in twenty years. The undertaking of a trader who trades on credit undoubtedly is to sell his goods in season to meet the payments for their purchase, and if, instead of doing so, he makes a trust for their payment at a later time, he has broken his engagement. It can hardly be said that a railroad company contracting a debt for building and equipping its road, undertakes to sell its franchise in season to pay that debt as it matures. Wisely or unwisely, it has been the policy of this country to encourage the building of these new highways by borrowed capital, and it is, I fear, true of a very large proportion of these corporations that that they neither can nor are expected to pay such debts at maturity, excepting by negotiating a new mortgage; and if the very act of giving such a mortgage is a technical fraud on the statute, then all these companies are, or at a period already fixed will certainly be, bankrupt. It was hardly a part of the understanding between this defendant and the purchasers of the income bonds that it must either pay them at maturity or sell out its road and relinquish its enterprise, while a trader does, I apprehend, assume that very burden. It has often been decided by juries, and even by courts, as matter of law, that a mortgage of a trader's whole stock in trade is a transaction out of the ordinary course of his business. But it has never been said, and cannot with truth be said, that a mortgage by a railroad company is an act of an unusual character. It would be out of the ordinary course of its business as a carrier of passengers and goods, but it must be admitted that as a mode of raising or renewing a part of its capital, it is of only too frequent occurrence, and is encouraged by legislation and the announced policy of the country. It is implied in the statute cited in this case, that this defendant may secure its outstanding debts in this mode. Another difference between a mortgage of this kind and one in which an ordinary trader should postpone the payment of his debts, is this: The note or bond of a railroad company secured by mortgage, is a well known security which passes current in the market, and the full value of which or what the general opinion fixes as its value can always be obtained. Its creditors who are unsecured are offered a new bond which is secured, they are obtaining a security which is at least as valuable as what they already have; in other words they are not delayed, according to any ordinary view of the matter that would be likely to occur to a person dealing in such securities. This petitioner is not injured by being offered a security fully as valuable and as readily convertible into money as that which he already has, and if the law departs in this respect from the fact, it in so far contravenes the truth, which is not to be presumed.

Another important point is that this mortgage does not merely offer to postpone the debt, but to give the long bond or the money instead thereof. This is plainly one of the trusts, and the trustee can be compelled to apply the new bonds in one or the other of these modes, to the satisfaction of the present creditors. The argument that this is not the purport of the mortgage seems to me wholly unfounded. If the bonds were at par, it is plain that no possible injury could be done to any creditor, because he might take the money if he did not like the bond. The plaintiff argues that he is entitled to prove that these bonds are not at par, and that they will probably not be so in Septem-

ber next, when his debt will mature, and if not then he must be content with something less than his debt, to wit, an equal dividend with the other creditors, of what the bonds will produce, and that, he says, is bankruptcy. I think there is some evidence in the mortgage itself that the defendant is not now and will not be likely soon to be in a position to pay these petitioners and its other unsecured creditors in full; and then the question is whether it is an act of bankruptcy in an insolvent railroad company, or one likely to become so, to make a mortgage to raise money for the equal benefit of its creditors. It is often said that an insolvent person has but two lawful courses open to him —to compromise with his creditors with the assent of every one of them, or to go into bankruptcy. But this is too broad a statement. We are admonished by a late decision of the supreme court that there is at least one other, namely, to remain entirely passive and permit his creditors to make what they can out of his property by legal process independent of bankruptcy. Wilson v. City Bank of St. Paul [17 Wall. (84 U. S.) 473]. And this is what the plaintiff says that defendant should do. The true explanation of Wilson v. City Bank of St. Paul, ubi supra, is that an insolvent trader may intend, and expect, and hope to recover his position and continue his trade, and therefore his failing to go into bankruptcy when his property is attached, does not lead to the inference that he intends to prefer the attaching creditor. Indeed, the decision arrived at rests upon the proposition that an insolvent person is under no legal obligation to go into bankruptcy under any circumstances. I must not be understood as criticising in a hostile sense a decision of the supreme court, which I believe to be a perfectly sound interpretation of the existing bankrupt law. I am merely pointing out its true scope. The only general proposition that can safely be laid down is one which I mentioned before, that one who is not only insolvent but who undertakes to make a final distribution of his assets, must do it through the bankrupt court.

If then the defendants, though technically insolvent, are not bound to go into bankruptcy, and do not undertake to make a distribution of their assets, are they bound to wait until these millions of income bonds mature, and then submit themselves to such processes of attachment and others as the laws may give to those of their creditors who choose to avail themselves of these remedies? Or can they mortgage their property in good faith to raise the money necessary to pay more debts, or so much of them pro rata as their property will bring in the market? So far as I know it has always been held that even a trader may mortgage his property for present value if there be no actual fraud. At common law a mortgage of goods necessarily delays creditors, because the goods cannot be taken in execution while the mortgage remains unpaid; and yet it is the law that a mortgage given for the honest purpose of relief, however inadequate the relief may be, that is to say, though the whole stock be mortgaged for a small advance, and however certain it may be that creditors will be delayed in levying their executions, will not be considered to be given with intent to delay them, the intent being really wanting. "It has been held," said Cockburn, C. J., delivering the opinion of the court of exchequer chamber, "that when a trader assigns his whole property, but receives in return a fair equivalent, the transaction is not void under the bankrupt law." Mercer v. Peterson, L. R. 3 Exch. 106, affirming the decision of the exchequer. In that case the whole was assigned for a return of about one-half. And it is obvious from the remarks of the judges that such an incumbrance would tend to delay half the creditors, but it was supported as being done in good faith and for present value with intent to continue the trade. See Robs. Bankr. American cases to the same effect are Darby v. Boatman's Sav. Inst. [Case No. 3,571]; Darby v. Lucas [Id. 3,573], affirmed; Tiffany v. Lucas [15 Wall. (82 U. S.) 410]. I understand the argument of the plaintiff to admit the soundness of these decisions, and to concede that a mortgage for money is always valid unless there were some intent to use the money fraudulently, and he does not contend that any such intent is proved or alleged in this case, but he does insist that he does not wish to take the bonds, and that those who do consent to take them will immediately become preferred creditors. This argument was repeated in various forms and dwelt upon with much earnestness, but I cannot admit its force. It is a new idea of preference that a security can be a fraudulent preference to some creditors which is offered equally to all. The very fundamental conception of preference is inequality, and this is equality. The creditors might perhaps have some reason to complain if the option were not given them, but that they can have any ground to object to the alternative can never be granted. It may be said that such a mortgage differs only in form from a sale of the whole property, with the intent to divide the proceeds among the creditors, instead of applying to the bankrupt court for that purpose. The difference is not great, but there is the point of distinction already mentioned, that the sale of a railroad would be a confession of the necessity of breaking up the business, while a mortgage does not carry with it that admission. Besides, although, as we have seen, a trust for sale and distribution by a sort of private bankruptcy, has been held by a preponderance of authority to be illegal, an outright sale for cash has never been so regarded, even in the case of a trader, unless he intended to commit some actual fraud or some fraud on the bankrupt act, with the proceeds.

A sale is mentioned in the statutes as one made in which fraud may be committed, and sales as well as mortgages have been set aside. See Walbrun v. Babbitt [16 Wall. (83 U. S.) 577]. I have set aside several sales and mortgages. But sales and mortgages for cash paid down have been uniformly upheld, in the absence of an actual intent to commit a fraud or preference with the money so obtained; and there is no case in which the intent to keep the money in full reach of creditors, instead of the property, or even to divide it ratably among them, has been held to be such a fraud. There is one case in Massachusetts, in which it was decided that when an insolvent person converted his assets into money, and offered to pay all his creditors pro rata, he had committed a fraud upon the act as against a creditor who had refused to receive his share. Fernald v. Gay, 12 Cush. 596. But that case was decided under St. 1844, c. 178 § 8, which provided that no discharge should be granted "if the debtor hereafter, when insolvent, shall within one year next before the filing of the petition by or against him, pay or secure, either directly or indirectly, in whole or in part, any borrowed money, or pre-existing debt," and of course the case came within the very words of that statute. It was not a decision upon the subject of preferences generally, nor is that word mentioned in the section, nor is there such a word as "intent" in that law. In my judgment it would not be a preference, under the bankrupt act, to pay several creditors sums which the debtor was able and willing to pay to all; though I do not mean to say that he must not be always ready (tout temps prest) to pay to all their equal share. While, therefore, I find it to be settled by a preponderance of authority, though against some weighty opinions, that a trust to sell all a debtor's property and divide the cash ratably among his creditors is an act of bankruptcy· I do not find it to be settled that a sale by the debtor himself for cash with intent so to divide it, is such an act, much less that a mortgage by a railroad company to secure all its creditors equally out of its earnings, or to pay such as refuse the security their ratable proportion of the proceeds, is an act of bankruptcy.

My opinion upon the first question renders it unnecessary that I should decide the still more interesting one of the constitutionality of the statute which undertakes to except this corporation out of the general law. If supported, it must be, I think, upon the ground of a right in congress to modify the charter of the company to that extent. Order to show cause refused.

UNION PAC. R. CO. (BAUMAN v.). See Case No. 1,117.

UNION PAC. R. CO. (DILLON v.). See Case No. 3,916.

Case No. 14,377.

UNION PAC. R. CO v. DURANT.

[3 Dill. 343,[1] 1 Cent. Law J. 581.]

Circuit Court, D. Nebraska. 1874.[2]

RAILROAD COMPANIES—DONATION OF PROPERTY TO SECURE LOCATION—TRUST.

The acting president and active manager of a railroad company, by an oppressive exercise of his powers, procured donations of property to be made to him in trust for the railroad company. *Held*, that his action was illegal, and that it affected the company, and that the effect was that he held the property in trust for the donors, and not the company.

In equity—on final hearing. The case made by complainant, in its bill, is substantially this: That in the month of November, 1863, the Union Pacific Railroad Company, having been incorporated and organized, and being about to commence the construction of its road, and having already commenced surveys in Nebraska, at or in the vicinity of Omaha, for the purpose of ascertaining the best point for the location of its eastern terminus, and the most practicable route thence westward, certain citizens of Omaha proposed to Peter A. Dey, the engineer in charge of said surveys, to convey to Thomas C. Durant, at the date of such proposal the president and acting manager of the corporation, for its use, certain tracts of land and certain lots therein described, "said conveyance to be made conditional upon the location of the said eastern terminus within one and a quarter miles of Farnam street, thence running west from said point towards the Platte valley;" that such proposal was accepted, and the conditions performed, and that, after the performance thereof, the several parties being satisfied therewith, and being willing to convey according to their agreement, offered to make such conveyances, and such conveyances were accordingly made; but, by the express direction of Durant, his name was inserted therein as grantee and "trustee," and the said conveyances recited the receipt of the consideration thereof in full, as being "in consideration of the location of the eastern terminus of the Union Pacific Railroad at Omaha, within one and a quarter miles of Farnam street, thence running west from said point to the Platte valley;" that it was the intention of the donors to convey in trust, and that Durant took said lands and lots in trust for the corporation, it having furnished the consideration therefor, and still so holds the same, but has refused, upon request, to convey to the rightful owner. The theory of the bill is, that the lands and lots thus conveyed to Durant as "trustee," were so conveyed in trust for the complainant, and the prayer of the bill is that Durant be compelled to execute the trust and convey the property to the Union Pacific Railroad Company. The conveyances run to "Thomas C. Durant, trustee,"

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[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[2] [Reversed in 95 U. S. 576.]

but for whom or what he is thus trustee is not stated in the instruments, and the lands and lots do not, in most instances, adjoin the company's road, and are not necessary for its use and operation.

The substance of the answer is, that the corporation did not make the surveys for, or fix the location of, the eastern terminus or westward route of the road, but that the surveys were made at Durant's individual expense, and under his individual management and direction; that the proposed donation was intended to be made to him individually, in order to secure his influence with the president and with the corporation in establishing the terminus and route westward; that, while it is true that the word "trustee" was inserted in said deeds solely at his own instance, it was so inserted to declare a trust in favor of the grantors, in case of non-performance of the conditions of the agreement; that a portion of the lands so conveyed to him he has conveyed to the corporation, because they were necessary to its use, but that the residue he still holds; that the sole consideration of said conveyances was the location of the eastern terminus within one and a quarter miles of Farnam street, and the approval of the route westward by the president, in whom alone was vested the power to fix the terminus of or locate the route; that the condition of the contract was never complied with, and that therefore there has been a reversion to the grantors, for whom he holds, and who should be made parties to the suit, but are not. The lots and tracts of land in controversy are numerous and of great value.

A. J. Poppleton and E. Wakely, for complainant.

J. M. Woolworth, for defendant.

DILLON, Circuit Judge. The cause is before the court on final hearing. I do not purpose to refer to the voluminous proofs in detail, but to give the conclusion reached, and, briefly, the grounds of it. The conveyances were made to the defendant as "trustee." As the instruments were drawn in this form at the defendant's suggestion, and as no mistake or accident in framing them is claimed, it is plain that he does not hold the property for himself in his own right. The deeds estop him to set up such a claim, and the proofs, aliunde, show that no consideration for the conveyances moved from or were furnished by him individually. An attempt was made in the proofs to show that the property was demanded and received by him to reimburse him for the expenses of surveys prior to the completed organization of the company, but this attempt failed. It clearly appears that these expenses were made good to the defendant by the company. It is indisputable, then, that the defendant holds the property in trust, and the only question now to be decided is whether he holds it for the complainant by such a trust that it can enforce. As between himself and the railroad company, of which at the date of the transactions in question the defendant was the acting president and active manager, there is no doubt, upon the proofs, that this property was taken by him in trust for it.

The exact point upon which the cause hinges, is whether the company's right to this property is such that a court of equity will, at its instance, enforce the trust by decreeing the defendant to convey the property to it. The history of the transaction shows that the property was unfairly obtained by the defendant acting for the company—obtained under circumstances which a court of equity cannot sanction. The subscription paper is dated November 23d, 1863, and in it the subscribers "agree to convey to T. C. Durant the lots and lands severally described over their respective signatures, for the purpose of securing the location of the eastern terminus of the Pacific road at Omaha city; said conveyances are to be made conditional upon the location of said terminus within one and one-quarter miles of Farnam street, thence running west from said point toward the Platte valley, and to provide that in case of the failure of such location said lots and lands are to revert to and become re-invested in the several grantors." The act of July 1, 1862 (section 14 [12 Stat. 496]), authorized the president to fix the terminus, and the same had been fixed by him on the 17th day of November, 1863, and his action was fully known when the subscription paper of the 23d day of that month was drawn and circulated. After this paper had been subscribed, another executive order, on March 7, 1864, was made, fixing the eastern terminus on the western boundary of the state of Iowa, opposite section ten of the township in which Omaha is situate. From Farnam street to the nearest part of section ten is a mile and three-quarters. The subscribers to the agreement stipulated for a location of the eastern terminus within one mile and a quarter of that street. When all of the deeds were made to the defendant as trustee, the legal terminus as thus fixed was known to everybody, but the business terminus, that is the actual terminus, had been fixed by the company within about a half mile of Farnam street. The deeds to the defendant as trustee, none of which are dated earlier than December, 1864, recite that they are made "in consideration of the location of the eastern terminus of the Union Pacific Railroad Company at Omaha, within one and a quarter miles of Farnam street, thence running west from said point to the Platte valley," and contain no clause as to reverter. It thus appears, with reasonable certainty, that all parties had in view the securing of the actual or business terminus, and not merely the legal terminus. The other matter to be secured, was that the road should run westwardly from Omaha, that is, not to a rival

place—Florence on the north, or Bellevue on the south, so as to leave "Omaha on a switch," as one of the witnesses phrases it, and although the route of the road was somewhat changed, it was not changed in the interest of either of those places, or to the detriment of Omaha.

Assuming, though not deciding, that the company has the capacity in law to acquire and take property like that in question, not on the line of its road nor shown to be necessary for its operations, I should be of the opinion, that if the subscriptions under the contract of November 23, 1863, were fairly obtained for a lawful purpose, the defendant would be bound to convey the property to the company. And in this view the whole case lies within the inquiry, was the property fairly or lawfully obtained? In my judgment it was not. There is no satisfactory evidence that this property was demanded by the company, or by Mr. Durant, acting for it, to reimburse it for the additional expense which a terminus at Omaha, instead of at Bellevue or Florence, would involve. Besides, after March 7, 1864, it was impossible for the company, if acting in good faith, not to construct and operate its road to Omaha, and it was after this date that all of the deeds to the defendant were made. Whether an agreement to donate lands in consideration of the location of the depot or business terminus of a railroad can be supported by law, we need not enquire. See Fuller v. Dane, 18 Pick. 472; Pacific R. Co. v. Seely, 45 Mo. 212. I am not prepared to say, that if a company has by law a discretion to adopt its own line and to go to any point its interest might suggest, and it is induced by offers of pecuniary advantages to adopt a more expensive line to another terminus, that such a transaction would necessarily be against public policy, or fall within the principles of the cases above cited. The facts of this cause present no such question, and I do not enter upon its consideration or give any opinion concerning it.

How these subscriptions were obtained, appears from the testimony; and they seem to have been extorted from the subscribers by reason of the powers which the law had conferred upon the company to be exercised for the public good, and not oppressively. The origin of the demand upon the people of Omaha clearly appears from the testimony of Mr. Dey, the confidential employé of Mr. Durant, and subsequently of the company, and who is a gentleman of high character. He testified that "the demand for these lands came from Mr. Durant." Mr. Dey thereupon caused Mr. Durant's demand to be communicated to leading citizens of Omaha. He says: "I did not circulate the paper (of November 23) but was in constant communication with those who did circulate it, and made many suggestions to them, with the view to aid them in getting the subscriptions filled out." He is asked "for what purpose the lots and lands was to be applied," etc., and his answer is: "The demand for those lands came from me, and the purpose avowed was to influence parties who might be of service to the road and of service in making Omaha the terminal point. Durant said he must have the deeds made to himself as trustee, that he might dispose of the lands without being answerable to any party, and that I stated to Mr. Aug. Kountz (an active citizen in circulating the papers of November 23, 1863) and other parties who were instrumental in procuring the donations." Again Mr. Dey testifies, "I wish to be understood as saying that one of the reasons avowed (why the citizens must give property) was that their donation could be used for that purpose," i. e., "to influence parties who might be of service in making Omaha the terminal point. I avowed that the parties controlling this matter (to-wit, Mr. Durant) had the power to procure such donations of lands as they wanted at the terminus of the road, and they expected to use it, and that I conceived it to be the policy of Omaha to donate what was asked of them. Mr. Durant at that time controlled the whole matter." Mr. Durant was absent and Mr. Dey was his representative. Public meetings were held, and the citizens given to understand that they must donate lots and lands liberally, or else Bellevue or Florence might secure the prize of the terminus; and when the subscriptions were made it is evident that it was done out of fear that Mr. Durant would, or might, otherwise use his power against Omaha, and that these donations (which one subscriber considered a species of "black mail," another as a "corruption fund") would have the effect to conciliate his favor and secure his influence. If Mr. Durant intended to use this property to corrupt the official action of others, it was obtained for an unlawful purpose. If he demanded the property not for this purpose, but because he had the power and intended to exercise it, his action is oppressive and cannot be permitted to stand. And as the company in this suit seeks the fruits of Mr. Durant's acts, they are affected through him with the vice of Mr. Durant's conduct.

My judgment is that the subscriptions to the paper of November 23, 1863, pursuant to which the conveyances were subsequently executed to the defendant, as trustee, were secured by an illegal and oppressive exercise and use of the powers which belonged to the defendant's position as the acting president, and active, and at that time almost the sole, manager of the company, and consequently a court of equity will hold the defendant as trustee for the donors, although he may have intended to take the lands and lots as trustee for the company. Accordingly, a decree will be entered dismissing the bill, except as to the tracts conveyed to him by Enos Lowe, and

which he admits in his answer to be held by him in trust for the complainant.

[Reversed on appeal to the supreme court. 95 U. S. 576.]

UNION PAC. R. CO. (FISK v.). See Cases Nos. 4,827–4,830.

UNION PAC. R. CO. (FORT v.). See Case No. 4,952.

UNION PAC. R. CO. (FROST v.). See Case No. 4,952.

UNION PAC. R. CO. (HALL v.). See Case No. 5,950.

UNION PAC. R. CO. (HINES v.). See Case No. 6,521.

Case No. 14,378.

UNION PAC. R. CO. v. LINCOLN COUNTY.

[1 Dill. 314;[1] 10 Am. Law Reg. (U. S.) 458.]

Circuit Court, D. Nebraska. 1871.[2]

TAXATION—POWER OF THE STATES—EXEMPTION OF FEDERAL INSTRUMENTALITIES.

1. The interest of the general government in the Union Pacific Railroad Company, though chartered and aided by congress, is not such as to exempt the company and its property from taxation by a state, through which the road is located and operated.

2. The doctrine of the implied exemption of federal instrumentalities from state taxation, considered and applied to this corporation, and the result reached, that it is not such an instrumentality; and if, in any case, it is such, the paramount rights of the government would not be affected, and, under the acts of congress, could not be injured by any subordinate right of the state to tax and sell the property of the corporation.

[Cited in Sweatt v. Boston, H. & E. R. Co., Case No. 13,684.]

3. Under the legislation of Nebraska, the county of Lincoln has the right to tax railroads in the unorganized country attached to it for revenue purposes.

On motion to continue the temporary injunction, heretofore allowed. The bill in this suit is filed to restrain the defendant, who is the county treasurer of Lincoln county, in the state of Nebraska, from proceeding to collect taxes upon the property of the complainant, assessed and levied under the revenue law of the state (Act 1869, p. 179). Section 17 of this act provides for the assessment and taxation of the property of canal, turnpike, railway, and other corporations, and makes it the duty of certain officers of these corporations to list, under oath, "all their personal property, which shall be held to include road-bed, depots, water stations, * * * and such other realty as is necessary for the daily business operations of said road," etc. 'Returns are to be made to the auditor of state, on or before the first Monday of March, annually, of the amount of such property situated in each organized county," etc. Taxes thus assessed are collected by sale and distress of personal property (section 49); are made a special lien on real property (section 51); and real estate may be sold for delinquent taxes when the collector is not able to make the same by distress and sale of personal property (section 54). Under this act a list was furnished by the auditor of state to the officers of the complainant, and the general superintendent returned the company as having two hundred and forty-six miles of road in "Lincoln county and west of the state line," of the average value of $16,000 per mile. Upon this length of road, and upon this valuation, the county authorities of Lincoln county assessed the property of the company, the total valuation being (as alleged) $3,936,000, and the amount of taxes charged for the year 1869, is $45,264, for state, county, and school purposes; while for the same year, the said county, upon all other persons, corporations, and property, only levied taxes to the amount, in the aggregate, of $6,350. The pleadings show that the county of Lincoln is the most westerly organized county in the state, through which the road of the complainant runs; that immediately west of Lincoln county is a large tract of unorganized territory, west of which, and extending to the west line of the state, is the unorganized county of Cheyenne. The road runs through this unorganized territory, as well as through Cheyenne county. By the averments of the bill, supported by affidavits, it would appear that the length of complainant's road through Lincoln county, to the west line of the state instead of being two hundred and forty-six miles, is only about one hundred and sixty-six miles, of which but eight miles are in Lincoln county (the road crossing only a corner of the county), and the residue of the one hundred and seventy-six miles is in Cheyenne county (one hundred and five miles), and in the unorganized territory between that and Lincoln county, (sixty-three miles).

The bill seeks to restrain the collection of the tax, for the three following reasons: 1. Because two hundred and forty-six miles of road-bed have been assessed by the authorities of Lincoln county; whereas only one hundred and seventy-six miles of the road-bed are situate in Lincoln county and the attached territory west of it, to the state line. 2. Because Lincoln county is not, by law, authorized to tax any portion of the road-bed or property of the defendant, except such as is situate within its geographical limits. 3. Because the state of Nebraska has no power to subject to taxation, for state purposes, the road-bed, rolling-stock, and other property necessary for the use and operation of the complainant's road; such power resting, as it is claimed, exclusively in the government of the United States.

On the 15th day of February, 1869, the

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 18 Wall. (85 U. S.) 5.]

legislature of Nebraska passed an act "to define the western boundary of Lincoln county;" and, after defining it, the act makes this important provision, to-wit: "That all the unorganized country lying west of the western boundary of Lincoln, and east of the east line of Cheyenne county, and south of the North Platte river, be and the same is hereby attached to the said county of Lincoln for judicial and revenue purposes, and that the county of Cheyenne be and the same is hereby attached, for judicial and revenue purposes, to said county of Lincoln." Laws Neb. 1869, p. 249. This act, as well as the revenue act, before mentioned, was approved on the 15th day of February, 1869, and each went into effect from its passage.

The more material provisions of the acts of congress relating to the Union Pacific Railroad Company, may be here conveniently mentioned. The company was incorporated by act of congress of July 1, 1862 (12 Stat. 489). This act was subsequently amended in some essential particulars, especially by the act of July 2, 1864 (13 Stat. 386). The incorporating statute is entitled, "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure the government the use of the same for postal, military, and other purposes." By this act, congress incorporated certain individuals, their associates and successors, as the "Union Pacific Railroad Company," with authority to build a continuous railroad and telegraph from a point on the one hundredth meridian to the western boundary of Nevada territory. It fixed the amount of the capital stock and shares, and declared that "the stockholders should constitute said body politic and corporate." The government has no stock in the road, though it has five directors, not stockholders, against fifteen company directors. The act grants the company the right of way through the public lands; and, "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and the public stores thereon," makes it an extensive grant of lands, and provides for the issuing of patents therefor. And, for the same purposes, the United States agreed to, and did issue its thirty-year six per cent bonds to the company, to the amount of $16,000 per mile, for each section of forty miles; which bonds, the original act declared, "shall, ipso facto, constitute a first mortgage on the whole of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind," and made specific provision as to proceedings, on the failure of the company, to redeem the bonds. By the act of July 2, 1864, this was changed, and the company authorized to issue its "first mortgage bonds, to an amount not exceeding the bonds of the United States," and the lien of the United States bonds was declared to be subordinate to the bonds so issued by the company, with the exception relating to the transportation of dispatches, troops, mails, etc., for the government. These grants to the company are declared to be "made upon condition (1) that the company shall pay the bonds of the United States at maturity; (2) shall keep their line and road in repair and use; (3) transport mails, troops, etc., giving the government the preference, at fair and reasonable rates of compensation, the amount thus earned to be applied in payment of the bonds, as well as five per cent of the net earnings of the road after its completion. By the 17th section of the act it is provided if the road, when finished, is for any unreasonable time permitted to remain out of repair, or unfit for use, congress is authorized to put the same in repair and use, and re-imburse the government for expenditures thus caused, from the income of the road. The 18th section provides that when the net earnings of the road exceed ten per cent of its cost, congress may reduce, fix, and regulate rates of fare thereon, and declares that "the better to accomplish the object of this act, to-wit: to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order; and to secure the government, at all times (but particularly in times of war), the use and benefits of the same for postal, military, and other purposes, congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act." The act also contains provisions that, so far as the public and government are concerned, the said railroad and branches shall be operated as one connected and continuous line. There is no provision in any act of congress relating to this company respecting the taxation of it, or its property, by the states through which its road may run. At the date of the passage of the act incorporating the company, Nebraska was in a territorial condition under the act of 1854, organizing the territories of Nebraska and Kansas. In 1867, Nebraska was admitted into the Union "upon an equal footing with the original states, in all respects whatever." By the enabling act of congress of April 10, 1864, Nebraska was required to, and subsequently did, in her constitution, disable herself from taxing "lands or property therein belonging to, or which may hereafter be purchased by, the United States;" and accordingly her revenue laws, in terms, exempt from taxation the property of the United States. The case is now before the court on a motion by the complainant, that the injunction allowed by the district judge be continued until the final hearing.

A. J. Poppleton and E. Wakely, for complainant.

J. M. Woolworth, for defendant.

Before DILLON, Circuit Judge, and DUNDY, District Judge.

DILLON, Circuit Judge. I. The authorities of the state of Nebraska have assessed and levied, for the year 1869, taxes upon the property of the Union Pacific Railroad Company situate therein. The company brings the present bill, in this court, to restrain the collection of these taxes. No question is made concerning jurisdiction. The cause is before the court on the motion of the company to continue in force the injunction allowed in vacation, and has been ably argued by counsel, on the merits of the application.

One of the grounds for the injunction is fundamental in its nature, and if well taken is decisive, not only of the present case, but against the power of the state, in any event, to subject the property of the company to taxation by its authority. To this ground, therefore, we shall first direct our attention. It is that the state of Nebraska has no power to levy a tax upon any property of the Union Pacific Railroad Company which is appurtenant to, or necessary for, the use and operation of its road. The argument in support of this proposition is, that the corporation was created by congress, and not by the state; that it was created because deemed by congress a fit instrumentality or means of exercising the constitutional powers of carrying on, promoting or facilitating the operations, or executing the duties of the general government, and that if it be such instrumentality or means, it is settled that it is beyond the taxing power of the state.

Reliance is placed upon the cases of McCulloch v. Maryland, 4 Wheat. [17 U. S.] 316, and Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738, in which it was held by the supreme court that this bank, "as the great instrument by which the fiscal operations of the government were effected," and "as a public corporation, created for public and national purposes," was not, on its capital or in its operations, taxable by the states. In a word, it is claimed by the company that as respects immunity from taxation, it stands precisely in the situation of the bank, and that taxation of it by the states is unconstitutional, for the same reasons that in those cases the laws of Maryland and Ohio taxing the bank, were adjudged to be invalid.

The defendant controverts these propositions, and contends that the Union Pacific Railroad Company, though chartered by congress, is essentially a "private corporation, whose principal object is individual trade and individual profit, and not a public corporation, created for public and national purposes;" and denies that it is an instrument, agency, or means of the general government, in such a sense as, on this ground, to exempt it by necessary implication from taxation by the states. The cases referred to undoubtedly establish the doctrine that no state has the right to tax the means, agencies, or instrumentalities rightfully employed within the states by the general government for the execution of its powers; and this doctrine is adhered to, and, when understood with the necessary qualifications, declared to be sound by the supreme court, in its latest adjudications on the subject. Thompson v. Pacific R. R., 9 Wall. [76 U. S.] 579, 591; National Bank v. Com., Id. 353, 361.

The doctrine of the implied exemption of federal instrumentalities from state taxation, its rationale, and its limitations, are so clearly stated by the learned justice assigned to this circuit, in the case last cited, that his observations may be advantageously extracted to aid our present inquiries. The case related to the right of the states to tax shares of the national banks, and "it is argued," says Mr. Justice Miller, "that the banks, being instrumentalities of the federal government, by which some of its important operations are conducted, cannot be subjected to such state legislation. It is certainly true that the Bank of the United States and its capital were held to be exempt from state taxation on the ground here stated, and this principle, laid down in the case of McCulloch v. Maryland has been repeatedly affirmed by this court. But the doctrine has its foundation in the proposition that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the states, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of state legislation. * * * The principle we are discussing has its limitation,—a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the federal government are only exempted from state legislation so far as that legislation may interfere with, or impair their efficiency in performing, the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the states. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." [National Bank v. Com.] 9 Wall. [76 U. S.] 361, 362. The state legislation, then, to come within the operation of the principle, must relate not simply to an agent, but to an agency of the general government, and must be of a

character which incapacitates the agency to perform, or interferes with its efficiency in performing its duties to the government, or it must (as in the case of a tax, which if valid at all, is valid to any extent the state may see fit to press it), assert a principle in its nature antagonistic to the federal instrumentality, and which may be exercised to destroy it.

Having thus defined and limited the principle on which the company relies as exempting it from the right of the state to tax its property, the next step in the inquiry is to determine whether this corporation is a federal instrumentality, within the meaning of the rule, and one which might be destroyed by the state if it was permitted to tax it.

Upon the most careful examination of the acts of congress relating to this company, and upon the best reflection I have been able to give the subject, I am of opinion that the interest of the government in the corporation, though organized under congressional authority, is not such as will bring it within the principle of implied exemption from the taxing power of the state. That there is, in any act of congress, an express provision on the subject of taxation, or a prohibition to the state to tax the company, is not claimed.

The Union Pacific Railroad Company is a private corporation, in the sense that all of its capital stock is owned by the stockholders, and these constitute the corporate body. The government has no stock in the road. But, in another sense, the corporation is a public one as respects the government, and the relations it sustains to the government are very peculiar. The government created the corporation, and both authorized and aided the building of the road. It was to be constructed within the territories of the United States; and if congress was not the only power which could erect said corporation, and authorize it to build the road therein, it is certain that no road could have been constructed through the national domain against the will of congress.

The purpose of congress is manifest, not only from the nature of the legislative provisions, but from the plain expression of it, both in the title and in the body of the incorporating act. It is declared in the 18th section that "the object of this act is to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes," and to this end "congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act." And to the same effect is the title, which is, "An act to aid in the construction of a railroad, etc., and to secure to the government the use of the same for postal, military, and other purposes."

The government aided the corporation by giving it the right of way, by granting it lands, and by issuing to it bonds which were originally the first, but, by the consent of congress, subsequently became the second, mortgage or lien on the road. Now, the act shows (sections 6, 17, 18) that the grants of corporate existence, of the right of way, of lands, and of pecuniary aid, were all made upon the condition or consideration that the corporation should build the road and keep it in repair and operation, so that the government might at all times have the use and benefit of the same for postal, military, or other purposes. To prevent this object from being defeated, congress reserved the right to repair and run the road (section 17), and at all times to legislate generally with respect to the rights of the company (section 18). The ownership of the road and its property is in the corporation. Its bonds, by the consent of congress, have been made a first mortgage; and the government bonds are the second mortgage "on the whole line of railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description." See Act July 1, 1862, § 5, and Act July 2, 1864, § 10. If these first mortgage bonds are not paid, is it not clear that they may be foreclosed, and "the whole line of the road and all its property" be sold to the purchaser, who would thereby, as against the corporation and against the United States, acquire the title unless the United States redeemed the debt? Such purchaser would acquire the ownership of the road and its property, but he would not acquire these discharged of the duty of the corporation to keep the road in repair, and to run it as a continuous line in connection with the other roads, and to transport the mails, troops, stores, etc., of the government; nor would the sale under the mortgage divest the government of its reserved right of legislative control in order to secure to the government the purposes for which it created the corporation, and so bountifully aided it to execute its great undertaking.

So far as the government sustains to this road the mere relation of creditor or lien holder, such a sale, it may be true, would defeat or foreclose its rights as such a creditor or lienor, the same as in ordinary cases a second mortgage is cut off by a foreclosure and sale under the first. But so far as the government sustains political, public, or sovereign relations to the road, these remain, after such a sale, the same as before. The sale does not annihilate the corporation as a legal personality, nor, in my opinion, was it destroyed, or the legislative control of congress over it abridged, by the subsequent admission of Nebraska into the Union as a state.

Congress gave the corporation, in terms, the power to make contracts, which includes the power to incur indebtedness, for which it was declared liable to be sued. It cannot be maintained, I suppose, that the corporation, having

become indebted, would not be authorized, the same as other corporations, to appropriate its property to pay its debts; or, that being sued, and judgment passing against it, its property could not be reached, and, if necessary, sold or otherwise judicially appropriated to the satisfaction of the judgment. If thus sold, the purchaser, as in case of the sale under mortgage, would take a title subject to all the conditions of the constituent statute of the corporation, and all the duties and liabilities of the corporation to the United States, not of a nature to be destroyed by the sale or transfer.

Judge Shepley has recently decided that the words of the bankrupt act, "all moneyed, business, or commercial corporations," include railroad corporations, which are consequently liable to be adjudicated bankrupts thereunder. Adams v. Boston, H. & E. R. Co. [Case No. 47]. He also held, following Hall v. Sullivan R. Co. [Id. 5,948], that under the bankrupt act, certain franchises, but not the franchise to be a corporation, were alienable in their nature, and were subject to sale and to transfer at the instance of creditors; but "the purchaser," he says, "must take his title subject to all the conditions of the original grant, and subject to all duties and liabilities to the state," &c. If this view of the bankrupt law is correct, I see no reason why the act would not include the Pacific Railroad corporation as well as others. The franchise to be a corporation is one thing, and the franchise of carrying on its business and taking tolls is another. The one cannot be aliened without a clear provision of law to that effect, while the other franchises are alienable in their nature. This distinction is plainly drawn by Mr. Justice Curtis in his elaborate opinion in Hall v. Sullivan R. Co., first published in Pierce, R. R. p. 520, note, and since reported [Case No. 5,948]. This eminent jurist says: "The franchise to be a corporation is therefore not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes by which such sale and transfer may be effected. But the franchise to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable."

The purpose of these illustrations, and their bearing on the question under consideration, are manifest. In its nature a tax is a debt or liability, though of a peculiar character, and whose enforcement, for reasons of expediency, is usually provided for by a summary sale of property, though it might in all cases, and sometimes is directed, or allowed to be enforced, by an ordinary action.

Congress had the power to create this corporation; it had the power to make its grants conditioned upon the performance by the corporation of certain duties; the power to reserve legislative control over it, as it did, and these and other provisions of the act intended to secure to the government the use of the road for postal, military, and other public purposes, are not abrogated or abridged by the subsequent admission of Nebraska into the Union as a state, and these rights are inalienable in their nature without the consent of congress, and not destructible by any act of the company. The property of the company and the right to operate the road may be sold or transferred, under the mortgage, or otherwise, or, it may be, under a sale for taxes, but the purchaser in either case will take his rights, subject to the fundamental conditions on which the corporation exists, and subject to its public duties and liabilities to the government. The state cannot tax this corporation out of existence. It cannot sell or destroy its franchise (derived from congress) to be a corporation. The public duties which it owes to the government it will owe into whosesoever hands its other subordinate and assignable franchises or property may pass. So far as the rights of the government are those of a mere creditor, it may be true that it would be affected by a sale, the same as any other creditor with like rights, but this is an inquiry into which it is not necessary now to enter.

I conclude this discussion by stating that it results from the foregoing views:

1. That the Union Pacific Railroad Company is not an instrument of the government in such a sense as exempts it, by implication, from the taxing power of the state through which its road may be located.

2. If it be in any sense a federal instrumentality, the rights of the government, under the incorporating act, are fully protected and reserved, and any rights derived from a sale for taxes, under state authority, are entirely subordinate to the original, paramount, and indefeasible rights of the general government; cannot destroy the corporation nor incapacitate it from discharging any of its inalienable, fundamental, and organic duties to the government. If so, then the case falls without the principle on which the corporation relies to sustain its application for an injunction.

I think I can discover, in the more recent judgments of the supreme court, evidences of a conviction on the part of the judges that the doctrine of implied exemption of federal agencies from state taxation has been carried quite to its limit, and that it will not be pressed to embrace a case of the character of the one now under consideration.

II. It is next claimed by the company that there is no authority in Lincoln county to tax any portion of the road situate beyond its limits. But in my judgment, the act of the 15th day of February, 1869 (Laws Neb. 1869, p. 249), is sufficient to authorize the action of the county in taxing the road-bed situate west of it. This act, in terms, attaches the county of Cheyenne and the unorganized territory to Lincoln county "for judicial and revenue pur-

poses," and is to be construed in connection with the revenue act, enacted at the same time. Thus, to the word "county," as occurring in the general revenue act (section 17) is to be annexed by construction as respects the county of Lincoln, the words "and attached territory." The same language which annexes it for revenue purposes is that adopted in this and other acts of the state for annexing unorganized territory to organized counties for judicial purposes. It has always been regarded as sufficient for the latter purpose, and, if so, it is equally so for the former, and great mischief would undoubtedly flow from any new view on this subject.

III. The only remaining ground for the injunction is, that conceding the road is taxable, and that the county of Lincoln has authority to tax all the road west of it to the state line, there are, in fact, only one hundred and seventy-six miles of road, while the county has assessed and is seeking to collect a tax upon two hundred and forty-six miles—seventy miles more than have any existence. The difference in the tax is over $12,000, and if the company is right that these seventy miles have no existence, it would strike the mind as unconscionable for the authorities of the state to insist upon availing themselves of the mistake by which this amount was erroneously assessed. But whether equity can relieve I prefer to determine when the precise facts are ascertained; and meantime as to this, I will order the injunction to be continued in force; but in other respects it will stand dissolved. Ordered accordingly.

Railroad companies are not exempt from taxation by reason of the government owning interests in the companies.

[On appeal to the supreme court, the judgment of this court was affirmed. 18 Wall. (85 U. S.) 5. See, also, Cases Nos. 14,379 and 14,380.]

Case No. 14,379.

UNION PAC. R. CO. v. LINCOLN COUNTY.

[2 Dill. 279.] [1]

Circuit Court, D. Nebraska. 1872.

TAXATION—ILLEGAL TAXES—WHEN EQUITY WILL INTERFERE—INJUNCTION.

1. An injunction to restrain the sale of property assessed as omitted property refused, it appearing that the property was taxable, and that if the taxes were paid, the complainant would pay no more than its share of the public burdens.

2. A sale of personal property for an illegal tax will not be enjoined—there being an adequate remedy at law; following Dows v. Chicago, 10 Wall. [77 U. S.] 108.

[Cited in Trask v. Maguire, Case No. 14,145; Dixwell v. Jones, Id. 3,937.]

3. The federal courts will exercise great caution in interfering with the collection of revenues by the states, or their municipal or public agencies.

Bill for an injunction to restrain the sale of three locomotives, seized by the county treasurer to pay certain taxes assessed against the complainant, amounting to about $20,000. In 1870, owing to the inaccurate return of the complainant of the number of miles of its road lying in Lincoln county, and west to the state line, the assessment made was upon seventy-two miles less of road than the actual amount. In other words, all of the road bed of the complainant, in the unorganized territory west of Lincoln county, and east of Cheyenne county, was omitted. The taxes upon the amount or length of road originally assessed have been paid by the complainant. On the 25th of October, 1871, acting under the authority conferred, or supposed to be conferred, by section 48 of the revenue act of the state, of 1869, the county treasurer reported to the county clerk that seventy-two miles of railroad had been omitted from the tax list of 1870, and thereupon the county clerk entered the same as omitted property upon the tax list or assessment roll in the hands of the treasurer, and the same was assessed at $16,000 per mile, the same rate that the rest of the railroad had been assessed at, and the levy of taxes for 1870 was carried out at the same rate per cent as the other taxes. Not being paid, the treasurer of the county seized three locomotives of the complainant, on the 1st day of November, 1871, and has advertised them for sale. To restrain this sale on the ground that the said tax is illegal and void, an injunction is asked, which, on the hearing, is prayed to be made perpetual.

Poppleton & Wakeley, for complainant.

Geo. W. Doane, for defendant.

Before DILLON, Circuit Judge, and DUNDY, District Judge.

DILLON, Circuit Judge. The omitted seventy-two miles was taxable property, and there is no doubt that the complainant was liable to pay taxes on the same. Union Pac. R. Co. v. Lincoln County [Case No. 14,378]. The omission to have it put upon the tax list at the regular time, was probably occasioned by the act of the complainant's own officer in making the erroneous return to the auditor. If the tax in question is paid, the complainant pays no more than its proportion of the public burdens, and the county collects nothing but what, under the law (had it been complied with by the complainant's officers and the public officers), it is entitled to. This bill is in equity, and, as no unjust burden is sought to be imposed upon the complainant, the very groundwork of equitable interference fails. Courts of equity, and particularly the federal courts, sitting in equity in the states, will exercise great caution in interfering with the collection of revenues by the states, or their public or municipal agencies. There must be a plain case of injury, and a plain case of equitable jurisdiction and want of adequate remedy at law to justify the chancellor in ar-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

resting, by injunction, the ordinary processes of collection under the revenue laws. Dows v. Chicago, 11 Wall. [78 U. S.] 108. Section 48 of the revenue law of the state authorizes the county treasurer (the collecting officer) to report to the county clerk any land or other property omitted from the tax list, and authorizes the clerk to enter such omitted property upon the assessment roll, to assess its value, and the treasurer to enter it upon his tax list, and to collect the tax as in other cases. This course was pursued in the present instance.

The injunction in this case must be refused on another ground. The property levied upon and advertised to be sold by the county treasurer (to restrain which the injunction is sought), is personal property—so declared by the statute; and assuming (but not deciding), that the action of the county officers, on the 25th day of October, 1871, in assessing, under section 48 of the revenue law, the omitted property, was unauthorized, and assuming that the tax (if valid) is not yet due, still the complainant's case falls within Dows v. Chicago, above cited, and he does not show that there is not an adequate remedy at law.

Injunction refused.

See Cases Nos. 14,378 and 14,380. As to equitable jurisdiction to restrain collection of taxes, see Atlantic & P. R. Co. v. Cleino [Case No. 631], and note.

Case No. 14,380.

UNION PAC. R. CO. v. LINCOLN COUNTY.

[3 Dill. 300;[1] 1 Cent. Law J. 106.]

Circuit Court, D. Nebraska. Nov. Term, 1873.

COUNTIES—ISSUE OF BONDS—INJUNCTION TO RESTRAIN.

1. Upon proper application the issue of negotiable bonds by a public corporation will be enjoined, when the statute authorizing their issue only upon certain terms has not been complied with in matters of substance.

[Cited in Osborn v. Board Co. Com'rs of Adams Co., 7 Fed. 445.]

2. An act of the legislature of Nebraska in respect to the issue of such bonds, construed, and it is held, where the statute required such bonds to be paid in ten years, that a vote authorizing bonds to run twenty years was such a material departure from the statute that the court would enjoin the issue of the bonds.

This is a bill by the Union Pacific Railroad Company, as a large property owner and tax-payer in the county of Lincoln, in behalf of itself and other tax-payers similarly situated, to restrain the proposed issue of $30,000 of the bonds of the county, to borrow money to aid in erecting public buildings therein. The county commissioners ordered an election to be held at the different voting precincts in the county, on the 25th day of May, 1873, to vote on the proposition to issue $30,000 in the bonds of the county to bear ten per cent interest and maturing in twenty years, and also to levy annually a tax sufficient to pay the interest of said bonds and the principal at maturity, for the purpose of building a court house and jail. The proposition carried, and the bill is brought to restrain the issue of the bonds. The bonds proposed to be issued are negotiable in form, with interest coupons attached, for $500 each, payable August 1st, 1892, or at the option of the county, at any time after 1880. Each bond contains a recital that it is authorized by sections 19 and 26, and section 28 of chapter 9, of the Revised Statutes of the state, in pursuance of the vote of the 25th day of May, 1873.

O. P. Mason and T. F. Gantt, for the county.

A. J. Poppleton, E. Wakely, and John D. Howe, for plaintiff.

Before DILLON, Circuit Judge, and DUNDY, District Judge.

DILLON, Circuit Judge. Upon consideration we hold:

1. That the act of the legislature of the state of Nebraska, of February 15, 1869, and the amendatory act of March 3, 1870, which authorize "any county or city to issue bonds to aid in the construction of any railroad, or other work of internal improvement," have no application to the issue of bonds by a county for the erection of public buildings therein; and, therefore, the legality of the proposed issue of bonds by the county in the case at bar can derive no support from these enactments.

2. That the only authority for the issue of such bonds in this state is that which is recited in the bonds here proposed to be issued, viz. sections 19-28, c. 9, of the Revised Statutes of the state.

3. Section 19 gives the county commissioners "power to submit to the people of the county, at any regular special election, the question whether the county will borrow money to aid in the construction of public buildings." The mode of submitting is prescribed in section 21, and section 22 provides as follows: "When the question submitted involves the borrowing of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof in addition to the usual taxes, and no vote adopting the question proposed shall be valid unless it likewise adopts the amount of tax to be levied to meet the liability incurred." "Sec. 23. The rate of tax levied shall in no case exceed three mills on the dollar on the county valuation in one year. When the object is to borrow money to aid in the erection of public buildings, the rate shall be such as to pay the debt in ten years."

It is our judgment that the legislative intention here is to require the debt created to borrow money to erect public buildings to be paid in ten years, and the requirement ex-

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pressly is that a rate of tax shall be voted and levied sufficient to pay the debt within that period. This provision is defeated if the county may vote to create a debt payable in twenty years, and to levy an annual tax during that period, and such was the proposition which was, in this instance, submitted to, and adopted by, the voters. If the tax is raised in ten years sufficient to pay the debt, the debt ought to be such an one as that the tax may be applied to its payment, for the tax is "specially appropriated and constituted a fund distinct from all others" for this purpose. A construction of this legislation is not admissible by which money to pay the debt may be raised years before the debt itself is payable.

As this is decisive against the right of the county commissioners to submit, or the people to adopt, the proposition for the issue of bonds to run twenty years, it is not necessary to notice the other grounds for the injunction presented in the bill. It may be that if these bonds were issued and in the hands of bona fide holders for value, they could be enforced against the county; but the issue of such bonds will be enjoined upon proper application, when the statute in matters of substance has not been complied with. An order will be entered denying the motion to dissolve the injunction heretofore allowed, and continuing the writ in force. Ordered accordingly.

NOTE. In the case of the same plaintiff, at the same term, to restrain Merrick county from issuing railway aid bonds, under the act of February 15, 1869, the court, on demurrer to the bill, held, under section 21 of the Revised Statutes of 1866, even where the notice of the question submitted to the voters of a county was published in a newspaper, that it was essential to the validity of the vote that "a copy of the question submitted should be posted up at the places of voting." In this case it was alleged that the notice was not thus posted at the place of voting, in a town, the vote in which controlled the result in favor of the proposition. See Union Pac. R. Co. v. Merrick [Case No. 14,383].

[See, also, Cases Nos. 14,378 and 14,379, for suits brought by same plaintiff against same defendant.]

Case No. 14,381.

UNION PAC. R. CO. v. McSHANE.

[5 Chi. Leg. News, 526; 21 Pittsb. Leg. J. 1.]
Circuit Court. D. Nebraska. 1873.

TAXATION—PUBLIC LANDS—GRANT TO RAILROAD—TAX SALES.

That the United States still retains a pecuniary interest in the lands granted to the Union Pacific Railroad Company, as well as the legal title to such lands, and that the contingent right of offering these lands to actual settlers at the minimum price asked for its lands by the government forbid the state to embarrass these rights by a sale for taxes, and that such lands are not liable to be taxed by the state.

DUNDY, District Judge. This is an action brought by the Union Pacific Railroad Company against Edward C. McShane, treasurer of Douglas county, and against the treasurers of several other counties containing lands belonging to said company, to restrain the collection of taxes levied on the said lands. The bill alleges that the lands described in the several exhibits, and on which the taxes are levied, were granted by the general government to the complainant company, to aid in the construction of the Union Pacific Railroad. That the complainant has procured the issuing of patents to certain of the lands so described, known as those situate within the ten miles limit. That the general government yet retains the title to, and a pecuniary interest in, all that portion of the lands so described, situate without the ten miles limit, and within what is known as the twenty miles limit, and that the complainant is equitably entitled to receive from the government patents for said land, on the payment of the usual land office fees and the cost of surveying the same, as provided by law. That at no time to the present date has the complainant been required to select the lands, nor to pay the fees and cost of the survey as aforesaid, and that the levying of the taxes upon the lands in question was without lawful authority. The matter and facts stated in the bill are at this time uncontroverted, and must be received as absolute verity. What questions may be presented after the filing of an answer and the taking of the testimony, it is neither necessary nor proper now and here to discuss. There does not seem to be any question about the manner in which the lands were assessed, nor about the levying of the taxes, or the method of proceeding to enforce the collection of the same. I do not understand the counsel to question the regularity or correctness of these proceedings so far as formality is concerned. So far as appears by the bill and by statements of counsel, we can safely infer that the revenue laws of the state have been literally complied with by the officers whose duty it is to enforce them. But it is the right to tax the lands for any purpose and under any circumstances whatever, by state authority that is challenged and expressly denied by the complainant. Stripped of all unnecessary surroundings, it is enough to say that if the naked right to tax these lands by state authority exists at all, it is decisive of this whole controversy, and the prayer of the bill would, for that reason, be refused.

The third section of the act of congress of July 1, 1862 [12 Stat. 492], entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes," and the fourth section of the amendatory act of the 2d of July, 1864 [13 Stat. 358], both of which must be taken and construed together, appropriates the alternate or odd-numbered sections of the public lands for a distance of twenty miles on each side of the railroad, for the purpose of aiding in the construction and completion

thereof. This grant, however, is not an absolute and unconditional one. Before the railroad company could acquire title to the lands it would be necessary to complete the railroad, or, at least, a section of it, in first-class style, as provided by the said acts of congress. After that the company would be required to make the selection of the lands to which it might be entitled, pay to the government the usual fees for entering and patenting, and the actual cost of surveying the same. When all these things were done, and not before, the company to be entitled to patents for the land. It is quite probable that some of these conditions have been complied with by the company, but it is absolutely certain that some of them have not, at least so far as relates to the land lying between the ten and twenty mile limit. When all the conditions precedent required of the company have been complied with, and the fact properly established, the company will be entitled to patents for the land last referred to. But the company has not yet done all that is required of it, and the result is, the United States still retains a pecuniary interest in the land, as well as the legal title to it. So long as that pecuniary interest exists, the right to enjoy it, and the remedy to protect and secure it, can not in any way be abridged or embarrassed by the action of individuals or of states. These rights and this pecuniary interest can alone be affected by the law-making power of the government; and until that power is exercised in such a manner as to secure to the state the right to tax the lands in which the government retains such an interest, it is useless to undertake to do so if such action would impair the value of the interest so retained by the government. If it were otherwise, and the right of the state to tax existed, such interest so retained in the public lands would, in many instances, be greatly impaired, if not wholly sacrificed. Few instances, if any, can be shown where this has been done or permitted, though instances are not wanting where the attempt to do so has not wholly failed. And since a decision recently made by the supreme court of the United States on a question precisely like this, arguments upon such questions in the inferior federal courts may as well be considered as closed. Would, then, the taxation of these lands, if permitted, in any way embarrass the government or impair the value of the interest retained in the lands? The right to tax the lands would necessarily carry with it the right to enforce the payment of the tax when an appropriate and adequate remedy should be provided by law. The usual remedy in such cases is by sale of the land when default is made in the payment. That is the remedy provided by law in this state for the payment of delinquent taxes on land. And when a proper revenue law is strictly complied with, and a sale of land for taxes takes place under it, the title of the purchaser becomes perfect. It is paramount to every other outstanding title, because of the fact that such title is derived from the sovereign power of the state. Were it otherwise, the whole proceedings, commencing with the assessment and ending with the recording of the treasurer's deed, would be a useless and idle ceremony, a cunningly-devised scheme concocted, I might say, to entrap, overreach and deceive the unwary. But I shall not be the first to ascribe any such injurious effect to our revenue laws, and if it is done at all, it must be done by a tribunal created by the constitution of this state, a thing which, I presume, we have at this time but little reason to apprehend. If these views be correct, then the right to tax carries with it and includes the right to sell the land for the non-payment of the tax, and the making of a perfect title to the land. This would impair and even totally destroy the interest retained in the land by the United States. This can not be done without overturning a long-established and well-settled principle, maintained by the government from its very foundation. It is claimed that the railroad is completed; that the company is entitled to patents for the land as soon as it shall elect to pay the land office fees and the cost of surveying, and that it ought to be compelled to receive patents for the same. But the bill alleges that the road is not completed as the law requires. This is probably correct, and, for this reason, the bill alleges, the government refuses to issue its patents for the land not already patented. The company is not bound to complete the road until the 1st day of July, 1876. And were the road now fully completed, there is no law or regulation of the interior department that would require the company to select the land, pay charges, etc., until it might suit the convenience of the company so to do. Certainly the company could not be required to do this before the time fixed by law for the completion of the road, and as that time has not yet arrived, it cannot be said that the company is yet in default. This may be a great misfortune to the people of the counties in which these lands lie, and to the people of the state generally. If so, it is the fault of the law-making power, by which alone the fault can be corrected and a remedy supplied. It follows from these views that the taxes levied upon the lands between the ten-mile limit and the twenty-mile limit are without authority of law. But there is another question raised by the argument of counsel for complainant, which strikes at the foundation of the alleged right of a state to tax any of the lands failing within the said grant.

This is nothing more nor less than a denial of the right of a state to provide for taxing any of the lands granted as aforesaid, until after they shall have been sold by the company. If the position assumed by counsel in this behalf be correct, then it necessarily disposes of the whole controversy growing out of the attempt to tax these

lands, and the efforts made to collect the taxes assessed thereon. This principle, if such it be, applies to the entire grant of lands made to the company, as well as the lands situated within, as without the ten miles limit. As the supreme court of the United States has recently spoken on this question, I shall content myself by adopting the language there used, more especially as I do not desire to add a single word to what was stated by that court. Most people would say without hesitation that when that high court speaks, the inferior federal courts ought to be silent. I fully recognize the propriety of this, and yield a ready obedience to what I regard a duty in the premises. In the case of Kansas Pac. R. Co. v. Prescott [16 Wall. (83 U. S.) 603], decided by the supreme court of the United States at its last term, the court says: "Another important and declared purpose of congress would be equally defeated by the title, thus acquired under the tax sale, if it were valid. It is wisely provided that these lands shall not be used by the company as a monopoly of indefinite duration. The policy of the government has been for years to encourage settlement on the public lands by the pioneers of emigration, and to this end it has passed many laws for their benefit. This policy not only favors the actual settler, but it is to the interest of those who, by purchase, own adjacent lands, that all of it should be open to settlement and cultivation. Looking to this policy, and to the very large quantity of lands granted by this statute to a single corporation, congress declared that if the company did not sell those lands within a time limited by the act they should then, without further action of the company, or of congress, be open to the actual settler under the same laws which govern the right of pre-emption on government lands, and at the same price. Any one who has ever lived in a community where large bodies of lands are withheld from use or occupation, or from sale except at exorbitant prices, will recognize the value of this provision. It is made for the public good, as well as for that of the actual settler. To permit these lands to pass under a title derived from the state for taxes would certainly defeat this intent of congress. It makes no difference in the force of the principle, that the money paid by the settler goes to the company. The lands which the act of congress declares shall be open to pre-emption and sale are withdrawn from pre-emption and sale by a tax title and possession under it, and it is no answer to say that the company which might have paid the taxes gets the price paid by the settler. For these reasons we think that though the line of the road had been built and approved by the president, so far as to authorize the company to obtain patent for this land, if they have paid the cost of survey and the expenses of making the conveyance, yet the neglect to do this and the contingent right of offering the land to actual settlers at the minimum price asked for its lands by the government, forbid the state to embarrass these rights by a sale for taxes."

I have carefully read and re-read the opinion of the supreme court in the case referred to, and I have diligently sought, but I have sought in vain, to find one single feature in this case that would distinguish it from the questions discussed and decided in the case before referred to. Believing as I do, that the supreme court has decided the identical question raised in this case, in language so plainly forcible that I could not possibly hope to equal it, it becomes my duty to yield a ready obedience, and not only to follow the law when so declared, but to see that it is duly enforced when a proper application is made therefor. Without questioning the correctness of the principles established in said case, I am forced to the conclusion that the complainant is entitled to the injunction prayed for in the bill. Injunction allowed until the first day of the next term of the court, and until a hearing of the case can be had. The complainant, however, to file with the clerk of the court, in the usual form, a bond in the sum of $25,000, before the issuing of the injunction—security to be approved by the clerk.

[The cause came up for a final hearing, and a decree was rendered making the injunction perpetual as to the lands not patented to the company, and dismissing the bill as to the others. Case No. 14,382. Cross appeals being taken to the supreme court, the decision of the circuit court was affirmed. 22 Wall. (89 U. S.) 444.]

Case No. 14,382.

UNION PAC. R. CO. v. McSHANE.

[3 Dill. 303.] [1]

Circuit Court, D. Nebraska. July, 1874.[2]

TAXATION—RAILROAD LAND GRANT—PLEADING IN EQUITY—MULTIFARIOUSNESS—INADEQUATE REMEDY AT LAW.

1. Lands for which a patent has issued to the Union Pacific Railroad Company are taxable by the authorities of the state of Nebraska, notwithstanding the proviso in section 3 of the act of July 1, 1862 (12 Stat. 489), which subjects lands not sold or disposed of by the company within three years from the completion of the road to settlement and pre-emption at $1.25 per acre. Case in judgment distinguished from Kansas Pac. R. Co. v. Prescott, 16 Wall. [83 U. S.] 603.

[Cited in Hunnewell v. Burlington & M. R. R. Co., Case No. 6,879.]

2. Said proviso construed and the respective rights of the company and persons proposing to settle on and pre-empt the lands of the company stated.

3. A bill by the railroad company joining as defendants the various counties through which this railroad runs, is not multifarious where the question on which the case turns is common to all, and the counties are agencies of the state as to that part of the taxes which they must pay into the state treasury.

[Cited in Northern Pac. R. Co. v. Walker, 47 Fed. 682.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 22 Wall. (89 U. S.) 444.]

4. Where in addition to the illegality of the tax, the bill shows that if not enjoined a multiplicity of suits will arise; and a cloud be cast upon the owner's title, and that he has no adequate remedy at law, it presents a case of equity cognizance.

This is a suit brought by complainant to restrain the several county treasurers, in which the lands granted by the United States, in aid of the construction of its railroad, by the acts of congress July 1, 1862, and July 2, 1864 (12 Stat. 489; 13 Stat. 356), are situated, from advertising and selling the same in satisfaction of state, county, and school taxes, levied thereon for the year 1872, and becoming due and delinquent May 1, 1873. The bill alleges in substance the incorporation of the company, its acceptance of the acts of incorporation, the fixing the eastern terminus, the approval of the route, and the construction and operation of the road to its western terminus, and the examination and acceptance by commissioners appointed by the president; that, thereafter, suggestions having been made that the road was not built in full compliance with the law, under authority of a joint resolution of congress of April 10, 1869, the secretary of the interior appointed a commission consisting of five eminent citizens of the United States, to examine and report whether the road was completed in all respects as required by law; that said commission made such examination, and on the 30th of October, 1869, reported that a further expenditure of $1,586,100 would be necessary for that purpose, and that thereupon the secretary of the interior suspended the issue of patents to granted lands; that the whole of said work has not been accepted by the government, as completed; and that the company is the owner of the lands derived from the grant contained in the acts of congress aforesaid, situated in the several counties and described in the several schedules to the bill, having never disposed of the same by way of mortgages. The bill also alleges the assessment and levy, by the proper authorities, of state, county, school and other taxes in the respective counties, in amount $104,180.51, and that the several treasurers of the several counties are proceeding, under warrants issued for that purpose, to advertise and sell said lands in satisfaction of said taxes (as well as by seizure of the cars, locomotives, and trains of complainant); that such sale and seizure will result in a multiplicity of suits and irreparable injury, for which no adequate legal remedy exists; and that the value of the lands situated in each county exceeds the sum of $500. No question is made upon the regularity of the proceedings in assessing, levying, or enforcing the tax. The bill further alleges that all lands situated within the ten miles limit have been selected and listed and certified to the company by the commissioner of the general land office, and the land office fees required upon the entry thereof, paid by the company; but that the cost of surveying the same has not been paid; that the lands situated outside the ten miles limit have neither been selected nor certified to, nor the land office or surveying fees paid by the company; that the amount of such taxes so sought to be collected, which are levied for state purposes, and will be paid to the state, if collected, is $17,711.17. It is thereupon claimed that, under the provisions of section 3, Act July 1, 1862, and section 21, Act July 2, 1864, the lands are not subject to state taxation, and injunction is invoked to restrain the treasurers from proceeding to collect. A temporary injunction being granted, at the November (1873) term [Case No. 14,381] the case was heard upon general demurrer and the demurrer overruled.

The answer, filed January 5, 1874, admits most of the allegations of the bill, but denies that the secretary of the interior has suspended the issue of all patents, and alleges the issue of patents to certain of the lands in controversy; alleges the making of a mortgage by the company of said lands, in 1867, claiming that such mortgage is a disposal thereof, within the meaning of section 3, act of July 1, 1862; denies that land office and surveying fees have not been paid as alleged in the bill; denies that the road was not accepted, as completed, by the United States in 1869, and insists that the question of exemption of said lands from taxation is not common, and the same in respect to each and all the said defendants as alleged in the bill, and that the bill is therefore multifarious. The answer also alleges that the lands in controversy had been surveyed in 1869; that since 1865 the complainant has exercised ownership over the same by advertising and offering the same for sale, and that they are treated by the government as private property. Replication being filed and proofs taken, the case now comes on for final hearing. As to the status of the lands, the evidence taken by the defendant shows (nor is it denied by the complainant) that, at the date of the assessment and levy of the tax in question, the lands in controversy had been surveyed, appraised, offered for sale, and mortgaged. It also appears from the proofs that of the lands situated within the ten miles limit, every alternate odd section to which the company claimed to be entitled had been patented previous to the assessment and levy of the tax; and that the residue of the grants within like limits was unpatented, and that the costs of surveying had not been paid on any lands situated within the ten miles limit, whether patented or unpatented, because not required by the interior department. In respect to the lands situated between the ten and twenty miles limits, it appears from the proofs that they had all been selected, listed, certified, and the land office fees and cost of surveying paid, and every alternate odd section of those claimed by the company patented—the resi-

due being unpatented. Upon the report of the committee of "eminent citizens" under the joint resolution of April 10th, 1869, that $1,586,000 be required for supplying deficiencies in the road, Mr. Cox, the secretary of the interior, November 3d, 1869, to indemnify the government, ordered that only one-half the lands to which the company would otherwise be entitled should be patented, and the patents for the rest be suspended until further directions from the department. He directed patents to issue beginning at Omaha and working westward for the odd numbered sections 1, 5, 9, etc., and that patents for sections 3, 7, etc., be not issued until further orders. In February, 1871, a patent issued to the company under this order for about 640,000 acres of land, the department refusing to issue a patent for the other half. In February, 1874, Mr. Delano, then secretary of the interior, refused to rescind the order of his predecessor, and so patents for one-half of the company's land are still withheld as security for the completion of its road, and matters reported deficient or not up to the required standard.

A. J. Poppleton and E. Wakely, for plaintiff.

Clinton Briggs, J. C. Cowin, and others, for defendants.

DILLON, Circuit Judge. The railroad company claims that the lands upon which the state authorities have levied taxes for the year 1872, are not subject to taxation for two reasons: one based upon a provision in section 3 of the act of July 1st, 1862, and the other of July 2d, 1864. These will be noticed in their order.

Section 3 of the act of 1862, is the one which makes the grant of land to the company within a specified distance of its line of road, and it concludes with this provision: "And all such lands so granted by this section, which shall not be sold or disposed of by the company within three years after the entire road shall be completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding $1.25 per acre, to be paid to the company."

Section 4 directs patents to issue for lands on each side of the road from time to time on the completion of sections of forty (afterwards reduced to twenty) consecutive miles, which patents it is enacted shall "convey the right and title to said lands to said company."

Section 21 of the amendatory act of 1864 provides "that before any land granted shall be conveyed to the company * * there shall first be paid into the treasury of the United States, the cost of surveying, selecting, and conveying the same," etc.

From the bill and the proofs, it appears that the work of constructing the road was commenced in 1865, that the road was completed and accepted from time to time in sections of forty and twenty miles, and that the entire road was completed by May 10th, 1869, and has since that time been in constant use and operation.

In 1867 the company "for the purpose of raising money to aid in the construction of its railroad," mortgaged its land grant to secure the payment of bonds for about ten millions of dollars. This mortgage is still in full force.

Upon this legislation and upon this state of facts, the first ground taken by the company upon which it insists that the state of Nebraska has no right to tax any of its lands, whether patented or not patented, is, that by the provision in section three above mentioned, these lands are "subject to settlement and pre-emption like other public lands, at a price not exceeding $1.25 per acre, to be paid to the company." In support of this proposition the counsel for the company rely upon the case of Kansas Pac. R. Co. v. Prescott, 16 Wall. [83 U. S.] 603.

I confess to some difficulty in distinguishing that case from the one now before the court; but upon the best consideration I have been able to give to the subject, I am of opinion that that case does not control this one, so far at least as regards the lands to which this company holds the patent of the United States.

There are two elements in that case which, in material respects, distinguish it from the present one so far as the plaintiff company has received a patent for its lands; the first is, that in that case the taxes were assessed before any patent had been issued; and the second is, that they were assessed at a time when by reason of the non-payment of the costs of surveying, etc., required by section twenty-one of the act of 1864, the company was not entitled to a patent.

If, in that case, the cost of surveying the land had been paid, and a patent for the land there in question had actually been issued before the taxes were assessed, it would seem that a different result would or might have been reached.

It is not my purpose to discuss at length the respective rights of the general government and of the railroad company in the lands, after the lapse of three years from the completion of the road, nor whether a mortgage of the lands is such a "disposition" of them as would defeat the right of settlement or pre-emption. The proofs show that the company has dealt with these lands, and is now dealing with them as if they were in all respects their absolute property. They are advertising and selling them at their own prices and upon their own terms, and they do not recognize the rights of the public to settle upon and pre-empt them, and to buy them at $1.25 per acre. On the other hand, neither congress nor the interior department has taken any steps to subject these lands to settlement and pre-

emption, and the public are denied the right to the benefit of the privilege or reservation in their favor.

I am inclined to consider the true meaning and effect of the provision in question to be this: While the road is being constructed and for a period of three years after the completion of the entire line, the company may sell or dispose of the lands at their own price, and they are subject during this period to no right of settlement or pre-emption; after three years have elapsed, the company may still sell or dispose of their lands in good faith, but as to any lands not thus sold or disposed of, there is a right on the part of the public to settle upon and pre-empt them in the same manner as if they were part of the public domain—the price not exceeding $1.25 per acre, being payable to the company instead of the government.

This view harmonizes and gives effect to all the different provisions of the act. The right of the company to the lands granted is a substantial one. The title passes to the company. Patents are required to be issued to the company conveying the "right and title to the lands" During the three years the right of the company to sell at its own price is clear, and has not been denied. After the three years the title does not change. The company still owns the lands, but "subject" to the right of any person possessing the qualifications of a pre-emptor, to settle upon them and obtain them as a pre-emptor may obtain other public lands. But this right does not prevent the company from selling lands in good faith to persons who may not wish to pre-empt or occupy them. The rights intended to be given to the public are secured and the evils apprehended from the company having a monopoly of such a vast amount of lands, are avoided by this construction—which recognizes the right of the actual settler to pre-empt the lands, and thus destroy the monopoly, and also the right of the company actually and in good faith, to sell any tract not at the time pre-empted, and which, if sold, likewise destroys to that extent the monopoly, since a sale of lands is usually the first step towards their settlement and cultivation.

If this be a correct view of section three of the act of 1862, it results that the lands of the company so far as they are patented, are subject to taxation by the authority of the state, and this privilege reserved in favor of the actual settler, and of which he may never wish to avail himself, which is contingent in its nature and subject to be defeated by a sale of the lands by the company, is not inconsistent with and will not defeat the rightful authority of the state to tax the lands.

As to the lands which have been patented to the company, I am of the opinion that it is the substantial owner, and that equity should not relieve it from taxation in respect thereto, because it may be compelled to sell particular tracts here and there to actual settlers at $1.25 an acre.

The other ground of exemption, in view of the decision in the Prescott Case, may be disposed of briefly. Upon the proofs in this case, which on some points are indefinite, I am of opinion that lands which have not been patented, either because the costs of surveying required by section twenty-one of the act of 1864 have not been paid, or because patents have been withheld by the interior department as indemnity to make good the deficiencies in the construction of the road, are not taxable, and to this extent the injunction will be continued in force. But as to all lands which have actually been patented to the company the injunction will be dissolved. It is true that as respects patented lands within the ten miles limit, Mr. Davis, the land agent of the company, states that the surveying fees have not been paid, but he also states that the reason why they were not paid was that the interior department did not require it.

It does not appear that there are any lands not patented which have been fully earned and set apart to the company upon which all fees have been paid, and for which the patents are not retained by the government for its own security, and therefore for all practical purposes. I hold that the lands in this case may, upon the proofs before the court, be divided into two classes: 1st, those which are taxable; 2d, those which have not been patented and which are not shown to be taxable.

Without stating at length the reasons for the view, my opinion is that the bill is not multifarious by reason of the joinder of the various counties through which the road runs, as the question on which the case turns is common to all, and the counties are in fact the agencies of the state as to that part of the taxes which they must pay into the state treasury.

I am also of the opinion that the bill presents a case of equitable cognizance so far as the tax sought to be enjoined is illegal, because of the multiplicity of suits which the sale of many hundred separate tracts of land would engender; because of the cloud which, under the legislation of Nebraska, would be cast upon the title of the lands by a tax sale and deed; because so far as the taxes going to the state are concerned, there is no remedy at law to recover them back (First Nat. Bank of Omaha v. Douglas Co. [Case No. 4,809], May term, 1873, decided by Mr. Justice Miller); and because the threatened seizure of the trains of the company in a new and remote region, causing delay and injury, should not be permitted in order to enforce an illegal tax. Let a decree be drawn dismissing the bill as to all lands embraced in the company's patent of February 23, 1871, and making the injunc-

tion perpetual as to the lands which have not been patented to the company. Decree accordingly.

NOTE. The decree in the foregoing case was rendered in July, 1874, and cross-appeals taken. By reason of its character and importance the case was advanced by the supreme court and a decree rendered January, 1875, affirming the decree of the circuit court both as to the patented lands and the lands not patented. [22 Wall. (89 U. S.) 444.] The following propositions as stated by Mr. Justice Miller, were ruled by the supreme court:

1. Kansas Pac. R. Co. v. Prescott, 16 Wall. [83 U. S.] 603, modified and overruled so far as it asserts the contingent right of pre-emption in lands granted to the Pacific Railroad Company to constitute an exemption of those lands from state taxation.

2. But affirmed so far as it holds that lands on which the costs of survey have not been paid, and for which the United States have not issued a patent to the company, are exempt from state taxation.

3. But where the government has issued the patent the lands are taxable, whether payment of those costs have been made to the United States or not.

UNION PAC. R. CO. (MAGEE v.). See Case No. 8,945.

Case No. 14,383.

UNION PAC. R. CO. v. MERRICK COUNTY.

[3 Dill. 359; [1] 6 Chi. Leg. News, 342.]

Circuit Court, D. Nebraska. May Term, 1874.

RAILROAD COMPANIES—COUNTY AID—STATUTE CONSTRUED—CONDITIONS ANNEXED.

1. The issue of bonds by a county to a railroad company will not be restrained where the requirements of the statute authorizing the issue have been complied with.

2. A vote by a county to issue bonds to a given railroad company whose line runs to the county seat is not rendered invalid by a condition that a depot of the company shall be located within a specified distance of the county seat, nor by a condition that the railroad bridge over a large stream in the county shall be so constructed that it may be used as a free wagon bridge.

This is a bill in equity to restrain the county authorities of Merrick county from issuing certain bonds voted to the Midland Pacific Railway Company. The statute of Nebraska provides "that any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county commissioners of such county, or the city council of such city, not exceeding ten per cent of the assessed valuation of all taxable property in said county, or city: Provided, the county commissioners or city council shall first submit the question of issuing such bonds to a vote of the legal voters of said county or city, in the manner prescribed by the statute." At a session of the board of county commissioners of Merrick county, held at Lone Tree, upon the 25th day of July, 1873, it was by said board resolved that the following proposition be submitted to the electors of Merrick county, to wit: "Shall the county commissioners of Merrick county aforesaid, for the purpose of aiding in the construction, extension and completion of the Midland Pacific Railway from the city of Lincoln, in the county of Lancaster in said state, to the town of Lone Tree in said Merrick county, issue the bonds of said county in the sum of one hundred and twenty-five thousand dollars ($125,000), payable to the Midland Pacific Railway Company, or bearer, to be dated the first day of January, A. D. 1875, and payable in twenty years from the date thereof, with interest thereon at the rate of ten per cent per annum from and after the date thereof, payable annually on coupons thereto attached. The principal and interest of said bonds to be paid in the city of New York, said bonds to be deposited with some national bank selected by the county commissioners of said county and the said Midland Pacific Railway Company, jointly. Said bonds for $125,000 to be delivered by the national bank selected as aforesaid to said Midland Pacific Railroad Company, or order, when the said railway shall have been completed from Lincoln, aforesaid, to Lone Tree aforesaid, and shall have regular trains running thereon for business; provided, said railway shall have been completed and have through trains running regularly thereon, from Lincoln aforesaid, to Lone Tree, aforesaid, on or before the 1st day of January, 1875; and, provided, also, the depot of said railway shall be located within one fourth of a mile of the court house of said county; and, provided, further, that said railroad company shall cross Prairie Island with their road, and shall plank their bridge at least eighteen feet in width from the north bank of said Prairie Island to the north bank of Platte river for a wagon bridge, and shall open the same free for a public highway, and shall enter into a good and sufficient contract to keep and maintain said bridge as aforesaid for a highway for ten years from January, 1st, 1875; and the county commissioners aforesaid shall cause to be levied annually, in addition to the other taxes, an amount of tax sufficient to pay the interest, and after the year 1883 an amount of tax sufficient to pay the principal thereof, provided, such tax so to be levied shall not exceed the amount authorized by law to aid the construction of works of internal improvement in said state of Nebraska, etc., etc."

A. J. Poppleton and E. Wakely, for plaintiff.

M. H. Sessions, for defendants.

DILLON, Circuit Judge. This is a bill by the Union Pacific Railroad Company, as the

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

owner of a very considerable portion of the taxable property within the county of Merrick, to restrain the county commissioners of that county from issuing $125,000 of the bonds of the county to the Midland Pacific Railway Company pursuant to a vote of the people of the county, at an election held on the 30th day of August, 1873. The cause is before the court on final hearing upon the pleadings and proofs.

The counsel for the plaintiff relies mainly upon two grounds for the relief sought. These will be briefly noticed.

The first is that no copy of the question submitted to the voters of the county was posted up at the place of voting during the day of election in Lone Tree precinct, the town of Lone Tree being the county seat, and that precinct giving in favor of the proposition a larger vote than the majority for the proposition throughout the county, thus controlling the result. We held on demurrer to the bill that the law of Nebraska made it essential to the regularity of the vote that "a copy of the question submitted should be posted up at the places of voting;" but the proofs quite satisfactorily show that the law was complied with in this respect. It is conceded that a copy of the question was posted on the front door of the court house building (in one of the rooms in which the election was held), and was the usual place for posting official and legal notices; and the evidence also tends very strongly to show that another notice was posted on the door of the very room (the sheriff's office) in the court house in which the election was held. This ground of relief, therefore, falls upon the proofs.

The next ground relied on by the complainant is that "the proposition or question submitted involved three distinct subjects to be passed on, and consequently the submission was illegal. First, the construction of the railroad to Lone Tree. Second, the establishment of the depot at a particular place. Third, the construction of a wagon bridge over the Platte river." In support of this position, counsel rely upon Lewis v. Commissioners of Bourbon Co. (decided by the supreme court of Kansas, 1873) 12 Kan. 186, and upon Board of Sup'rs of Fulton Co. v. Mississippi & W. R. Co., 21 Ill. 338; People v. Tazewell Co., 22 Ill. 147; Clarke v. Board of Sup'rs of Hancock Co., 27 Ill. 310; and McMillan v. Lee Co., 3 Iowa, 311.

Without examining or questioning these cases, our opinion is that the present case does not fall within the principle they assert. There were not three distinct propositions submitted or three separate projects sought to be aided. On the contrary, only one propostion was submitted, viz.: to vote aid to the extent of $125,000 to the Midland Pacific Railway Company; but this aid was to be upon condition that the depot of the company should be located within one-fourth mile of the court house of the county, and upon the further condition that the company would so construct its railroad bridge over the Platte river, that it might be used as a wagon bridge, and would agree that it might be so used for ten years, and to that end would keep it in repair during that period.

These conditions are reasonable in themselves, and such as the county authorities might, in their judgment, require. They are conditions obviously in the interest of the county, and if the vote would have been valid without them, we cannot see why they render it illegal. Pacific R. Co. v. Leavenworth [Case No. 10,649]; Northern Cent. R. Co. v. Mayor, etc., of Baltimore, 21 Md. 93; Phillips v. Town of Albany, 28 Wis. 340; Lawson v. Milwaukee & N. R. Co., 30 Wis. 597; Rhey v. Railroad Co., 27 Pa. St. 261; Id. 318.

The law of the state on the subject of voting aid to railways has been sustained by the supreme court of the United States as valid in the Otoe County Case. We may doubt the wisdom of the enactment, but being valid we have no right to overthrow it; and as the law in the case before us seems to have been complied with in all essential particulars, we see no ground on which we would be justified in restraining the issue of the bonds which a majority of the people of the county have voted. Bill dismissed.

See Union Pac. R. Co. v. Lincoln Co. [Case No. 14,380], as to restraining the issue of bonds by public corporations.

Case No. 14,384.

UNION PAC. R. CO. v. POTTAWATTAMIE COUNTY.

[4 Dill. 497.] [1]

Circuit Court, D. Iowa. May Term, 1877.

TAXATION—BRIDGE—RAILROAD COMPANIES.

Under the revenue laws of Iowa (Code 1873, §§ 808, 810), that portion of the bridge of the Union Pacific Railroad Company over the Missouri river, between Council Bluffs, Iowa, and Omaha, Nebraska, which lies within the limits of Iowa, may be taxed as a bridge, and not necessarily as a part of the road of the company; and this mode of taxation is not inconsistent with the decision of the supreme court in Union Pac. R. Co. v. Hall, 91 U. S. 343.

This suit is brought to restrain the collection of the state, county, and school taxes levied in Iowa for the year 1875 on that portion of the property of the Union Pacific Railroad Company commonly known as its "Missouri River Bridge." The city assessor of the city of Council Bluffs, in the year 1875, assuming that that portion of the Union Pacific Railroad extending over the Missouri river into the state of Iowa constituted a portion of a railway bridge across said river, proceeded to assess it under the provisions of sections 808 and 810 of the Code of 1873,

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

as follows, viz.: "The east one-half of the Union Pacific Railroad bridge across the Missouri river, valued at $350,000, and a strip of land two hundred feet wide, commencing at the west line of section 34, in township 15, and range 44, and running on or near the middle of sections 34 and 33 to the Missouri river, inclosing and including the approaches thereto, valued at $50,000." Afterward, said assessment, at the instance of the complainant, was modified by the board of equalization to the following: "The east one-half of the Union Pacific Railroad bridge across the Missouri river, valued at $350,000." It will thus be seen that the assessment was made by the local assessor, and modified by the board of supervisors sitting as a county board of equalization, neither of which, the complainant claims, had any jurisdiction to assess said property.

The amount and denomination of tax levied by the board of supervisors upon such valuation and assessment are as follows:

State	$ 735 68
County	1,471 36
School	367 84
Court-house	651 76
Bonds	735 68
Bonds, Mississippi and Missouri	367 84
Insane	91 96
Poor	367 84
Judgment	91 96
Independent school district of Council Bluffs	2,942 72
City of Council Bluffs	3,678 40
	$11,503 04

Of these, the state, school, independent school district of Council Bluffs, and city of Council Bluffs taxes, being an aggregate of $7,724.64, or about two-thirds of the entire amount, will be paid over by the collector to the different officers authorized to receive them as required by law. The bill of complaint for an injunction sets out, inter alia, these facts, and claims that the bridge in question can only be taxed as an integral portion of the Union Pacific Railroad, and that, under the revenue laws of Iowa, it is beyond the jurisdiction of the local assessor, and that the assessment was not made in the manner nor upon the principles required by those laws. An answer and replication have been filed, and the facts agreed upon by the counsel, and the cause is before the court on final hearing

A. J. Poppleton, for complainant.

James T. Lane, Abner Davison, and B. W. Hight, for defendants.

Before DILLON, Circuit Judge, and LOVE, District Judge.

DILLON, Circuit Judge. Passing the question whether the bill states a case for an injunction, within the principles on this subject laid down by the supreme court in the Illinois Tax Cases, 92 U. S. 575, and the question whether the complainant, if right in the views on which the bill is based, has not a complete remedy at law, the fundamental question is whether, under the revenue laws of Iowa, the authorities of the state can lawfully tax the portion of the complainant's bridge over the Missouri river situate within the state of Iowa separately as a bridge, or whether it must be taxed as a portion of the road of the complainant, the same as any other like length of its line. The latter view is asserted by the complainant, the former by the defendants The character of this bridge, the authority to build it, and the duty to operate it, fully appear in the case of Union Pac. R. Co. v. Hall, 91 U. S. 343. It was there held that this bridge, as respects the duty of the complainant company to use and operate it, was an integral part of its line of road. The bill in this case is based upon the view that, if this bridge is part of the road, then it must be taxed as a part of the road, and not separately as a bridge. Whether this view is sound, is really the important question in the cause upon the merits.

It is to be borne in mind, that the case referred to related to the duty of the company, under the acts of congress, to operate its whole line of railway from and to its initial point in Iowa; while this case relates to the power of the state to tax the bridge, or rather to the mode of exercising that power. It might well be that the bridge is part of the road as respects the duty of continuous operation under the acts of congress, and yet, for other purposes, as, for example, the security of bridge bondholders under the act of congress of February 24th, 1871, or for purposes of taxation under the revenue laws of the state, it might be regarded as a bridge.

The power of the state to tax the property in question is settled by the case of Union Pac. R. Co. v. Peniston, 18 Wall. [85 U. S.] 5, and is not disputed by the complainant's counsel. Unless the provisions of the Iowa statute for the taxation violate some prohibition of the state constitution, or some right given to the company by the legislation of congress in its behalf, they must be sustained. The state could, undoubtedly, provide for taxing the bridge in question as part of the road of the company, valuing it no higher than other portions of the road, and distributing the taxes as it might see fit; or, in its discretion, it might provide for a separate valuation, assessment, and taxation of the bridge, if it thereby violated no paramount right of the company.

Now, what has the state done? If we look into its legislation on this subject, it seems to be uniform and unambiguous.

By the act of April 12, 1870 (Laws 13th Gen. Assem. c. 106, p. 109), railway companies, upon their railway property proper, were taxed exclusively in respect of their gross earnings; but as to their other property, the taxation was local, the same as the property of individuals (section 5). As to bridges, there was this special provision: "Sec. 6. No provision of this act shall be

held to apply to any railroad bridge across the Mississippi or Missouri rivers, but such bridges shall be assessed and taxed on the same basis as the property of individuals."

By the act of April 6th, 1872 (Laws 14th Gen. Assem. p. 29, c. 26), the mode of taxation was changed, and taxation upon valuation instead of gross receipts was adopted. This act substitutes the census board for the state treasurer in receiving the sworn statement of the railroad companies, and requires said board to make a valuation of all the property of railroad companies, except lands, lots, and other real estate not exclusively used in the operation of the roads, and excepting railroad bridges across the Mississippi and Missouri rivers, and to transmit to the board of supervisors of each county through which the road runs a statement showing the length of main track within said county, and the assessed value per mile, which shall constitute the taxable value of said property for all taxable purposes.

The 3d section declares that this "assessment shall be made upon the entire road within the state, and shall include the right of way, the road-bed, bridges, culverts, rolling stock, depots, station grounds, shops, buildings, gravel-beds, and all other property, real and personal, exclusively used in the operation of such railroad."

But section 10 declares that no provision of this act shall apply to any bridge across the Mississippi or Missouri rivers,—the same terms, precisely, as are contained in section 6 of the first act of 1870,—and affirmatively provides that such bridges shall be assessed and taxed on the same basis as the property of individuals.

The act of 1872 is substantially embodied in the Code of 1873 (sections 808, 810, 1317, 1322), in force when the tax in question was levied. Section 808 of the Code of 1873 is as follows: "Lands, lots, and other real estate belonging to any railway company, not exclusively used in the operation of the several roads, and all railway bridges across the Mississippi and Missouri rivers, shall be subject to assessment and taxation on the same basis as the property of individuals in the several counties where situated."

Section 810: "All railway property not specified in section 808 of this chapter, shall be assessed upon the assessment made by the executive council, as provided in chapter 5 of title 10, at the same rates, by the same officers, and for the same purposes as individual property under the provisions of this chapter; and all provisions of this title relating to the levy and collection of taxes, shall apply to the taxes so levied upon railway property."

It thus appears that, from the year 1870, the legislature of Iowa has made special provision for the taxation of "all railway bridges across the Mississippi and Missouri rivers,"—these, whether owned by a separate company, as in Dunlieth & D. Bridge Co. v. Dubuque, 32 Iowa, 427, or by a railway company, as in City of Davenport v. Chicago, R. I. & P. R. Co., 38 Iowa, 633, being, under the legislation of the state, subject to municipal taxation, as respects the portions thereof within the municipality.

The taxes here in question were assessed in conformity with this view of the legislation of the state, and are valid unless this legislation conflicts with the constitution of the state, which is not claimed, or unless it is inconsistent with the acts of congress in respect to the complainant.

Where is the inconsistency? Congress has not spoken in respect to the extent or mode of taxation of this property by the states. I am unable to perceive that, because the supreme court has declared it to be the duty of the company to operate its whole line, including this bridge as part of it, that it necessarily follows that, for the purposes of taxation, the bridge cannot be separately valued and assessed.

Nor is this result inequitable or unjust to the company. Equality of burden is the desideratum of all just revenue laws; and the value of the property to be taxed (having reference to its uses and earnings) ought not to be overlooked in the legislative endeavor to meet this desideratum Take the legislative history of this bridge. The company had authority to build it under its general charter. But the structure proved to be very expensive. Congress was applied to by the company to authorize the bridge to be separately mortgaged for $2,500,000, to raise the means to build it, and to levy and collect special rates and tolls upon freights and passengers crossing the bridge. 13 Stat. 430. This mortgage has been executed, and special tolls, much larger than the general rates of the company for the use of its road, are exacted for the use of the bridge. It is thus seen that, as respects the structure in question, complainant has and enjoys the substantial franchise of a bridge company. There is, therefore, no inherent inequity in taxing the bridge as a bridge, and not as a mile, more or less, of railway, overlooking the cost, value, and authorized uses of the structure. It is my judgment that the bill be dismissed. Let a decree be entered accordingly. Bill dismissed.

An appeal was prayed and allowed.

[The records of the clerk's office of the supreme court do not show that the appeal was ever perfected.]

UNION PAC. R. Co. (SIOUX CITY & P. R. Co. v.). See Case No. 12,909.

UNION PAC. R. CO. (SMITH v.). See Case No. 13,121.

UNION PAC. R. CO. (SULLIVAN v.). See Case No. 13,599.

UNION PAC. R. CO. (THURSTON v.). See Case No. 14,019.

UNION PAC. R. CO. (TURTON v.). See Case No. 14,273.

UNION PAC. R. CO. (UNITED STATES v.). See Cases Nos. 16,598–16,601.

UNION PAC. R. CO. (WARDELL v.). See Case No. 17,164.

Case No. 14,385.

UNION PAC. R. CO. v. WATTS.

[2 Dill. 310.] [1]

Circuit Court, D. Nebraska. 1872.

RAILROAD COMPANIES — CONSTRUCTION OF LAND GRANT.

1. The land grant to the Union Pacific Railroad Company (12 Stat. 492, § 3) excepts, inter alia, lands to which homestead claims had attached at the time the line of the railroad was definitely fixed: *Held*, that this exception did not operate in favor of a sham and fraudulent homestead claim.

2. What would constitute such a claim, illustrated.

Ejectment for one hundred and sixty acres of land. No questions arise on the pleadings. The plaintiff introduced a patent for the land in dispute, dated February 23, 1871, made under the act incorporating the plaintiff, July 1, 1862 (12 Stat. 489), and rested. Defendant [James R. Watts] was in actual possession, and claimed that this land was excepted out of the grant to the plaintiff, of July 1, 1862 (12 Stat. 492, § 3), because before the definite location of the plaintiff's line of road there was a homestead right thereon in favor of one Peter Hugus. On the trial the defendant offered evidence of the filing of papers by Hugus, December 5, 1863, to obtain a homestead right under the act of congress in that behalf. Plaintiff, in rebuttal, produced the said Hugus as a witness, who testified, in substance, as follows: "I am same person that, on December 5, 1863, made a homestead filing on this quarter section; never made but one such filing; I had never seen this land before I made that filing; I made it as a great many others made them in those days; four of us agreed to build one house on the four corners of the section; two of them abandoned the scheme, and when they did, I gave the whole thing up, and we never went on to this land; never made any improvement upon it; I lived in Omaha then, and ever since, and never moved on to the land, and never saw it. Afterwards, Mr. Davis, land agent of the Union Pacific Railroad Company, called upon me, and refunded what I had paid, about $10, and I relinquished my right to the company; I never had any intention of improving this land or of moving on to or entering it; I did not know where it was, except that it was between the Elkhorn and Platte rivers; the land office at the time was in Omaha." On cross-examination, he said: "I was a citizen of the United States, and a resident of Nebraska; I filed upon it with intention to procure it in the same manner as other people did at that time; Mr. Davis, agent of the Union Pacific Railroad Company, called upon me to relinquish; he paid me the amount I paid the United States local land officers to make the filing, about $10." The grant of public lands by congress to the Union Pacific Railroad Company (12 Stat. 492, § 3), is "of five alternate sections per mile on each side of said railroad, on the line thereof, * * * not sold, reserved, or otherwise disposed of, by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

Poppleton & Wakeley, for plaintiff.
Mr. Baldwin, for defendant.

Before DILLON, Circuit Judge, and DUNDY, District Judge.

DILLON, Circuit Judge. The land in question is embraced in the patent to the plaintiff, introduced in evidence, dated February 23, 1871, and this gives the plaintiff the legal title thereto, unless the same was land which had been sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim may have attached at the time the line of the plaintiff's road was definitely fixed.

The defendant claims that the land was excepted out of the grant made by the act of July 1, 1862, because before and at the time the line of the plaintiff's road was definitely fixed, there was a homestead claim thereto in favor of one Peter Hugus.

If you find, from the evidence, that Peter Hugus never saw this land, never made any improvements thereon, and never intended to make any, or to comply with the provisions of the homestead act as to settlement, occupation, and improvement of it, and never did anything except to file an application for an entry, and that he afterwards relinquished all right to the plaintiff, then we instruct you, as a matter of law, that no homestead claim attached to the land in favor of Hugus, and that the land would be embraced in the grant to the plaintiff, made by the said act of July 1, 1862, and conveyed by the patent to the plaintiff, which has been introduced in evidence.

NOTE. The jury found for the plaintiff, and the court rendered judgment upon the verdict and signed a bill of exceptions.

For construction of congressional railroad land grant: Schulenburg v. Harriman [Case No. 12,486].

UNION PAC. RY. CO. (ROSS v.). See Case No. 12,080.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

Case No. 14,386.

UNION PAPER-BAG CO. v. NIXON et al.

[6 Fish. Pat. Cas. 402;[1] 4 O. G. 31.]

Circuit Court, S. D. Ohio. April 16, 1873.

PATENTS—SPECIFICATIONS—REISSUE—DRAWINGS—RESULTS — ANTICIPATION — EQUIVALENTS — MACHINE FOR MAKING PAPER BAGS.

1. A patent is not invalid because the specification does not describe such parts as practical use would at once suggest as necessary to render the machine efficient; nor because it does not mention a cam which is indispensable in the machine, when from the reciprocating motion required, and exactly described, an intelligent mechanic would at once properly locate this cam.

2. Where four drawings, which did not appear in the original pa ent, were inserted in the reissue: *Held*, that as the forms shown were clearly indicated by the original specification, they were legally added to the drawings of the reissue.

3. Because in a particular case, other tribunals, co-ordinate or appellate, have decided that certain words, when used in connection with their accompanying incidents, did import a claim for a result or principle, another tribunal should not treat these judgments as setting up formulas in all circumstances involving a similar meaning.

4. Words identical should be rendered as diversely as the conditions in which they are employed demand, in order not to defeat the fairly presumed intention of those who use them.

5. The reissued letters patent granted to Morgan, Whitney, and Priest, assignees of Benjamin F. Rice, March 6, 1860, for improvement in machines for making paper-bags, are not for a principle. Being capable of a different reading, and these being novel and meritorious devices and combinations for the accomplishment of a result to which they may be referred, it is the duty of the court to give them such a reference.

6. The second claim is for a supporting-bar, with its end distended and shaped so as to enable the oblique cut to sever the tube, and form a lap for the bottom of the bag, and is not antedated.

7. The third claim is a combination claim, including the roller which works in the supporting-bar, and the devices more immediately concerned in carrying forward the paper and giving it tension while it is severed, and is not antedated.

8. The first claim of the Rice patent is not infringed by the Morgan machine.

9. The second claim is for the bar only, not for the former, or any of the pulleys and other devices which, in the accident of association in the Rice machine, are mechanically connected with it.

10. The four leading features required in this bar enumerated, and *held* to be present in defendants' bar.

11. The claim reaches in no way to the devices intended to perform collateral functions.

12. The seeming differences between defendants' bar and that of the patent, all depend upon collateral devices.

13. Objections to all the claims of the Pettee patent, except the eighth and ninth, overruled.

14. Eighth and ninth claims of Pettee patent *held* to be antedated.

15. The first and second claims of Pettee patent *held* to be infringed.

16. The essence of these first two claims, and substantially of the first four, is the quality of adjustability. This is the subject of a patent, so far as it is embodied in practical instrumentalities to make it operative.

17. The patentee will be protected from obvious modes, readily adopted without invention, for accomplishing the same end.

18. The third claim is for the combination of adjustable forming-rollers, with a creasing pulley or pulleys.

19. The various forms of creasing apparatus used by the defendants, in combination with the guides or formers, *held* to be infringements of this claim.

20. It would be a blemish upon the law, which professes to protect useful improvements, if such substitutes, capable of selection by persons of ordinary intelligence were not deemed invasions of an inventor's rights.

21. The fourth claim is infringed both by the bent bars and by the adjustable pulleys.

22. An alternative claim is invalid only in those instances where it claims positively neither of several subjects, but is good, if all of many which are mentioned are claimed, as one or the other are employed by an infringer. The latter is the case with the third claim of the Pettee patent.

In equity. Final hearing on pleadings and proofs. Suit brought upon letters patent [No. 17,184] for an "improvement in machines for making paper bags," reissued to Morgan, Whitney, and Priest, March 6, 1860 [No. 920], as assignees of the original patent granted Benjamin F. Rice, April 28, 1857; afterward extended, seven years from the expiration of the original term, by the Union Paper-Bag Company, as assignees of the reissued patent and extended term of the same; also, suit brought upon letters patent [No. 38,452] for "improvement in paper-bag machines," granted Simon E. Pettee, May 6, 1863, by same complainant, as assignee of said last-named patent.

The claims of the reissue of the Rice patent are as follows: "1. I claim the machine as a whole, composed of mechanism for forming, feeding, cutting, pasting the tube or bag, combined or arranged, and operating substantially as described. 2. I also claim the use of a supporting-bar, or its equivalent, around which paper may be formed into a tube, and in connection with which the said paper tube may be severed, each and the whole, substantially as described. 3. I also claim giving the paper the variable feeding motion, for the purpose and in the manner substantially as described. 4. I also claim cutting the paper, without waste of material, in such a form as shall have suitable projections for the formation of the bottom lap or seam of the bag, and for the convenient opening of the bag at the mouth, substantially as described."

The claims of the Pettee patent are as follows: "Firstly. Hanging the spindle G, which carries the roll of paper to a plate, E, so secured to the frame as to be readily adjusted laterally thereon, for the purpose specified. Secondly. So connecting the plate D, which carries the roller I and the pasting device to

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

the frame, that the whole may be adjusted laterally on the said frame for the purpose specified. Thirdly. Folding the continuous sheet by means of a pulley or pulleys, M, M, or their equivalents, in combination with the horizontal pulleys d, d, or their equivalents, to the same, the sharp edges of the pulleys forming the crease at the proper place in the paper, and the pulleys d, d, or their equivalents, turning down the fold, determined by the creasing pulleys, thereby dispensing with the objectionable 'former' used in the machines for making paper bags. Fourthly. So securing the creasing pulleys M, M, to the shaft L, that they can be adjusted thereon, in respect to each other and to the paper, for the purpose described. Fifthly. The roller h, h, secured to the bar P, and so arranged as to present a lateral sagging of the paper, without disturbing the creases made by the pulleys M, M. Sixthly. So constructing the revolving striker that the striking-bar can be moved to and from the center of rotation and secured, after adjustment, for the purpose specified. Seventhly. The revolving striker, when arranged in respect to the rollers v, v, and the rollers w and w', as and for the purpose herein set forth. Eighthly. Imparting to the pasting-blade 15, by the devices herein described, or their equivalents, the motion described to and from the pasting-roller, as well as the motion described to and from the folding-rollers, for the purpose herein set forth. Ninthly. The beveled portion of the blade 15, so formed and arranged as to conform, or nearly conform, to the circumference of the roller 6, and so as to effectually transfer the paste to and spread it over the fold at the bottom of the bag, as described. Tenthly. The roller 7, with its annular projecting plate 2, 2, when combined and operating in conjunction with the paste-roller 6, substantially as and for the purposes herein set forth."

[For engravings descriptive of the Pettee machine, see Case No. 14,387.]

George Harding and Fisher & Duncan, for complainants.

James Moore, for defendants.

EMMONS, Circuit Judge. It is due to counsel and to the court to say, that while examining this case we have been unable personally to peruse either the briefs or the record. Wholly unaccustomed to labor through the reading of others, and unable to make the memoranda which long habit renders a necessity, we have found it impossible to dictate with anything like satisfaction even the outlines of conclusions. These circumstances forbid all attempts to verify by citations the legal conclusions we announce. It must be apparent that in these circumstances we must have less confidence in the general result.

The objection, that the specifications of the Rice patent are so imperfect that a working machine could not be made from them, has given us much trouble. Various criticisms of the experts, which assert the impracticability of the described machine, without certain readily perceived additions, are not among those which have created doubt. The necessity for a spring, a weight, a slight difference of mere dimensions, or other quite obvious modifications which practical use may suggest to make the machine more efficient, would not render invalid otherwise sufficient specifications; certainly not, if it would work without them. Here, however, an important device, without which it could not operate at all, is wholly omitted. An intelligent assistant and expert are unable to find it in either the specifications or the photo-lithographic copies of the patent office drawings. To this precise defect the complainant's counsel directed the attention of neither of his expert witnesses, nor has he referred to it in argument. It is rested upon the general unreasoned assertion of Renwick & Morgan, that from the specifications and drawings they could make an operative machine.

Four cams on the main shaft are indispensable. Stated in the order in which they occur, the first moves the presser-bar; the second, the pasting-knife; the third gives the reciprocating motion to the pasting-rollers and the devices connected with them; and the fourth, the severing-blade. That which is required to give this motion to the pasting-rollers is wholly omitted. This error is accompanied by another, which refers to the cam which moves the presser-bar, as the one which is to perform the function of that which is not described at all. Such an office by it is impossible; another cam on the main shaft for this purpose is necessary. The specifications and drawings are to a scale. The exact reciprocating movement required for these bottom pasting-rolls and accompanying devices is given, and the location of the cam on the main shaft to impart it is in no degree doubtful. A hundred intelligent mechanics would all, necessarily, from data given, locate it in the same place. Its shape and dimensions result from mathematical calculations, well understood by all educated mechanics. The arms and connecting-rod, in order to enable it to perform its office, are among the most familiar devices, and we can not agree with the experts who have sworn so pointedly, that invention would be necessary to supply the omitted features. There is no other instrumentality, except this cam, arms, and connecting-rod, which would suggest themselves to a builder by which this omission could be supplied. They are so common and obvious, they would be inserted by a mechanic as readily as a driver would put the fourth wheel on the naked axle of his coach.

It is objected that the reissue of the Rice patent is void because it contains new matter. Four drawings, representing bags to

be manufactured by the machine, which did not accompany the original patent, are referred to as bringing the case within the rule. These forms were clearly indicated by the original specification, and may be legally added to the drawings of the reissue.

It was presented in this connection in the brief, and therefore somewhat out of order. We have referred to the objection that the original patent was for a machine and the reissue for a principle, and therefore void. It is of no consequence, so far as this question is concerned, that the original patent is different; it may illustrate the argument, but it is of no other consequence. Our judgment upon other points with sufficient fullness shows that we do not consider any of the claims in the latter subject to such an objection. That they may be so construed, without violence to language, is clear. That some judgments of authority have so rendered nearly equivalent words, is conceded. It is a mere matter of construction. Did the solicitor intend to make a void or a lawful claim? The decisions leave this to be decided in view of the art, the character of the machine, the entire specifications, drawings, and claims. Few cases constitute precedents for others. Because in a particular case other tribunals, co-ordinate or appellate, have decided that certain words, when used in connection with their accompanying incidents, did impart a claim for a result or principle, another tribunal should not treat these judgments as setting up formulas in all circumstances involving a similar meaning. They assert no such rule. All go upon a full critical review of the accompanying facts in reference to which they have been used, excluding the idea that other courts are not to perform the same duty. Words identical should be rendered as diversely as the conditions in which they are employed demand, in order not to defeat the fairly presumed intention of those who use them. Applying to these claims the rules of interpretation applicable to all other instruments, we do not think that construction necessary which renders them void. Being capable of a different reading, and these being in fact a novel and meritorious set of combinations and devices for the accomplishment of a result to which they may be referred, we understand it to be a duty to give them such a reference.

It is said the first claim of the Rice patent is for the machine, technically so-called, and demanding for its validity the novelty of all its parts. It is held to be a combination claim.

It is conceded that if the second claim is for a supporting-bar, with its end distended and shaped so as to enable the oblique cut to sever the tube and form a lap for the bottom of the bag, then it is not antedated. That we so construe it, will more fully appear hereafter. It is only when held to be a former, without more, that there is any claim it is not novel. This objection is not sustained.

The third claim of the Rice patent, it is alleged, is also antedated. If it is construed to include only the eccentric spur-wheel and its fellows on the side of the machine, and the shaft connected therewith, then it was suggested to Pettee by Morgan, and taken from Willis' Principles of Mechanism, p. 256. It is, however, a combination claim, including the roller which works in the supporting-bar, and the devices more immediately concerned in carrying forward the paper and giving it tension while it is severed. So construed, it is not claimed to be old.

It is also argued in this connection that as Rice knew this eccentric cog-wheel was old, it avoids his whole patent. This objection is disposed of by our construction of the claim. It is not for the mechanism he knew to be old. The fourth claim has been abandoned by the complainants.

The first claim of the Rice patent, as construed, is not infringed by the Morgan machine. It is unnecessary to refer to other features than the omission of the intermittent feed motion and the substitution of the revolving instead of reciprocating knife.

That the second claim of the Rice patent is not infringed has been argued with great pertinacity and extended discussion. Were we considering the case in much more fortunate circumstances, all its details could not be dealt with. In the present unfortunate condition, but little more than conclusions can be stated.

This claim is for the bar only, not for the former or any of the pulleys and other devices which in the accidents of its association in the Rice machine are mechanically connected with it. It does not form the tube, and, what is unnecessary for the purposes of this judgment to say, no part here claimed even aids in doing so. Decrease the size of the bar over the forming device to that of the defendants' and the tube will still be formed; and if not, no such property in the bar is claimed. It is for a bar around which a tube may be formed, and not for one which will form it. Nor is this mere literalism. Four leading features are required. First, that it be sustained in place at a point so far removed from the forming device, no matter what that may be, as to enable the paper to be gradually bent into a tube, that the connection with the bed or table which sustains it in place shall be on the same side of the bar where the side lap of the tube is formed and pasted, so that the forward movement of the material may meet with no obstruction upon the top, along which it proceeds; that this point of support, which so sustains it in place, shall be in the rear of the locality where the tube is completed, by being united and pasted; and it must also have an end of sufficient size to distend the tube for severing, so as to form the lap for the bot-

tom of the bag. These conditions are all found in the defendants' bar, and all the others in every machine before us. They are all necessary to enable a tube to be formed around it, to travel unobstructedly its whole length while being formed on its passage by other collateral devices, and, arriving at the distended end, to be severed without waste, to form the desired lap. The essence inheres in the conditions which give it this capacity. The contrivances to accomplish it are as ingenious as they have been beneficial to the public. Turning the bar upside down upon a bed or table, making its dimensions from the head backward smaller, omitting the cutting-edges, and the other alterations by the defendants, do not escape infringement. The side guides on the Morgan machine, the rollers that work by the side of the bar instead of through it, the rollers in the Rice bar, the fact that by its weight or spring it presses these rollers on others beneath them, to pinch, carry forward, and paste the paper, we do not consider as included in this claim. It reaches in no way to these devices intended to perform collateral functions. The bar around which a tube may be formed and so held in place with its tube-distending end, and in connection with which it may, without waste, be severed in a direction to create a lap, is all which is claimed. Just such a bar, literally, the defendants use. The patent would enable them to make it. The seeming differences all depend upon the other and collateral devices for pasting, forming, carrying forward, and completing the bag. Remove all these from both bars, and with the wholly immaterial diversity of lessened dimensions in the rear of the all-important head. it is identical in function, form, and mode of operation.

It is admitted that while the defendants used what is called the Rice machine, they infringed the first, second, and third claims of that patent.

There is much proof to show that the Pettee patent is antedated. With some hesitation, we overrule the objection as to all the claims, save the eighth and ninth.

The defendants' testimony to show want of novelty in the first, second, third, and fourth claims is very strong. Without a description of the machinery, the relation of the parties, the transfers of title, the condition and interest of each witness at the time he testified, and a multitude of circumstances, which we can not reproduce, a minute analysis of the testimony would be unintelligible. That which annexes all these devices to the Morgan machine early in September, 1860, is the most formidable. There is much quite as positive in character to show that they were all on the Armstrong machine when Pettee was introduced to it, before the date of his own invention. Much of the conflict might naturally result from imperfect memory, while other portions, on one side or the other, are undeniably corrupt.

Substantially, and without exact accuracy, the history out of which this part of the contest springs is as follows:

The condition of the art in 1860 materially affects this question of fact. In the latter part of August, in that year, Morgan, being the assignee of the Rice patent, worked in Philadelphia a machine like his model, and which was an improvement of the former by the addition of the revolving knife. For this he obtained a patent in 1863, without making any claim to these devices. Armstrong, the other person alleged to have invented them at the same time and at the same place, was working a machine, and, as we think, without them. It severed the tube with the lap, but had no apparatus for pasting and finishing the bottom of the bag. September 1, in that year, he made a contract with Pettee to add machinery for that purpose, and to share with him any patent which might be procured for their joint invention. He then had pending an application for a patent, in which no right is asserted to anything contained in these claims. He was entitled to one-half of the Pettee patent, which does claim them, and, we infer, promoted its procurement. We have not examined the proof in this regard, but it was conceded at the bar that he took a license under it. We assume, also, he participated in and reaped a part of the benefit of its transfer to these complainants. Immediately after the date of the contract, September 1, 1860, Pettee entered upon the work of improving Armstrong's machine, and swears circumstantially that he added the devices in question. He alone, of all those who are asserted to be the inventors, claimed and procured a patent for them. We conclude the facts are what all this public action by Morgan, Armstrong, and Pettee indicate, that each invented what he claimed, and was not the inventor of what he omitted to claim. Each knew of the action of the other. There is a large amount of most significant action in regard to this question since the granting of the patents. All of it is in harmony with our theory. The oaths of some of these parties, and the irrational explanations by which they attempt to account for passively resigning to another what they knew they were entitled to, are incredible.

In reference to the eighth and ninth claims of the Pettee patent, the respondents' testimony is full, that the pasting-knife and the other devices connected with it were used by Morgan before their adoption by Pettee. Nothing in the least contradicts this. We reluctantly hold that these two claims were antedated. We say reluctantly, because there is much which raises the supposition that if attention had been directed to these devices as pointedly as to those included in the first, second,. third, and fourth claims, the result would have been the same. We

may be mistaken, but there seems to be an implication in the argument that the plaintiff's evidence does include them. However this may be, the conclusions from the record as it is can but be as declared.

The first and second claims of the Pettee patent are infringed. It is argued by the defendants that they include only the slot and screw which fastens the bottom of the frame to the bed, and are not therefore infringed, unless some mechanical device is employed to effect that purpose. The defendants' frames are held in place by their own weight only. The essence of these two claims, and substantially of the first four, is the quality of adjustability. This is the subject of a patent, so far as it is embodied in practical instrumentalities to make it operative. The patentee will be protected from obvious modes, readily adopted without invention, for accomplishing the same end. A screw, a cord, weight, either laid upon or included in a heavier construction of the frames, or other obvious modes, which would hold them in place while at work, and secure adjustability, would infringe the patent. They would cease to do so only when they accomplished it in a mode which requires such invention as to be the subject of a patent. The defendant has not escaped infringement by making his frames so heavy that they will lie in position without a slot and screw. He has so secured them to the table as to obtain adjustability, within the meaning of these claims.

The third claim is for the combination of adjustable forming-rollers with a creasing pulley or pulleys. The defendants, in their industrious changes, in order to avail themselves of this feature of adjustability, have successively adopted different forms of creasing apparatus, in combination with the guides or formers. We think them all infringements. The last resort, and that most earnestly defended, is two rounded bars or hooks suspended from a frame and adjustable with a slot and screw, by coming in contact with the paper at the same point, and having in all respects the same relations to the residue of the machine. They perform in the same mode the function of the creasing-rollers. The only imputed difference we are able to glean from the elaborate argument is that the friction from the bent bars is greater than that of the rollers. Various other immaterially varied forms so pressed in contact with the moving paper as to crease it would also increase the friction. But it would be a blemish upon the law, which professes to protect useful improvements, if such substitutes, capable of selection by persons of ordinary intelligence, are not deemed invasions of an inventor's rights.

That the fourth claim is also infringed by these bent bars is involved in what is just said; that the adjustable pulleys did so is conceded. While the Morgan machine was worked with the single creasing pulley, it did not infringe this fourth claim for an adjustable one.

It is also said the third claim is void, because in the alternative. An alternative claim is invalid only in those instances where it claims positively neither of several subjects, but is good if all, of many which are mentioned, are claimed, as one or the other are employed by an infringer. If it is said A or B is claimed, this asserts a right to neither; but to claim the one or the other, as either are used, with an assertion that it has been discovered both are interchangeably available for specified purposes, is not an alternative claim, within the case cited by defendants. Such is the third claim in this case. Decree for injunction and account.

[For a subsequent suit between the same parties, and involving the same patent, see Case No. 14,391.]

Case No. 14,387.

UNION PAPER-BAG MACH. CO. et al. v. BINNEY.

[5 Fish. Pat. Cas. 166.] [1]

Circuit Court, D. Massachusetts. Nov., 1871.

PATENTS—PRELIMINARY INJUNCTION—AFFIDAVITS—INFRINGEMENT—DEFENCE.

1. A preliminary injunction in patent cases ought not to be granted where there are new and difficult questions to be decided, or where there is anything in the position or relations of the parties which would cause it to operate unjustly.

2. A delay of three months in filing a bill, after the infringement was ascertained, is no ground for refusing an injunction.

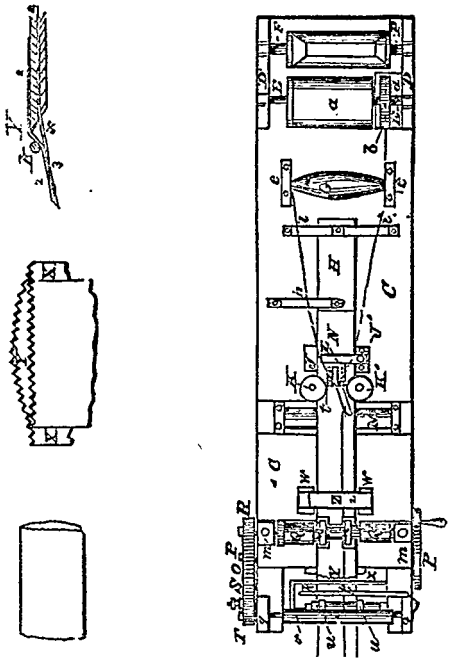
3. The plaintiff must not strengthen his case, on the question of infringement, by rebutting affidavits. There would be great danger of surprise if he were permitted to do this under the guise of a reply.

4. A defendant who denies access to his machine, and who does not, at the hearing, produce his machine, nor any model or drawing of it, nor the product which it manufactures, nor rely upon the patent under which it is constructed; but who contents himself with attacking the plaintiff's model, denying that it can be a true copy of his machine, and with pointing out certain discrepancies in it, must not expect that doubtful points will be construed favorably to him.

5. A defendant can not relieve himself from the charge of infringement by showing that while he uses substantially the same devices, they operate less perfectly in his machine than in the plaintiff's.

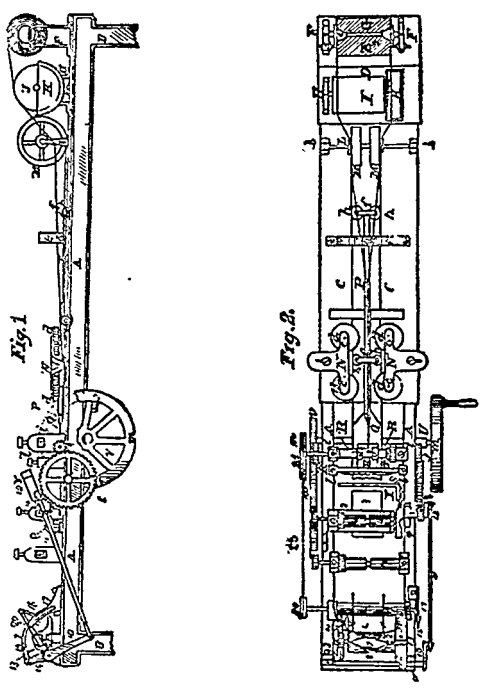
Motion for provisional injunction. Suit brought [against Benjamin S. Binney] upon letters patent [No. 30,191], for "improvement in paper-bag machinery," granted to Horatio G. Armstrong, October 2, 1860, and assigned to complainants; and also letters patent [No. 38,452], for "improvement in paper-bag machines," granted to complainants as assignees of Simon E. Pettee, May 5, 1863.

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



The above engraving represents a plan view of the Armstrong machine. The paper passed from the roll, a, under the shaping-roller, G, by which it was partially folded, to the bar, N, between the guide-blocks, J, J', and rollers, K, K', which completed the formation of the tube. The edges of the horizontal lap having been pasted together, the tube was cut off in suitable lengths for single bags by a striker, k, which struck the paper sharply against two knives with serrated edges, so that, when severed, one side projected over the other, and thus formed the top and bottom lap of the bag.

The claims of the patent were as follows: "(1) The employment, for severing the folded paper, of the upper and lower knives, with their edges, X and Y, arranged in respect to each other, substantially as set forth, in combination with the revolving striker k, or its equivalent. (2) In combination with the said knives and striker, I claim the rollers, U and V, for retaining the end of the folded paper during the operation of the striker. (3) The roller, Q, Q', in combination with the blade, N, the upper roller having one or more collars n, n, so arranged in respect to openings in the blade that the action of the rollers on the folded paper can not interfere with the said blade, as set forth. (4) The horizontal rollers, K, K', and the guide-blocks, J, J', arranged in respect to each other and to the blade, N, substantially as and for the purpose set forth. (5) The plate, L, with its projections 1 and 1', or their equivalents, arranged and operating as set forth, for the purpose specified. (6) Causing one edge of the paper to traverse in contact with a ratchet or notched wheel, b, arranged to revolve in a trough



containing the paste, as set forth, for the purposes specified."

The invention set forth in the Pettee patent is illustrated in the foregoing engraving, and, in the specification, was described as an improvement on the machine of Armstrong, and consisted: (1) In the lateral adjustment of the plate to which the spindle, which carries the roll of paper, is journaled. (2) In the lateral adjustment of the plate which carries the pasting device. (3) In folding the continuous sheet of paper by sharp-edged pulleys, which crease the paper, and others that fold it down, dispensing with the "former." (4) In making the pulleys adjustable laterally as to each other, and to the paper, to determine the creases for different sized bags. (5) In the rollers which guide the paper to the severing device. (6) In the construction and adjustability of the striker to and from its center of rotation, and in regard to the rollers. (7) In the pasting blade, which transfers the paste from the roller to the lap of the bag, the blade having a projection, which determines its action on the paste-roller in respect of the amount of paste transferred from the latter. (8) In the roller with angular projecting plates, acting in combination with the paste-roller, to determine the width of the paste on the latter.

The claims were as follows: "(1) Hanging the spindle, G, which carries the roll of paper to a plate, E, so secured to the frame as to be readily adjusted laterally thereon, for the purpose specified. (2) So connecting the plate, D, which carries the roller, I, and the pasting device to the frame, that the whole may be adjusted laterally on the said

frame for the purpose specified. (3) Folding the continuous sheet by means of a pulley or pulleys, M, M, or their equivalents, in combination with the horizontal pulleys, d, d, or their equivalents, to the same, the sharp edges of the pulleys forming the crease at the proper place in the paper, and the pulleys, d, d, or their equivalents, turning down the fold determined by the creasing pulleys, thereby dispensing with the objectionable 'former' used in the machines for making paper-bags. (4) So securing the creasing pulleys, M, M, to the shaft, L, that they can be adjusted thereon, in respect to each other and to the paper, for the purpose described. (5) The roller, h, h, secured to the bar, P, and so arranged as to prevent a lateral sagging of the paper without disturbing the creases made by the pulleys, M, M. (6) So constructing the revolving striker that the striking bar can be moved to and from the center of rotation and secured after adjustment, for the purpose specified. (7) The revolving striker, when arranged in respect to the rollers, v, v, and the rollers, w and w', as and for the purpose herein set forth. (8) Imparting to the pasting blade, 15, by the devices herein described, or their equivalents, the motion described to and from the pasting roller, as well as the motion described to and from the folding rollers, for the purpose herein set forth. (9) The beveled portion of the plate, 15, so formed and arranged as to conform or nearly conform to the circumference of the roller, 6, and so as to effectually transfer the paste to and spread it over the fold at the bottom of the bag, as described. (10) The roller, 7, with its angular projecting plate, 22, when combined and operating in conjunction with the paste-roller, 6, substantially as and for the purpose herein set forth."

George Harding, for complainants.
T. W. Clarke, for defendant.

LOWELL, District Judge. A preliminary injunction, in patent cases, ought not to be granted where there are new and difficult questions to be decided, or where there is anything in the position or relations of the parties which would cause it to operate unjustly. The defendant insists that there are considerations of the latter kind arising out of the plaintiffs' delay to prosecute. He says the infringement was known to them before January, 1871, and this bill was filed in September. If it were true that there had been any license, express or implied, or if the defendant had been misled by the conduct of the plaintiffs, or if there had been even such hesitation as to show a doubt of their own title on the part of the patentees, a court of equity might refuse its summary interposition. But in this case, the plaintiffs' title to the two patents relied on in this motion is of long continuance, and was well known to the defendant. The misleading, if any, was on the other side, for the defendant wrote to the plaintiffs' solicitor, in March, 1871, that his machines were new and valuable; that they did not infringe on any patent, but were themselves in the course of being patented, and that he should be willing to sell them to the plaintiffs for a certain price. This negotiation was never completed, and on the 18th of July, the plaintiffs' agent went to the defendant's factory and saw one of his machines. There is no evidence that before that day its character was known to the plaintiffs. A delay of three months in filing the bill, the defendant not having been induced to change his position, or, so far as appears, having had any communication with the plaintiffs in the interval, is no ground for refusing the injunction.

Upon this hearing, the title of the plaintiffs has been admitted, and the validity of the Armstrong and Pettee patents has not been denied. The only points presented by the affidavits relate to the alleged infringement of the first, second, third, and sixth claims of the Armstrong patent, and of the first, eighth, and ninth claims of the Pettee patent. To sustain the issue on their part, the plaintiffs introduced a model, which Mr. Howlett, president of the plaintiff company, who saw the defendant's machine at work in July, as above mentioned, swears to as a true representation of it, and some bags, which he says he procured when he was there. It is not denied that if the machine is like the model, it infringes several of the claims; but the defendant himself, his foreman, and Mr. Edson, an expert, made affidavit to certain differences between the two. The plaintiffs, in reply, introduced a patent issued to the defendant since the affidavits in chief were filed, with evidence tending to show that it is for the same machine which he is using; and this patent certainly does describe a machine resembling the model in the disputed particulars. The defendant objects to the introduction of these papers at this time, as not being in reply to his case. This objection is sound. There would be great danger of surprise if the plaintiffs could strengthen their own case on the question of infringement under the guise of a reply. The evidence was not accessible when the plaintiffs' case was made up, but that is no reason for permitting it to be brought in irregularly, though it might have been cause for varying the order of proof on suitable terms, giving the defendant an opportunity to answer the new matter. It is admissible in reply to the defendant's own affidavit, as tending to contradict his description of the machine by showing that he has made a different statement to the patent office. Admitted for that purpose, it has a tendency to neutralize Mr. Binney's evidence, and even to throw some doubt on the good faith of his defense, which in other respects is not satisfactory. He does not produce his machine, nor any model or drawing of it; does not rely on his own pat-

ent; does not bring forward the bags with which he supplies the trade; but contents himself with attacking the plaintiffs' model, denying that it can be a true copy of his machine, with pointing out certain discrepancies in it, and with showing certain bags that were made experimentally at his factory, and show marks of the differences between the two machines. There is some evidence, too, that his factory was not to be visited by strangers. The plaintiff must succeed, no doubt, by the strength of his own evidence; but in weighing it and passing upon its truth and correctness, the mode in which it is met by the defendant is a proper matter for consideration, and I must say that the defendant's course in this case does not lead me to construe the doubtful points favorably to him.

The two main points of difference relied on, are the parts of the machine coming under the first claim of Armstrong and of the eighth of Pettee. The first is for upper and lower knives, with their serrated edges, so arranged, in combination with the revolving striker or its equivalent, that the paper is forced by the striker against these edges, and cut in a particular shape. The defendant has the arrangement of knives and a striker, which reciprocates instead of revolving, and he says that it does not wholly sever the paper, but only brings it just far enough against the edges of the knives to cause perforations in the paper, which is then torn apart in the line of the perforations by the tension of the next pair of rollers. This statement, I doubt. It is opposed to the direct evidence of the plaintiffs' witness, and to the appearance of the bags produced by him, and is highly improbable. But, granting it to be true, it amounts only to this—that the defendant's striker is so imperfectly organized in the combination as to make a further process necessary. The striker performs the same office, as far as it goes, and in the same way; it brings the paper against the edges of the knives, and establishes a line of cutting, though it does not complete the operation. It is an imperfect infringement, because the machine is imperfect; but it is still an infringement. So of the eighth claim of Pettee. Before his time, bags came out of the machine unfinished at the bottom. His improvement, in this respect, consists in carrying the bag over a pair of horizontal rollers, and just as the lower end of the bag passes over the space between these rollers, it is struck by a plate or knife, which creases it, and forces the crease between the rollers. This plate or knife moves to and from a roller covered with paste, and deposits paste in the crease which it makes, so that, when the rollers have pressed it, the bottom is complete. This eighth claim is: "Imparting to the pasting blade, 15, by the devices herein described, or their equivalents, the motion described to and from the pasting roller, as well as to and from the folding rollers, for the purpose herein set forth." The defendant has a blade or knife, or plate, which moves to and from a pasting roller, and to and from a pair of horizontal folding rollers, by which he creases and pastes the bottom of the bag. He says that this plate strikes the bag just before, instead of at the moment it reaches the intersection of the rollers, and spatters the paste upon it, instead of wiping itself on it; but I can not see that this affects the mode of operation, excepting that it may do the work less well. The defendant's expert says that Pettee, in his eighth claim, describes his invention as imparting to the pasting blade a described motion by described means or their equivalents, and he then points out differences in the motion and in the means. He does not say whether these differences are formal or not; whether the defendant's means are well-known substitutes for those of the plaintiffs. He evidently does not consider the moving of the pasting blade to and from the pasting roller, so as to meet the end of the bag at the proper time, to crease and paste it, as of the essence of the claim; but the precise form of motion, and the precise means of imparting it, are what he regards. Considering what Pettee, upon the evidence, might be expected to mean, and what he fairly may mean, this is too narrow a view of that claim, and his idea can not be borrowed by making some slight alteration of the details of the motion, especially when the variation is not shown to have required invention.

It is noticeable that in neither of these parts of the machine, as represented in the affidavits, is there any pretense of an improvement on Armstrong and Pattee, nor of any reversion to an earlier type of paper-bag machines, but a device admitted to resemble his very much in construction, but said to be incapable of readily doing the work at all times; for, in respect to both of them, they say there is great danger of injuring the bags unless everything goes at its best. This singular state of things gives some weight to the plaintiffs' theory that the machine was partly disorganized when these experiments were made upon it; that the striker and paster did not show their fair and usual operations, but were crippled for the time being. Besides these claims, there are two others of great importance, concerning which there seems to be scarcely a doubt raised by the testimony. Armstrong's second claim is for rollers which hold the bag during the operation of the striker. The defendant says his rollers operate to tear the paper by tension; but this only shows that they have a double use. It can not be denied that they likewise hold the paper while it is subjected to the operation of the striker, which is the claim of the patent. Then there is Armstrong's third claim for rollers, in combination with the blade over which the paper is formed. The combination consists in cutting a piece out of the blade and enlarging the corresponding

part of the upper roller by collars, so that the rollers meet upon the paper and carry it forward without interfering with the blade. In the defendant's machines the blade is cut away on each side, instead of in the middle, and there are corresponding enlargements on the under roller, instead of the upper one, so that the same effect is produced, and in the same way. The defendant's expert says: "I do not find in the Binney machine any collars on either the upper or lower roll, nor any openings in the blade, but I do find that the former (blade) is made with a neck fitting in between two rolls and having a play vertically, which vertical play is impossible in the Armstrong machine, and serves an important purpose in the cutting-off process of Binney." The vertical play has nothing to do with the combination of Armstrong's third claim, and a neck fitted in between two rolls is plainly the same as a cap fitted between two rolls; and the expert does not venture to say that there is any mechanical difference. How he can even say that the enlarged parts of the lower roll are not collars, I do not quite understand, though perhaps there is something in the mode of making them which permits the use of a different name. The thing is the same, with scarcely a colorable difference. I find that at least four of the most important claims of the two patents are infringed—two of the four without any question—and this is enough for the purposes of this motion.

No reason being shown for doubting the validity of these two patents, and nothing in the acts or situation of the parties to render the injunction unjust in its application, I must order it to issue.

Case No. 14,388.

UNION PAPER-BAG MACH. CO. v. CRANE et al.

[Holmes 429; 1 Ban. & A. 494; 6 O. G. 801.] [1]

Circuit Court, D. Massachusetts. Oct. 6, 1874.

PATENTS—INTERFERENCE—RES JUDICATA—PRIORITY—ESTOPPEL.

1. After decision by the patent office of an interference between an applicant for a patent and the grantee of a patent theretofore issued, granting a patent to the applicant as the prior inventor, suit was brought in the circuit court by his assignee of the patent to have the interfering patent declared void. *Held*, that the decision of the patent office in the interference was not conclusive upon the question of priority of invention.

[Cited in Pentlarge v. Beeston, Case No. 10,963, Wire Book Sewing Mach. Co. v. Stevenson, 11 Fed. 155. Followed in Whipple v. Miner, 15 Fed. 117; Gloucester Isinglass & Glue Co. v. Brooks, 19 Fed. 427; Hubel v. Tucker, 24 Fed. 702; Illingworth v. Atha, 42 Fed. 144.]

2. The defendants were not, by the statement of the date of his invention made to the patent office by the patentee, their assignor, estopped to show that his invention was in fact made at an earlier date.

[Cited in Lockwood v. Cleaveland, 6 Fed. 725.]

[This was a bill in equity by the Union Paper-Bag Machine Co. against Luther Crane and others.]

George Harding and T. W. Clarke, for complainant.

T. L. Livermore, for defendants.

LOWELL, District Judge. The bill is brought under section 58 of the consolidated patent act of 1870 (16 Stat. 207), alleging that the complainant owns a patent [No. 134,244] granted to it Dec. 24, 1872, as assignee of Lorenzo D. Benner, for an improvement in paper bags, of which said Benner was the original and first inventor; that the defendants hold a patent [No. 123,811], dated Feb. 20, 1872, for an improvement alleged to have been invented by Luther C. Crowell; that the patents interfere; and the complainant prays that the patent of the defendants may be declared void. The answer denies that Benner was the original and first inventor of the improvement patented to the complainant; insists that Crowell was the inventor of that held by the defendants; does not explicitly confess or deny the interference between the two; and concludes with a prayer that the complainant's patent may be adjudged void.

It appears, on a comparison of the specifications, that they describe and claim the same invention, and the evidence proves that the complainant intended that its patent should cover the same ground as the defendants'. The patent office decided in favor of the complainant, after an interference had been regularly declared with Crowell's patent, which had already issued; upon that hearing Crowell produced no evidence excepting his own statement, and Benner examined several witnesses, and both parties were heard in argument.

Two points of law are taken by the complainant: 1. That the decision of the patent office is final between these parties. 2. That the defendants are estopped by the statement made by their assignor, Crowell, to the patent office, respecting the date of his invention, to introduce evidence in this cause, carrying his invention back to an earlier time than that which he specified in that statement.

1. The decision of the patent office is never final upon the question of the novelty or priority of an invention. The rule may have been adopted at first from a consideration of the ex parte character of the proceedings at Washington, but it has never been confined, as is now maintained by the complainant, to cases in which no contest was had; and it is obvious that it cannot be so limited, because if one party to an interference is concluded, as against the other party, the result may be that a patent is valid as against him which

[1] [Reported by Jabez S. Holmes, Esq., and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

is void as against all the rest of the world. If, for instance, Crowell's invention was in fact earlier than that patented to the complainant, the later patent is conceded to be void as against every one who had no hearing before the patent office, while the defendants' patent would be void as against the complainant, and all persons claiming under it; so that the only person who could not practise the invention would be he who had made it, and his assigns.

The statute is not ambiguous. It gives a court of equity power to decide between interfering patents, without any exception or limitation. This is substantially a re-enactment of section 16 of the act of 1836, under which Mr. Justice Nelson is said to have decided the very point. Atkinson v. Boardman, Law Dig. p. 666, §§ 16, 3. By the act of 1793, interfering applications were to be passed upon by three arbitrators, and upon this act Mr. Justice Story said: "The award or decision of the arbitrators would have been final between the parties only so far as respected the granting of the patent. . . . The sole object of such an award is to ascertain who is prima facie entitled to the patent. But, when once obtained, it is liable to be repealed or destroyed by precisely the same process as if it was issued without objection." Stearns v. Barrett [Case No. 13,337]. Upon reasoning and authority then, the new patent granted after a hearing merely makes out a prima facie case for the complainant, shifting the presumption that would otherwise exist from the earlier date of the defendants' deed.

2. There is no ground for holding the statement of Crowell an estoppel. It was not made to the complainant, nor intended to influence its action, and the evidence is clear that it did not act upon it.

We have examined with great care the evidence concerning priority of invention, and are of opinion that Crowell was the true and first inventor. He neglected his case before the patent office; and the examiners were led to believe that he might have obtained hints or suggestions from the drawings of Benner for a patent which was issued to him a short time before that of Crowell. It is true those drawings were left with Mr. Coffin, one of the persons interested in Crowell's invention, and in the shop where Crowell was at work on his machines; but the evidence in this case does not prove that any use was made of them, but tends to prove the contrary. But a wholly decisive consideration, as to which the course of proceedings before the patent office led the examiners into error, is that those drawings do not contain the invention, and, if they had been seen and studied by Crowell, would be no answer to his claim of priority. This is now admitted by the complainant, and was well known to it while the interference was going on, as appears by a letter from its counsel to the president of the company, which it has printed at page 41 of the record. As the argument before the patent office is not given, we do not know whether the admission was made at that time; but the fact that the decision was very largely influenced by this mistake is shown by the record, and must detract much from the weight of the adjudication.

Upon the principal point of fact we are well satisfied not only that Crowell's invention was actually made by him, but that it was completed in 1867. The complainant, not denying that Crowell made the invention, insists that he was not the first inventor, and has introduced evidence which it relies upon to prove that Benner made it in 1868, and that Crowell was not earlier than 1871. The defendants, on the other hand, insist that they have thrown doubt upon the claim of Benner to have made the invention at all, though he may have approached it. As we are satisfied that Crowell really made the invention before Benner or any of his witnesses say that Benner made it, we have not examined the question whether Benner ever made it at all. Decree for defendants.

Case No. 14,389.

UNION PAPER-BAG MACH. CO. et al. v. NEWELL et al

[11 Blatchf 549; 1 Ban. & A. 113; 5 O. G. 459.] [1]

Circuit Court, S. D. New York. April 3, 1874.

PATENTS — INFRINGEMENT — PRELIMINARY INJUNCTION—MOTION TO DISSOLVE.

In a suit in equity for the infringement of letters patent, the answer did not state the name or residence of any person alleged to have had prior knowledge of the patented invention, or set up a defence of the abandonment of the invention to the public by the inventor, although it averred generally prior knowledge and use of the invention. The plaintiff took proofs for final hearing, and rested his case. The defendant took no proofs. The court then granted a preliminary injunction in the suit, restraining the infringement of one of the claims of the patent. Afterwards, and after the time for taking proofs had expired, the defendant, without having obtained leave to amend his answer, or an extension of the time for taking proofs, applied to the court to dissolve the injunction. On affidavits setting out matters intended to show that the invention covered by said first claim was, with the consent and allowance of the inventor, in public use, at a place named, for more than two years before the patent was applied for, and that the invention was previously known by persons named: *Held*, that, inasmuch as such defences could not be availed of by the defendant in the taking of proofs for final hearing, they could not be availed of to dissolve the injunction.

[This was a bill in equity by the Union Paper-Bag Machine Company against George L. Newell and George H. Mallary, brought on letters patent No. 49,951, granted to Benjamin S. Binney. Heard on motion to dissolve an injunction.]

[1] [Reported by Hon. Samuel Blatchford, District Judge, reprinted in 1 Ban. & A. 113, and here republished by permission.]

Marcus P. Norton, for the motion.

George Harding and Horace Binney, opposed.

BLATCHFORD, District Judge. By the sixty-first section of the act of July 8th, 1870, (16 Stat. 208,) it is provided, that, in a suit in equity for relief against an alleged infringement of letters patent, certain specified defences may be pleaded, and proofs of the same may be given upon certain specified notice in the answer of the defendant, and with a certain specified effect. Among the defences specified in the section are, that the patentee "was not the original and first inventor or discoverer of any material and substantial part of the thing patented," and "that it had been in public use or on sale in this country, for more than two years before his application for a patent, or had been abandoned to the public." As to notice in the answer, the section requires, that, in giving such notice as to proof of previous invention, knowledge or use of the thing patented, the defendant shall state in the answer "the names and residences of the persons alleged to have invented, or to have had the prior knowledge of, the thing patented, and where and by whom it had been used." As to the effect specified, the section provides, that, "if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him, with costs."

This is a suit in equity for relief against an alleged infringement by the defendants of letters patent of the United States, granted to Benjamin S. Binney, assignee of E. W. Goodale, as inventor, September 12th, 1865, for a "machine for making paper bags." The bill was filed May 13th, 1873. The answer was filed July 7th, 1873. The replication was filed August 25th, 1873. The plaintiff commenced taking proofs for final hearing, by the examination of witnesses orally, before an examiner, under the 67th rule in equity, as amended, and by the putting in of documentary proof, on the 23d of October, 1873. The plaintiff rested his case on the 6th of November, 1873. The defendants, so far as appears, have taken no proofs for final hearing. On the 26th of November, 1873, this court, after a full hearing of both parties, granted a preliminary injunction restraining the defendants from infringing the patent, by using the invention described and claimed in the first claim thereof. [Case No. 14,390.]

The answer of the defendants sets up, in general terms, a denial that E. W. Goodale was the original and first inventor of what is claimed in the patent, or of any substantial or material part thereof, and a denial "that the same was not known or used before, or that it was not, at the time of the application for letters patent, * * * in public use or on sale," and avers, in general terms, "that the said alleged invention and improvements contained in said letters patent were in public use and on sale for more than two years prior to the date of the aforesaid application for letters patent therefor, or of any invention of the same by and on the part of said E. W. Goodale." But the answer does not state the name or residence of any person whom it alleges to have previously invented, or to have had prior knowledge of, the thing patented, nor does it state where or by whom the thing patented had been previously used. Nor does it set up any defence of the abandonment of the invention to the public by E. W. Goodale, as inventor. Under this state of facts, the defendants not having obtained any leave to amend their answer, or any extension of the time for taking proofs, which has expired by the lapse of time, now apply to the court, on affidavits, to dissolve the injunction referred to. The affidavits seem to be intended, so far as they relate to defences authorized by the sixty-first section, to raise the defence that the invention covered by the first claim of the patent was, with the consent and allowance of E. W. Goodale, in public use at Clinton, in Massachusetts, for more than two years before the application for the patent was made, and, perhaps, the defence that E. W. Goodale was not the original and first inventor or discoverer of what is covered by the first claim of the patent. The plaintiff takes the objection, as a bar to the hearing of the application, so far as it rests on said defences, that, inasmuch as the defences attempted to be set up in the affidavits could not be availed of by the defendants in the taking of proofs for final hearing, both because the proofs are closed and the case is ready for final hearing, and because, also, the defendants have laid no foundation, in their answer, for putting in any proof to sustain such defences, such defences cannot be availed of to dissolve the injunction granted. This objection must prevail. No ground is shown, in any other respect, for dissolving the injunction.

In order to avoid any implication that the defences sought to be set up in the affidavits, as defences under the sixty-first section, would, on the papers put in on both sides on the application, be regarded as made out to such an extent at least as to warrant the dissolving of the injunction, or to have required the withholding of the injunction when originally granted, it is proper to say that an examination of such papers has led me to the conclusion, that no such result would follow from a consideration of the facts established by such papers.

The motion to dissolve the injunction is denied.

Case No. 14,390.

UNION PAPER-BAG MACH. CO. et al. v. NEWELL et al.

[11 Blatchf. 379; 6 Fish Pat Cas. 582; 5 O. G. 173.] [1]

Circuit Court, S. D. New York. Nov. 26, 1873.

PATENTS — PRELIMINARY INJUNCTION — MACHINE FOR MAKING PAPER BAGS—SIDE CUTTERS.

1. The first claim of the letters patent granted September 12th, 1865, to Benjamin S. Binney, assignee of E. W. Goodale, for "a machine for making paper bags," is in these words: "Making the side cutters, B, with curved ends, substantially as, and for the purpose, set forth." Such claim covers side cutters which have a regular curve near their inner ends, although the specification speaks of the curve near the inner ends of the patented side cutters as being an irregular curve, it not appearing that any side cutter with a curved inner end, for the same purpose, existed before.

2. The repeal, by the 111th section of the act of July 8, 1870 (16 Stat. 216), of the act of July 4, 1836 (5 Stat. 117), did not have the effect to vacate patents granted under the said act of 1836, nor does it have the effect to prevent the maintaining of suits on such patents for causes of action accruing after the passage of said act of 1870.

In equity.

[Motion for preliminary injunction. Suit brought [against George L. Newell and George H. Mallary] on letters patent [No. 49,951] granted Benjamin S. Binney, assignee of E. W. Goodale, September 12, 1865, for "machine for making paper bags," and afterward assigned to complainants.] [2]

George Harding and Fisher & Duncan, for plaintiffs.

Marcus P. Norton, for defendants.

BLATCHFORD District Judge. This is an application for a preliminary injunction to restrain the defendants from infringing letters patent granted, September 12th, 1865, to Benjamin S. Binney, assignee of E. W. Goodale, the inventor, for a "machine for making paper bags." As the claim of infringement, on this application, is confined to the first claim of the patent, only such parts of the specification need be referred to as relate to that claim. The specification says: "This invention consists, first, in giving to the side cutters an irregular curve at or near their inside ends, in such a manner that the form of the paper cut by their action, and the corners produced by folding said paper, are of such a shape that the paste shall come upon the paper where it is single, and thus be enabled to hold better than it does when it is applied in the ordinary way. It designates as "side cutters" the cutters "which serve to cut the paper so that the sides may fold and make the seam in the centre of the bag." It says, that "these cutters or knives are bent in an irregular curve near their inner ends, so that the paper cut by their action, and the corners produced by folding said paper, are such that the paste shall come upon the paper where it is single, and that it will hold better than it does when applied to the paper in the usual manner." One of the figures in the drawings contains lines which are said, by the specification, to designate the cuts made by the side cutters. The first claim is in these words: "Making the side cutters, B, with curved ends, substantially as, and for the purpose, set forth."

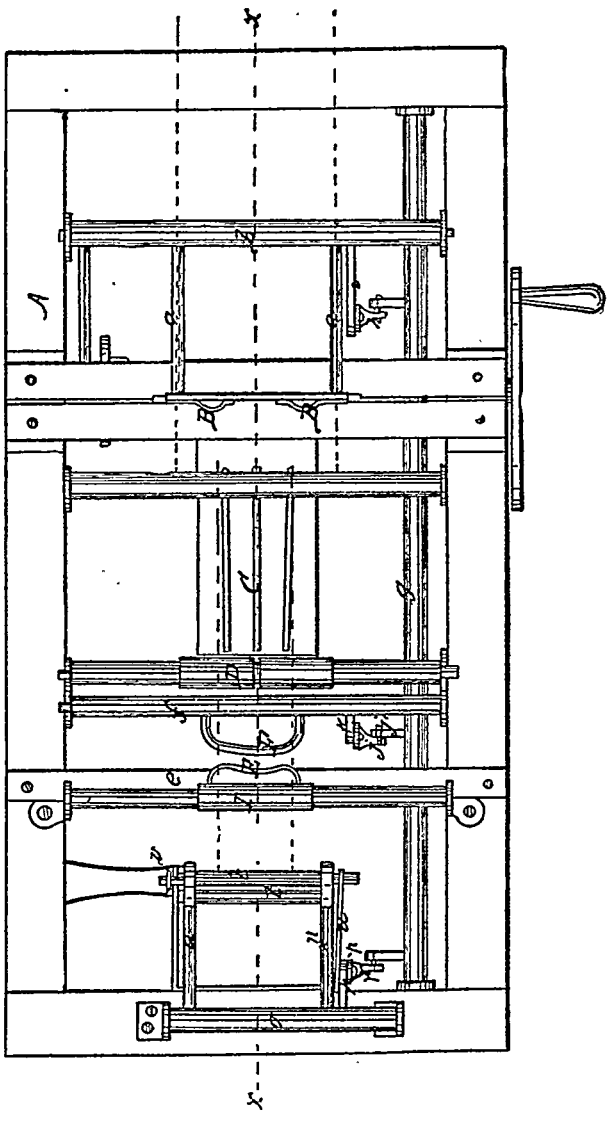
In the defendants' machine there are cutters which serve to cut the paper so that the sides may fold and make the seam in the centre of the bag. They are side cutters. They make a cut of a definite length from the outside edge of the paper inwards towards the centre, so as to leave flaps or side pieces, which are then to be folded over from each side towards the centre, overlapping each other at the centre, and making a seam in the centre. The defendants' side cutters are not straight or unbent in their whole length nor are they bent at an angle near their inner ends; but they are bent in a curve near their inner ends. The effect of this curve is, that, when the side pieces are folded over, the central end piece, of a single thickness of paper, may be pasted down without folding over, in addition to such single thickness, any part of the double thickness formed by folding the side pieces, and yet the corners will be perfectly close and tight. This result is due to the curve near the inner ends of the side cutters, in contradistinction to an angle there. Where the cutters have an angle there, and the central end piece, of a single thickness, is pasted down, without folding over, in addition, any part of the double thickness, there are holes or openings at the corners, and, to make tight corners, it is necessary to fold down part of the double thickness, and then the paste can only come upon the inner one of the two thicknesses, while the outer one, not being held to the inner one, tends to draw the inner one away from the surface to which it is pasted. This is precisely what is done by the patentee's arrangement, and what he describes, in the specification, as the result of his arrangement, when he says, that the form of the paper cut by the curved side cutters, and the corners produced by folding said paper, are of such a shape that the paste shall come upon the paper where it is single, and thus will hold better than when applied to the paper in the usual way. The language of the specification is not very artistic, and the idea sought to be conveyed is not as well expressed as it might be, but the meaning cannot be mistaken, when read in view of the state of the art, by a person skilled therein

It is to be noted, that the body of the

[1] [Reported by Hon Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 11 Blatchf. 379, and the statement is from 6 Fish. Pat. Cas. 582.]

[2] [From 6 Fish. Pat. Cas. 582]

[Drawing of patent No. 49,951, granted September 12, 1865, to E. W. Goodale; published from the records of the United States patent office.]



specification speaks of the curve near the inner ends of the side cutters as being an irregular curve, and that the claim drops the word "irregular," and claims making the side cutters "with curved ends, substantially as, and for the purpose, set forth." It is contended by the defendants, that the drawing of the patent shows the cut made by the side cutters as being, for its whole length, of a form of curve which may properly be called irregular, as a whole, and that the defendants' side cutter is straight for most of its length, and of a regular curve near its inner end. But this is immaterial. It is not shown that any side cutter with a curved inner end, for the same purpose, existed before. That being so, any degree of curve to the inner end of the cutter, which will produce the result described, is within the claim, and must be regarded as an irregular curve, whatever the word "irregular" may mean. Nothing but a curve will produce the effect. An angle will not. The patentee was the first to use the curve. The form of curve represented in his drawings will produce the effect. His claim speaks merely of "curved" ends. Hence, any curved end which will produce the result is his curved end.

It is contended, for the defendants, that, as the patent sued on was issued under the authority of the act of July 4, 1836 (5 Stat. 117), and as that act is repealed by the 111th section of the act of July 8, 1870 (16 Stat. 216), such repeal vacated and made void the said patent; and that, if this is not so, yet no suit can be maintained upon said patent, for any cause of action which accrued after the 8th of July, 1870, as did the cause of action in this suit. The 111th

section of the act of 1870, which repeals the act of 1836, contains the proviso, that "the repeal hereby enacted shall not affect, impair or take away any right existing under" the repealed act, "but all actions and causes of action, both in law and in equity, which have arisen under" said act, "may be commenced and prosecuted, and, if already commenced, may be prosecuted to final judgment and execution, in the same manner as though this act had not been passed, excepting that the remedial provisions of this act shall be applicable to all suits and proceedings hereafter commenced."

The rights created by, and arising under, a patent granted under the act of 1836, are rights existing under that act. The proviso declares that the repeal of that act shall not affect, impair or take away such rights. A right granted by the patent in suit is the exclusive right to make and use and vend to others to be used the inventions claimed in the patent. Such right was a right existing under the act of 1836, on the 8th of July, 1870. The right to sue, after the latter date, for infringements of the patent committed after that date, may, in one sense, be said not to have been a right existing on the 8th of July, 1870, because the cause of action had not then arisen. But, the grant held under the patent was a right, and a vested right. Such grant it was intended should continue till it should expire by its limitation. This is apparent from the provisions of the 63d, 64th, 65th and 66th sections of the act of 1870, which enact that patents granted prior to March 2d, 1861, (and which were patents for fourteen years,) may be extended for seven years beyond the original terms of their limitation.

It is further urged, that the wording of the proviso to the 111th section of the act of 1870 is such, that the only right saved is the right to prosecute actions and causes of action which arose prior to July 8th, 1870, on patents theretofore granted. No reason is assigned why, if such prosecutions are allowed, they should not also be allowed in respect of causes of action arising on or after July 8th, 1870, on such patents. But the point taken is rested solely on the fact, that the enactment in reference to prosecutions is introduced by the word "but;" and it is maintained that the effect of the use of that word is, that the rights declared, in the preceding part of the proviso, to be not affected, are limited to the actions and causes of action afterwards specified, that is, to such as arose before July 8th, 1870. No such effect, however, can properly be given to the use of the word "but." The first part of the proviso, as already stated, has the effect to keep in life the patent and its grant. But, actions had been brought and were pending on existing patents, and causes of action had arisen on existing patents, which had not been sued on, and the provisions of all prior existing acts in regard to suits on patents were being repealed. Hence, the necessity of providing that such actions and causes of action might be prosecuted in the same manner as though the act of 1870 had not been passed. But, the proviso goes on to declare, that the remedial provisions of the act of 1870 shall apply to all suits thereafter commenced for causes of action existing on the 8th of July, 1870, under patents previously granted. It leaves existing suits to be conducted according to the remedial provisions prescribed by the prior acts. There remain, however, suits to be brought on causes of action arising on or after July 8th, 1870, on patents theretofore granted. The proviso does not apply to the manner of conducting such suits. The existing patents, and the grants of right in them, being saved by the proviso, a reference to prior sections of the act shows that those sections apply to then existing patents, and to suits to be brought thereon for causes of action to arise on or after July 8th, 1870, as well as to patents to be issued under the act of 1870 and to suits to be brought thereon. Thus, the 53d section, in regard to reissues, embraces reissues of existing patents. If not, as all prior acts are repealed, there could be no reissues of such patents. The same is true of the 54th section, in regard to disclaimers, and of sections 55, 56, 58, 59, 60, 61, and 62, in regard to suits. Full authority is given by the latter sections, for bringing this suit.

As to the alleged license set up by the defendants, it was fully considered and passed upon in a former suit in this court between the parties to this suit, where it was held, on final hearing, that such license had no valid existence as a license, in the hands of these defendants, as against the Union Paper-Bag Machine Company, and persons holding under them.

Nothing is shown to affect the novelty of the first claim of the patent sued on, the infringement is clear, and the case, on all points, is one entirely free from doubt. The injunction asked for must, therefore, be granted.

[Subsequently, the defendants made an application to the court, on affidavits, to dissolve the injunction. The motion was denied. Case No. 14,389.]

Case No. 14,391.

UNION PAPER-BAG MACH. CO. et al. v. NIXON et al.

[1 Flip. 491; 2 Ban. & A. 244; 9 O. G. 691; 3 Cent. Law J. 223; 1 Cin. Law Bul. 58.] [1]

Circuit Court, S. D. Ohio. March, 1876.

PATENTS—ASSIGNMENT—CONSTRUCTION—MACHINE FOR MAKING PAPER BAGS—SUPPORTING BAR.

1. If an assignee of a patent convey his entire interest to a second assignee, a subsequent

[1] [Reported by William Searcy Flippin, Esq., and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here compiled and reprinted by permission.]

purchaser from the first assignee of a machine covered by the patent, obtains no right to use the machine during either the first named or extended term

2. The right to use in the extended term a machine purchased or made under the patent during the original term. is an incident to the primal right to use it during the original term. Should that fail on account of fraud, the incident falls with it.

3. A claim was for "the use of a supporting bar or its equivalent, around which paper may be formed into a tube, and in connection with which the said paper tube may be reversed, each and the whole substantially as described." *Held*, that the claim may be deemed to include a supporting bar around which the paper may be formed into a tube, and in connection with which the same may be severed without including, as an essential part, the mode by which the bar is supported; and that defendants have not avoided the patent by employing a different mode of supporting the bar, and they will be held as infringers, though the court, misled by the argument, thought (in another suit) that the mode of supporting the bar was an essential feature.

4. The doctrine, that where a patentee describes particular modes as essential to his invention he is confined to them, should not, where the device is complete in itself, be held to apply.

5. The claim also was for "cutting the paper without waste of material in such a form as shall leave suitable projections for the formation of the bottom lap, or seam, of the bag, and for convenient operation of the bag at the mouth, substantially as described." *Held*, to be a claim for the machine, and sustained by the court.

6. The learning upon licenses and estoppel in such cases discussed.

Final hearing on pleadings and proof. Suit was brought on the patent [No. 17,184] granted Benj. F. Rice, April 28, 1857, and re-issued to Morgan, Whitney & Priest, March 6, 1860 [No. 920], and afterwards assigned to the Union Paper-Bag Company for the extended term. This company conveyed to Chatfield & Woods the exclusive right to use machines in certain western states, Ohio among them. The suit was brought for infringement of the second and fourth claim of the patent. The claims were as follows: 2d. "I also claim the use of a supporting bar, or its equivalent, around which paper may be formed into a tube, and in connection with which the said paper tube may be severed, each and the whole substantially as described. 4th. I also claim cutting the paper, without waste of material, in such a form as shall have suitable projections for the formation of the bottom lap or seam of the bag, and for the convenient opening of the bag at the mouth, substantially as described." In a former suit between the parties [Case No. 14,386], this patent was sustained, and defendants were enjoined under the second claim. The fourth claim was not involved in that suit. The defendants, now seeking to avoid the terms of the second claim as construed by the court, constructed a machine having a floater, over which the paper tube passed, against the ends of which it was severed, the floater being kept in place between friction rollers. The floater did not possess all the four requirements laid down in the former opinion, as necessary accompaniments of the bar. On a motion for commitment under the former injunction, the court did not think the question of infringement clear enough to authorize such a step. This suit was therefore brought. Defendants set up non-infringement as one defense, insisting that the device as used was the subject matter of patent both in this country and England, and therefore a new invention not known as an equivalent for the Rice bar at the date of his patent. That having purchased the machines from Charles Morgan when he owned a right in the original term of the Rice patent, they had the right to use them until they were worn out. It appeared in proof that Morgan originally gave the exclusive right in the west, under the Rice patent, to Nixon, Chatfield & Woods. Nixon afterwards went out of the firm, conveying his rights to Chatfield & Woods. Soon afterwards, Nixon purchased of Morgan the machines sought to be enjoined, and which the defendants were using in Ohio. At the time of this sale to Nixon, Morgan owned an undivided interest in the Rice patent for the original term only. Afterwards he made an agreement for an assignment of the extended term, should the patent be extended. Rice died before the extension, and all rights in it were conveyed to Mrs. Rice, his administratrix, who, on the extensions, conveyed the same to the Union Paper-Bag Company. Two months after the extension, the Union Paper-Bag Company conveyed the exclusive right to use machines in certain western states for the extended term to Chatfield & Woods. Now the defense claimed that, though their assignment during the original term may have been void, Nixon and Morgan both knew the rights of Chatfield & Woods, and that upon the extension Chatfield & Woods' rights stopped, Nixon's revived and became prior to that of Chatfield & Woods; there being two months in which they held no right. The case was argued both on the license and on the question of infringement. It was at first decided for defendants.

Geo. Harding and Hatch & Parkinson, for complainants.

James Moore and Stallo & Kittridge, for defendants.

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

EMMONS, Circuit Judge. License: Charles Morgan, the assignee of the patent, sold to Nixon the exclusive right to the use of these machines in the state of Ohio. Nixon sold the same right to Chatfield & Woods. After this, Morgan had no right to sell the use of a machine in Ohio at any time. Not during the original term, because he had already transferred that; not during the extended term, because he did not own it. Nor could he sell a single machine with the right to use it until it was worn out after the expiration of the original term, because the assignments

of the patentee to him transferred no such double authority as that of first transferring the exclusive right of the whole state, which would exhaust his whole power of disposition under the assignment, and then, secondly, to flood the country with machines to be used after the expiration of the term, thus defeating the interest of the patentee in the extension. It is not a fair construction of the assignment of a patent that the assignee shall first assign the entire right for a particular territory, and get its whole value from his vendee, and, after having thus received all the benefit he was entitled to under the transfer, sell single machines to be used in the same territory during the extended term. He will in this mode obtain the value of a right never conveyed to him.

It is argued that inasmuch as Morgan himself subsequently, for a short period, owned the extended term, that if he were in court seeking to enjoin Nixon, he would be estopped to say that at the time of the sale he had no right to make it. If this be so, as the present complainants claim the extended term through him, they should also be estopped. There are many fallacies in this argument.

We hold the purchase from Morgan by the defendant of the infringing machine was in fraud of complainants' rights. Such a title, although it might estop Morgan personally, is not one which would work the same consequences against one whom it was intended to defraud.

It will be noticed particularly that the argument we are now considering, does not suppose the defendant to be possessed of a legal title, but only an equitable right growing out of the fact that his vendor subsequently became possessed of the right, which by the assumptions of this argument he pretended to grant, but this principle is applicable only where justice demands it, and to prevent circuity of action; good faith demands the annexation of no such incident to a contract made for the purpose of defrauding others; no action could be maintained by Nixon against Morgan for a failure of his user of the machine until it was worn out after the expiration of the first term. In view of the fact that Nixon had before bought and sold the same right, that Morgan was the assignee only of the patent and had no right to the extended term, we doubt whether any action could be maintained irrespective of fraud. But in view of our conclusion that the contract was actually fraudulent as to third persons, it is clear that no action could be maintained by one particeps criminis against the other. In either view we are clear that no such right, legal or equitable, passed to the defendant, Nixon, as within the decisions authorized him to use it during the original term in such sense as would give him the right to use it during the extended term. The right to use after the expiration of the term is an incident to the primal rights to use it during the original term; if that fails on the account of fraud, the incident falls with it.

Second claim: In the former printed opinion the head for distending the bag so that it could be severed by an oblique cut was considered "the all important feature of this supporting bar." It treated the word "supported," as referring to that function of the bar which supported and distended for severance the tube; it treated as unimportant and utterly functionless all the other portions of the bar save for the single purpose of sustaining the distending head. So fully was this idea entertained by the court, the presiding judge remarked to defendant's counsel that if a hair or thread possessed the power of support, and either was substituted for the near part of the bar, he would deem it an infringement. He added that he thought the very essence of the invention would be taken if by some novel discovery a power analogous to magnetism could be made to hold it in place in an operative machine

It was, therefore, because the court erroneously assumed, as it was fully authorized to do by the argument and facts before it, that this particular mode was the only one by which the head could be supported, that it was said "the attachment of the bar to the bed of the machine was one of its leading features." The defendant has succeeded in sustaining this head by other means; he demonstrates by experiment that as matter of fact such feature is not essential. He presents a supporting bar around which the tube is formed, and by which it is sustained and extended for an oblique cut precisely in the mode and with the identical functions as those clearly described in the complainants' patent.

The letter of complainants' specifications is followed by the defendant, and the actual history and growth of this identical machine shows that in fact as well as in legal theory the complainants' supporting bar has been the parent of the defendant's device. Nixon bought an operative machine which he had no right to use; he called experts to make numerous substitutions of subordinate parts and was enjoined, they being pronounced mechanical equivalents. He has all the time been running the same machine, and the question is now presented whether the substitution of another mode of sustaining this supporting bar which he borrows from an English patent, is such a substantial alteration of the complainants' device as avoids infringement.

Notwithstanding what was said by the court when the final injunction was ordered under the former bill in reference to that feature of the bar by which it was attached to the bed of the machine, and which constitutes the foundation of so much of the defendant's argument, we now hold, not without some doubt, that the second claim may

be so construed as to include a supporting bar around which paper may be formed into a tube and in connection with which the same may be severed without including, as an essential part of it, the mode by which the bar is suspended or sustained. When so interpreted, the defendant has not only a mechanical equivalent, but that which is identical in all particulars with that of the complainants.

The nomenclature of the first judgment arose from the accidents of the argument, and is misleading. It might be inferred that the all-important head was something different from the supporting bar itself. The whole judgment shows, however, that all which went to form and distend the tube, the part around which the tube was formed and in connection with which it was severed, was treated as the supporting bar within the meaning of the patent, and all the residue or rear portions as a mere form or mode of holding the supporting bar in place. We adopt no new view now. The only embarrassment results from the undue prominence which was given to the mode of suspending the bar; it was then erroneously supposed to be the only mode.

We think this most useful and highly meritorious invention, one which has cheapened one of the most useful productions of commerce, should not, if any liberal reading of the claim can prevent it, be taken by defendant and used without any alteration or addition, without one particle of invention, of even experiment or expense, because the device of another shows him a different mode of sustaining this bar. Before the complainants' invention no one ever thought of making the lap for a bag by the ingenious device of an extended tube and an oblique cut. Especially was it never thought of in connection with a continuous tube by which bags are made more rapidly than we can count.

It seems to us a breaking down of all the protective principles of the patent law to hand over an invention so novel and so useful to one who has done no more to improve or change it than has this defendant.

Pressed as we are for time, we shall make no attempt to distinguish this case from the judgments cited by the learned counsel for the defendants. We have examined them all, and think they warrant us in saying that the essence of the complainants' device having been appropriated by the defendant, he does not escape infringement, as we construe the claim, even though the mode of supporting the bar were so entirely different as to constitute the subject of a patent. We should deem it a different instrumentality for a support only, and not an essential and indivisible portion of the device around which the tube is formed, distended and presented for severance

We have not overlooked the many decisions which hold that where the patentee describes particular modes as essential to his invention, that he is confined to those; but we do not think their principle ought to be applied to a case like this where the device is so capable of being employed in another mode, where it is so complete in itself, and when so used and thus employed all its benefits are wholly secured. And we add, more especially, that where, without such employment, its novel purpose could not be accomplished at all. Not one of the cases have taken from an inventor so meritorious a device by such means.

It is possible we are somewhat influenced by the history of this contest before us; for it was well calculated to warp, and perhaps even to prejudice, the legal judgment. But if an error should be committed, it is better that it should be in an effort to protect meritorious invention rather than to aid in what appears to us to be an attempt to obtain the benefits of this invention without compensation. From these views it follows that the defendant's device infringes the second claim of complainants' patent.

Fourth Claim: This claim has been construed by Judge Blatchford to be a claim for the mechanism by which the paper for the manufacture of the bags is cut as described. Giving it this construction in connection with the construction which we have given to the second claim, it must, therefore, be held that this claim is also infringed by the defendant.

[See 105 U. S. 766.]

Case No. 14,392.

UNION PAPER-BAG MACH. CO. et al. v. PULTZ & WALKLEY CO. et al.

[15 Blatchf. 160; 3 Ban. & A. 403; 15 O. G. 423; Merw. Pat. Inv. 678.] [1]

Circuit Court, D. Connecticut. Aug. 20, 1878.

PATENTS—PRIOR EXPERIMENTS—SPECIFICATIONS—PAPER BAG MACHINE.

1. The first claim of the letters patent granted to William Goodale, July 12th, 1859, for improvements in machinery for making paper bags, and extended for 7 years from July 12th, 1873, namely: "Making the cutter which cuts the paper from the roll or piece, of the form herein described, that, on cutting off the paper, it also cuts it into the required form to fold into a bag, without further cutting," is valid.

2. Knowledge of prior experiments by another, will not defeat the claim of the patentee to an invention, if it appears that, after those experiments were abandoned, he first perfected and adapted the invention to actual use.

3. The patentee has the right to take up the improvement at the point where it was left by his predecessor and if, by the exercise of his own inventive skill, he is successful in first perfecting and reducing to practice the invention which his predecessor undertook to make, he is

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 403; and here republished by permission. Merw. Pat. Inv. 678, contains only a partial report.]

entitled to the merit of such improvement, as an original inventor.

[Cited in Whittlesey v. Ames, 13 Fed. 899.]

4. Declarations of a patentee and former owner of a patent, undertaking to restrict the invention within a narrower compass than that stated in his specification, will not be allowed to vary the construction which would otherwise be given to the patent.

5. The invention of Goodale was not simply a knife which would cut without waste, or which would produce the exact form of blank described in the specification, but was a machine having a cutter of five planes, which, by a transverse cut across a roll of paper in the flat sheet, cut the paper into the required form to fold into a paper bag without further cutting out, the form of the blank being substantially the form given in the specification.

6. A machine having a knife of the irregular form of the Goodale cutter, which cuts the paper into the required form to fold into a bag, without further cutting out, is an infringement of the first claim of the Goodale patent, although such knife has an additional parallel blade at each end of it.

7. Nor does the removal of the central cutting portion of such knife about a bag's length in advance of the side cutters, cause the machine to be no infringement, the cutters which remove side pieces of paper from the roll remaining the same.

8. It required invention to make a knife which would cut from a roll of paper in the flat sheet, by one cut, a blank which could be folded into a bag without further cutting out.

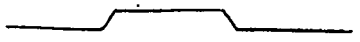
In equity.

George Harding, for plaintiffs.

Charles E. Mitchell and Benjamin F. Thurston, for defendants.

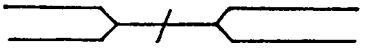
SHIPMAN, District Judge. This is a bill in equity founded upon the alleged infringement by the defendants of the first claim of letters patent [No. 24,734], dated July 12th, 1859, which were granted to William Goodale, for improvements in machinery for making paper bags. Said letters patent were extended for the term of seven years from July 12th, 1873. The patentee, on July 14th, 1873, assigned all his interest in the patent to the Union Paper-Bag Machine Company. The other plaintiffs are the exclusive licensees of said assignees, to use the improvement within certain territory, including the state of Connecticut. The answer denies that the patentee was the original and first inventor of the alleged invention, and also denies that, upon any proper construction of the patent, the defendants have infringed, and avers that the patent was surreptitiously and unjustly obtained for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same, and that the alleged improvements were not the product of inventive ingenuity, but were due to mechanical skill merely.

The specification says, that the invention which is the subject of the first claim consists "in making the cutter which cuts the paper from the roll or piece, of the peculiar irregular form hereinafter described, whereby it is caused, by the operation by which it cuts the paper from the roll or piece, to give it the form hereinafter specified, which permits it, without further cutting out, to be folded into a bag." The form of the cutter will be understood by the following representation of the cut which is made in the paper:



By the stroke of the cutter, a projection is left in the centre of one end of the blank, which forms, when the side lips are folded together, a lap to cover the mouth of the bag. A depression is left in the centre of the other end of the blank. When the side lips of the blank are folded together, they lap over to make the seam down the middle of one side of the bag, and the two projections at the lower end of the side lips combine, when folded on the opposite side to the central seam, to form a lap and thus to make the bottom of the bag. The top flap is upon the seam side of the bag, and the bottom flaps are upon the reverse side. The first claim of the patent is for "making the cutter which cuts the paper from the roll or piece, of the form herein described, that, in cutting off the paper, it also cuts it to the required form to fold into a bag, without further cutting out."

The cutter which was used by the defendants prior to the commencement of the suit was of the following form:



It appears, by a stipulation of the parties, that, afterwards, the "defendants employed cutting devices like those previously employed, so far as they removed side pieces of paper from the roll, and then severed the paper by a straight cutter near the end pasting device, and a bag's length in advance of the side cutters above referred to."

The effect of either system of the defendants' cutters is to cut a projection at the centre of each end of the blank. When the two side lips are folded over to form a central seam down one side of the bag, the two end flaps are likewise folded over upon the same side, and form respectively the top and bottom of the bag, and thus all the seams are upon the same side. The Goodale cutter produces no waste. The paper which is severed between the two blades at the right and left extremities of the defendants' cutter is a waste piece of paper.

As in many other cases, the question of infringement depends much upon the construction which is given to the patent. The defendants insist that, properly construed, the first claim is for a knife having five planes, for producing the blank described in the patent without waste of material, that is to say, a blank in which the two lower ends of the side lips combine to form the bottom lap, or a blank having a projection at one end and a corresponding depression at the other end.

In order to ascertain the proper construction of the patent, it is important to know the nature and extent of the invention which was made by the patentee. Upon the question of novelty, the defendants have not relied upon any of the devices or patents which are mentioned in the answer, but they say, first, that William Goodale, the patentee, borrowed the invention from his brother, E. W. Goodale, who is not named in the answer, and, secondly, that, if the E. W. Goodale machine cannot be used as an anticipatory invention, to defeat the patent, it can properly be used to show the state of the art at the time of the William Goodale invention.

On July 25th, 1856, E. W. Goodale, the brother of the patentee, made an application for a patent for an improvement upon a bag machine which he had theretofore invented, which application was rejected. A small model, containing the alleged improvement, was sent to the patent office. This model contained the same form of cutter, the "three cutter method," which is now used by the defendants. E. W. Goodale never constructed a machine of full size like his model, and never made or sold bags like those which could have been made upon such a machine. William Goodale worked for his brother from 1854 or 1855 to 1859 or 1860, and knew of the model and the invention which was specified in the rejected application, and testifies that his, William's, object in shaping his knife was to cut the paper without waste. E. W. Goodale purchased the William Goodale patent, and constructed machines like those described therein, and manufactured bags upon such machines. It does not appear that he ever undertook to perfect his model after the application was rejected. His idea was never reduced to practice, and was never embodied in an operative machine, and, upon the rejection of his application, he seems to have abandoned his inchoate invention, and afterwards to have manufactured bags under the subsequent patent of his brother. About a year after the rejection of the application, William Goodale first thought of attempting to construct a new machine.

Seasonable objection was made by the plaintiffs to the admission of this testimony, if it was offered to prove that the patentee was not the original inventor of the thing patented, upon the ground that neither the invention of E. W. Goodale, nor his use of the invention, nor his name, as one who had a prior knowledge of the thing patented, were mentioned in the answer. It has frequently and uniformly been held that such testimony is not admissible to show that the patentee was not the original inventor of the thing patented. Agawam Co. v. Jordan, 7 Wall. [74 U. S.] 583; Railroad Co. v. Dubois, 12 Wall. [79 U. S.] 47. But, as the testimony is relied upon in order to affect the construction of the patent, it is necessary to state what it proves. The E. W. Goodale model was an experiment which rested in theory alone, and was never reduced to practice, or brought into use, and was abandoned by the alleged inventor. If an alleged prior invention "was only an experiment, and was never perfected or brought into actual use, but was abandoned and never revived by the alleged inventor, the mere fact of having unsuccessfully applied for a patent therefor cannot take the case out of the category of unsuccessful experiments." The Corn-Planter Patent, 23 Wall. [90 U. S.] 181. It is, however, said, that William Goodale knew of this model and of this invention before he commenced his own experiments, and, therefore, was not an original and independent inventor. Knowledge of prior experiments by another will not defeat the claim of the patentee to an invention, if it appears that, after those experiments were abandoned, he first perfected and adapted the invention to actual use; but he will not be an original inventor, and his claim to originality will be defeated, if the knowledge or information which he derived from the abandoned models or experiments was sufficiently definite and clear to enable him to construct the improved thing which was the subject of his alleged invention. Washburn v. Gould [Case No. 17,214]; Judson v. Moore [Id. 7,567]; Pitts v. Hall [Id. 11,192]. It is plain, that the cutter of William Goodale was, in its completed and perfected state, a simpler and more economical cutter than the one shown in the E. W. Goodale model. It proved that the patentee had exercised invention. Having attained success by such exercise and by his skill and ingenuity, he was entitled to the position of an original inventor, and he rightfully obtained a patent for his improvement.

Admitting this to be true, the defendants now ask what was his improvement, and they say that the model and the rejected application of E. W. Goodale, and the patentee's knowledge of his brother's invention, so far as it had progressed, are important facts showing the state of the art at the date of the patentee's invention, and showing that his actual invention was of a very limited character. Such facts are admissible to show the circumstances connected with the invention, and the state of things existing at the time, and thus to enable the court to understand the subject-matter of the patent, and to throw light upon its proper construction, and may be very important. The patentee is not, however, necessarily limited, in his patent, to the narrow field between the model of his predecessor and his own perfected machine, for, his invention may have actually covered a wider field, and may have included the territory which the previous investigator undertook to occupy and abandoned. The patentee has the right to take up the improvement at the point where it was left by his predecessor, and it, by the exercise of his own inventive skill, he is successful in first perfecting and reducing to practice the in-

vention which his predecessor undertook to make, he is entitled to the merit of such improvement, as an original inventor. Whitely v. Swayne, 7 Wall. [74 U. S.] 685. And, if he is an original inventor of the improvement, he is entitled to the benefit of unsubstantial variations and modifications in form of the principle of his invention, notwithstanding such modifications may run into and include the forms of mechanism shown in the abandoned experiments of which he had knowledge, provided the invention is properly claimed and set forth in his specification.

To the testimony of the patentee that his object in shaping his knife "was to cut the paper without waste, without any reference or view to my brother's machine any way," I do not give much weight, if the answer is construed to mean that his sole or main object was to cut the paper without waste. Undoubtedly, one object was to avoid waste; but the patentee, in his specification, gave a wider scope to his invention. Nothing is said in the patent in regard to cutting the paper without waste. I am not willing to vary the construction which would otherwise be given to a patent, in order to conform to the declarations of a patentee and former owner, whereby he undertakes to restrict the invention within a narrower compass than that which he had previously stated in the specification.

Giving to the new testimony in regard to the state of the art its appropriate weight, I think that the invention of William Goodale was not simply a knife which would cut without waste, or which would produce the exact form of blank described in his specification, but that his place as an inventor is that which was stated in the opinion of the supreme court upon this patent. "Evidence of a satisfactory character is exhibited, to show that the assignor of the complainants was the first person to organize an operative machine to make paper bags from a roll of paper in the flat sheet, by a transverse cut across the same with a knife having five planes, so that the blanks, so called, when cut and folded, will present a paper bag of the form and description given in the specification and drawings of the patent." Union Paper-Bag Mach. Co. v. Murphy, 97 U. S. 120. The thing invented was an organized machine, having a cutter of five planes, which, by a transverse cut across a roll of paper in the flat sheet, cut the paper into the required form to fold into a paper bag without further cutting out, the form of the blank being substantially the form given in the specification. The form of the knife must be substantially "the peculiar irregular form" which was described. It must have the specified effect, that is, it must cut the paper into the form substantially specified, so as to be folded into a bag without further cutting out. The exact form of the Goodale blank when it was cut, and before it was folded, was not of the essence of the invention, provided it could be folded, without further cutting out, into a paper bag of the ordinary form; otherwise, the patentee, who was the pioneer in the art of making paper bags from a roll of paper in the flat sheet, by a transverse cut across the same with a knife having five planes, had limited himself not only to a knife of the peculiar irregular form, but to a knife which should produce a blank of the precise shape, before folding, which his knife produced.

Neither did the patentee confine himself to a form of knife which should cut without waste. If another person should use a knife so near to the form of the patented knife as to embody its mode of operation, and to produce the same result of cutting a blank from a flat roll, so that it could be folded without further cutting out, he would be an infringer, notwithstanding his knife did not accomplish the work to as good advantage as did the patented invention. "The patentee having described his invention, and shown its principles, and claimed it in that form which most perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of those forms." Winans v. Denmead, 15 How. [56 U. S.] 330.

The defendant's knife has the five planes of the Goodale knife, with an additional parallel blade at each end of the cutter. The effect of these two parallel blades is to make the same projection at the top of the blank which the Goodale knife makes, but, by cutting out a waste piece of paper, to make, also, a projection at the other end of the blank, which forms the bottom flap; whereas, the Goodale knife makes a depression, and the two end lips are turned over to make the bottom of the bag. The substance of the invention, the irregular form of the Goodale cutter, which cuts the paper into the required form to fold into a bag, without further cutting out, is found in the defendants' knife. The office which is performed by the cutter in such machine is substantially the same, and the variations in form or in function do not vary the principle of either cutter. If the E. W. Goodale knife had been the first perfected invention, the William Goodale knife, which omitted a parallel blade, and thereby effected a small saving in stock, would have been a patentable improvement, but would have been subsidiary to the original invention. The defendants' cutter, by cutting out a projection on each end of the blank, produces a bag which has a neater appearance than its rival has, but the work is done in substantially the same way and by substantially the same means, and the result is substantially the same.

Stress is laid upon the argument, that the Goodale machine is organized, in all its parts, with reference to the fact that the cutter is one which makes a projection at the top and

an excavation at the bottom of the blank, and thus the fold of the bottom of the bag is upon the reverse side from the fold of the top. This is true, but this fact does not establish the defendants' position, that the essence of the Goodale invention was the exact form of his cutter. He had made a decided advance in the art, and his invention gave him a right to claim a cutter of substantially the form which he invented, notwithstanding the fact that the other parts of his machine, which turned and pasted the bottom flaps, were arranged with reference to the peculiar form of his blank. The defendants do not escape from the charge of infringement by the fact that, in order to accomplish the results attained by parts of the plaintiffs' machine other than the cutter, those parts had to be modified in order to meet the change which they made in the form of the cutter.

The defendants next insist that their "three cutter method" is not within the patent, even if the knife which they used at the commencement of the suit is an infringement. After a preliminary injunction had restrained them from the use of the knife as originally constructed, the defendants moved the central cutting portion of the knife about a bag's length in advance of the side cutters. This was a mere change of position, and was not a change of substance, and produced no new result.

It is not necessary to consider the defence, that the patentee surreptitiously and unjustly obtained the patent for that which was in fact invented by E. W. Goodale, as there is no evidence that he was using any effort to adapt and perfect his invention, and he had in fact given up all attempts to perfect it before the patentee took up the subject of the improvement.

The remaining defence is, that there was no invention in the cutter, but that the improvement was an exercise of mechanical skill only. The history of the art of paper bag manufacture, and of the various patents which have been granted for paper bag machines, shows that this is a theoretical defence. As a matter of fact, there was invention. The inventor was required to make a knife which should cut from a roll of paper in the flat sheet, by one cut, a blank which could be folded into a bag without further cutting out. That had not been done before, although paper bag machines are old, and have "been constructed by many persons and in various forms for more than twenty years, and with more or less utility." Machine Co. v. Murphy, cited supra.

There should be a decree for an injunction and an accounting in respect to the first claim.

[The above decision was confirmed in Case No. 14,393 For another case involving this patent, see Union Paper-Bag Mach. Co. v. Murphy, 97 U. S. 120.]

Case No. 14,393.

UNION PAPER-BAG MACH. CO. et al. v. PULTZ & WALKLEY CO. et al.

[16 Blatchf. 76; 4 Ban. & A. 181.] [1]

Circuit Court, D. Connecticut. March 11, 1879.

PATENTS—PRIOR EXPERIMENTS—MACHINE FOR MAKING PAPER BAGS.

1. The decision in Union Paper-Bag Mach. Co. v. Pultz & Walkley Co. [Case No. 14,392], sustaining the validity of the first claim of the letters patent granted to William Goodale, July 12th, 1859, for improvements in machinery for making paper bags, confirmed.

2. An inoperative and abandoned model, containing a three-cutter knife, existed and was known to the patentee, but he was the first to demonstrate that such a knife would, in an organized machine, cut a blank from a roll of paper in the flat sheet, by a transverse cut, so that the blank, when cut off, would be of the form ready to be folded into a bag. Having done so, he had a right to claim the knife separately.

In equity.

George Harding, for plaintiffs.

Charles E. Mitchell and Benjamin F. Thurston, for defendants.

SHIPMAN, District Judge. Since the opinion in this case was filed [Case No. 14,392], the question which will be hereafter considered has been reargued, upon the application of the defendant. The point at issue between the parties is the effect of the patentee's knowledge of the E. W. Goodale model upon the construction of the first claim. It being admitted that such a construction is to be given to the claim as will limit and restrict it to the actual invention which the patentee made (Estabrook v. Dunbar [Case No. 4,535]; Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274), the defendants insist, that the invention of William Goodale, which is described in the first claim, consisted simply in his departure from, and improvement upon, the knife found in the E. W. Goodale model, of which knife the patentee is proved to have had knowledge. The precise question is—what was the invention of William Goodale?

If the E. W. Goodale knife had been an operative and effective piece of mechanism in a machine, the defendants would unquestionably be right, but it was, in fact, simply his idea expressed in a model, and communicated through that model to William Goodale. It was not a perfected but an inchoate invention. But, the defendants say, and this is the thought which runs through the argument of their counsel, that the model fully disclosed to William Goodale that the three-cutter system shown in the model was adequate to cut a bag blank from a roll of paper, suitable to be folded into a bag without further cutting out, and he cannot, therefore, claim broadly such cutting device, per se.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 181; and here republished by permission.]

but can only claim specific improvements upon the same, which were invented by him, or new combinations. If it is true, as matter of fact, that William Goodale knew that the "three-cutter system" was adequate, as a part of an organized machine, to accomplish the result mentioned in the first claim, then his invention was simply an advance in the art, and he can only claim his specific improvement.

The proved state of facts is this: An abandoned model of a machine containing the three-cutter system was known and understood by William Goodale, who invented a better cutting mechanism. A model existed, but it had been discarded. The patentee entered the field of invention and attempted to make a paper bag machine. He did not make it in accordance with the model. The model gave him ideas, and these ideas he first worked out to a successful issue. Now it is said the old model was the boundary of his invention, because he knew that the method of the model would have been successful and was adequate to produce a successful result. The error of the defendant consists, as it seems to me, in the position, that the inoperative model, which could not make and never did make a blank, disclosed to William Goodale that its knife was, or could be, an effective cutting instrument in a machine, and that, therefore, his invention consisted solely in departing from the E. W. Goodale knife. The patentee's invention did not consist simply in making an improvement upon a pre-existing invention, because he did not know, and nobody knew, for nobody had ever made the experiment, whether that knife would make a blank, in a machine. The object of each experiment was to make a knife which, as a part of an organized machine, could cut a blank from a roll of paper in the flat sheet, by a transverse cut, so that the blank, when cut off, would be of the form ready to be folded into a bag. That result had not been accomplished. E. W. Goodale thought that he could accomplish it. He exhibited and abandoned his plan. Whether this plan would be successful was not then known, because it had not been tried; but William Goodale attained success upon his independent plan.

If the patentee had believed or had known that the E. W. Goodale knife could not accomplish the work, and that it had been properly abandoned as a useless experiment, it could not justly be claimed that the patented invention consisted merely in being an improvement upon the abandoned knife. Is the position of William Goodale as an inventor altered by the fact, that, instead of believing that the knife of his brother was a useless knife, he knew nothing in regard to its utility, because its utility had never been tested, and then existed only in theory? Its utility has now been proved, and it is natural to impute to William Goodale, at the date of his invention, the knowledge which is now enjoyed; but no such knowledge then existed.

It is said, and said truly, that the subject of the first claim is a knife not in combination with any other part of the machine, and, therefore, for the purposes of this case, the knife, per se, was the thing which the patentee invented; and it is strenuously insisted, that the court must look at the two knives, disconnected from any other mechanism, and that it is obvious that the patentee knew, or must have known, that his brother's knife would cut the desired blank, and that there could have been no ignorance in regard to the feasibility of the device, for simple inspection would impart knowledge, and no experiment was necessary. But the knife was not to be a hand tool. It was to be a part of an automatic bag machine, and, therefore, a knife was to be invented which could be used in connection with other parts of the machine, although, in the claim, it is, properly, separately claimed. Inspection would show that such a knife would cut out pieces of paper in the form of a blank. Inspection would not show that it would operate in the place where it necessarily must be used. The fact that such a knife would do the work was not a part of the fund of knowledge which the patentee had when he commenced to plan his invention.

If, then, as I think was the case, all that William Goodale knew was that the three-cutter system had been represented in a model, with which model he was familiar, and that the model had been laid aside, but did not, therefore, know that it was adequate to do the work, he started, as an independent inventor, into an unoccupied field of invention, and his invention is as broad as the territory which he actually reduced to possession.

For these reasons, I still give to the first claim the same construction which was given in the former opinion.

Case No. 14,394.

UNION PAPER-COLLAR CO. v. LELAND.

[1 Holmes, 427; 1 Ban. & A. 491; 7 O. G. 221; Merw. Pat. Inv. 339.] [1]

Circuit Court, D. Massachusetts. Oct., 1874.

PATENTS—REISSUE—VARIANCE—PAPER COLLARS.

1. Where the specification of a patent for ornamented paper collars and cuffs in imitation of linen or other fabric, especially for ladies' use, points out that by the described mode of manufacture, the surface of the linen or fabric will be imitated, as well as the ornaments, the patent may lawfully be reissued so as to claim the imitated surface instead of the imitated ornaments, and collars generally, as well as those to be worn by ladies.

2. Paper collars and cuffs, and paper embossed in various modes, some of which were imita-

[1] [Reported by Jabez S. Holmes, Esq., and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here compiled and reprinted by permission. Merw. Pat. Inv. 339, contains only a partial report.]

tions of textile fabrics, being known in the art, there is no patentable novelty in the application of paper embossed in imitation of linen to the making of collars and cuffs.

Bill in equity [by the Union Paper-Collar Company against Emerson Leland] for an injunction to restrain alleged infringement of reissue letters-patent [No. 5,259] dated Jan. 24, 1873,[2] for paper collars and cuffs, granted W. E. Lockwood; and for an account.

W. G. Russell, for complainant.

A. J. Robinson, for defendant.

LOWELL, District Judge. This suit is brought to restrain the infringement of the second reissue of W. E. Lockwood's patent of 1859; this reissue being granted in 1873. The specification declares the invention to consist of a collar or cuff having a paper surface, imitative of the textile surface of a collar or cuff of textile fabric; that in carrying out his invention, Lockwood uses a fabric composed of paper and muslin, or equivalent fabric, having a smooth, white, polished or enamelled paper surface to represent that of starched linen. It then describes one mode of making the imitation of a linen or muslin surface by dies, but does not claim or limit the invention to any particular appliances or machinery for embossing the fabric. The claim is for a collar having a paper surface imitative of the textile face and fibre of a dressed linen collar, as set forth.

The first objection taken is, that the reissue is for a different invention from that described in the original patent. The patent appears to have been intended to apply to ornamented collars and cuffs, especially those for ladies' use; but the description of the mode of obtaining the result points out that the surface of the linen or other textile fabric will be imitated as well as the ornaments; and we see no reason why the patent might not lawfully be reissued, so as to claim, as it now does, the imitated surface instead of the imitated ornamented cuffs and collars generally, as well as those to be worn by ladies. There is no repugnancy nor any introduction of a new invention.

The case turns on the question of novelty. It appears by the case brought by this plaintiff against Van Deuzen [Case No. 14,395] that the claim of the first reissue of this patent was for an embossed collar or cuff made of a fabric composed of paper and muslin, or an equivalent fabric. This was held to be no patentable novelty. Judge Blatchford says: "But, as like embossing had been done on starched linen, the result of producing such embossing on a smooth, white, polished or enamelled surface, representing that of starched linen, cannot be patented as an invention, when nothing is claimed as new in the appliance, machinery, or process for producing the embossing. A starched linen collar, with its surface embossed, existed before. There was nothing of patentable novelty in the idea that, the imitative surface being provided, it would be well to emboss it. The patent does not claim the invention of the imitative surface, or of any means of producing it."

It will be seen that the present form of the patent follows the suggestion, if it be one, of the court, and does lay claim to the imitative surface itself as used for making collars, and thus avoids, as is contended, the reasoning of that case. But the evidence in the case at bar discloses that paper as well as linen was embossed in various modes and for many uses before the date of Lockwood's patent. There is the English patent of De La Rue, taken out in 1834, for embossing paper in parallel lines; and one granted to John Evans, in 1854, for ornamenting paper with an imitation of the patterns of textile fabrics. It may be doubted whether Evans produced upon his paper the surface, as well as the ornaments, of textile fabrics; but there is proof that paper made in imitation of such fabrics, including linen, was well known and in use for paper-hangings and some other purposes. Samples are produced from papers actually made before 1859 which are of this character. It is said that these imitations are not very well done; but they appear to have been accepted as good enough for the purposes for which they were used; and the patent is not for any improvement in the imitation, or in the mode of producing it.

Collars and similar articles made of paper were patented to Walter Hunt in 1854, as a new manufacture, and Lockwood was the owner of this patent when he made the improvement now in controversy.

In this state of the art, collars and cuffs made of paper being known; and paper embossed in various modes, some of which were imitations of the surface of textile fabrics, being known; we are of opinion that there was in 1859 no patentable novelty in the application of paper embossed in imitation of linen to the making of collars and cuffs. Hotchkiss v. Greenwood, 11 How. [52 U. S.] 248.

The evidence in the record goes even beyond what we have already mentioned, and renders it probable that paper embossed in imitation of a linen surface was used for collars and cuffs long before the date of the alleged invention, and that such articles were offered for sale in New York, and known to several persons. It is true that they were not found to be acceptable to the trade, and they had very probably been forgotten; but they were imitations of linen, and the reasons which operated to prevent their general use were of a commercial and economical character. Bill dismissed, with costs.

[For another case involving this patent, see Union Paper-Collar Co. v. Van Deusen, Case No. 14,395.]

[2] [The original patent, No. 23,771, was granted to W. E. Lockwood, April 26, 1859.]

UNION PAPER-COLLAR CO. (MERSEROLE v.). See Case No. 9,488.

Case No. 14,395.

UNION PAPER-COLLAR CO. v. VAN DEUSEN et al.

[10 Blatchf. 109; 5 Fish. Pat. Cas. 597; 2 O. G. 361; Merw. Pat. Inv. 335.] [1]

Circuit Court, S. D. New York. Aug. 27, 1872.[2]

PATENTS — REISSUE — NEW ARTICLE OF MANUFACTURE — PAPER COLLARS.

1. The reissued letters patent No. 1,828, granted to William E. Lockwood, as assignee, November 29th, 1864, for an "improvement in shirt collars," the original patent, No. 11,376, having been granted to Walter Hunt, as inventor, July 25th, 1854, the claim thereof being, "As a new manufacture, a shirt collar composed of paper and muslin, or its equivalent, and polished or burnished substantially as and for the purpose described," are not invalid, as being for an invention different from that described in the original patent.

2. Under the language of the specification of the original patent, such claim would have been a proper claim in such patent. It is, therefore, a proper and valid claim in the reissue.

3. The reissued letters patent No. 1,980, granted to William E. Lockwood, as inventor, June 6th, 1865, for "improvements in collars," the claim thereof being, "As a new article of manufacture, an embossed collar or cuff, made of a fabric composed of paper and muslin, or an equivalent fabric," and reissued letters patent No. 1,981, granted to said Lockwood, as inventor, June 6th, 1865, for "improvements in collars," the claim thereof being, "As a new article of manufacture, an ornamental collar or cuff, made of a fabric composed of paper and muslin, or of an equivalent fabric ornamented by printing or otherwise marking on the surface plain or colored devices," the original patent, No. 23,771, having been granted to said Lockwood, April 26th, 1859, are both of them invalid.

4. No. 1,980 does not claim any appliance or machinery for embossing, or any process of embossing, but only the result, in the embossed article, as a new article of manufacture; and is merely for embossing on a surface which imitates starched linen, the starched linen collar, with its surface embossed, having existed before, the invention of the imitative surface, or of a means of producing it, not being claimed, and the fabric of paper and muslin being old. There was no patentable novelty in the idea of embossing the imitative surface.

[Cited in Union Paper-Collar Co. v. Leland, Case No. 14,394; Reed v. Reed, Id. 11,650; Cone v. Morgan Envelope Co., Id. 3,096.]

5. No. 1,981 does not claim any machinery or process for doing the printing, but only the result, in the printed article, as a new article of manufacture; and is merely for printing plain or colored devices on a surface which imitates starched linen, printing having been done before on a smooth, white, enamelled surface, the invention of an imitative surface, or of the means of producing it, not being claimed, and the fabric to be printed upon being old. There was no patentable novelty in the idea of printing on the imitative surface.

[Cited in Milligan & Higgin Glue Co. v. Upton, Case No. 9,607.]

6. The first claim of the reissued letters patent No. 1,646, granted to Solomon S. Gray, as inventor, March 29th, 1864, for an "improvement in shirt collars," the original patent, No. 38,961, having been granted to him June 23d, 1863, namely, "The turning over of a paper, or of a paper and cloth, collar, by a defined line, whether pressed into the material by a die or pointed instrument, or by bending it over the edge of a pattern or block, of the proper curve or line, substantially as described," claims a defined line, whether straight or curved, made by the means indicated, and is void, for want of novelty.

7. The second claim of the said Gray reissue, namely, "Turning the part B, of a paper, or a paper and cloth, collar, over, on to or towards the part A, in a curved or angular line, instead of a straight line, substantially as and for the purpose described," embraces the third claim, namely, "So turning over the part B, on to or towards the part A, in the manner above described, as that a space shall be left between the two parts, for the purpose, and substantially in the manner, herein described," and is void for want of novelty, as is, also, the third claim.

8. The reissued letters patent, No. 2,309, granted to James A. Woodbury, as assignee, July 10th, 1866, for an "improvement in paper shirt collars," the original patent, No. 38,664, having been granted to Andrew A. Evans, as inventor, May 26th, 1863, the claim thereof being, "A collar made of long fibre paper, substantially such as is above described," are void.

9. The invention claimed is not the process of making a paper possessing the qualities indicated, but the making of collars out of such a paper.

10. Whatever invention there was to be made in the premises, was an invention of the paper possessing the described properties; and the inventor of the paper is he who invents the process of producing the paper.

11. Evans did not invent such process, and was not entitled to a patent for the paper, or for the collar to be made from it.

12. The first claim of letters patent, No. 56,737, granted to James A. Woodbury, as assignee of Andrew A. Evans, as inventor, July 31st, 1866, for an "improvement in paper cuffs or wristbands," namely, "As a new article of manufacture, a wristband or cuff, made of long fibre paper, substantially such as is above described," is void, for the same reasons for which the claim of the said reissue No, 2,309 is void.

13. The second claim of the said patent No. 56,737, namely, "Making said wristband or cuff reversible, substantially as and for the purpose described," was new and patentable.

[3] [Final hearing upon pleadings and proofs. Suit brought [against Isaac Van Deusen and others] upon the following letters patent, all assigned to complainants: 1. Letters patent [No. 11,376] for "improvement in shirt-collars," granted to Walter Hunt, July 25, 1854; assigned to William E. Lockwood, and reissued to him in four divisions (A, B, C, and D), which were dated as follows: Division B, November 29, 1864, No. 1,828; division C, February 7, 1865, No. 1,867; divisions A and D, April 4, 1865, Nos. 1,926 and 1,927. No. 1,927 was subsequently surrendered, and reissued July 10, 1866, in two divisions, A and B,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 10 Blatchf. 109, and the statement is from 5 Fish. Pat. Cas. 597. Merw. Pat. Inv. 335, contains only a partial report.]

[2] [Affirmed in 23 Wall. (90 U. S.) 530.]

[3] [From 5 Fish. Pat. Cas. 597.]

Nos. 2,306 and 2,307. 2. Letters patent [No. 23,771] for "improvements in collars," granted to William E. Lockwood, April 26, 1859, and reissued June 6, 1855, in two divisions, Nos. 1,980 and 1,981. 3. Letters patent [No. 38,664] for an "improvement in paper shirt-collars," granted to Andrew A. Evans, May 26, 1863, and reissued July 10, 1866, to James A. Woodbury, assignee, No. 2,309. 4. Letters patent for "improvement in shirt-collars," granted to Solomon S. Gray, June 23, 1863, and reissued March 29, 1864, No. 1,646. 5. Letters patent for an "improvement in paper cuffs or wristbands," granted to James A. Woodbury, as assignee of Andrew A. Evans, July 31, 1866, No. 56,737. The bill alleged the infringement of reissues Nos. 1,828, 1,867, 1,926, 2,306, 1,980, 1,981, 2,309, 1,646, and patent No. 56,737; but, upon the hearing, all claim was abandoned as to reissues 1,867, 1,926, and 2,306.] [3]

William Whiting and Clarence A. Seward, for plaintiffs.

Joseph J. Coombs and Edmund Wetmore, for defendants.

BLATCHFORD, District Judge. The bill in this case is brought by the Union Paper Collar Company, a corporation, against Isaac Van Deusen and others, composing the copartnership of Van Deusen, Boehmer & Co. It alleges the infringement by the defendants of the following letters patent owned by the plaintiffs: Reissued patent No. 1,646, granted to Solomon S. Gray, as inventor, March 29th, 1864, for an "improvement in shirt collars," the original patent, No. 38,961, having been granted to him June 23d, 1863; reissued patent No. 1,828, granted to William E. Lockwood, as assignee, November 29th, 1864, for "an improvement in shirt collars," the original patent, No. 11,376, having been granted to Walter Hunt, as inventor, July 25th, 1854; reissued patent No. 1,867, granted to said Lockwood, as assignee, February 7th, 1865, for an "improvement in shirt collars," the original patent being the one of July 25th, 1854, above mentioned; reissued patent No. 1,926, granted to said Lockwood, as assignee, April 4th, 1865, for an "improvement in shirt collars," the original patent being the one of July 25th, 1854, above mentioned; reissued patent No. 2,306, granted to the plaintiffs, as assignees, July 10th, 1866, for an "improvement in shirt collars," the original patent being the one of July 25th, 1854, above mentioned and a reissue thereof, No. 1,927, having been granted to said Lockwood, April 4th, 1865; reissued patent No. 2,309, granted to James A. Woodbury, as assignee, July 10th, 1866, for an "improvement in paper shirt collars," the original patent, No. 38,664, having been granted to Andrew A. Evans, as inventor, May 26th, 1863; patent No. 56,737, granted to said Woodbury, as assignee of said Evans, as inventor, July 31st, 1866, for an "improvement in paper cuffs or wristbands;" and reissued patent, No. 1,980, and reissued patent, No. 1,981, granted to said Lockwood, as inventor, June 6th, 1865, each for "improvements in collars," the original patent, No. 23,771, having been granted to him April 26th, 1859. The defendants admit, by a written stipulation, that they have infringed each and all of the said patents set forth in the said bill, "by making, using and selling to others to be used the things therein respectively described and claimed as new." The contest is as to the validity of the patents.

At the hearing, all claim on the part of the plaintiffs in respect of reissues Nos. 1,867, 1,926, and 2,306, of the Hunt patent, was abandoned.

In regard to reissue No. 1,828, of the Hunt patent, it is contended, by the defendants, that that reissue is for an invention different from that described, or intended to be described, in the original patent. The claim of the reissue is this: "As a new manufacture, a shirt collar composed of paper and muslin, or its equivalent, and polished or burnished substantially as and for the purpose described." The claim of the original patent was: "The above described shirt-collar, made of the fabric set forth, and polished and varnished in the manner and for the purpose specified." The original specification describes the shirt collar as made of muslin, coated on both sides with paper made to adhere to it by sizing, the fabric being then polished by a burnisher, or otherwise, the collar being then cut out, and being afterwards varnished with a transparent, colorless, waterproof varnish. The specification states the object of the varnish to be, to protect the collar from the effects of moisture, and to preserve it for a much longer time from being soiled. It says, that the invention consists "in making the collars of a fabric composed of both paper and cloth, and in subsequently polishing the same by enamelling or burnishing, or in any suitable or efficient manner"; and that it further consists "in covering the collars made of the same material with a thin pellicle of transparent, colorless varnish, whereby they are rendered proof against injury from either rain or perspiration, and, when soiled, may be wiped off with a damp cloth or sponge, and restored to nearly their original whiteness." The specification of the reissue does not mention the varnishing of the collars; but it describes the mode of making them, up to and including the polishing and burnishing, in substantially the same language used in the specification of the original patent. The collar is a complete collar when made and polished or burnished. The varnishing only adds to its further useful qualities. Under the language of the specification of the original patent, the claim now found in the reissue would have been a proper claim in the original patent. It is, therefore, a proper and valid claim in the reissue; and nothing

[3] [From 5 Fish. Pat. Cas. 597.]

is adduced which destroys the validity of such reissue.

The claim of reissue No. 1,980, of the Lockwood patent, is as follows: "As a new article of manufacture, an embossed collar or cuff, made of a fabric composed of paper and muslin, or an equivalent fabric." The specification defines the fabric as one "having a smooth, white, polished or enamelled surface, to represent that of starched linen." It defines the embossing to be a representation of embroidery, or of ornamentation, whereby portions of the surface are depressed and portions are in relief. It describes a mode of effecting the embossing, by taking an electrotype from a linen collar or cuff, and using it as a die, and pressing between it and a counter die a collar and cuff made of the fabric mentioned, whereby all projections, depressions, stitches and marks on the original linen collar or cuff are reproduced, and the plain surface looks like starched linen; but it states that the inventor does not confine himself to any particular appliances or machinery for embossing the fabric.

The claim of reissue No. 1,981, of the Lockwood patent, is this: "As a new article of manufacture, an ornamental collar or cuff, made of a fabric composed of paper and muslin, or of an equivalent fabric, ornamented by printing, or otherwise marking, on the surface plain or colored devices." The specification defines the fabric as one "having a smooth and polished or enamelled surface, to represent that of starched linen. It states that the inventor prints, on the exposed surface of the article cut from the fabric, "plain or colored devices, so as to impart to it an ornamental appearance, the printed designs being such, as regards color and pattern, as the manufacturer may consider best suited to the taste of the public."

It is impossible to uphold either of these reissues as valid patents. No. 1,980 is merely for embossing on a surface which imitates starched linen. The appliance or machinery for embossing is not claimed. The process of embossing is not claimed. The result, in the embossed article, is claimed, as a new article of manufacture. But, as like embossing had been done on starched linen, the result of producing such embossing on a smooth, white, polished or enamelled surface representing that of starched linen, cannot be patented as an invention, when nothing is claimed as new in the appliance, machinery or process for producing the embossing. A starched linen collar, with its surface embossed, existed before. There was nothing of patentable novelty in the idea that, the imitative surface being provided, it would be well to emboss it. The patent does not claim the invention of the imitative surface, or of any means of producing it. The fabric of paper and muslin was old.

The same observations apply to No. 1,981. It is merely for printing plain or colored devices on a surface which imitates starched linen. No novelty in any machinery or process for doing the printing is claimed. Nothing is described in regard to any part of the apparatus or instruments for printing. The direction is simply to "print." The result, in the printed article, is claimed, as a new article of manufacture. Printing had been done before on a smooth, white, enamelled surface; and, nothing being claimed as new in the appliance, machinery or process for producing the printing, and the surface imitating starched linen being provided, there was nothing of patentable novelty in the idea of printing upon such surface. The invention of the imitative surface is not claimed, nor is any means of producing such surface claimed; and the fabric to be printed upon was old.

If experiments were necessary before an embossed or a printed collar, of the fabric and surface indicated, could be produced, resulting in overcoming difficulties which were met with, the invention really consisted in the means or process of producing the embossed or printed collar, but the specifications and the collars produced alike fail to indicate any novelty in any such means or process, or any difficulties which can be overcome by following specific methods of operation.

Calling the thing produced a new article of manufacture, confers upon it no quality of patentable novelty, when there is no such novelty in the process or instrument for producing the embossed or printed collar, and when the substance of the whole invention claimed is merely embossing or printing on a surface imitating starched linen.

The claims of reissue No. 1,646, of the Gray patent, are three in number: (1) "The turning over of a paper, or of a paper and cloth, collar, by a defined line, whether pressed into the material by a die or pointed instrument, or by bending it over the edge of a pattern or block, of the proper curve or line, substantially as described." (2) "Turning the part B, of a paper, or a paper and cloth, collar, over, on to or towards the part A, in a curved or angular line, instead of a straight line, substantially as and for the purpose described." (3) "So turning over the part B, on to or towards the part A, in the manner above described, as that a space shall be left between the two parts, for the purpose, and substantially in the manner, herein described."

In reference to the invention embodied in the first claim, the specification says: "In the making of turn over shirt collars of paper, or of cloth and paper combined, it is exceedingly difficult to fold the material so that, when turned over on the arc of a circle, it will present a regular line. This cannot be done by the eye, but must be done by a gauged line made in the material, or by a former of suitable shape, laid on the material, as a guide to turn it over by." It also says, that the best mode of securing the turning over

in the arc of a circle, is to make in the collar an impression of the curve or line on which it is to be turned over, either by means of a die pressed upon it, or by drawing a pointed instrument over it, beside or along a pattern; that, when this is done, the collar can be readily turned over on or following the indented line; that the collar may also be turned over the edge of a pattern or block of the proper curve or line; and that the effect of making the folding line the arc of a circle, instead of a straight line, is to prevent the tension of the outer circle of the collar, after the turning over is effected, from wrinkling or puckering the inner circle, and to cause the outer portion to stand off from the inner portion, so that a necktie may be inserted in the space, without causing either portion to be wrinkled or puckered by the pressure of the necktie.

It will be observed, that the claims limit the turning over to a paper, or a paper and cloth collar. Nothing is said about a linen collar. It is not stated that any difficulty exists in turning over a collar of paper, or a collar of cloth and paper, on the arc of a circle, so as to present a regular line, which does not exist in turning over a linen collar; nor is it stated that the inner part of a turn-over linen collar, which is turned over in a straight line, will not wrinkle or pucker, when brought into a circular form, and the more if a necktie be inserted between the inner part and the outer part.

The third claim of the patent is entirely embraced within the second claim. One of the purposes described as to be attained by turning the one part over, on to or towards the other, in a curved or angular instead of a straight line, is, that a space shall be left between the two parts, and the leaving of the space is described as being merely the result of turning the collar over on other than a straight line. Attention may, therefore, be confined entirely to the first and second claims, for, if the second is void, the third must fall with it.

The first claim covers a defined line, whether straight or curved, made by the means indicated—either pressing a die or pointed instrument into the material, to make the line, or making the line by bending the material over the edge of a pattern or block representing the desired line. The second claim covers the turning over of the collar in a curved or angular line whether by a defined line or not, and by whatever means.

It is shown, that, for many years before Gray's invention, paper envelopes, and the tops and bottoms of paper and cardboard boxes, were produced by shapers of steel, pressed on the material, so as to produce defined lines, whereby the material could be folded. It is also shown, that, in 1856 and 1857, the collars of Walter Hunt, made of paper and cloth, were folded over a piece of metal, in a straight line—the same process spoken of in the first claim of Gray's reissue, as bending the material "over the edge of a pattern or block, of the proper curve or line." It is also shown, that, prior to Gray's invention, linen collars were ironed on blocks, with a groove in the block, so that, as the iron passed into the groove, the collar received a defined line, by which it was turned down. This evidence disposes of the first claim of the Gray reissue.

It is also proved, that before Gray's invention, paper collars were folded by laying upon the unfinished side a piece of tin, having at one edge the required curve, and pressing upward, over such curve, a part of the collar, so as to mark the line of the curve, and crease the paper, preparatory to folding it over; and that linen collars were turned over on a curved line, before Gray's invention, with the prevention of wrinkling and the affording of space for the cravat. The second claim of Gray's reissue, is, therefore, invalid.

The serious contest in this suit, is in regard to reissue No. 2,309, of the Evans patent. The specification of the reissue states, that the object of Evans was to make a paper collar in which there was no backing of woven fabric. It proceeds: "Said Evans discovered, as the result of many experiments, that, in order to produce a really good collar, the paper must possess the following qualities, viz: strength to withstand the usual wear and tear, particularly where button holes are used, without excessive thickness, such as to destroy the resemblance to a starched linen collar, and tenacity or toughness, with pliability sufficient to allow the collar to be folded upon itself, without cracking at the fold, and the pureness of color and necessary polish to make it resemble starched linen. He (said Evans) made his collars out of a paper which he produced, or caused to be produced, in which he combined these qualities, which paper was made of a long fibre, substantially, in this respect, like bank note paper, but of about the same thickness as that of an ordinary collar, and of a pure shade or color, such as to resemble starched linen. By means of the length of fibre in the material, he was enabled to obtain, from the degree of thickness above specified, a sufficient degree of strength, tenacity and pliability to make a collar practically useful for wear, without interfering with the resemblance in appearance to a linen collar. A sample of the paper which he thus found suitable and used, is shown, filed with the original application of the said Evans for his patent above referred to." The specification then describes what quality of stock should be used, and in what manner the stock should be pulped and beaten, and how the sheets should be run off and how the water should be expelled, and what tint of color should be given, and adds: "The invention of said Evans is not confined to the use of any specific proportion of hard stock, nor to any specific time or mode of long beating of the pulp, nor

any specific method of running off or uniting the sheets of pulp or of exhausting the moisture, or of giving the required tint, but it is believed that the quality of stock to be used, the process by which the length of fibre and the required shade of color are produced, will be readily understood by paper manufacturers, having regard to the above description and the purposes for which the paper is designed." From the paper, when prepared, collars are directed to be cut. The claim is: "A collar made of long fibre paper, substantially such as is above described."

The specification points out, as the invention of Evans, not the process of making a paper possessing the qualities indicated, but the making of collars out of such a paper—the discovery, that, for a good paper collar, the paper must possess those qualities. The specification states, that he "produced, or caused to be produced," such a paper, and, also, that he "found" such a paper "suitable" and "used" it. In fact, the invention indicated and claimed is, that, when a paper of the qualities set forth is found, a collar is to be made of it.

But, whatever invention there was to be made in the premises, was an invention of the paper possessing the described properties. No person can be considered an inventor of the paper, who did not invent the process for producing the paper. It is entirely clear, from the evidence, that Evans had nothing to do with the process for producing the paper. Mr. Crane and his operatives worked out that process, without any suggestions from Evans as to any parts of the process. All that Evans did was to say, that he must have a paper of a certain weight, thickness, color, strength and finish. Such a paper was produced by Mr. Crane, after many experiments as to the character of the materials used and the mode of treating them. Evans' relation to any invention in the premises is no other than what it would have been if he had found ready to his hand the desired paper, and had conceived the idea of making a collar from it. The making of the collar would not have been patentable, collars having before been made of other qualities of paper and of other materials. Charles Goodyear discovered the process for producing vulcanized india rubber, and was the first person to produce such article. He was entitled to a patent for the process and to a patent for the product. He was entitled to a patent for the product because he invented the process, and for no other reason. If he had not invented the process, he would not have been entitled to a patent for the product. If he had said to another person: "I wish to have produced from india rubber an article possessing such and such properties, and, when I procure it, I can use it for such and such purposes." and such other person had, by experiment, produced vulcanized india rubber, Charles Goodyear could not have obtained a valid patent for such product. Nor could he have obtained a valid patent for anything, as a new manufacture, to be made from such product, which had before been made, in like form and shape, from other materials. The patent to Charles Goodyear, for his product, covered the making of all such things. In the present case, the collar described in the specification, and shown in the drawings, of the reissue of Evans' patent is, in form, structure and arrangement, apart from the paper of which it is to be made, identical with collars previously made of linen, paper, and other fabrics. Evans not having invented the paper, was not entitled to a patent for it, or for the collar to be made from it.

The broad proposition is contended for by the plaintiffs, that Evans invented the paper, as a new manufacture, because he was the first to conceive the idea of having a paper combining all the qualities prescribed in the specification. It is urged, that, as he was not a paper maker, he had a right to use the trained skill of Mr. Crane and his operatives, to carry out the idea; that they were merely the instruments of Evans, in working out the invention of Evans; that, although Evans does not claim to have invented the process or the machinery for making the paper, yet he was the inventor of the paper, and could have obtained a patent for it, as an article of manufacture; and that, therefore, a patent for his invention of a collar made from such paper can be sustained. The principle sought to be applied, in the view thus urged, is a familiar one in the patent law, and properly applicable in some cases. But it has no proper application to the patent in question. Evans had nothing to do with imparting to the paper the qualities attributed to it by the specification. He merely announced to the paper maker, that he desired a paper having those qualities, to be made. If the paper maker, setting forth the process and machinery by which the paper was made, had—the paper, as combining in itself properties never before combined in a paper, being a new article of manufacture—claimed a patent for the paper, as having invented the process by which it was made, could it be said that he would not have been entitled to such patent? If not, can Evans be entitled to a patent for the paper, or to the present patent, which is really nothing else but a patent for the paper? At the very utmost, Evans could properly assert nothing more than that he and the paper-maker were joint inventors of the paper.

For these reasons, I am constrained to hold that the reissue No. 2,309 is void.

The patent of July 31st, 1866, No. 56,737, for an alleged invention of said Evans, has two claims: (1) "As a new article of manufacture, a wristband or cuff, made of long fibre paper, substantially such as is above described." (2) "Making said wristband or cuff reversible, substantially as and for the purpose described."

The specification of this patent, so far as the first claim is concerned, is, in its descriptive part, identical with the specification of the reissue No. 2,309, substituting "wristband or cuff" for "collar." The first claim is for a wristband or cuff, as a new article of manufacture, made of the paper described in the reissue No. 2,309. Wristbands and cuffs of paper, linen and other fabrics, being old, and there being nothing new or peculiar in the form or structure of the wristband or cuff embraced in the first claim, except as to the paper of which it is to be made, and Evans not having been the inventor of such paper, the first claim is invalid, for the same reasons for which the claim of the reissue No. 2,309 is void.

As to the second claim of No. 56,737, so far as the evidence discloses, it was new and patentable. The wristband or cuff shown in the drawings of the patent as being double or reversible, is so in a sense different from anything shown to have existed before. It has six button holes, three on each end, the middle and outer ones alone being necessarily in use at any one time, and the inner ones being capable of being left to be first used when the wristband or cuff is reversed. There is something new, useful and patentable in such a construction.

There must be a decree for the plaintiffs, for an injunction and an account of profits on reissue No. 1,828, and on the second claim of patent No. 56,737. The question of costs is reserved until the entering of a final decree.

[Affirmed in 23 Wall. (90 U. S.) 530.]

Case No. 14,396.

UNION PAPER COLLAR CO. v. WHITE.

[2 Ban. & A. 60; 32 Leg. Int. 143; 7 O. G. 698, 877; Merw. Pat. Inv. 351; 11 Phila. 479; 1 Wkly. Notes Cas. 362; 21 Int. Rev. Rec. 142; 22 Pittsb. Leg. J. 155.] [1]

Circuit Court, E. D. Pennsylvania. April 3, 1875.

PATENTS—REISSUE—TEST OF VALIDITY—PAPER COLLARS.

1. Where a new article of manufacture is produced, by giving a new form to an old substance, and by suitable manipulation making its peculiar properties available for a use to which they had not before been applied, thereby distinguishing it from all others of the class to which it belongs, and giving to it great practical benefits, such production would possess special patentable merits.

2. Although a patent has been reissued several times, still the law presumes that the last reissue was granted to correct an inadvertent omission in the original, because it commits to the commissioner of patents the conclusive determination of the question.

3. The only test of the validity of the action of the commissioner in granting the reissue, is whether he has allowed it for a different invention from that covered by the original patent, or for what was not therein described, claimed, or indicated.

4. The first claim of letters patent reissue No. 5,109, granted Walter Hunt, October 22, 1872, which is for "a shirt collar composed of paper and muslin, or its equivalent, so united that the muslin will counteract the fragile character of the paper," does not claim the article of manufacture in broader terms than those in which it was described, or at least clearly indicated, in the original patent.

5. The said claim construed to be for "a shirt collar composed of paper and muslin, or its equivalent, united by paste, glue, or other appropriate sizing, by means of which union the fragility of the paper is re-enforced by the fibrous strength of the muslin, and the necessary cohesiveness of the fabric is thus secured."

6. The claim is not open to the objection that it is for an abstract result, and therefore, void. It is not for the mere result of a union of paper and muslin in a shirt collar, independent of the corporeal substance which embodies it; but it is for a thing fabricated in a given form, for a specific purpose, and out of materials so united that the combined fabric is impressed with the peculiar qualities which belong to each of its constituents.

7. The said claim covers a fabric made of paper and muslin for making collars, where its constituents are incorporated with each other, so that the textile strength of the one is made available to re-enforce the fragility of the other.

[Cited in Cochran v. Wilson, 41 Fed. 222.]

8. The original patent, No. 11,376, July 25, 1854, described a standing collar with paper on both sides of the cloth, but the invention and claim are broad enough to include a collar with paper on one side only, even though the collar is turned over so as to expose the cloth surface only in view.

9. The patent is not infringed by collars of paper with a simple cloth re-enforcement at the button-holes.

10. Characteristic resemblance is the fairest test of substantial identity.

[This was a bill in equity by the Union Paper Collar Company against Henry J. White, to restrain the infringement of reissued letters patent No. 5,109, granted October 22, 1872, and assigned to complainants.]

George Harding, for complainants.

J. J. Coombs and E. Wetmore, for defendant.

McKENNAN, Circuit Judge. The complainants are the owners by several mesne assignments of a patent [No. 11,376] granted to Walter Hunt on the 25th of July, 1854, for a new article of manufacture consisting of a collar made out of paper and muslin, so combined, formed, and manipulated as to adapt it to use as such. This patent was duly extended for seven years from the date of its expiration, and was reissued on the 22d of October, 1872, No. 5,109. The validity and infringement of this reissued patent are the subjects of this contention.

I do not think that the legal presumption, that Hunt was the first and original inventor of the article of manufacture for which he obtained a patent, is at all shaken by the proofs in the cause. It is true that paper and muslin, or linen cloth, were be-

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 351, and 1 Wkly. Notes Cas. 362, contain only partial reports.]

fore united, and used as a fabric for maps, etc., but this was not analogous to the use to which Hunt adapted them, nor was it in anywise suggestive of his invention. He was the first to discover the adaptability of this material to a use not cognate to any to which it had before been applied, and, by appropriate manipulation, to give it a useful and practical form. He, thus, not only supplied the public with a new article of manufacture, but he demonstrated unknown susceptibilities of the material, out of which it was made. This is something more than the mere application of an old thing to a new purpose. It is the production of a new device by giving a new form to an old substance, and, by suitable manipulation, making its peculiar properties available for a use to which it had not before been applied, thereby distinguishing it from all other fabrics of the class to which it belongs. This seems to me to involve an exercise of an inventive faculty, and, in view of the great practical benefits resulting from it, to invest the product with special patentable merit. The patent in controversy is the seventh reissue of Hunt's original patent. This multiplication of reissues is, of itself, suggestive of a purpose to cover intervening improvements, and some phrases in the specification of the last reissue may, not without semblance of reason, be treated as having that significance.

It is difficult to suppose that so many reissues with considerable intervals of time between them were necessary to correct accidental or inadvertent mistakes in the specification and claims of the original patent. And yet the correction of these is the only legitimate purpose of a reissue. This practice has been strongly disapproved of by the supreme court on more than one occasion.

In Carlton v. Bokee, 17 Wall. [84 U. S.] 471, Mr. Justice Bradley remarks: "We think it proper to reiterate our disapprobation of these ingenious attempts to expand a simple invention of a distinct device into an all-embracing claim, calculated by its wide generalizations and ambiguous language to discourage further invention in the same department of industry and to cover antecedent inventions."

Whatever reason there may be to suspect that the motive of the patentee was to give undue elasticity to his patent, still the law presumes that the reissue was granted to correct an inadvertent omission in the original, because it commits to the commissioner of patents the conclusive determination of that question, and the only test of the validity of his action is whether he has allowed a reissue for a different invention from that covered by the original patent, or for what was not therein described, claimed, or indicated.

The claim in the reissue which, it is urged, avoids it, is as follows:

"A shirt collar composed of paper and muslin, or its equivalent, so united that the muslin will counteract the fragile character of the paper."

Construing this in connection with the specification, its obvious import is that the patentee sought to secure as his invention a shirt collar composed of paper and muslin or its equivalent, united by paste, glue, or other appropriate sizing, by means of which union the fragility of the paper is re-enforced by the fibrous strength of the muslin, and the necessary cohesiveness of the fabric thus secured.

Now, is not this described, or at least clearly indicated, in the original patent? In that patent the nature and distinguishing qualities of the invention are thus stated: "Attempts have been made at various times to manufacture shirt collars of paper; but they have never been extensively introduced, nor has anything lasting or beneficial resulted therefrom, on account of the fragile nature of the material, which rendered it liable to be easily broken and defaced, while it was liable to be quickly soiled and entirely destroyed if exposed to either rain or perspiration. The object of my present invention is to produce a shirt collar that shall not easily be broken, while it shall have sufficient elasticity to bend to the motions of the head; that shall possess the beauty and whiteness of the most carefully dressed linen collar, and at the same time shall preserve itself unsoiled for a much greater length of time, and shall cost originally less than the washing and dressing of a linen collar; and my invention consists in making the collars of a fabric composed of both paper and cloth, and in subsequently polishing the same by enamelling or burnishing, or in suitable and efficient manner."

This statement distinctly identifies the subject of the first claim of the reissued patent. The invention to which it refers is said to be a shirt collar consisting of paper and muslin, the qualities of which are cheapness of cost, smoothness of surface, flexibility, cohesiveness, and impermeability to moisture. It is not expressly declared that muslin is combined with paper to "counteract the fragile character of the material out of which they are made." This infirmity the inventor proposes to cure by the addition of a textile material, which obviously has no other function or object; and in describing the mode of carrying his invention into effect, he directs how the paper and muslin are to be combined to secure for the fabric the necessary and desired qualities. Clearly this distinctly indicates, and is broad enough to cover, "a shirt collar composed of paper and muslin, so united that the muslin will counteract the fragile character of the paper."

But it is urged that the contested claim is merely for an abstract result, and is, therefore, void. Certainly it is the settled law that a mere principle, or result, or mode of

operation is not patentable. So therefore, in O'Reilly v. Morse, 15 How. [56 U. S.] 62, the eighth claim of Morse's patent was adjudged to be void because it sought to appropriate the use of electro-magnetism for marking or printing characters at a distance independently of the means by which this natural agency was thus utilized, and in Burr v. Duryee, 1 Wall. [68 U. S.] 531, it was held that a mode of operation, irrespective of mechanism by which it was effected, would not be patentable.

Is the claim in this patent obnoxious to this objection? In one sense it is for a result, but only in the sense in which any fabric or device is the result of the means employed to produce it. It is not for the mere result of a union of paper and muslin in a shirt collar, independent of the corporeal substance which embodies it, but it is for a thing fabricated in a given form, for a specific purpose, and out of materials so united that the combined fabric is impressed with the peculiar qualities which belong to each of its constituents. A collar made of these materials in mere juxtaposition is not within range of the patentee's conception; but when they are incorporated so as to constitute substantially a single fabric, and are used for the purpose for which he was the first to discover their adaptability, it is an invasion of his right.

The claim is not, then, for the mere effect resulting from a union of paper and muslin, nor for the fabric thus produced, nor for the special mode of preparing it; but it covers the use of it for making collars where its constituents are incorporated with each other, so that the textile strength of the one is made available to re-enforce the fragility of the other. And such original application of it, to the production of a most useful article, the inventor can lawfully claim to appropriate.

Does the defendant infringe this patent? Hunt's invention consists of two elements, or parts; first, of a collar, with reference to the materials out of which it is made, and their union, so as to secure certain qualities; and, second, of the subsequent manipulation of this collar, by which a smooth surface is given to it, and it is rendered impervious to moisture.

The defendant manufactures and sells shirt collars made of muslin or linen cloth pasted to a sheet of paper. Fundamentally they are the same with the collar described in Hunt's patent, because they are composed of muslin (or its equivalent) and paper so united as to utilize the same properties contemplated by Hunt in the union of the same elements. But it is sought to differentiate them for the reasons that the defendant attaches a sheet of paper to but one side of the cloth, and that the collar is turned down with the cloth surface only burnished and exposed to view.

The first reason rests upon an undue limitation of the scope of Hunt's invention. In his original patent, in explaining a mode of carrying his invention into practice, he describes a collar with paper on both sides of the cloth. Although he does not limit himself to any form of collar, yet the description is evidently applicable to the standing collars then in fashion, and the double coating of paper was suggested as best adapted to collars of that class. But, as has already been said, his invention was more comprehensive than this, and it was clearly indicated in his original specification. It is appriately claimed in the reissued patent in controversy, the unauthorized purpose of which was to protect it fully. Clearly, the terms of that claim are broad enough to embrace the collars made by the defendant; but, at any rate, I do not think a double coating of paper on one side of the cloth changes the identity of the fabric described by Hunt. It is still composed of the same constituents, so united as to embody the same properties which he first proposed to utilize, and the difference is only apparent and formal. Characteristic resemblance is the fairest test of substantial identity.

Now, is there any better foundation for discrimination in the fact that the defendant's collars are turned down and the cloth surface only is exposed to observation. Hunt's patent is not limited to any particular form of collar, and the polishing of the cloth surface pertains exclusively to the manipulation of the collar, after it is made, to fit it for use. It does not in any sense change the fundamental character of the fabric out of which it is formed, and, therefore, does not affect the applicability of the first claim of the reissue.

The defendant also manufactures collars entirely of paper, with patches of muslin pasted around the button-holes, to give additional strength at these points; and those are claimed to infringe the patent. I do not think so. Hunt did not contemplate any such restricted combination of paper and muslin. His collar was composed, throughout its whole body, of paper and muslin, and this was necessary to secure and embody the properties which he intended to make available. Nor could he successfully claim such a device. He did not invent paper collars, nor the application of cloth to button-holes to strengthen them. Such re-enforcements had been long before applied to button-holes, in leather curtains, sails and other fabrics. It was merely, therefore, the application of an old device to an analogous and well-known use, for which no one could obtain a patent.

The complainants are entitled to an injunction, to continue in force until the 25th day of July next, when the patent will expire, and to an account, and a decree will be entered accordingly.

UNION ROLLING MILL CO., In re. See Case No. 13,783.

UNION R. TRANSP. CO. (LEITCH v.). See Case No. 8,224.

Case No. 14,397.

UNION SUGAR REFINERY v. MATHIESSON et al.

[2 Cliff. 304.] [1]

Circuit Court, D. Masachusetts. May Term, 1864.

WRITS—ENTICING INTO DISTRICT—PRIVILEGE—MOTION TO DISMISS ACTION—PATENTS.

1. Under the eleventh section of the judiciary act [1 Stat. 78,] when a party defendant is found in the district where the process issued, although not a resident thereof, he may lawfully be served with the process; but it cannot properly be said that he was found there, if he was inveigled or enticed into the district by false representations or deceitful contrivances, for the purpose of making such service upon him.

[Cited in Steiger v. Bonn, 4 Fed. 17; Plimpton v. Winslow, 9 Fed. 366.]

2. The general rule is, that a person illegally in custody at the suit of one party, is not privileged from arrest at the suit of another, except there be proof of concert or collusion; but prior illegal arrest and subsequent detention will render the service illegal, and entitle the defendant to an unconditional discharge.

[Cited in Moynaham v. Wilson, Case No. 9,897.]

3. Courts of justice everywhere regard the employment of one legal process as a means of detaining a party till a second can be served upon him, such an abuse of the process as to render the second service unavailing; but whether the defendant is also entitled upon an ex parte application, to a discharge from the prior service as well, quære.

[Cited in Bridges v. Sheldon, 7 Fed. 46.]

4. Where an inventor who had assigned his invention to certain third parties, invited the defendant, an infringer, into the jurisdiction where the assignees resided, for the avowed purpose of settling the controversy, but without the knowledge of such assignees, and procured an interview between the parties, at the close of which the defendant was served with process in consequence of such infringement, *held*, there was not sufficient evidence of deceptive contrivances to obtain service on the defendant, and that a motion to dismiss the action on that account must be overruled.

Trespass on the case for the alleged infringement of certain letters-patent [No. 37,548]. The plaintiff corporation was a citizen of this district, and the defendants [Francis O. Mathiesson and others] of New Jersey, the former having a place of business at Charlestown, the latter a residence in Jersey City, but service of the writ was made on the first-named defendant at Boston, in this district, under process returnable to this court. After entry the defendant appeared specially and moved the court that the service of the writ upon him be set aside, and that the action be stricken from the docket, on the ground that the service was illegal and void, because obtained by false representations and deceptive contrivances, in consequence of which the defendant was enticed into this district, with the design to have him so served with the process, and because he was so served in pursuance of such fraudulent plan and design. Testimony was taken by both parties under the direction of the court, and at this term the cause was heard. The plaintiff assumed that service was made under the eleventh section of the judiciary act, allowing civil suits to be brought before the courts of the United States against an inhabitant thereof by original process in the district in which the defendant may be found at the time of serving the writ. The following was the substance of the testimony: The inventor of the improvement which was the subject of dispute, one Gustavus A. Jasper, before he obtained letters-patent, assigned his invention to the corporation plaintiffs, who secured the patent, and held the invention under reissued letters-patent at the time of the trial. When the assignment was made, it was orally agreed that the plaintiffs should pay the assignor one half of the net proceeds of the sale or grant of all licenses or privileges of using the invention under the patent, when obtained, and this was subsequently embodied in a written agreement. The defendant had been using the invention without license before the date of the assignment to the plaintiffs, before of course the issue of the patent and down to the date of the writ. Objection to this use was made by the officers of the corporation, and interviews between the president and one of the directors and the defendant had taken place. The corporation demanded a substantial price for the use of the invention by the defendant, while he was willing to pay only a nominal sum; and therefore no settlement could be effected. The inventor and the defendant were intimate friends, had been in the habit of interchanging visits, and in the fall of 1863 the former invited the latter to visit him at Charlestown, in this district. The defendant, in reply, expressed his intention of accepting the invitation. In December of the same year the inventor again wrote the defendant, renewing the invitation, and also expressing the wish that he, the defendant, and the corporation might adjust the dispute about the patent, and requesting him to have an interview with the company for that end. Furthermore, he advised the defendant to treat with the before-named director, and not with the president. On the following day the inventor addressed another letter to the defendant, of similar purport. On the 16th of the month the defendant arrived at Charlestown, and he and the inventor called upon the president of the corporation, but nothing was said either about settling the controversy or bringing a suit. Three or four hours later the same two parties called upon the before-named director, but no settlement of the in-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.].

fringement was made; and as the inventor and defendant left the office of the director, service of the writ in this case, which had been procured by the president since the call upon him, but without the knowledge of the director, was made upon the defendant. The evidence showed that the officers of the corporation were ignorant of the invitation extended by Jasper to the defendant to visit Charlestown, and it was not pretended that he had any expectation or thought that in so doing he would afford the corporation an opportunity of obtaining service of a writ upon the defendant.

B. R. Curtis, Chauncey Smith, Preston & Kimball, for plaintiff.

Browne & Maynadier, for defendant.

CLIFFORD, Circuit Justice. Under the provisions of the eleventh section of the judiciary act (1 Stat. 79), it is clearly the right of the plaintiff to serve the defendant with process in the district where the plaintiff resides, provided the process be in proper form, and the defendant be found in that district, within the true intent and meaning of that provision. The argument of the defendant admits the proposition as stated, and it is so obvious that it is correct that the statement of it furnishes all the explanation that is required in its support. Withdraw that right from the plaintiff, and the consequence would immediately follow that a defendant, although a citizen of another state, might evade service indefinitely by fleeing into the district where the plaintiff resides, and by remaining there until he could secrete or convey all his property, might defeat all means of rendering available any judgment which the plaintiff might recover against him in the federal courts. The right secured, therefore, by the provision, is plainly one of importance, and one that ought not to be impaired or frittered away by construction. Important as the right is, however, it must not be forgotten that it is conferred only under the special circumstances described in the provision, and if those circumstances are wanting, then the right does not exist. When the party defendant is found in such district, he may then be lawfully served with process; but it cannot be said that he was so found there, if he was inveigled or enticed into the district for the purpose of making such service upon him, by false representations and deceitful contrivances of the plaintiff in the suit, or by any one acting in his behalf. Abuse of legal process in any form has always been frowned upon by courts of justice, whenever and wherever the fact has been made to appear, and the party practising it is never allowed to reap the fruits of his wrongful act. Where the defendant was first arrested without process, and detained until process could be procured, and while so unlawfully detained was served with legal process, it was held that inasmuch as the original arrest was illegal, the subsequent confinement under legal process was also illegal; and the defendant accordingly was unconditionally discharged. Barlow v. Hall, 2 Anstr. 461. The arrest was also held illegal, and the defendant discharged, in Birch v. Prodger, 1 Bos. & P. (N. R.) 135, because the defendant was first seized by the plaintiff in the street, and carried by him to the office of an attorney, and there detained until the process already issued and in the hands of the officer could be sent for and served. See, also, Loveridge v. Plaistow, 2 H. Bl. 29. The general rule, however, is that a person illegally in custody at the suit of one party, is not privileged from arrest at the suit of another, unless there is some proof of concert of collusion; because in the absence of such proof it cannot be assumed that the latter party has been guilty of any abuse of legal process or of any wrongful act whatever. Barclay v. Faber, 2 Barn. & Ald. 743; Howson v. Walker, 2 W. Bl. 823; Davies v. Chippendale, 2 Bos. & P. 282; Egginton's Case, 2 El. & Bl. 735. The rule, of course, would be otherwise if the party was not subject to arrest, as is admitted in all the cases establishing the preceding general rule. Spence v. Stuart, 3 East, 89. Improper contrivance also, as well as a prior illegal arrest and subsequent detention, will render the service illegal, and entitle the defendant to an unconditional discharge. Consequently, where a respondent in an equity suit was in contempt for not filing an answer, and the complainant having procured an order of attachment against him, and being unable to serve it, caused the respondent to be personally examined in certain insolvent proceedings pending against him in another tribunal, and as the respondent retired from the room after his examination, served him with the attachment process, it was held that the arrest was illegal, and that he should be discharged, because he had been arrested by a deceptive and improper contrivance. Snelling v. Watrous, 2 Paige, 314. The same principle is also laid down in Wells v. Gurney, 8 Barn. & C. 769, where it was held that a defendant, arrested on Sunday for an assault actually committed, but for the real purpose of detaining the defendant until Monday, so that he might be arrested in a civil suit, was entitled to a discharge from the arrest in the civil suit, because the arrest had been effected by an abuse of legal process and by deceptive means. Courts of justice everywhere regard the procurement and use of one legal process merely for the purpose of arresting a party and detaining him in custody until he can be served with another process, as such an abuse of process as will at least render the second service utterly unavailing to the party making it; and cases may be found where it has been held that the party arrested was entitled to be discharged from both upon an ex parte application to the court. Ex parte

Wilson, 1 Atk. 152. Whether or not the rule ought to be extended so far, it is not necessary now to determine, but it is clear that the service of the latter process in the case stated was illegal, and was properly set aside. Several cases also are cited by the defendant, in which it was held that if a party upon whom process is served, and who at the time was residing in another jurisdiction, was induced to come into the jurisdiction of the court where the suit was commenced, by a deception practised upon him by the plaintiff for the purpose of serving the process, such service is not good, and that the court will set it aside and dismiss the suit. Such were the views of the court in Williams v. Reed, 5 Dutch. [29 N. J. Law] 385, which is a case directly in point under the theory of fact set forth in the motion. Express adjudication to the same effect is also to be found in Carpenter v. Spooner, 2 Sandf. 717, which is entitled to much weight. An examination of these cases and others cited by the defendant satisfies the court that the proposition of the defendant, as stated in the motion, is correct that, where the defendant, residing in another district, is inveigled, enticed, and induced to come into the district where the plaintiff resides, by the false representations or deceptive contrivances of the plaintiff, or of any one acting in his behalf, for the purpose of serving legal process upon the defendant, and the same is served through such improper means, such service is illegal and ought to be set aside, and that the process should be dismissed. But the proofs in this case do not show that the defendant was first seized without process, and detained until process could be obtained and served, nor that he was arrested and held upon process obtained for the mere purpose of so arresting and detaining him until the process in question could be obtained, and served upon him. Nor do the proofs show that the plaintiffs or any one in their behalf, were guilty of any misrepresentations or practised any deceptive contrivances to entice or inveigle the defendant into this district to serve him with the process under consideration. All these conclusions of fact are admitted by the defendant, and, in admitting them, he also admits, in the view of the court, that his motion must be denied.

The proposition of the defendant is that the inventor is interested in the patent, and that, inasmuch as he invited the defendant to come into this district, and the defendant came in pursuance of such invitation, neither the corporation nor its officers, while he was here under that invitation, could sue out process returnable in this court, and cause the same to be served upon the defendant. The argument is that the inventor, although he had assigned the entire legal title to the corporation, nevertheless, under the agreement before mentioned, sustained to the corporation the relation of a partner in interest, and that, sustaining that relation, and having invited the defendant to come here, the corporation could not sue out process here and make service upon the defendant under the before-mentioned provision of the judiciary act. But the proposition cannot be sustained for several reasons, any one of which is conclusive against it, and sufficient to show that it is wholly untenable. The corporation held the entire legal title to the patent, and consequently had the exclusive right to determine whether or not a suit should be instituted. They had no knowledge of the acts of the inventor, and, as the inventor was not their agent in any sense, they could not be affected by his acts. He did not profess to act as their agent, and did not act in their behalf, which was well known to the defendant. Neither the corporation nor its officers committed any wrongful act either in suing out the process, or in directing it to be served by the marshal. The inventor did no wrongful act in writing the letters, or in extending the invitation to the defendant to come here and make an effort to adjust the controversy, as all he did and said was merely advisory, and without any improper intent. Where there is no false representation and no deceptive contrivance and no wrongful act of any kind done by the plaintiff, or by any other person in his behalf, to entice, inveigle, or induce the defendant to come into the jurisdiction where the plaintiff resides, for the purpose of serving him with process, it is competent for the plaintiff to sue out process and have it served; and such service is legal, and cannot be set aside, or the process dismissed, because made returnable and served in the district where the plaintiff resides. The motion is overruled and denied.

[For subsequent proceedings, see Cases Nos. 14,398 and 14,399.]

Case No. 14,398.

UNION SUGAR REFINERY v. MATHIESSON.

[3 Clif. 146.] [1]

Circuit Court, D. Massachusetts. May Term, 1868.

ACCOUNT—REPORT—REVISION—PRACTICE IN EQUITY.

1. Upon the final hearing of a cause in equity, a final decree was entered, and the cause referred to a master, to take, and state to the court, an account of all gains and profits made by the defendants. No report was made by the master, but the following entries were made upon the docket: "May 27th. Master's certificate upon settlement of interrogatories, with state of facts, and schedule filed." "Roll containing nine drawings filed with certificate." "May 31st. Exceptions to master's certificate and report filed." Ordered, that the filings entered by the clerk be stricken out, and that the several papers filed be returned by the clerk to the master.

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

2. Explanation of the correct practice in this circuit, where a cause has been referred to a master to state an account.

3. In case the decretal order was ambiguous, the master might have authority to report the case back for more specific instructions.

4. The court might have power to revise each act of the master, as it progressed, but such a practice would be productive of delay, and will not receive countenance from the court.

[Cited in Lull v. Clark, 20 Fed. 455; Bate Refrigerating Co. v. Gillette, 28 Fed. 674.]

5. When a suit in equity has been heard, neither party has a right to file any paper in the cause, except by leave of court.

6. The correct method is, for a master, if possible, to complete his investigations under the rules, make up his draft report, file it in the clerk's office, and give time for the parties to make their objections thereto.

The decree in this case was as follows:—It is ordered, adjudged, and decreed that the letters-patent [No. 37,548], dated January 27, 1863, granted to the complainant as assignee of Gustavus A. Jasper, for an improvement in purifying and cleansing sugar, is a good and valid patent; that said Jasper was the original and first inventor of the improvements therein described and claimed; that the defendant [Francis O. Mathiesson] has infringed upon the said patent and the exclusive right of the complainant thereunder; that the complainant recover of the defendant all gains and profits by him made from his infringement of the said patent by his unlawful using of the patented invention in purifying and cleansing sugars, at any time since January 18, 1864; that the complainant recover of the defendant his costs and charges in this suit to be duly taxed; that it be referred to George S. Hillard, Esquire, one of the masters of this court, residing in the city of Boston, to take and state to the court an account of all such gains and profits made by the defendant as aforesaid; that the complainant in such accounting have the right to cause an examination of said defendant ore tenus, or otherwise, and also the production of all books, vouchers, and documents relative and pertinent to such accounting; and that said defendant attend for such purpose before said master, from time to time, as said master may direct; also, that an injunction according to the prayer of this bill be issued against the said defendant, to stand until the further order of this court.

[See Cases Nos. 14,397 and 14,399.]

B. R. Curtis, Chauncey Smith, George H. Preston, and C. W. Huntingdon, for comp'ainant.

E. W. Stoughton, Robert Gilchrist, Jr., Causten Browne, A. C. Washburn, and W. P. Walley, for respondent.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. Strong doubts are entertained whether the case is properly before the court, under circumstances which will authorize it to make any order therein. The cause went to final hearing upon pleadings and proofs, and the conclusion of the court was expressed in the decree entered on the occasion. The substance of the decree was, that the inventor was the original and first inventor of the improvements described in the patent; that the defendant had infringed upon the patent; that the complainant should recover of the defendant all gains and profits made by him from his infringement of the patent, by his unlawful use of the invention, in purifying and cleansing sugar, after the time alleged in the bill; that the cause be referred to a master, to take, and state to the court, an account of all such gains and profits made by the defendant; that the complainant in such accounting should have a right to cause the examination of the defendant ore tenus, or otherwise, and also the production of all books, vouchers, and documents relative and pertinent to such account; and that the defendant attend for such purpose before the master from time to time as the master may direct.

No report has been made by the master, but we find upon the docket the following entries:—"May 27th. Master's certificate upon settlement of interrogatories with state of facts and schedule filed." "Roll containing nine drawings filed with the above certificate." "May 31st. Exceptions to master's certificate and report filed." These are all the entries that need to be referred to at this time.

When a suit in equity has been heard and submitted to the court for decision, neither party has a right to file any paper in the cause except by leave of the court. Such prohibition commences at the date of the submission of the cause to the court, and continues throughout the period that it remains upon the docket thereafter. The master may report back the cause to the court at any time when he has completed his investigations; and it would be the duty of the clerk to allow him to file his report without any new order from the court, as the right to do so is implied from the decree, referring the cause to him for the purpose specified in the decree.

No report has been made in this case by the master, although the docket entry describes the first paper filed as the "master's certificate upon the settlement of interrogatories, with statement of facts and schedule." Referring to the paper, it appears that the master, upon settling certain interrogatories to be propounded to the defendant, made the following memorandum in his own office: "May 22, 1867. Upon argument, the above interrogatories are settled and allowed, and state of facts setting forth the defendant's objection to the interrogatories are herewith filed, marked 'A,' with my initials and with this date" (signed by the master). Nevertheless it is true that no report of the case has been made by the master to the court; and

the cause is still pending before the master. Our impressions are, that the proceeding is irregular, and, if allowed, would work very considerable inconvenience. Besides, we are of the opinion that it is a departure from the usual course in equity suits, at least in this circuit. We are not, however, inclined to place our decision entirely nor even chiefly upon that ground on the present occasion.

The better practice, as the court thinks, is for the master to complete his investigations under the rules prescribed by the supreme court, and in accordance with the usual course of proceeding in equity cases in this circuit. The usual course is, that the master allow both parties, if they desire, to introduce testimony upon the subject of damages. He hears them fully, and when he has taken all the testimony, heard the parties, and come to a conclusion, he makes a draft of his report in the premises, and shows it to the parties, or files it in the clerk's office, and gives time for the parties respectively if they see fit, to make their objections to the drafted report. When those objections are made, it becomes his duty to consider or reconsider, as the case may be, the questions involved in those objections; and if, upon full consideration, he is still of the opinion that he was right in the conclusions formed and stated in the drafted report, he then makes his final report, and the parties have a right to file their exceptions to the final report, founded upon the previous objections made to the draft report, and then the whole matter comes back to the circuit court for adjudication upon the master's report. Either party may set down the case for hearing upon the exceptions to the master's report. Both parties may except; both may object in the first instance to the draft report, and both parties may afterwards except to the final report. They are entitled to be heard upon all the questions which have arisen before the master, provided they are embraced in their objections and in their exceptions.

When the exceptions are filed, if either party desires the evidence to be reported, they request the master to report it in whole or in part, as the case may be. It is the usual course for the master to comply with such a request; but if neither party makes the request, it is not incumbent upon the master to report the evidence at all. He may or may not, in his discretion, as he sees fit. If he does report the evidence at the request of one or both parties, it then becomes the duty of the court, if there be proper exceptions, to review the questions of fact embraced in the report as well as the questions of law. But, if the evidence is not reported, the court does not review the facts, but simply re-examines the questions of law. Such has been the practice in this circuit as far back as the knowledge of the justices now holding the court extends; and there has been no departure from the practice, since either of us came into the court, within the recollection of either member of it.

Authorities are referred to, very properly, by the respondent in this case as showing that exceptional cases have occasionally arisen, which support the course adopted on this occasion as a correct course. Our attention has been drawn to those cases, more especially to those referred to in the Circuit Court Reports of this circuit; but we think they do not sustain the course adopted in this case. One of the cases, which was a suit at law, contains some remarks of Judge Story, which at first reading might seem to afford some countenance to the supposed right of a party to bring back from a master questions arising there for the preliminary consideration of the circuit court. That was, as before remarked, a suit at law. It was a case of interrogatories and cross-interrogatories filed in the clerk's office under the rules regulating the taking of testimony in suits at common law. The usual course of practice in that class of cases has been for the party objecting to any interrogatory to note his objection under the interrogatory and to allow it to go, reserving the question for the consideration of the court in case the deposition should be taken and duly returned and offered in evidence at the trial; but it must be admitted in that case that the interrogatories were reported to the court, were before the court, were presented to the court, and received the consideration of the presiding justice. Looking at his remarks, however, it is quite clear that nothing practically useful to either party would possibly grow out of adopting the course there pursued as a general rule of practice, because Judge Story held that he would look at the interrogatories, and, if they presented any question of doubt, he would decline to decide it, and would postpone the matter until the trial, when the parties could be heard, and when they could save their rights by exceptions; and if, upon looking at the interrogatories, they were manifestly immaterial or incorrect, he would correct the error. Two things are very clearly to be inferred from those observations: first, the judge would not examine them unless they were plainly incorrect or immaterial, and then, if he did examine them at that stage of the case, and made any correction, the parties would be without remedy, as perhaps it is obvious they would be. Exceptions can only be taken in common-law suits at the trial. They must be made before the jury retire; they must be reduced to writing; they must be sealed by the judge. They may be drawn out after the jury has retired; but they must be taken during a trial, noted on the minutes of the judge, and subsequently drawn out and sealed by the judge, or they have no validity, and will not be examined in the appellate court. Taken as a whole, therefore, our conclusion is, that that decision does not furnish any substantial support to the views of the respondent in this case.

We are inclined to go a step further in respect to that decision, that it may not be a subject of misapprehension hereafter. Some inquiries have been made, and we cannot find that any such general practice has ever prevailed in the circuit. Indeed we learn of no other case of the kind. No such practice prevailed in the time of my predecessor, as I learn, and nothing of the kind since I have been in court, a period now of ten years; but the uniform course has been to allow the party to go to the clerk's office, and make his objections under the interrogatories, and save all his rights to be decided by the court at the trial. Otherwise the court would be settling moot questions very frequently, as it often happens that interrogatories are filed, and the deposition never taken, and perhaps it still oftener happens that they are filed, and the deposition taken, but so irregularly taken that it cannot be received in evidence. It is only necessary to settle those questions when the deposition has been taken, is offered in evidence, and is in a condition to be admitted to the jury; then the question arises, what portion of the statements of the deponent are proper evidence and have been properly taken?

Some other cases have also been cited, one in which the master in a chancery suit, the late Professor Greenleaf, made a certificate of the questions which arose, the interrogatories, and the matters were reported to Judge Story. The master expressed the opinion that the deposition ought to be taken,—I refer to the case of Gass v. Stinson [Case No. 5,262],—and the case shows that Judge Story ordered the commission to issue. The interrogatories in that case were to witnesses, not to either of the parties; and the master in chancery, apparently entertaining some doubt, sent the matter to the judge at chambers, because under the rules of that day the order for the commission must go from the court; there being in chancery suits no provisions for its issue by the clerk, which at a later period the rules authorized the clerk to make in common-law suits. The conclusion of the court in that case, although affording more countenance to the course adopted in this than any case the court has examined, is not sufficient to sustain the practice.

In fact our conclusion is, that in general the practice heretofore pursued and described by the court is the correct practice in equity suits, and is the general course of practice that the court will require to be followed, unless in some very special cases.

We do not decide that if the decretal order was ambiguous and indefinite, or incomplete, the master might not have authority to report the case back for more specific instructions. We do not express any decided opinion upon that point, because the case is not before us. In this case there is no suggestion that the decretal order is not sufficiently comprehensive, and if the suggestion was made our conclusion is that it could not be sustained. The decretal order is in the usual form in this class of cases, and contains the several allegations which the court have required to be inserted in such orders after a good deal of consideration.

Three times this court itself has corrected a decretal order because it was ambiguous,—twice in this district and once in the Rhode Island district, in a case where a very large amount was involved. The report of the master there was in favor of the complainant; but upon looking at the decretal order when the report came in, the court saw that one of the clauses of the order was quite ambiguous, and, perceiving that its phraseology had escaped the attention of the court at the time, the court of its own motion corrected the decretal order by a new order, and recommitted the cause to the master, and the whole subject was revised and a report brought in greatly more satisfactory to the court. The first correction of the kind in this district now resting in my memory was in the case of Howe v. Williams [Case No. 6,778], where, through inadvertence in consequence of the first draft having been lost by the counsel, after it had been fully examined and settled by the court, a new draft was prepared, varying its phraseology; and when that case came back from the master, the court, for the first time in this district, corrected, took out the ambiguity from the decretal order, and sent it back to the master. No doubt is entertained of the power of the court in that behalf.

We are not now deciding that the court might not have the power to revise each act of the master as it progressed, provided it was referred back in a formal report by the master. But we do decide that such a practice would be productive of great delays, and will not receive any countenance from the court. My opinion is that the general practice which has been pursued in this circuit is for the interest of all concerned, and until it can be clearly seen that it can be amended to the advantage of the parties litigant, and in a manner to promote the convenience of the court, we must adhere to that practice.

Sudden changes in practice, especially in equity suits, are not advisable. Great care is necessary in equity suits in following closely the rules of the court and the settled course of practice. Otherwise the bar would become confused and the court find itself involved in difficulties far greater than need be, if the regular course of practice is pursued. Some experience at the bar, and more in the courts, in this court and in the supreme court, has convinced the presiding justice of the great benefit of a careful adherence to the usual practice in equity suits. They sometimes continue for a considerable length of time; parties decease, supplemental bills, amendments to bills, and answers, and new proofs, are introduced; and in these different stages, unless there is a pretty close adherence to the known rules of practice, confusion is apt to ensue; and it is hardly necessary to remark

that, whenever a case is involved in confusion, it is embarrassing to the bar, and still more embarrassing to the court.

We feel more satisfaction in announcing this conclusion in this important case, because we are utterly unable to see how the respondent who brings the case here for the consideration of the court, on this occasion, can possibly suffer any ultimate detriment. The power of the court to revise any and every irregularity before the master is full and ample, and can in our view of the matter be best exercised when we have them before us with the whole case. Take any litigation of this volume in evidence and pleadings and it would be quite difficult for the judges to decide an isolated point to their own satisfaction, without looking at the whole or nearly the whole record; as the consideration of one point necessarily must have a bearing greater or less upon other parts of the same record.

We should be exceedingly reluctant to lay down any rule in equity which could embarrass the parties or the bar; but, on the contrary, we do not hesitate to say, if we could see by any new rule we could adopt that there would be less embarrassment to the bar, the parties, and the court, we should adopt such new rule, but our impressions are that innovations ought to be very carefully considered. Even the supreme court, in one or two instances, have adopted a rule which they thought to be an improvement, and the probabilities are very strong that they will find it necessary to revise the practice and return to the rules which existed before.

In view of the circumstances our conclusion is, that the filings entered by the clerk be stricken out, and that the several papers filed be returned by the clerk to the master.

[For another case involving this patent, see Union Sugar Refinery v. Matthiessen, Case No. 14,399.]

Case No. 14,399.

UNION SUGAR REFINERY v. MATTHIESSON et al.

[3 Cliff. 639; 2 Fish. Pat. Cas. 600.] [1]

Circuit Court, D. Massachusetts. Nov. 14, 1865.

PATENTS — INVENTIONS — COMBINATION — EQUIVALENTS — EXPERIMENTS — PURIFYING SUGAR.

1. Inventions pertaining to machines may be divided into four classes. (1) Where the invention embraces the entire machine. (2) Where the invention embraces one or more of the elements of the machine but not the entire machine. (3) Where the invention embraces both a new element and a combination of elements previously known. (4) Where all the elements are old, and a new combination, producing a new result, is made out of them.

[Cited in Seymour v. Osborne, 11 Wall. (78 U. S.) 542; American Diamond Rock Boring Co. v. Sutherland Falls Marble Co., 2 Fed. 354.]

2. A person is an infringer of a patent of the first class who, without license, makes any portion of the machine; of the second, when the part new and patented is made or used; of the third class, when the new element or new combination is used; of the fourth, when the patented combination is pirated.

[Cited in Sharp v. Tifft, 2 Fed. 701.]

3. The property of the inventor is the exclusive right which the letters-patent secure to him to make, use, and vend the thing patented.

4. The reason that a patent, when introduced in evidence, is prima facie evidence that the patentee is the first and original inventor of what is claimed therein, is that it is issued upon the adjudication of a public officer charged by law with such duty.

5. Where all the elements of a machine are old, the patentee cannot invoke the doctrine of equivalents to suppress all other improvements on the old machine.

[Cited in Crompton v. Belknap Mills, Case No. 3,406; Perkins v. Eaton, 40 Fed. 674.]

6. But he is an infringer who makes or vends the patented improvement with no other change than the employment as a substitute for one of its elements, of a device well known in the state of the art to be such at the date of the invention, and which any constructor acquainted with the art, would then know how to employ. Such substitution of one well-known element for another is a mere colorable evasion of the patent.

[Cited in Dudley E. Jones Co. v. Munger Improved Cotton Mach. Manuf'g Co., 1 C. C. A. 158, 49 Fed. 66.]

7. Whether a witness has sworn falsely or not is a question for the jury, and if they find that he has willfully sworn falsely as to a material fact, they may, if they deem it proper, disbelieve everything he has said.

8. The presumption that the patentee is the original and first inventor of what is claimed in the patent, when introduced in evidence, extends, in the absence of the original application no farther back than the date of the patent; and those alleging an earlier date must prove it by competent evidence.

9. Where there is no evidence to the contrary, the presumption is that the patentee at the time of making his application for a patent believed himself to be the original inventor or discoverer of the thing patented.

10. Crude and imperfect experiments equivocal in their results, and then abandoned and given up, shall not be permitted to prevail against an original inventor who has perfected his improvement and obtained his patent.

11. It is not enough to defeat a patent to show that another had first conceived the possibility of effecting what the patentee accomplished, unless it appears that he reduced what he conceived to practice.

[Cited in Electric Railroad Signal Co. v. Hall Railroad Signal Co., 6 Fed. 606.]

12. If two machines, having the same mode of operation, do the same work in substantially the same way and accomplish substantially the same result, they are the same, though differing in form, shape, or name

[Cited in Converse v. Cannon, Case No. 3,144; Dorsey Harvester Revolving Rake Co. v. Marsh, Id. 4,014; Willimantic Linen Co. v. Clark Thread Co., Id. 17,763.]

13. If the defendant's means of causing pressure at the nozzle of his machine were, at the date of the patentee's invention, known as a substitute for the means of causing pressure at the nozzle described in the patent in this case, and if this mode performed the same function as the

[1] [Reported by William Henry Clifford, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 3 Cliff. 639, and the statement is from 2 Fish. Pat. Cas. 600.]

patented one, and could from a constructor's knowledge be substituted for it, then the two means are substantially the same.

14. The patent in this case is not limited to any arbitrary mathematical amount of pressure, but covers such degree as is capable of carrying out the described object of the patentee under the conditions described in the patent.

[This was an action on the case tried by Judges CLIFFORD and LOWELL and a jury, for the infringement of letters patent [No. 37,548], for "improvement in purifying and cleansing sugar," granted to the plaintiffs as assignees of Gustavus A. Jasper, January 27, 1863. The claim of the patent was as follows: "Combining with process of cleansing sugar by centrifugal action, in the centrifugal machine, a means or process of forcing the cleansing liquid or syrup in one or more fine jets or streams, under high pressure or velocity, against the mass of sugar in revolution, the whole being substantially as described."] [2]

[See Case No. 14,397.]

G. H. Preston, C. Smith, and B. R. Curtis, for complainants.

Robert Gilchrist, Causten Brown, and E. W. Stoughton, for defendant.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice (charging jury). Pursuant to the uniform practice in this court, it now becomes my duty, as the organ of the court, to direct your attention to the nature of the controversy between these parties, as exhibited in the pleadings, and to give you such instructions in matter of law as seem to be applicable to the evidence in the case.

The action is an action on the case for an alleged infringement of certain letters-patent. The writ is dated the 16th of January, 1864; infringement is alleged on the 2d day of November, 1863, and from that time to the date of the writ. The plea is the general issue, with notices, under the statute, of certain special defences. The principal special defence relied on is that the assignor of the plaintiff is not the original and first inventor of the improvement described in the letters-patent on which the suit is founded. The claims of the plaintiffs, as laid in the declaration, rest upon two material allegations: First, that their assignor, Gustavus A. Jasper, is the original and first inventor of the improvement described in the patent on which the suit is founded; second, that the defendant, Francis O. Matthiesson, infringed the same as alleged in the declaration. Both of these allegations are denied by the defendant, and the issues presented in the affirmation and denial of these two allegations constitute the principal questions for your decision. They present mixed questions of law and fact, and consequently must be determined under the instructions of the court. Questions of law must be determined by the court, subject to revision by the supreme court on a writ of error; but questions of fact are for your determination, under the instructions of the court as to the rules of law properly applicable to the subject-matter involved in the inquiry.

Controversies like the present are exclusively cognizable in the circuit courts of the United States; and the rights of the parties in such controversies are to be ascertained and determined according to the provisions of the acts of congress upon this subject, and the rules and decisions established by the federal courts. Power is conferred upon congress, in the constitution of the United States, to promote the progress of science and the useful arts by securing, for limited terms, to authors and inventors, the exclusive right to their respective writings and discoveries. Congress has accordingly legislated upon the subject. The existing patent act [5 Stat. 117] establishes the patent office, and provides for the appointment of a commissioner of patents, by the president, by and with the advice and consent of the senate. Provision is made by section 6 of the act, "that any person or persons, having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, or composition of matter, not known or used by others before his or their discovery or invention thereof, and not at the time of his application for a patent in public use or on sale, with his consent or allowance, as the inventor or discoverer, and shall desire to obtain an exclusive property therein, may make application in writing to the commissioner of patents, expressing such desire, and the commissioner, on due proceedings had, may grant a patent therefor."

Protection is afforded, as you perceive, by that provision, to inventors of various kinds, but it will only be necessary, in this case, to speak of inventions or improvements in machines. Inventions pertaining to machines may, for the purpose of such explanations as the court find it necessary to give you in this case, be divided into four classes. First, where the invention embraces the entire machine, as a car for a railway, or a sewing-machine, as was decided by this court in a well-known case. Such inventions are seldom made, but when made, and duly patented, any person is an infringer who, without license, makes or uses any portion of the machine. Under such a patent the patentee holds the exclusive right to make, use, and vend to others to be used, the entire machine; and if another, without license, makes, uses, or vends any portion of it, he invades the right of the patentee.

The second class of inventions referred to are those which embrace one or more of the elements of the machine, but not the entire machine; as the coulter of the plough, or

[2] [From 2 Fish. Pat. Cas. 600.]

the divider of the reaping-machine. In patents of that class any person may make, use, or vend all other parts of the machine or implement, and he may employ a coulter or a divider in the machine mentioned, provided it be substantially different from that embraced in the patent.

The third class of machines which are to be mentioned are those which embrace both a new element and a new combination of elements previously used and well known. The property in the patent in such a case consists in the new element and in the new combination. No one can lawfully make, use, or vend the machine containing such new element or such new combination. They may make, vend, or use the machine without the patented improvements, if it is capable of such use; but they cannot use either of those improvements without making themselves liable as infringers.

The fourth class of machines to be mentioned are those where all the elements of the machine are old, and where the invention consists in a new combination of those elements, whereby a new and useful result is obtained.

Most of the modern machines are of this class, and many of them are of great utility and value. You will observe that in this class the invention consists solely in the new combination; and the rule is, that the property of the inventor, if duly secured by letters-patent, is in all cases exactly commensurate with his invention. Such an invention, however, is but an improvement upon an old machine; and consequently the patentee cannot treat another as an infringer who has also improved the original machine, by the use of a substantially different combination, although the machines may produce the same result. But every inventor is entitled to the full benefit of his invention, as described and secured in his patent; and no one charged with infringing the same can successfully defend himself against the charge merely because the machine he makes, uses, or vends differs from that of the plaintiff in any respect which does not render the machine so made, used, or vended substantially different from the patented machine.

Inventions of the fourth class are just as meritorious as those of any other class, and the property of the inventor is entitled to the same protection. When we speak of the property of the inventor, we refer to the exclusive right which the letters-patent secure to him, to make, use, and vend to others to be used, the improvement therein described for the terms specified in the patent. Take the patent, for example, on which the suit is founded. The plaintiffs' property as assignee of the patentee—if the patent is valid—consists in the exclusive right to make, use, and vend to others to be used, the patented improvement for the period specified in the patent. The patentees have that property in their inventions, as secured by letters-patent, and they have no other; hence it is that courts of justice have uniformly held that patents for inventions are not to be treated as mere monopolies, and therefore odious in the eye of the law, but they are to receive a liberal construction, and, if practicable, are to be so interpreted as to uphold and not to destroy the rights of the inventor.

Objection was made by the defendant to the introduction of the letters-patent described in the declaration, but the objection was overruled by the court, and it will be your duty to regard it as properly admitted. Such objections are made to the court, and are never for the consideration of the jury, whether they are sustained or overruled.

The plaintiffs having introduced the letters-patent described in the declaration, the prima facie presumption is that they are the assignees, and that the patentee is the original and first inventor of what is therein described as his improvement. The reason of that presumption is, that the letters-patent were issued by a public officer, acting under the authority conferred upon him by an act of congress. The substance of the provision in that behalf is, as I have before explained, that any person having made an invention or discovery such as is described in section 6 of the patent act, may, if he desires to obtain an exclusive property therein, "make application, in writing, to the commissioner of patents, expressing such desire; and the commissioner, on due proceedings had, may grant a patent therefor." The effect of the provision is, that the commissioner of patents is authorized to determine, in the first place, whether the applicant is entitled to a patent, and having determined that question in the affirmative, and issued the patent, the prima facie presumption is, that he correctly performed his duty; consequently, that the patentee is the original and first inventor of his described improvement. Such presumption, however, is not conclusive in any case, but may be overcome by legal evidence, showing, to the reasonable satisfaction of the jury, that the patentee was not the original and first inventor of the alleged improvement in point of fact.

Although the presumption referred to is not a conclusive one, still it is sufficient to support the issue on the part of the plaintiffs, unless it is overcome by evidence to show that the fact is otherwise; and the burden of proof on this branch of the case is upon the defendant.

Evidence was also introduced by the plaintiffs, tending to support the allegation of infringement, as laid in the declaration. You have already been told that the burden of proof on the question as to the novelty of the invention is upon the defendant; but the burden of proof on the issue of infringement is upon the plaintiffs. They charge infringement, which is a wrongful act, in the nature of a trespass; and inasmuch as no one is presumed to do wrong, the rule is,

that he who alleges that another has committed a wrongful act must prove it. Granting the rule to be as stated, the plaintiffs introduced testimony tending to prove the allegation of infringement, and rested their case in the opening.

You will remember that two defences were opened by the counsel for the defence: First, that the assignor of the plaintiff was not the original and first inventor of the improvement described in the letters-patent on which the suit is founded; second, that the defendant never infringed the patent, as alleged in the declaration. Both parties agree that the two issues mentioned present the principal questions in the case, and most of the evidence introduced by the respective parties has been directed to one or the other of those issues.

In considering these questions, and weighing the evidence bearing upon them it becomes necessary that you should know what the invention is, as described in the letters-patent on which the suit is founded. The construction of a patent is always a question of law, exclusively for the court, except in cases where the patent contains technical words or phrases, or terms of art which require explanation by parole testimony. The present case is one where the construction of the patent is a question exclusively for the court. Viewing it in that light, counsel on the one side and the other have been heard on that subject, and the question has received our deliberate consideration.

The claim of the patent is "the combining with the process of cleansing sugar by centrifugal action, in the centrifugal machine, a means or process of forcing the cleansing liquid or syrup in one or more fine jets or streams under high pressure or velocity against the mass of sugar in revolution, the whole being substantially as above described." Due weight must be given to the words, "the whole being substantially as above described," which is a direct and emphatic reference to the description of invention as contained in the specification. Independently, therefore, of the general rule, that makes it the duty of the court, in construing the claim of a patent, to look at the entire patent, including the specification and drawings, it is especially necessary to do so in this case because of the emphatic reference made in the claim to the prior description of the invention. As recited in the patent, the invention is described to be "a new and useful improvement in purifying and cleansing sugar," and the introductory sentence of the specification describes it as "a new and useful invention, having reference to the cleansing or bleaching of sugar"; and the patentee states that it "may also be applicable to other useful purposes of like nature." Nothing of that kind, however, is otherwise described in the specification, and it is not perceived that the suggestion, unaccompanied by any other explanation, can have much weight in determining the character of the invention. Speaking of the state of the art, the patentee admits "that water or other cleansing liquid has, for the purpose of cleansing sugar, been gradually poured or discharged upon or near the centre or other suitable parts of a mass of sugar contained in a centrifugal machine, while the foraminous vessel of such machine was in rapid revolution"; but he utterly repudiates the idea of making any claim to any such procedure. On the contrary, he states that his invention consists in combining with that well-known process, as specified, "a process or means of forcing such cleansing liquid in numerous fine jets or streams, under a high degree of pressure, against the mass of sugar while under centrifugal action"; and he makes that statement in immediate connection with the important declaration that his invention enables him to use thick syrups to great advantage, and that thick syrups prevent the melting of the sugar crystals. Moreover, he also states that he has discovered "that if, when a mass of sugar is in revolution in a centrifugal machine, a minute stream of syrup or other saccharine matter is caused to impinge against it, the impinging force of the stream will cause it to so act against the inner or exposed surface of the mass as to penetrate the same without melting it, and also that the combined forces of impingement and centrifugal action greatly facilitate the cleansing of the sugar." Reference to the further statements of the patent, immediately following the description of the mechanism of his apparatus, will show, with the preceding explanations of the patentee in respect to thick syrups, that the important results obtained by his mode of operation point to the characteristic and most important features of the invention.

Mention should here be made that the patentee, in speaking of his invention, describes it as an apparatus; and in carrying it out, he states that he employs it in connection with one or more centrifugal machines, which he admits are well known. His description of the apparatus is, that at a suitable height above the centrifugal, he places a tight vessel, made of strong material, capable of bearing great internal pressure; that he provides that vessel with a filling pipe, having a stopcock in it; and he also states that it may have a safety-valve and a glass tube, arranged as shown in the drawing, and made to communicate at each end with the interior of the principal vessel, in order that the height of the liquid in the vessel may be indicated by the liquid in the tube. He also states that a pipe leading from an air force-pump may enter the upper part of the above-described vessel; and that another pipe, having a stopcock near its upper end, will lead from the bottom of the vessel, and communicate with a flexible pipe, arranged over each of the centrifugal machines. Con-

tinuing the description, he also states that each flexible pipe terminates in a perforated nozzle—"foraminous," he says—which may be provided with a stopcock; and that there may also be a stopcock at the lowest extremity of the pipe, which proceeds from the bottom of the principal vessel.

Brief as the description is, it is nevertheless amply sufficient, in connection with the model in the case, to enable you to understand the exact character of the apparatus. A precise description is then given of the mode of operating the apparatus, in order to produce the described result. The first step is to charge the reservoir with strong or thick cleansing liquor or syrup until it is about two thirds full of such liquor. That is the first step. The next step is, to force air into the reservoir, and let it be condensed therein, under a high pressure, varying, however, according to the character of the sugar to be cleansed or bleached. When these steps are taken, the apparatus described is ready for use. But the centrifugal machine or machines must be charged with a mass of sugar and be put in rapid revolution. Nothing then remains to be done but to open the proper stopcocks, especially the one at the lower end of the flexible tube directly over the centrifugal machine, and direct the perforated nozzle of the same so as to discharge with great velocity and force the minute streams of cleansing liquid against the inner surface of the mass of sugar lying against the inner surface of the rotary vessel of the centrifugal machine, taking care to move the nozzle so as to cause the streams to be laid on the sugar evenly.

Doubtless, these suggestions as to the course of reasoning adopted by the court in coming to a conclusion as to the true intent and meaning of the patent under consideration might have been omitted; but in view of the importance of the question, we have thought that it was due to the parties to present these preliminary explanations as to the nature and characteristics of the invention. They are all derived from the patent, and appear to be incontrovertible.

Repeating the remark, that the construction of the patent in this case belongs to the court, you are instructed that the invention of Gustavus A. Jasper consists in an apparatus of described means for the purpose of cleansing or bleaching sugar with liquor, as set forth in the specification of the letters-patent.

The defendant's views are, that the invention consists merely in combining with the centrifugal machine the mechanical means the patentee has described for discharging, under high pressure or velocity, upon the sugar contained therein, the cleansing liquor or syrup mentioned in the specification; but it is not possible to give you that instruction, for the reason already explained. Plain as those explanations are, however, the object is made even plainer by what immediately follows in the specification. The patentee expressly disclaims his invention as a pressure liquoring apparatus, and states that his object is "to combine with the force induced by the centrifugal machine a force which shall so operate on the cleansing liquor or syrup as to drive it with such velocity into the sugar, while in revolution, as to prevent such sugar from being melted at the surface of impingement." Unquestionably, he contemplates the issue of fine jets or streams, because he states, in addition to what has already appeared, that by throwing the cleansing liquor in minute streams against the surface of the sugar, its tendency to melt the crystals is greatly diminished; and he adds, in that connection, that the smaller the streams the less is their liability to produce that effect.

Special mention was made by the patentee in the outset that his invention enabled him to use thick syrups as cleansing liquids; and his first direction to the operator is, that the reservoir shall be two-thirds filled with a strong or thick cleansing liquid or syrup; and at the close of his description of the advantages of his invention, he repeats for the third time that his invention enables him to employ very thick syrups as cleansing liquids, and thus to diminish the chance of melting the crystals or particles of sugar to be cleansed. Cleansing or bleaching the sugar is not the only object intended to be accomplished by the apparatus; but the intent and purpose of accomplishing that object with smaller loss, or less melting of the crystals of sugar to be cleansed, are unmistakably indicated and disclosed in the description given of the invention, as well as in the directions to the operator, and in the summing up of the advantages claimed for the invention over previous machines Detached passages of the specification, if separately considered, might possibly lead to a different conclusion. But the different parts of an instrument must be compared with each other, and the instrument considered as a whole; and when so considered it leaves no doubt in the mind of the court that the invention of the plaintiffs consists in an apparatus of described means for the purpose of cleansing or bleaching sugar with liquor, as set forth in the specification of the patent.

A description has already been given of the elements of the apparatus, and of the means described by the patentee for carrying his invention into effect. Before any inventor can receive a patent for his invention, he is required to deliver a written description of the same, and of the manner of making and constructing it, in such full, clear, and exact terms as to enable any person skilled in the art to practise the invention. Where an invention consists of a machine, he must fully explain the principle and the several modes in which he has contemplated

the application of that principle, by which it may be distinguished from other inventions. But he is not required to specify such well-known substitutes for any particular element of his invention as any constructor acquainted with the art fully understands are usually employed as such substitute for the accomplishment of the same function.

All the elements of the invention in this case are old, and the rule in such cases, as before explained, undoubtedly is, that a patentee cannot invoke the doctrine of equivalents to suppress all other improvements of the old machine; but he is entitled to treat every one as an infringer who makes, uses, or vends his patented improvement without any other change than the employment of a substitute for one of its elements, well known as such at the date of his invention, and which any constructor acquainted with the art will know how to employ. The reason for the qualification of the rule as stated is, that such a change—that is, the mere substitution of a well-known element for another, where it appears that the substituted element was well known as a usual substitute for the element left out—is merely a formal one, and nothing better than a colorable evasion of the patent.

The means for carrying out the invention are: first, a tank containing the liquor; second, a suitable pipe or hose to convey the liquor to a point near the centrifugal machine; third, a flexible hose, with a short perforated nozzle, to enable the operator safely and efficiently to perform the required manipulations; fourth, an air force-pump, entering the upper part of the tank, and forcing air into the same and condensing it therein, under a high pressure, varying as may be required for the kind of sugar to be treated. Such are the means described in the specification. But it is undoubtedly true that the patent includes such known substitutes for the described means as were within the knowledge of constructors acquainted with the art, and well known as usual substitutes for performing the same purpose.

Guided by these rules as to the construction of the patent, you will proceed to the consideration of the merits of the controversy. Coming to the merits of the controversy, your attention will first be directed to the question whether the assignor of the plaintiffs is the original and first inventor of the improvement described in the patent, as expounded by the court. Whether he is so or not is a question of fact which you must determine under the instructions of the court, from all the evidence in the case applicable to that issue. Attention should always be paid, in causes like the present, to the precise positions which the respective parties assume as serving to facilitate the investigation; and you will find it necessary or convenient to follow that suggestion with some care in this case, else there is great danger that you may be led into error. In the opening, the defendant conceded that the assignor of the plaintiffs had made an invention, and that the same was secured to him by letters-patent, specified in the declaration; but he denied that the patent embraced any such apparatus as that which the defendant employed in his sugar refinery during the period covered by the charge of infringement. The closing council makes the same denial; but he insists, at least, by the course of argument, not in direct terms, that if it shall be otherwise determined, still the plaintiffs are not entitled to recover, because, as he contends, the defendant's apparatus, as used in his refinery, was substantially the same as that employed in the Cabot street establishment and that employed in the Northampton street refinery; and that the apparatus there employed was invented and used in those establishments prior to the date of the invention on which the suit is founded. But the court declines to submit any such complicated issue for your consideration. Looking at the pleadings, it is obvious there are two principal issues to be determined; and they are, as before explained: first, whether the assignor of the plaintiffs is the original and first inventor of his alleged improvement; and, secondly, whether the defendant has infringed the patent. Confine your attention, in the first place, to the question of novelty, and do not suffer the questions to be commingled, as the inevitable effect of that course of investigation is to produce embarrassment and confusion. Persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement, or any art, machine, manufacture, or composition of matter not known or used by others before such discovery or invention, and not, at the time of the application for a patent, in public use or on sale with their consent or allowance, are entitled to a patent.

The proposition of the defendant also is, that the supposed invention, described in the declaration, was not new at the date of the letters-patent, but that the same was well known to various persons employed in the establishment of the Union Linen Company, at Cabot street, and that the same apparatus, or one substantially the same was used prior to the date of Jasper's invention for the purpose of cleansing or bleaching sugar. The evidence shows that the establishment at Cabot street, or the principal interest in it, belonged to the firm of Sampson & Tappan. The theory of the defendant is, that the use of such apparatus was commenced at that establishment the latter part of May, 1861, and that the use was continued there throughout that year, and until the proprietors broke up the establishment and removed to Northampton street, in January of the following year. They commenced to move from Cabot street to Northampton street in December, 1861; and the theory of the defendant is,

that the same apparatus was used in that sugar refinery as early as the latter part of February following. The ground assumed by the defendant is, that the apparatus was invented, constructed, and put in operation at both these places by George E. Evans, or under his superintendence and direction, and that he continued to use it at the latter place, sometimes with water, sometimes with liquor, under varying circumstances, as detailed in the testimony of the witnesses, from the day the proprietors of that refinery commenced operations at that place, to the date of the alleged invention made by the assignor of the plaintiffs, and to a much later period. Parties defendant in a suit like the present are permitted to plead the general issue, and to give certain special matters in evidence of which notice in writing may have been given to the plaintiff or his attorney thirty days before the trial. Take, for example, the case under consideration. The defendant might give notice, in writing, that he would offer evidence to prove that the assignor of the plaintiff was not the original and first inventor or discoverer of the thing patented, or the substantial and material part thereof claimed as new. But the same section of the patent act requires, that whenever the defendant relies in his defence upon the fact of the previous invention, knowledge, or use of the thing patented, he shall state in his notice of special matter the names and places of residence of those whom he intends to prove to have possessed the prior knowledge, and when and where the same had been used. Both parties were desirous of coming to the trial of this case at the regular session held here in May last; but the cases having precedence on the docket prevented the court from complying with their request. Unable to grant their request for an immediate trial, on account of the near approach of the regular session of the court in another district of this circuit, the court, at the request of the parties, assigned the case as the first to be tried at the special session of the court to be held on the 4th of September, which was ordered in part to accommodate the parties in this suit. They accordingly appeared, and on the morning of the day when the trial was to have been commenced, the affidavit of George E. Evans was presented to the court by the defendant.

The statement of the defendant was, that he was ready to go to trial if the plaintiffs would waive the statute requirement of thirty days' written notice of defence; but inasmuch as the plaintiffs declined to waive this requirement, and inasmuch as no such notice had been given, the case was continued until the present term, to enable the defendant to give that notice. Such notice was afterwards given, and the witness, George E. Evans, has been fully examined in the case. His testimony has been the subject of comment by both sides, and in the course of those comments certain material parts of it have been very carefully reviewed. The argument for the defendant is, that this testimony proves that the apparatus described in the patent, as construed by the court, was invented and constructed by the witness, in the form of an operative machine, at the establishment in Cabot street, as before explained, and also at the Northampton street sugar refinery, for three months before the assignor of the plaintiffs had reduced his supposed invention to practice as an operative machine, or had any definite knowledge of its actual mode of operation. The views of the plaintiffs are, that these statements of the witness are all founded in error: that he never invented anything pertaining to the patented invention, and that he never constructed or used any such apparatus as he pretends, at the establishment in Cabot street at any time, nor at the sugar refinery in Northampton street until some time after the assignor of the plaintiffs made the patented invention, and the same has been successfully reduced to practice as an operative machine at the establishment of the Union Sugar Refinery, at Charlestown, in this district.

Witnesses are presumed to speak the truth; but experience shows that they are often in error, and that sometimes they are false; and the rule is, that whenever their truthfulness is called in question, the jury are to judge of their credibility under the instructions of the court. Regarding the matter in that light, the defendant has called your attention to several general considerations which, as he insists, have a strong tendency to support the witness, and to the testimony of the other witnesses in the case who have testified to any material facts or circumstances confirmatory of his statement. On the other hand, the plaintiffs assail the truthfulness of the witness, and insist that he is mistaken, or has sworn falsely, and that the witnesses called to confirm his statements are mistaken as to dates; and that, in point of fact, there was no attempt to liquor sugar according to the plan of the patentee, until long subsequently to the time when he had put his invention in practice at the establishment of the plaintiffs. They (the plaintiffs) contend that he is contradicted by so many witnesses, and by such incontrovertible facts and circumstances, that you ought not and cannot believe his testimony. When falsehood is imputed to a witness, the question is always for the jury; and the rule is, that if they find he has wilfully sworn falsely as to a fact material to the issue, they are at liberty, if they deem it proper to do so, to disbelieve everything he has stated in the case. The correctness of that rule is admitted by the defendant, and he asks that it may be applied to some of the plaintiff's witnesses. In order to defend the witness, George E. Evans, against the charge of falsehood, he (the defendant) makes the same charge against the president of the plaintiffs' corporation, the patentee, and the

senior member of the firm of Sampson & Tappan, who was one of the principal owners of the two establishments to which reference has been made.

Where there is a conflict of testimony, it is the duty of the jury to reconcile it, if they can reasonably do so; but if they cannot reasonably reconcile it, and are obliged to come to the conclusion that it is false on the one side or the other, then it is their duty fearlessly to determine, if they can, where the truth lies. Doubts on this issue must weigh in favor of the plaintiffs, because the burden of proof is upon the defendant. Looking at the whole evidence, perhaps you will come to the conclusion that there is reason to believe that a valuable invention has been made by some one at some time, and it is not going too far to say, that the issue most strenuously contested in the trial has been whether it was actually made by George E. Evans or the assignor of the plaintiffs. The apparatus of William P. Breck and the foreign patents must not be overlooked. They will be brought to your notice in due season; but the several propositions of the parties to such a controversy cannot all be considered at the same moment. The theory of the plaintiffs is, that the invention was made by their assignor; and one theory of the defendant is, that it was made by his principal witness. Experience shows that much light is often derived in endeavoring to ascertain the truth from a mass of testimony, by looking with careful scrutiny at the conduct of the parties whose acts are called in question or are the subject of inquiry.

The patentee applied for a patent, and the same was granted to him; and he has since been engaged, as he has testified, in perfecting the invention. The date of the patent is the 27th of January, 1863, and it does not appear that George E. Evans set up any claim as the inventor of the improvement prior to the 1st of September last, when he gave his affidavit. Weigh this circumstance, and give it such consideration as you think it deserves, bearing in mind that inventors are not obliged to apply for a patent or to make known the result of their inventions. Inventions ought not to be supported by false testimony, and letters-patent ought not to be broken down by any such means. Courts of justice are supposed to be able to investigate such an issue and ascertain the truth; and the court feel it to be their duty to urge you to apply your best powers to the accomplishment of that object. Examine the testimony of George E. Evans, and see if you have any reason, and if so, to what extent, to doubt his veracity, giving due weight to everything adduced in evidence to confirm his testimony. Carefully examine, also, the testimony of the proprietors of the establishments where he was employed, and of the president of the plaintiffs' corporation, and of the patentee, and of all the other witnesses who have testified to facts or circumstances confirmatory of their statements, and decide whether you have any, and if any, what reason to disbelieve what they have testified.

The suggestion of the defendant is, that the testimony of the witnesses for the plaintiffs on this issue is merely negative, and that the affirmative statement of a witness as to what he saw and heard is entitled to more credit than the negative statement of another witness that he did not see or hear the same thing. Unquestionably, the rule is so, where the testimony of a witness called to contradict an affirmative statement is merely negative; and it is for your consideration whether the testimony of the plaintiffs' witnesses as to what was or was not done at Cabot street or Northampton street is really negative. The testimony of the president of the corporation is, that he was the commission merchant, the agent who furnished the proprietors with all the raw material,—some sugar, some melado, some molasses,—all the raw material for the manufacture of the sugars made in those establishments. The first stock furnished, as he states, was for the purpose of experiment on the open pan, which he particularly describes. Having authorized the experiment, he visited the place, sometimes two or three times a week, and sometimes daily, and oftener, for the purpose of watching the experiment, and of seeing if it was likely to be successful. The statements of the proprietors of the establishment are, that they were there, one or both of them, at the same time, and they substantially concur in the statements of the president of the corporation. Other witnesses are called who had occasion to visit the establishment, and who had an opportunity to know if any apparatus was used there as the defendant assumes was used, and they all deny that they ever saw anything of the kind.

Severe criticism is made by the defendant upon the senior partner of the firm, whose members were the principal proprietors of those establishments. The witness admits that he was mistaken as to the date of the first attempt of George E. Evans to cleanse or bleach sugar with liquor in a centrifugal machine; and he also admits, that while he was under that erroneous impression as to the date, he stated that the operations of defendant's witness were prior to the alleged invention of the assignor of the plaintiffs. Mistakes as to dates are of frequent occurrence, even with honest witnesses, and where it satisfactorily appears that it was without intentional error, the fact that such mistake was made is not entitled to much weight, as affecting the credit of the witness. Intentional misstatements on the part of a witness, if material to the issue, are as much perjuries as any other species of false swearing. Examine the testimony of the witnesses, in view of this explanation, and determine for yourselves whether the contradic-

tory statements of the witness do really affect his credit.

Certain other testimony is introduced by the defendant to prove what he stated to the witness, and to some one or more of the party who accompanied him in the visit to the counting-room of the witness, subsequent to the special session of this court on the 4th of September last. Those contradictions are in evidence, and are for your consideration. Such contradictions do not tend to prove the disputed fact, and are only admitted as affecting the credit of the witness; and you should keep in mind his explanation, that he did not hear the affidavit read, and that he was still in error as to the date of the experiment made by the witness for the defendant. Subsequently, as he states, he examined certain letters, written by himself at that time, and saw the bill of the first sugar —of the 26th of August—purchased for the making of liquor, and became fully convinced that he was in error as to the date. Plainly, these explanations ought to have weight, in connection with the contradictory evidence, and it is for you to say whether or not they are satisfactory. Consider for a moment what the mistake was which he affirms he made, and perhaps it will aid you in coming to a right conclusion. According to his testimony, he made no mistake as to anything which occurred at Cabot street, because he still affirms, in the most positive terms, that he has no knowledge of any such experiments being made there as are described in the testimony of the principal witness of the defendants. His mistake, as he states, was as to what occurred in Northampton street, in the experiments made there with the sugars purchased and sent there for that purpose by Mr. Holden, or the president of the plaintiffs' corporation. The plaintiffs admit that such experiments were made at that refinery, and one of the questions in controversy between the parties is, when they were made. The error of the witness, as he states, was as to that date, and his testimony now is, that it was subsequent to the invention described in the declaration. The patentee states that he commenced his operations for starting a sugar refinery in Charlestown in April, 1862, and gives a detailed statement of the various experiments which he made before he arrived at the patented result. The repetition of these experiments is unnecessary, as they have been the subject of comment on both sides.

The first experiments were made with a barrel of sugar which he obtained from the East Boston house, and on the 8th of May, 1862, he procured another barrel of sugar from the same place for a similar purpose. His idea was, as he states, at that time, to run the sugar through the centrifugal machine, and after the syrup was thrown out, to remove the mass of sugar from the machine, mix it with white liquor, and then run it through the machine for the purpose of cleansing or bleaching it; but while the product was good, he found he must use too much liquor to allow any considerable profit. Experiments were shortly after made, he says, with a barrel filled with white liquor, but the first result was not satisfactory. Further experiments were made by the witness on the 4th of August, 1862, with the barrel and white liquor, first placing the barrel on the next floor above the basement, and afterwards on the third floor. The result was satisfactory, and he then gave orders for the pipe or hose; workmen commenced putting up the pipe on that day, and the apparatus was completed, as the witness states, in about ten days, so that he commenced using it on the 18th of August of the same year. On the other hand, the defendant denies that the patentee ever made any such experiments with the barrel and white liquor as he has described in his testimony, and has called several witnesses employed in the establishment, who testify that they were at work there at the time, and never saw anything of the kind. The president of the corporation testifies that he was present and saw the experiments made, and witnessed the results; that they used that apparatus for some three months without much change, except that the patentee purchased these sprinklers with many perforations, and used them in the place of the sprinkler with one perforation, as the apparatus was at first constructed. Several other changes were subsequently made in the apparatus, but it is unnecessary to describe them, as they have been the subject of comment at the bar.

As already explained, the patent having been introduced in evidence, affords a prima facie presumption that the patentee is the original and first inventor of what is therein described as his improvement. But that presumption, in the absence of the original application, extends no further back than the date of the patent, and consequently where the patentee, or those claiming under him, allege that the invention was actually made at a time prior to the date of the patent, the burden is upon the party making the allegation to prove the prior date. The allegation of the defendant is, that the assignor of the plaintiffs never made such an invention as is claimed in the present suit; but if you believe the patentee and the president of the plaintiffs' corporation, and find that he did make the invention, you will probably find no great difficulty in determining from the evidence when the invention was made. The theory of the plaintiffs is, that it was made at least as early as the 11th of August, 1862; and it does not appear to be controverted by the defendant, that if the patentee is to be believed, it was made about that time. Assuming it to be so, then you will perceive it was before any such apparatus was used at the Northampton street refinery, as testified by the plaintiffs' witnesses, but after it was used both at the Cabot street establishment

and at the Northampton street refinery, as testified by George E. Evans and the several witnesses called to confirm his evidence.

Reliance is also placed upon the testimony of William P. Breck, as showing that an apparatus was used by him like that described in the patent, several months prior to the invention in controversy. The construction of the patent has been given by the court, and in determining what the invention is you will look at the patent, as expounded by the court, and follow the instructions of the court upon that subject. Considering that the model of the Breck apparatus is before you, and has been the subject of extended comment on both sides, it does not seem to be necessary to enter into any detailed explanation of the machinery. A patented improvement, consisting of old elements, cannot be proved to be invalid by showing some one of the elements in some prior machine, and another in another prior machine, until it is shown that all the elements which constitute the improvement were in prior use, because the theory of such a patent is, that the elements are old, and the invention consists in a new combination, whereby a new and useful result is obtained.

Seven or eight foreign patents are also introduced for the defence, as tending to show that the assignor of the plaintiffs was not the original and first inventor of his improvement, but only two of them were brought to your attention in the closing argument. Proof of the previous invention, knowledge or use of the thing patented, is a good defence against a charge of infringement, under the conditions specified in the patent act. The 15th section, among other things, provides, "that, whenever it shall satisfactorily appear that a patentee, at the time of making his application for a patent, believed himself to be the first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having been before known or used in any foreign country, it not appearing that the same, or any substantial part thereof, had before been patented or described in any printed publication." Where there is no evidence to the contrary, the presumption is, that the patentee, at the time of making his application, believed himself to be the first inventor or discoverer of the thing patented. The defence set up is that the invention in controversy had before been patented in a foreign country; and it can only be established by evidence that the invention, or some substantial part thereof, had before been patented in some foreign country, as alleged.

Under this notice of special matter, the defendant introduced the two patents to which your attention was called in the argument, each as covering the thing patented: First, the patent of John Gwynne. Referring to the specification of the patent, you will observe that it contains some thirty claims; but it will be only necessary to notice the 14th and 15th, as they are the only ones relied upon by the defendant. Of these, the first (the 14th) consists of "the combination, in one machine or apparatus, of the process of separation of crystals from their syrup or mother liquor, and the washing and drying the same," as described in the specification. The remaining claim is for "the system or mode of washing or cleansing the crystals, or other solid matters treated in centrifugal machines, as hereinbefore described." The elements of the apparatus are described in the specification, but inasmuch as the model is before you, it does not seem to be necessary to reproduce them in the summing up. The patent of De Costa, of the 12th of December, 1854, which is a foreign patent, was also introduced. Three claims of the patent were adverted to by the counsel for the defendant. They are the 4th, 5th, and 7th, as given in the translation introduced in evidence. The 4th claim is for "the various means and methods for introducing the liquor from below, either by two concentric tubes or by a single tube through holes of all sorts of shapes, spirally or obliquely placed at various points, and particularly at the upper part of the central shaft." The 5th claim is for "the new method of crystallizing, moulding, and liquoring every shape of sugar-loaves that have a hole through the middle, and that are liquored by centrifugal force, according to the method indicated" in the specification. The 7th claim is for "the use of the pump described, of whatever form, dimension, or material."

A repetition of the description of the elements of the apparatus would be of little aid to you in your investigation, as the model is in the case and has been the subject of careful comment at the bar; one of the experts, in speaking of the apparatus, says that the means which the patentee clearly contemplated, as far as he could judge, was to give a cover to the centrifugal, so as to enclose it, and keep its contents inside of it securely, and to assist in keeping the machine from trembling, by furnishing another bearing to the shaft. The machine being covered, he further infers that the operator cannot get at the inside to act upon anything within it, while it is in motion; and his opinion was, that the machine was designed to wash whatever was put into it, whether beet pulp or anything else; and that, in order to get the washing fluid into it, the inventor intended to get it up by means of a pipe through the body of the machine, and discharge the fluid through perforations in the pipe inside. Working in that way, it is his opinion that it could not produce the operation of the invention in controversy,—first, because there is no indication that pressure is to be used; second, because there is no provision by which the nozzle can be held close up to the mass to

be cleansed, so that the streams can be discharged distinctly and with force upon the material to be treated; and third, because there is no provision whatever by which the liquor can be applied equally over the mass, or in any manner, under the direction of the operator. Recommending these suggestions to your careful examination, it is unnecessary to say more, except to remark that we think you ought not to come hastily to the conclusion that the patented improvement in this case is superseded by either of these foreign patents.

The jury have a right to adopt such order of inquiry as they see fit; but it is suggested as a convenient order that you inquire and determine, in the first place, whether George E. Evans invented, constructed, and used such an apparatus as is described in his testimony, either at the establishment in Cabot street or at the sugar refinery at Northampton street, before the date of the invention of the assignor of the plaintiffs. Such order of investigation would be convenient, because, if you find that he did not, then you need not proceed any further in that inquiry, so far as what he did is concerned. But if you find he did construct and use the apparatus described in his testimony, before the date of the patented invention, you will then proceed to inquire whether he reduced it to practice as an operative machine.

Courts of justice have established the rule, that crude and imperfect experiments, equivocal in their results, and then abandoned and given up, shall not be permitted to prevail against an original inventor who has perfected his improvement and obtained his patent. The settled rule is, that it is not enough to defeat a patent to show that another conceived the possibility of effecting what the patentee has accomplished, unless it also appears that he reduced what he conceived to practice in the form of an operative machine. To constitute a prior invention, he who is alleged to have produced it must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form. Consequently, you are instructed, that if what you find to have been done by any one before the date of the patented invention, as established by the evidence, did not amount to a successful reduction to practice of the mode of operation described and claimed in the patent for cleansing or bleaching sugar, then such acts of experiment do not have the effect to invalidate the patent. Governed by these instructions, if you find that what was done by George E. Evans prior to the date of the patented invention in the manufacture of sugar, did not amount to a successful reduction to practice of the mode of operation described and claimed in the patent for the cleansing or bleaching of sugar, then you need not proceed any further in the examination of the evidence in this branch of the case, as it is clear his experiments afford no defence.

Believing that in any view you may take of the evidence, you will find it necessary to compare the Jasper apparatus, as described in the patent and expounded by the court, with the apparatus which George E. Evans testified he constructed at Cabot street and at Northampton street, and perhaps with the apparatus of William P. Breck, and those described in the two foreign patents to which your attention has been called, we will next proceed to give you the necessary instructions applicable to such inquiry.

Proceeding to such inquiry, you are instructed that whether the apparatus described by George E. Evans in his testimony, or that described by William P. Breck, if you find that he employed it, or either of those described in the foreign patents, is substantially the same as the patented invention, as expounded by the court, is a question of fact for you to determine, under the instructions of the court. In determining that question, you are not to determine about similarities or differences merely by the names of things; you are to look at the machines and their several devices and elements in the light of what they do, or what office or function they perform, and how they perform it; and to find that a thing is substantially the same as another if it performs substantially the same function or office in substantially the same way, to attain substantially the same result; and that the things are substantially different when they perform different duties in substantially a different way, or produce a substantially different result.

For the same reasons you are not to judge about similarities or differences merely because things are apparently the same or apparently different in shape or form; but the true test of similarity or difference in making the comparison is the same in regard to shape or form as in regard to name, and in both cases you must look at the mode of operation,—the way that the parts work, and at the result, as well as at the means by which the result is attained. In all your inquiries about the mode of operation of other machines, you are to inquire about and consider more particularly those portions of the particular part or element which really do the work, so as not to attach too much importance to the other portions of the same part which are only used as a convenient method of constructing the entire part or device. You will regard a well-known substantial equivalent of a thing as being the same as the thing itself; so that, if two machines, having the same mode of operation, do the same work, in substantially the same way, and accomplish the same result, they are the same. And so, also, if the parts of two machines, having the same mode of operation, do the same work, in substantially the same way, and accomplish substantially the same result, those parts are the same, although they may differ in name, form, or shape. But in both cases, if the two things perform

a different work, or in a way substantially different, or do not accomplish the same result, then they are substantially different.

Applying to the case the several instructions given by the court, you will inquire and determine whether the assignor of the plaintiffs is or is not the original and first inventor of the invention described in the patent, as expounded by the court. Should you find from the evidence that he is not the original and first inventor of the improvement, then you need not proceed any further, but your verdict should be for the defendant. But if you find that he was the original or first inventor of the improvement, as alleged in the declaration, then you will proceed to consider the issue of infringement.

The charge of infringement is made by the plaintiffs, and the burden of proof is upon them to prove the allegation to your reasonable satisfaction. But in considering that question, you will assume, if you have previously so found, that the assignor of the plaintiffs is the original and first inventor of the improvement described in the patent, as expounded by the court. Counsel sometimes strive, in the trial of a cause, to blend the questions of infringement and novelty together, as jointly and interchangeably involved in every phase of a lawsuit for the infringement of a patent. Undoubtedly, they involve the same considerations, but each also involves several considerations not involved in the other. The burden of proof in one case is upon the plaintiffs; the burden of proof in the other is upon the defendant; and the evidence required to support one and the other is very different. Whether the apparatus used by the defendant during the period covered by the declaration, infringes the invention made by the assignor of the plaintiffs, as the same is expounded by the court, is a question of fact for your determination, from all the evidence in the case, under the instructions of the court. The material facts on this branch of the case lie in a narrow compass. The declaration alleges that the infringement commenced, as before stated, on the 2d of November, 1863, and continued from that day to the 16th of January following, which is the date of the writ. The defendant concedes that he constructed and used, or caused to be constructed and used, in his sugar refinery, an apparatus such as is represented in the model introduced into the case; and, substantially, the testimony of Alexander A. Sanborn, called by the plaintiffs, is that the defendant desired him to put up a liquoring apparatus for him, to be used for liquoring with white sugar, the same as he had previously put up for the inventor while in his employment. The witness stated that it was fitted up accordingly; that he did a part of the work, and that the rest was done by other workmen, under his direction; that they placed the tank for the liquor on the fourth floor above the machine, giving thirty-two or thirty-five feet height of column as means for causing pressure at the nozzle. Instructions have already been given you on another branch of the case, presenting certain general rules of law by which you are to be governed in comparing one machine or device with another, to enable you to determine whether, in legal contemplation, the two machines are substantially the same or different; and those instructions are equally applicable to the present question with reference to the pressure apparatus of the defendant; but, considering the nature of the inquiry, we think it necessary to give you more specific instructions by which you will be governed in applying those general rules of law to the question under consideration. In examining that question, you will find it necessary to keep constantly in view the instructions of the court as to the construction of the patent on which the suit is founded, else you will be liable at every step to fall into error. By the true construction of the patent, the invention consists of an apparatus of described means for the purpose of cleansing or bleaching sugar with liquor, as set forth in the specification. What those means are, the instructions already given will enable you to understand with clearness and certainty; and if the defendant in his machine used, during the period covered by the charge of infringement, substantially the same means, operating substantially in the same way, and accomplishing substantially the same result, then you are instructed that the defendant's machine infringes the patent on which the suit is founded; and if you also find that the assignor of the plaintiffs was the original and first inventor of the improvement then your verdict will be for the plaintiffs. But if you find that the defendant in his machine used during that period substantially different means, or that the means so employed did substantially different work, and in a mode of operation substantially different, then you are instructed that the defendant's machine or apparatus does not infringe the patent described in the declaration, and your verdict will be for the defendant.

The patent declared on is not for the result, but for the means, as substantially described in the specification, for accomplishing that result. The defendant is right also, in the proposition that the claim of the patent is not for every means of cleansing or bleaching sugar with liquor, but only for the means the patentee has substantially described in his specification for accomplishing that result. Lest any mistake, however, should arise, we repeat that the patentee cannot invoke the doctrine of equivalents to suppress all other improvements of the old apparatus or machine, but he is entitled to treat every one as an infringer who makes, uses, or vends his patented machine, without any other change than a common substitution for one of its elements, well known as such, and which any constructor, without any more experiment, or

resorting to invention, knew how to employ. Pursuant to that qualification of the general rule, as explained, you are instructed, that if you find from the evidence that the means of causing pressure at the nozzle used by the defendant were, at the date of the invention and of the patent, commonly known to be a substitute for the means of causing pressure at the nozzle which are particularly described in the specification, and that, consequently, those skilled in the art to which the invention appertains, or with which it is most nearly connected, could, by the use only of the knowledge which they had as constructors, substitute the mode of producing such pressure practised by the defendant for the mode particularly described in the specification, and that, when thus substituted, it was capable of performing, and would perform, substantially the same mode of operation as the mode of operation described in the patent, then the defendant cannot successfully defend himself against a charge of infringement, merely by employing this substituted mode of producing pressure. Whether the means of causing pressure at the nozzle used by the defendant were, at the date of the invention and of the patent, commonly known to be a substitute for the means of causing pressure at the nozzle which are particularly described in the specification, is a question of fact for you to determine, from all the evidence in the case. Should you find that the defendant's means of causing pressure at the nozzle were, at the time supposed, commonly known to be a substitute for the means of causing pressure at the nozzle which are particularly described in the specification under consideration, you will then inquire whether those skilled in the art to which the invention appertains, or with which it is most nearly connected, could, by the use only of the knowledge which they had as constructors, make the proposed substitution; and if you also answer that inquiry in the affirmative, you will then proceed to the remaining inquiry of fact involved in the instructions to which the two preceding relate. The remaining inquiry involved in that instruction is, whether the substantial means or mode of producing pressure, when thus substituted as proposed, is capable of performing, and will perform, the same function in the same mode of operation, as the mode of producing pressure particularly described in the specification of the patent; and if you answer this inquiry in the affirmative, as well as the two others preceding it, then you are warranted in finding that the difference in the means of causing pressure at the nozzle in the two machines, as compared with each other, is a mere formal one, and that the difference in that respect is not such as of itself, without more, will enable the defendant successfully to defend himself against the charge of infringement.

Carrying out the views of the court expressed in construing the patent, you are instructed that the patent is not limited to any arbitrary mathematical amount of pressure, but that it calls for and contemplates such a degree of pressure as is capable and sufficient to effect substantially the described object of the patentee, to drive the cleansing liquor or syrup with such velocity into the sugar, while in revolution, as to prevent such sugar from being melted at the surface of impingement; and if the apparatus, as constructed and used by the defendant, was capable of exerting and would exert this degree of force in substantially the same way, his apparatus, in this particular, was within the patent.

Adopting these instructions as the law of the case upon the subjects to which they relate, you will examine the whole evidence upon the question of infringement, and determine whether the apparatus of the defendant, as used by him during the period covered by the declaration, infringes the patented invention, as the patent has been expounded by the court. If you find that the apparatus of the defendant, as used as aforesaid, does not infringe the patented invention, as expounded by the court, your verdict should be for the defendant; if you find it does infringe the patent as alleged in the declaration, then your verdict should be for the plaintiffs, and you will proceed to the question of damages.

Suffice it to say, upon the subject of damages, that if you find for the plaintiffs, they do not claim more than nominal damages, as the main purpose of the suit is to establish the validity of the patent. Your verdict, if for the defendant, will be that he is not guilty; if for the plaintiffs, that the defendant is guilty, and you may assess damages in the sum of one dollar, which is the more usual sum in this court where the verdict is for nominal damages. Under the circumstances of the case, we do not think it necessary to remark further upon the subject, except to say that in general the claim for damages in cases of this description is no test of the importance of the controversy. Parties coming into this court, as in all other similar tribunals, have a right to expect that justice will be administered according to the law and the evidence, and it is the duty both of the court and the jury to fulfil their just expectations in that behalf.

The jury then retired for deliberation, and remained out until the next morning.

The court came in at ten o'clock, and, by direction of the presiding justice, the jury were summoned to the room.

CLIFFORD, Circuit Justice (charging jury). One member of the court received a note from your foreman this morning, which was very properly framed, but yet the question put was one which, in the view of the presiding justice, could not be answered either way without danger of misleading you. In other words, it required an explanation which the presiding justice thought, inasmuch as the court had adjourned, and his

associate justice was not present, he did not possess the authority to make. Hence he found it necessary to request you to remain in session. It would have afforded me the greatest pleasure to have relieved you, if I had thought I could properly do so. I may express the opinion here, and I have no doubt that every one of you will concur in that view, that it is better that the members of the court, and even the jury, should suffer considerable inconvenience, than that the slightest irregularity should be introduced into the proceedings of this court. They have gone along since the commencement of the government until the present time without irregularities, and it is very desirable that that course should continue. In view of these circumstances I felt constrained to return the answer that the presiding justice could not answer the question directly, without explanation, and that he did not feel at liberty to give this explanation in the absence of his associate, inasmuch as the court had adjourned.

Two passages from the charge already delivered to you, carefully noted and understood, will afford you the necessary explanation upon the matter of inquiry, and it will afford you as specific an answer as it seems to be competent for the court to give, because the matter of inquiry is a mixed question of law and fact. Hence the reason why a direct answer could not safely be given, lest it should mislead.

"Lest any mistake should arise, we repeat that the patentee cannot invoke the doctrine of equivalents to suppress other improvements of the old apparatus or machine, but he is to treat every one as an infringer who makes, uses, or vends his patented improvement without any other change than a common substitution for one of its elements, well known as such, and which any constructor without any experiment or resort to invention will know how to employ. Pursuant to that qualification of the general rule (that is, that he cannot invoke the doctrine of equivalents), as explained, you are instructed, that if you find from the evidence that the means of causing pressure at the nozzle used by the defendant were, at the date of the invention and of the patent, commonly known to be a substitute for the means of causing pressure at the nozzle which are particularly described in the specification; and that, consequently, those skilled in the art to which the invention appertains, or with which it is most nearly connected, could, by the use only of the knowledge which they had as constructors, substitute the mode of producing such pressure practised by the defendant, for the mode particularly described in the specification, and that, when thus substituted, it was capable of performing and would perform substantially the same function, in substantially the same mode of operation, as the mode of operation described in the patent, then the defendant cannot successfully defend himself against the charge of infringement merely by employing this substituted mode of producing pressure."

There the principle is laid down. Now you are referred to the evidence. So far as it is a question of law, the court has decided that; you will receive that as law.

"Whether the means of causing pressure at the nozzle used by the defendant were, at the date of the invention and of the patent, commonly known to be a substitute for the means of causing pressure at the nozzle, which are particularly described in the specification, is a question of fact for you to determine from all the evidence in the case. Should you find that the defendant's means of causing pressure at the nozzle were, at the time supposed,—that is, at the date of the invention and the patent,—commonly known to be a substitute for the means of causing pressure at the nozzle, which are particularly described in the specification under consideration, you will then also inquire, as a matter of fact, whether those skilled in the art to which the invention appertains, or with which it is most nearly connected, could, by the use only of the knowledge which they had as constructors, make the proposed substitution. And if you also answer that inquiry in the affirmative, you will then proceed to the remaining inquiry of fact involved in the instruction to which the two preceding relate. The remaining inquiry of fact involved in that construction is, whether the substituted means or mode of producing pressure, when thus substituted, as proposed, are capable of performing, and will perform, the same function, under the same mode of operation, as the mode of producing pressure particularly described in the specification of the patent. And if you answer this inquiry in the affirmative, as well as the two others preceding it, then you are warranted in finding that the difference in the means of causing pressure at the nozzle in the two machines, as compared with each other, is a mere formal one, and that the difference in that respect is not such as by itself, without more, will enable the defendant successfully to defend himself against the charge of infringement."

Unable to conceive that any command of language which we possess could make the matter clearer than it is there stated, we do not think it our duty to attempt to add anything to it; and you will please retire with this explanation, and with the kindest spirit towards each other, and an anxious desire to end this controversy, compare your opinions afresh, and see if you cannot agree upon a verdict.

The jury then retired, and remained out about half an hour, when they again entered the court-room, and the usual question was put by the clerk: "Gentlemen of the jury, have you agreed upon a verdict?"

Foreman. We have not.

The Court. Mr. Foreman, is there any prospect of an agreement?

Foreman. There is no hope of a verdict from this jury.

The Court. Is the difference between you law or fact?

Foreman. I conceive it to be law. There is a difference of opinion upon that point, even.

The Court. Is the subject of difference the one embraced in the instructions re-read to you this morning?

Foreman. I think so.

The Court. We do not see that we can make that matter more explicit, than we have already done. You have already been instructed that questions of law belong to the court, questions of fact to the jury; but the subject-matter of that instruction, and the questions involved in that instruction, being mixed questions of law and fact, the court without the jury cannot determine them, and the jury without the court cannot determine them. It requires both court and jury to determine them. If, in that view of the subject, Mr. Foreman, you are of opinion that there is no hope of agreement, you will rise and say so.

Foreman. Perhaps, if we could be enlightened upon a single point, we might agree.

The Court. You may state the point as clearly as you can

Foreman. Whether we are to try the Matthiesson apparatus, as we have had it before us, at thirty-five feet, or whether we are to vary from that, in any conceivable manner.

The Court. The question propounded by the foreman is one purely of fact, so that it would not be possible for the court to render you any assistance. The evidence in the case is before you, and if you are of the opinion, Mr. Foreman, that further deliberation would result in no practical utility, and that there is no hope of agreement without the court give further instructions, you may answer

Foreman. I think not, that was not the precise point we differed upon, but I suppose, by working from that, if we could get instructions upon that, we might arrive at a verdict; but I don't think it would be possible without it.

The Court. Consult with your fellows, and see whether they think it is worth while to retire again. You have now been out sixteen hours and a half, and I have no idea of resorting to the old barbarous mode of starving a jury to an agreement.

Foreman (after consultation with his associates). There is no use, sir.

The Court. The court regrets that you are unable to come to an agreement; but at the same time we feel that we ought to return thanks to you for the patient effort you have made, during a long period, without complaint, to reach a satisfactory result. You have had a weary service of three weeks, and, under the circumstances, the court will excuse you from any further attendance until the first Tuesday in February next.

[For further proceedings, see Case No. 14,398.]

Case No. 14,400.

UNION TOW-BOAT CO. v. The DELPHOS.

[Newb. 412.] [1]

District Court, E. D. Louisiana. Nov., 1849.

SALVAGE—SURRENDER OF CONTROL—SUPERFLUOUS SERVICES—SPECULATIVE DANGER—SALVAGE SERVICES.

1. In a case of salvage, it is immaterial whether the master of the vessel requiring assistance formally surrenders the vessel into the hands of the salvors or not, if it appear that he called for assistance, and that neither he nor his crew actively participated in the salvage service. Their presence, merely, cannot be permitted to detract from the meritorious character of the services performed by the salvors.

2. The aid rendered to a burning vessel by tow-boats whose services were not actually required to rescue the vessel from her perilous situation, will be regarded as superfluous. And the court, in estimating the value of the tow-boats employed in the salvage service, will look to the evidence to ascertain how many were really necessary for the accomplishment of the object in view, and treat all others as supernumeraries, which being in sight of the burning vessel, rendered assistance not actually required.

3. While such assistance is not to be deprecated by the court, it cannot be received as a reason for increasing the estimate of the property put at risk, and thereby enhancing the claim of the owners for salvage compensation.

4. A tow-boat company cannot be treated as a salvor, but as the owner of property (their tow-boats), which is put at risk in the salvage service, are to be compensated like all other owners of vessels under similar circumstances.

5. Salvage is not always a mere compensation for work and labor. Various considerations: the interests of commerce and navigation, the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale.

6. The ingredients of salvage are: First. Enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures, and to rescue the property of their fellow citizens. Secondly. The degree of danger and distress from which the property is rescued, whether it was in imminent peril and almost certainly lost, if not at the time rescued and preserved. Lastly. The value of the property saved. Where all these circumstances concur, a large and liberal reward ought to be given; but where none, or scarcely any take place, the compensation can hardly be denominated a salvage compensation. It is little more than a mere remuneration pro opera et labore. Sir John Nicholl, in the case of The Clifton, 3 Hagg. Adm. 117.

7. Mere speculative danger will not be sufficient to entitle a person to salvage; but the danger need not be such that escape from it by other means was impossible. It cannot be necessary that the loss should be inevitably certain; but it is necessary that the danger should be real and imminent. Talbot v. Seeman, 1 Cranch [5 U. S.] 1.

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

8. It is rare that we find combined in a single case all the ingredients of a salvage service; but we must not, therefore, lose sight of those which prominently appear, from the evidence, to command our approval or elicit our commendation.

In admiralty.

Cohen & Labott and Winthrop & Roselius, for libelants.

Hunton & Bradford, for respondents.

McCALEB, District Judge. The libel in this case was filed on behalf of the Union Tow-Boat Company, a limited copartnership established by an act of the legislature of Louisiana, approved the 13th of March, 1837, for the purpose of towing vessels by steam in and out to sea, and up and down the Mississippi river, and also lightening vessels in said river, or at sea, and carrying freight and passengers in the Gulf of Mexico, and elsewhere at sea. A claim for salvage has been set up by the company against the bark Delphos, for the reasons which will appear from the following facts substantially proven by the witnesses examined on the trial of the cause. On Thursday, the 3d of May last, at about 9 o'clock in the morning, while the tow-boat Conqueror, belonging to the libelants, was towing the bark in question from inside the bar of the South West pass to sea, the latter was discovered to be on fire in the hold. By order of Captain Crowell, master of the bark, her head was immediately turned up stream; but, as the vessels were then in shoal water, it was found necessary to have the aid of another tow-boat, and the Ocean, also belonging to the libelants, was by a signal, summoned to the assistance of the Conqueror. Thus, by the co-operation of both tow-boats, the Delphos was carried back to an anchorage, under the direction of the branch pilot, in whose charge she was proceeding to sea when the fire was discovered. Captain Crowell being anxious to extinguish the flames without any other assistance than such as could be derived from his own officers and crew, immediately commenced searching for the fire under the main hatches and the cabin floor, but soon found it necessary to put the hatches on again. He continued his exertions to extinguish the flames by pouring water through the deck and cabin floor; but without producing any favorable result. Finding it impossible to subdue the flames, which were, indeed, every moment increasing, he called upon Captain Snow, the master of the tow-boat Conqueror, to save the bark if he could. It may be proper to add that he intimated, when he commenced his exertions with the means at his own disposal, he should ask assistance if those means should prove insufficient. The hose and pump of the Conqueror had been placed at his disposal, but he had used them without producing the desired effect. As soon as Captain Snow was authorized to undertake the rescue of the bark from the danger, which the evidence shows was imminent, he immediately set to work with the crews of the Conqueror and Ocean, and all the pumps that could be brought into use. At this time the fire was increasing rapidly; and it was the unanimous opinion of all present, that the only effectual mode of saving the vessel that could be resorted to, under the circumstances, was to scuttle her, and let her sink to the deck. It was the opinion of several persons present, that there was not water sufficient to cover her; but as there was no time to remove her into deeper water, she was scuttled without delay and on the spot where she was then anchored. The deck and cabin floor were at the same time kept covered with water. As the bark took the mud on the bottom she settled very slowly. About sunset the tow-boat Hercules, also belonging to the libelants, came alongside and assisted with her pumps. From this time until 3 o'clock next morning, it required the most active exertions of not only the crews of the Conqueror, the Ocean and the Hercules, but also of the tow-boats Star and Claiborne (also belonging to the libelants), to keep the fire from breaking out. After 3 o'clock, the flames were so far subdued that the pumps of the steamer were worked only occasionally during that and the next day. At 7 o'clock on Friday morning the steam pumps belonging to the Star, of peculiar construction and extraordinary power, commenced working, and by 6 o'clock in the afternoon had succeeded in freeing the bark of water. Although she had both anchors out, there was a constant tendency of the bow of the bark down stream, because of the great weight of the water in the stern, and it was therefore found necessary to keep the tow-boat Ocean alongside the greater part of the day. On Friday evening after the water was pumped out, the bark was got under way and towed into deep water off the pilot's station, by the Ocean and Star, which remained alongside all night. On Saturday morning at about 9 o'clock, the Star started to the city with the bark and a small brig in tow, and arrived about 4 o'clock in the afternoon on Sunday. She remained alongside all night. On Monday morning there was considerable water found in the hold of the bark. This was removed by the steam pumps belonging to the Star, and by 12 o'clock the bark was left in safety alongside the levee.

The facts of the case as thus far stated, are substantially contained in the statement of facts, signed by Capt. Crowell of the bark and Capt. Snow of the Conqueror, and afterwards submitted to arbitrators appointed by the parties. They are mainly confirmed by the testimony of witnesses, and especially by that of Capt. Snow, who was sworn and examined before the court. Capt. Crowell was also examined as a witness under a commission, and denies that he called upon Capt. Snow to save the bark if he

could, and declares that he objected to that particular part of the statement of facts after the claim of salvage was submitted to arbitrators, but before the award. Whether he said what is there stated be correct or not, is not material, when we consider what actually occurred. Whether he formally surrendered the vessel into the hands of the salvors or not, it is clear that he called for assistance, and it does not appear that either he or any portion of his crew, actively participated in the salvage service after Capt. Snow commenced operations. It is, however, proper here for me to remark that there was not what is usually denominated in admiralty law an abandonment of the vessel. The master and crew did not leave her cum animo non revertendi. This is then not properly a case of derelict in the sense of the maritime law. The master and crew of the bark were present while the salvage services were performed. But it is difficult to perceive wherein their presence merely can detract from the really meritorious character of the services performed by the salvors. According to the testimony of Mr. Park, the pilot at the South West pass, if assistance had not been rendered by the tow-boats, the bark would have been a total loss in three hours. The timbers were burnt and the mizzen-mast was on fire. The peril to which she was exposed was most imminent; and it is clear that she was rescued only by the timely assistance of the tow-boats. The evidence shows that there was great energy, promptitude and skill on the part of the salvors. The bark was so scuttled as to enable them to free her of the water when the flames were subdued; and this last important service was performed by the application of the powerful steam pump on board the tow-boat Star. It is proven by the testimony of Capt. Whitney of the Hercules, that the bark could not, without this machinery, have been raised. The persons engaged in giving assistance were almost constantly in the water, and greatly annoyed by the smoke from the burning cotton. I certainly cannot agree with the proctors of the claimants, when they contend that there was no risk of life and property incurred by the salvors. It is almost impossible to imagine the close proximity of human beings and of property like those tow-boats, to a vessel with a cargo of cotton on fire in her hold, without feeling a strong conviction that there must be danger. There would be danger from the sudden bursting up of the deck, which may naturally occur from the pressure of the intense heat produced by such a combustible as cotton in the pent up hold of a vessel; and there would be danger from the sudden breaking forth of the flames consequent upon such an explosion. The salvage services commenced at 9 o'clock on Thursday when the Ocean was summoned to aid in towing the bark to an anchorage, and continued until 12 o'clock on Monday following, when she was finally left in safety at the levee. For about twelve hours only of the time here mentioned, however, were the salvors laboriously and energetically employed. During the balance of the time, not much more than ordinary vigilance and care were necessary to preserve the vessel and bring her to this port. I cannot assent to the ground taken by the proctors for the libelants, that the co-operation of all the tow-boats was required to save the vessel and cargo. This co-operation may be magnified into importance for the purpose of swelling the claim for salvage compensation by showing the great value of the property employed and put at risk in the salvage service. The co-operation of the Ocean with the Conqueror, I consider was indispensably necessary, to get the bark back to her anchorage; and it is quite clear that without the aid of the extraordinary pump on board of the Star, it would have been impossible to relieve the vessel of water after the flames were subdued by scuttling. The aid of the Hercules and Claiborne must therefore be regarded, to a great extent at least, as superfluous. They stand rather in the light of supernumeraries, which being in sight of the burning vessel offered and rendered assistance, which was not really demanded for the safety of the bark and cargo; and while such assistance is by no means to be deprecated by the court, it cannot be received as the basis for increasing the estimate of the value of the property put at risk and thereby enhancing the claim of the owners. Having reviewed as minutely as I deem necessary, the main facts of the case, I shall now present the law which must govern me in awarding compensation. And here, I am sorry to say, that the view which I feel bound to take of the case, differs widely from the positions assumed by the proctors of both libelants and claimants. While I am disposed to regard the services of the salvors as highly meritorious, it is yet clear that there is nothing in the record to show that there is a single salvor before the court claiming compensation for those services.

The libel sets forth the claim of the Union Tow-Boat Company, and makes no mention whatever of the names or claims of the individuals who actively participated in the salvage service. There is no allegation and no proof that any of the salvors were even members of or stockholders in the corporation, which alone appears as libelant in the cause; and even if such allegation and proof appeared of record, the salvor who thus appeared to be member or stockholder, would not be allowed a compensation in the former character, unless his rights were distinctly asserted as such. His claim would otherwise be merged in that of the corporation as owner of the property employed and put at risk in the salvage service. To regard this corporation as a salvor and award it compensation as such, would in my opinion be

contrary to all the well established principles of admiralty law regulating the action of courts in cases of this nature. It is doubtless entitled to a liberal reward for the employment and risk of its property, but this reward must be fixed in accordance with the usual mode of distributing the whole amount of salvage compensation. Such was the course pursued by this court in the case of The Charles. In that as in this case, the actual salvors set up no claim for compensation, and it was contended by the proctors for the libelants, who were the owners of the tow-boat employed in the salvage service, that all the rights of the captain and crew of the tow-boat when not formally asserted by themselves, necessarily accrued to the owners. This principle was distinctly repudiated by the court, upon the ground that owners were usually allowed a certain proportion of the whole quantum of compensation awarded, and they had no right to claim that proportion which was exclusively due to the actual salvors if they had chosen to demand it. And the court declared that to act upon any other principle would be to award to cupidity that portion which modesty had declined receiving. The case was considered as if all the salvors had been before the court, a fair aggregate compensation was fixed, and of that compensation the proportion of one-third was awarded to the owners of the tow-boat. The course pointed out by the case here cited, is the only one which can be safely and legitimately pursued in the case now under consideration. It is moreover the only course which can be adopted to secure uniformity in judicial decisions in cases which are confided by the law to the sound discretion of the court.

Let us proceed, then, to inquire what would be a fair salvage compensation if the actual salvors were before the court. And here I cannot assent to the position of the proctor for claimants, that the rates of towage usually charged by tow-boats can form even a basis upon which the court shall estimate the value of the services of the salvors themselves, or of the boats by means of which they were mainly enabled to perform those services. "Salvage," Says Sir John Nicholl, in the case of The Clifton, 3 Hagg. Adm. 117, "is not always a mere compensation for work and labor; various considerations, the interests of commerce, the benefit and security of navigation, the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of salvage are: First, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures and to rescue the property of their fellow subjects. Secondly, the degree of danger and distress from which the property is rescued, whether it was in imminent peril and almost certainly lost if not at the time rescued and preserved. Thirdly, the degree of labor and skill which the salvors incur and display, and the time occupied. Lastly, the value of the property saved. Where all these circumstances concur, a large and liberal reward ought to be given; but where none or scarcely any take place, the compensation can hardly be denominated a salvage compensation. It is little more than a mere remuneration pro opera et labore."

In regard to the degree of peril in which the property should be to authorize a claim for salvage compensation, I shall content myself with referring to the decision of the supreme court of the United States, delivered by Chief Justice Marshall, in the case of Talbot v. Seeman, 1 Cranch [5 U. S.] 1. In that case it was urged in argument, that to maintain the right to salvage, the danger ought not to be merely speculative, but must be imminent and the loss certain. In reply to this position, the chief justice said: "That a mere speculative danger will not be sufficient to entitle a person to salvage, is unquestionably true. But that the danger must be such that escape from it by other means was impossible, cannot be admitted. In all the cases stated, safety by other means was possible, though not probable. The flames of a ship on fire might be extinguished by the crew or by a sudden tempest. A ship on the rocks might possibly be got off by the aid of wind and tides without assistance from others. A vessel captured by an enemy might be separated from her captor, and if sailors had been placed on board the prize, a thousand accidents might possibly destroy them; or they might even be blown into a port of the country to which the prize vessel originally belonged. It cannot therefore be necessary that the loss should be inevitably certain; but it is necessary that the danger should be real and imminent." Another principle by which courts of admiralty are governed and which leads to a liberal remuneration in salvage cases, is not to look merely to the exact quantum of service performed in the case itself, but to the general interests of navigation and commerce. The fatigue, the anxiety, the determination to encounter danger, the spirit of adventure, the skill and dexterity which are acquired by the exercise of that spirit, all require to be taken into consideration. It is rare that we find combined in any single case all the ingredients of a salvage service. But we must not therefore lose sight of those which prominently appear from the evidence to command our approval or elicit our commendation. The evidence in this case abundantly shows that there was promptitude, energy and skill displayed by some of the salvors, especially by Captain Snow, the dux facti, the strong prevailing mind that conducted the combined operations of the tow-boats; and in all there seems to have been no want of alacrity or zeal in the discharge of their respective duties. What is particularly to be considered in deciding upon the claim of the tow-boat

company as owners, is the admirable equipment of their boats. They were well manned and provided with the necessary appliances to afford immediate and effective assistance to vessels in distress; and it is doubtless by the application of the extraordinary and powerful steam pump of the Star, that the salvors were enabled to raise the Delphos after she was sunk. If it be important upon principles of public policy and in view of the general interests of navigation, to encourage vessels thus provided and equipped to embark in salvage services, courts of admiralty should not lose sight of the great expense which must necessarily be incurred to keep them always in a state of preparation to afford assistance.

Upon a review of the whole case, I am clearly of opinion that a liberal compensation should be awarded. Property of the value of $50,000 and upwards has been rescued from inevitable destruction by the timely assistance of the tow-boats. All suppositions that it might have been saved through some other agency, are merely speculative, and have no weight with the court. The claimants, however, have rights which must be protected. They have been unfortunate, and the court will not subject them to any further loss which may be inconsistent with a fair and equitable compensation to those through whose means they were saved from a greater calamity. It is the duty of the court to encourage active exertions in salvage cases, but not cupidity. I think that under all the circumstances of the case, forty-five per cent. would be a fair and proper allowance, if all the salvors were before the court. Of this quantum I award the usual one-third to the libelants. I adhere to this proportion for the owners of the property engaged and put at risk in the salvage service, upon the authority of the great case of Mason v. The Blaireau [2 Cranch (6 U. S.) 240], which Mr. Justice Story in most emphatic terms has declared should be the guide for all inferior courts except under very peculiar and extraordinary circumstances. It is therefore ordered, adjudged and decreed that the libelants recover the one-third of forty-five per cent. on the value of the property saved—that is to say, one-fifteenth of the said value, after all expenses are deducted.

Case No. 14,401.

UNION TRUST CO. v. ROCKFORD, R. I. & ST. L. R. CO.

[6 Biss. 197;[1] 7 Chi. Leg. News, 33.]

Circuit Court, N. D. Illinois. Oct. 20, 1874.

COURTS—CONFLICT OF JURISDICTION.

1. It is the settled rule of law that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and to take possession and control of the subject-matter of the litigation, to the exclusion of all interference from other courts of co-ordinate jurisdiction.

[Applied in Gaylord v. Ft. Wayne, M. & C. R. Co., Case No. 5,284. Cited in Owens v. Ohio Cent. R. Co., 20 Fed. 13; Judd v. Bankers' & Merchants' Tel. Co., 31 Fed. 183; Reinach v. Atlantic & G. W. R. Co., 58 Fed. 44; Wadley v. Blount, 65 Fed. 674; Wheeler v. Watson & Whann Co., Id. 722; Cohen v. Solomon, 66 Fed. 415; Hatch v. Bancroft-Thompson Co., 67 Fed. 809.]

[Cited in Smith v. Ford, 80 Iowa, 626, 45 N. W. 1031; Id., 2 N. W. 159; State v. Ross (Mo. Sup.) 23 S. W. 202; Re Schuyler's Steam Towboat Co., 136 N. Y. 176, 32 N. E. 623; Texas Trunk Ry. Co. v. Lewis (Tex.) 16 S. W. 648.]

2. This rule does not require that the court first taking jurisdiction of the case shall also first take possession of the property; and prior seizure from another court does not give priority of jurisdiction.

3. The power of the court over its judgments, to set aside, modify or annul, is unlimited during the term at which they were rendered.

4. Where a demurrer to a bill is sustained and bill dismissed, the court may, during the term, set aside its dismissal and restore the case without losing its jurisdiction, and a state court cannot, by taking jurisdiction during this interval, oust or supersede the jurisdiction of this court. The case stands precisely as though no order of dismissal had been made.

[Cited in Adams v. Mercantile Trust Co., 15 C. C. A. 1, 66 Fed. 620.]

5. The cases where courts have refused to set aside their judgment and proceed with the case, in order to protect their parties acting in good faith, are cases of equitable discretion, not of right, and do not contravene the rule.

At law.

Lyman Trumbull, for Union Trust Co.

Lawrence, Winston, Campbell & Lawrence, for Nickerson.

Osborn & Curtis, for Rockford, R. I. & St. L. R. Co.

Before DRUMMOND, Circuit Judge, and BLODGETT, District Judge.

BLODGETT, District Judge. It is not proposed to review at length the able and exhaustive argument of the counsel for the respective parties in this case, as it seems to us that a few of the propositions discussed are sufficient for the purpose of this motion. The main question arising is one of great delicacy, and the history of the jurisprudence of this country shows a most commendable disposition on the part of both the federal and state courts, not to impinge upon each other's jurisdiction; but the delicate nature of the matter furnishes no reason why the court to which jurisdiction belongs should not firmly assert and maintain its rights. The subject of this controversy is equally within the jurisdiction of the state and federal courts, always assuming the jurisdiction of the federal courts to be invoked by persons authorized to bring suit in those courts.

It will hardly be necessary to cite authorities to show that it is, and has long been, the settled rule of law in all cases of conflict

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

of jurisdiction, that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take the possession of or control the res, the subject-matter of the dispute, to the exclusion of all interference from other courts of co-ordinate jurisdiction. Bell v. Ohio, L. & T. Co. [Case No. 1,260]; Riggs v. Johnson Co., 6 Wall. [73 U. S.] 166; Bill v. New Albany, etc., R. R. [Case No. 1,407]; 1 Abb. U. S. Prac. 223, and cases cited. The proper application of this rule does not require that the court which first takes jurisdiction of the case shall also first take, by its officers, possession of the thing in controversy, if tangible and susceptible of seizure, for such a rule would only lead to unseemly haste on the part of officers to get the manual possession of the property; and while the court first appealed to was investigating the rights of the respective parties, another court, acting with more haste, might, by a seizure of the property, make the first suit wholly unavailing. To avoid such a result, the broad rule is laid down that the court first invoked will not be interfered with by another court while the jurisdiction is retained.

It is also equally well settled that the power of a court over its judgments, to set aside, modify or annul, is unlimited during the entire term at which such judgments are rendered. Doss v. Tyack, 14 How. [55 U. S.] 297; O'Conner v. Mullen, 11 Ill. 116; Walden v. Craig, 14 Pet. [39 U. S.] 147.

The common law rule, that an execution will not issue until the close of the term, is but a familiar illustration of the proposition. So, too, as a general rule, the liens of judgment do not attach till the close of the term, and all for the reason that during the term a judgment is in fieri in the breast of the court, liable to such modifications or reversal as shall seem best to subserve the ends of justice.

The right of a court of equity to allow amendments to a bill, and to allow the filing of a supplemental bill at any time during the term, after having sustained a demurrer to the bill, was conceded upon the argument to be a general rule, subject, however, to the exception contended for, that when the court, by its judgment on the demurrer, dismissed the case out of court, it could not resume jurisdiction as against third parties who had in good faith acquired rights while the judgment of dismissal remained in force.

Applying these propositions to the facts of this case, we find that this court, on the 20th of July last, sustained a general demurrer to complainant's bill, and entered judgment dismissing the suit. On the 22nd of July, Nickerson filed his bill in the state court, and made his motion for a receiver. On the 24th of July, which was yet of the same term at which the demurrer was sustained, the order dismissing the cause was set aside in this court, on motion of the complainant's solicitors, and leave to amend and file a supplemental bill given; and on the 25th of July, Nickerson, by consent of the defendant, obtained an order, appointing receivers in the Henry county circuit court. The solicitors of Nickerson had notice of the motion to amend in this court, and under the facts in this case, Nickerson is chargeable with notice of the action of this court in the premises, and that this court had resumed jurisdiction of the suit before he took his order appointing a receiver. Nickerson was not a stranger to this suit. He had appeared by his counsel on the argument of the demurrer, and resisted the complainant's suit, although not technically a party to the record. He was then chargeable with actual as well as constructive notice that this court might, at any time during the July term, set aside its judgment on the demurrer and proceed with the case. When the order was made by this court, setting aside its judgment of dismissal, the case stood as if that judgment had never been rendered. The court had never lost jurisdiction. Suppose, for illustration, the complainant had appealed within sixty days, as he might, or at any time during the term, from the judgment of this court, and the appellate court had reversed our judgment, it would not, of course, be contended that the jurisdiction of another court could attach by any form of proceeding so as to divest this court of jurisdiction; and yet a complainant is not bound, in order to save jurisdiction, to pray an appeal instanter a judgment or decree is rendered against him. He may lie still and take no action for days, perhaps months, and then by taking his appeal in due form all rights of jurisdiction are preserved intact. So, too, instead of resorting to an appellate court, the complainant may ask this court to revise its own order or decree, and in furtherance of justice such request may be granted and the former judgment annulled and set aside any time during the term.

We find, then, that this court had not lost jurisdiction of this case when the suit in Henry county was commenced; and although the suit was technically dismissed on our record, from the 20th to the 24th of July last, yet it was all the time subject to the power of the court to set aside that order; and Nickerson could not, by commencing a suit in another county, supersede the jurisdiction of this court over the subject matter. Undoubtedly cases may be found where courts have in their discretion refused to set aside their judgment, and proceed with the case, after having once dismissed it, where the rights of parties, acting upon the faith that the dismissal was final, had intervened; but such cases are an exception to the general rule, as a matter of equitable discretion, rather than of right, and are for the protection of those acting in good faith. In this case, both Nickerson and the defendant, the railroad company, seem to have left this court, and rushed in haste into the state court,

and there consented to the appointment of receivers, while they had strenuously resisted such appointment here. This fact, with others, appearing in the record, tends strongly to prove that the proceeding in the Henry county circuit court was not commenced by Nickerson in good faith, and that the case does not come within the exceptions which have been cited.

[We come for a moment to consider the amendments and supplemental bill, and the objections made thereto. The amendments only state, with greater particularity, certain matters alluded to in the original bill, and seem upon their face to make a clear case for the intervention of a court of equity; at least to restrain waste, and prevent diminution of the bond-holder's security. Standing alone, these allegations might not justify the appointment of a receiver; but so long as they make out a case for equitable relief, this court, as the first to assert jurisdiction, must retain it over the property, to give such relief as the complainant is entitled to under his bill and proof. The supplemental bill shows clearly that the inchoate right of foreclosure under the mortgage has ripened by the continuance of the default in the payment of interest for upwards of six months, and seems to us germain to the subject matter of the original bill. The motion to strike these amendments and supplemental bill from the files must therefore be overruled.] [2]

The necessity for the appointment of a receiver was not discussed on the argument, for the reason, as we infer, that the defendant, by consenting to such an appointment by the state court, has virtually admitted its necessity.

DRUMMOND, Circuit Judge. I concur in general in the views of the district judge. I may be allowed to express the hope that there will be no trouble growing out of this decision, and that the state court will not insist upon its receiver retaining control of the property. If it should, it may then become a question for this court to determine what course shall be pursued if the receiver appointed by this court shall seek to obtain possession of the property, and should be resisted by the receiver appointed by the state court. The only question there is in this case is whether the appointment of a receiver by the state court is of such a character as to confer rights which are to be protected under the rule already stated. During the interregnum between the dismissal of the case in this court, and its resumption by the order setting aside that dismissal, has anything occurred so that the rights of other persons need protection? They are such only in this case as grow out of the appointment of the receiver by the state court. It cannot be said that Nickerson has himself acquired any special rights or interests which are to be affected. It is only whether the state court should maintain its control over the property. Now, conceding that there might have been during this interval rights acquired by third parties which should be protected by this as well as all courts, what was the status of the case at the time that the receiver was appointed? If we concede that Nickerson might commence a suit in the state court for the appointment of a receiver to take possession of the property the same as was asked by the plaintiff in the original case in this court, when this court resumed control of the case, as it did by its order of the 24th of July setting aside the previous order of dismissal, then Nickerson and his counsel should have suspended all proceedings in the state court as to the appointment of a receiver. Whatever may be said as to the order of dismissal, the cause then stood precisely, as my brother judge has said, as though no order of dismissal had ever been made; and it presents, therefore, a case where there was, at the time that the order was made by the state court for a receiver, a bill pending in this court which also asked for a receiver of the same property, and of which this court had jurisdiction.

These conflicts, of course, are always unpleasant to us. We desire to proceed harmoniously with the state courts and state judges. We cannot, however, shrink from duties imposed upon us, where we have once obtained jurisdiction of a case, as we think we have here. We believe that it is our duty to maintain it, according to well-settled principles. And we trust that there may be no such conflict between the state and federal courts in this instance as has been intimated.

However this may be, we have to proceed according to our views of law and equity in the case. We would hope that there will be no controversy about the person to be appointed receiver. If the plaintiff can suggest some name, and the counsel on the other side have no objection, we shall appoint him. But if they object, we may appoint one of our own motion.

[It was then stated by the court that the parties might have until Saturday next to determine upon their action.] [3]

Case No. 14,402.

UNION TRUST CO. v. ST. LOUIS, I. M. & S. R. CO.

[4 Dill. 114; [1] 4 Cent. Law J. 585.]

Circuit Court, E. D. Missouri. June, 1877.

RAILROAD COMPANIES—APPOINTMENT OF RECEIVERS—WHEN MADE.

1. A court of equity will not appoint a receiver of a railroad merely upon a showing that there has been a default in the payment of interest, secured by a mortgage of the properties and

[2] [From 7 Chi. Leg. News, 33.]

[3] [From 7 Chi. Leg. News, 33.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

income of the company, that upon such default the trustees under the mortgage were entitled to immediate possession, that they have demanded possession, and that the same has been refused. It is necessary, in addition to this, to show that ultimate loss will happen to the beneficiaries under the mortgage by permitting the property to remain in the hands of its owners until final decree and sale, if such decree and sale be made.

[Cited in Morgan's Louisiana & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 32 Fed. 532; Pennsylvania Co. v. Jacksonville, T. & K. W. Ry. Co., 5 C. C. A. 53, 55 Fed. 136; McGeorge v. Big Stone Gap Imp. Co., 57 Fed. 271.]

[Cited in Schreiber v. Carey, 48 Wis. 213, 4 N. W. 124.]

2. The facts in this case examined, and *held* not to exhibit such danger to the bondholders as will warrant the appointment of a receiver. The case of Williamson v. New Albany Railroad Co. [Case No. 17,753] followed.

This was an application by the complainant, the trustee in a railway mortgage, for the appointment of a receiver. The material facts appear in the opinion of MILLER, Circuit Justice. The arguments were heard, at chambers, in Keokuk, May 31 and June 1, 1877.

Henry Hitchcock and John W. Noble, for plaintiff.

Glover & Shepley and Thoroughman & Warren, for defendant.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

MILLER, Circuit Justice. The plaintiff is trustee in a mortgage made by the defendant to secure the payment of $28,000,000 upon six hundred and eighty-six miles of railroad and its appurtenances, and some two or three million acres of land. Of these bonds only about three millions of dollars have been issued, and more than half of these are the property of Baring Bros. & Co., whose interests in the matter are in the hands of S. G. & G. C. Ward. The mortgage was executed and the bonds dated May 6th, 1874. It contained all the usual stringent covenants of a railroad mortgage—among others, an authority to the trustee to take possession of the mortgaged property, which included the income of the road, upon the failure to pay any installment of interest when it fell due, and, after three months of continued default in such payment, to advertise and sell the whole property, rights, and franchises of the company

Plaintiff having filed a bill in the circuit court of the United States for the Eastern district of Missouri, to foreclose this mortgage, at the same time gave notice to the defendant of an application to a judge of that court, at chambers, for the appointment of a receiver. This motion is now before us for a decision, upon the bill and the answer of defendant, which has been filed meantime, and upon numerous affidavits on both sides.

We have been aided by full argument from able counsel, and propose now to state, very briefly, the decision of that motion, and the reasons which have governed us in making it.

It is not denied by the answer that there was a failure to pay in full certain coupons of interest falling due at various times between the month of October, 1876, and the time of filing the bill in this case. Nor is it denied that early in April last, on the failure to pay certain coupons then due, a formal demand was made by complainant of the defendant for possession of the road, which was refused. And it is insisted by counsel for plaintiff, that the failure to pay these installments of interest, and to deliver possession of the road on demand, leaves, under the covenants and conditions of this mortgage, no discretion in the court to refuse to place the road in the hands of a receiver—that because the income of the road is pledged by the mortgage for the payment of the bonds, and the plaintiff is authorized, on failure to pay any installment of interest, to take possession; these circumstances, with a conceded default, without reference to the showing of the defendant, without regard to its resources, with no danger of ultimate loss to any bondholders or of any serious delay of payment, require, as matter of law, that the court must dispossess the defendant by the appointment of a receiver to take possession of the property of the company. Whether this is a sound principle or not, is the first question we are to decide. The argument is much pressed that the contract is plain that on failure to pay, the trustee is authorized to take possession, and since possession has been refused, it is the duty of the court to enforce the contract specifically.

If the contract contemplated any very protracted tenure of this possession by the trustee, as, for instance, during the forty years which the bonds have to run before maturity, and a bill were filed looking mainly to the specific enforcement of this part of the contract, equity might be bound to do so. But that is not this case. The possession can, by the terms of the contract, be only temporary, and is auxiliary to other and more important relief. If the default continues for three months, the trustee in possession is bound to advertise and sell the property, so that his possession under the contract can be but for a short time, and is only to enable him to sell and deliver the property, and take care of it in the meantime. The frame of the present bill is very different from this. It abandons the right of foreclosure by a sale by the trustee, and seeks the regular and safer mode of the chancery court. It does not ask that plaintiff be put into possession as of right belonging to the trustee, but that a receiver, plaintiff or any one else, take possession, as the officer of the court. It is plain that any receiver we may appoint is our officer, amenable to the orders of the court, responsible to it for all he does, and completely under its control, his authority resting in the appointment of the court, and not

in the contract of the mortgage deed. Hence he cannot sell the road as required by the morgage, but such sale, if made, is by decree of the court; nor can he pay the overdue coupons to the bondholders without an order from the court. This is no specific performance of that contract for possession, and no such relief is prayed in the bill.

It is also said that the income of the road mortgaged to plaintiff can be secured in no other way than by appointing a receiver, and perhaps this is the surest mode of effecting that purpose. But the income is no more mortgaged than the visible property and the franchises of the company, and, unless there is danger of loss to the bondholders, there is no more reason why the income should be sequestrated than the other property of the company. It is also in the power of the court, without appointing a receiver, to require of the defendant to render account of the income, and, after payment of the necessary expenses, to pay so much as rightfully should be paid to the debt secured by the mortgage. On this branch of this case, some language used by the supreme court in the late case of American Bridge Co. v. Heidelbach, 94 U. S. 798, is supposed to sustain the ground taken by complainant. In that opinion the court was arguing the proposition that, though the income of a bridge company was mortgaged to secure its bonds, that income might be seized by attachment in favor of others, even pending a suit to foreclose the mortgage, where the mortgagee had taken no steps to appropriate or secure the income. And it is said that, among other modes of preventing this, was the appointment of a receiver. This was predicated of a proper case for the appointment of a receiver, and, though stated by way of illustration it was not intended to convey the idea that a receiver was the only mode, or that his appointment was to follow in every case of foreclosure where the income was mortgaged.

The usual legal remedies to obtain possession were open to the plaintiff, besides an action for damages for refusing to deliver; and though these may be inadequate, that does not constitute an imperative reason why a court of equity should become active in specifically enforcing a contract which is in its nature a forfeiture of the most stringent character.

We are not of opinion, therefore, that a court of equity is bound in every such case, on failure to pay, to appoint a receiver, without considering other circumstances which have a proper bearing on the question of appointment.

Treating the case as one in which the court must exercise a sound discretion on all the facts before us, we must inquire a little more at length into those facts.

The St. Louis, Iron Mountain & Southern Railway Company owes its existence to the consolidation of several other railroad companies, which it absorbed, and its road was largely built before the present defendant had a corporate being. Each of the four companies which became so consolidated had heavy mortgages on the pieces of road which it brought into the combined corporation; and the main purpose of the mortgage under which plaintiff is proceeding was to convert these various mortgage debts into one debt and one mortgage, by exchanging the bonds of this new company, secured by the new mortgage on the whole road and all its property, for the bonds issued by the several companies, secured by mortgages on the several parts of the road. For this purpose, twenty-one millions of dollars of these bonds were set apart, to be exchanged for the old bonds, which amounted to that sum.

The new mortgage bound the new company to pay the old bonds, if not exchanged, and to pay the interest promptly on these bonds as it fell due; and a failure to do this was ground for the trustee to enter and take possession, as well as a failure in regard to the new bonds. This part of the programme was a complete failure, as less than two millions of the old bonds have been exchanged for new, after three years of that offer. It became apparent, very soon after the mortgage was made, that the company could not complete its road to its terminus, at Texarkana, Arkansas, where it was expected to unite with the Texas system of railroads, and pay the interest on its bonded debt, and an arrangement was made by which the interest coupons on all old bonds, and the new (except, perhaps, those on one part of the old road), for two years to come, were to be funded and the company relieved from the burden of the interest, temporarily. This carried them past October, 1876. In the making of this arrangement Baring Bros. & Co. were largely consulted, and its success was mainly due to their exertions.

During these two years the road was completed to Texarkana, the floating debt was considerably reduced, and the gross income, as well as the net income, increased more or less every year. In the autumn of 1876, when the first coupons of interest were soon to fall due, not embraced in those to be funded, an examination of the resources of the company showed that they would not be able to pay, out of the regular net income of the road, those coupons as they would fall due through that autumn and the next year.

The agents of Baring Bros. & Co., Messrs. S. G. & G. C. Ward, who had been very influential in the management of the road, having also in effect two members in the board of directors, were again freely consulted, and their advice followed, against the views of the president and vice-president of the company. These views were that the company should borrow what money it needed above the net income to pay these coupons, and they alleged that the credit of the company was so good at its home office, in St. Louis, that they would have no difficulty

in borrowing the necessary sum. They said that the interest to be paid during the year was about $1,600,000, and the net income would be about $1,300,000; and the difference could be borrowed and carried until the company, whose business was increasing, would enable them to pay the interest steadily. They said that the funded debt for interest had several years yet to run, and that the floating debt was easily within their control. They make affidavits now to their belief in the truth of these statements.

The Messrs. Ward did not concur in this view. They said there were deficiencies not noted by the president and vice-president, and mistakes in calculation, both as to existing net income and as to their hopes of the future, which would make the failure in the end more severe and more disastrous. In this divergence of views, two plans were suggested, viz.: By the president and vice-president of the company, that the coupons soon coming due to themselves and to Baring Bros. & Co. should not be presented for payment, while all others should be paid in full; and by Messrs. Ward, that half of each coupon presented should be paid, relying on the leniency of the holders for such extension of time for the other half as should be necessary or useful.

Which of these plans was first presented, and which was the counter-project, is not very well seen; but it is very clear that, against the views of the president and vice-president, the plan of Messrs. Ward prevailed, and was acted on. All, or very nearly all, the coupons falling due prior to April 1st, 1877, were presented; half the amount due on each was paid, was accepted and indorsed on the coupons, without objection, so far as is shown, on the part of the holders.

Without any notice of change of purpose, as is sworn by the officers of the company, the coupons for the April interest of Baring Bros. & Co. were offered for payment, and the payment of half on each, though tendered, was refused, and within forty-eight hours the present complainant made demand for possession of the road under the mortgage, and that being refused, the present bill was filed immediately, and the application made for the appointment of a receiver.

The bill and the affidavits of the complainants state that the company is hopelessly insolvent; that its property is insufficient to pay its debts; that there is danger that the prior divisional mortgages will be foreclosed on the separate pieces of road which they cover; that in this way a road which, as a whole, may be valuable, will be rendered no security at all for the debt of the Baring Bros. & Co., at whose request this foreclosure was commenced; and that the income of the road, which they are entitled to have appropriated to the payment of their interest, will be diverted to the payment of a floating debt, on part of which the directors of the company are personally liable. No allegation is made of past or present mismanagement of the company or its finances; no dishonesty or fraud is charged, and no misappropriation of the funds of the company

The answer of the defendant, supported by numerous affidavits, controverts all or nearly all these assertions of plaintiff. They say that the road itself is now yielding a net income of six per cent on $28,000,000, while its entire debt hardly reaches $26,000,000; that, prior to the unreasonable and unexpected attack of the Messrs. Ward, its credit was so good as to enable it to carry its burden without serious difficulty until the income would be ample to pay its interest, its floating debt, and current expenses; that the road is just on the point of reaping the benefit of its completed connections with other roads, east and west; that besides the road, its rolling stock and appurtenances, the company own lands, subject to the mortgage, to the value of $8,000,000. which is apart from the road, whose value, estimated by its net income at six per cent per annum, is $26,000,000. They show that the income of the road has steadily increased during the last four years, so disastrous to railroads generally, and that this is true of the net as well as the gross income.

In this conflict of evidence we must exercise the best judgment we can in its consideration, for it is a matter of which we can know nothing personally. Some things are, however, beyond dispute. It is true that both the gross and net income have steadily increased. It is true that the net income now amounts to six per cent per annum on a valuation of $26,000,000, which is about equal to all the indebtedness of the corporation. It is true that there are about two million acres of land unsold, the average value of those sold being $3.50 per acre; and, above all, it is true that the road has been recently finished to points connecting it with the whole system of Texas railroads, and opening up the shortest line for the great cattle trade of that state to its best market. It is also beyond dispute, as shown by affidavits of bank officers, that the banks were ready to loan and carry for the company a large sum, $500,000, when the tactics of the Messrs. Ward were so suddenly changed.

It is not necessary to impute to the Wards or their principals any other motive than that which usually governs men in moneyed transactions, viz., to make the most of their money. If having, as they do, some seven millions of dollars invested in this road, their contract gives them the right to sell it and buy it in, a court of equity must enforce that right by the foreclosure of the mortgage. And though the consequence of this may be to extinguish some thirty or forty millions of stock held by people who have done no wrong, and place in the hands of Baring Bros. & Co. a road whose future gives every promise of making that stock valuable, we must give them the benefit of the rules of chancery, in enforcing the contract which

the parties have voluntarily made. But this refers to the right to foreclose, which depends upon the existence of the default in payment, which is denied. The right to foreclose we do not and cannot decide here.

Unquestionably there may be a right to foreclose without the right to appoint a receiver, or change the possession of the property. This latter depends upon the danger of ultimate loss to the bondholders by permitting the property to remain in the possession of its owners until the final decree and sale, if one is to be made.

Without attempting here to analyze all the testimony, which we have carefully considered, much of which is in direct conflict, we are of opinion that, on what we have above stated to be established facts, there exists no such danger of loss to the parties which plaintiff represents, as to justify us in turning over to them or to a receiver all this immense property. Nor is there anything in the manner in which the owners of it have managed this property, or in their relations (otherwise than that they are debtors, to those parties, which would influence us to go beyond the strict demands of the law. They have placed the financial management of the company for several years almost completely at the control of Baring Bros. & Co. They have solicited and followed their advice in every emergency; and in the latest struggle, which is claimed to have resulted in the default on which this suit rests, they accepted and followed the suggestions of those gentlemen, though opposed to their own views of what was wisest and best.

If authorities are necessary to support a decision, which must largely rest in the discretion of the court, and which in every case must be founded on its own special circumstances, the case of Williamson v. New Albany Railroad Co. [Case No. 17,753], decided by the late Justice McLean, will be found to be almost perfect in its analogy to this, and quite so in the principles on which we decide it. The motion for a receiver is denied.

Motion denied.

[For final hearing, see Case No. 14,403.]

Case No. 14,403.

UNION TRUST CO. v. ST. LOUIS, I. M. & S. RY. CO.

[5 Dill. 1.] [1]

Circuit Court, E. D. Missouri. 1878.

RAILROAD COMPANIES—MORTGAGE—FORECLOSURE—EXTENSION OF TIME OF PAYMENT—ESTOPPEL—WAIVER OF PAYMENT AT THE DAY—DEFAULT—COVENANT TO PAY PRIOR MORTGAGES—PRINCIPAL—INTEREST—AMOUNT OF DECREE.

1. Bill to foreclose a mortgage for default in the payment of interest on the railway and appurtenances of the defendant company. The defence was that the promoters of the suit had extended the time of payment beyond the date at which the suit was brought. The facts relating to this defence stated, and *held* not to amount to an agreement to extend, nor to estop the trustee from maintaining the bill, but only to a waiver of payment of interest at the covenant day, which may be terminated on notice and demand for full payment. Treat, J., dissenting.

2. The mortgage in suit contained, inter alia, a covenant by the defendant company to pay interest on mortgages upon distinct divisions of its road made by separate companies, which were afterwards consolidated into the defendant company; the plaintiff had not paid anything in respect of these divisional mortgages, and the holders thereof were not parties to this suit: *Held*, that no decree of foreclosure could be granted in respect of the default in the payment of interest on the divisional mortgages.

3. The principal sum named in the mortgage in suit not being due, a decree can go only in respect of the interest due and unpaid.

The plaintiff is the trustee in a railway mortgage executed by the St. Louis, Iron Mountain, and Southern Railway Company (the only defendant in the cause), May 6th, 1874, upon six hundred and eighty-six miles of railway and appurtenances, to secure the payment of bonds to the nominal amount of $28,000,000. The defendant company was formed by the consolidation of the St. Louis and Iron Mountain Railroad Company, the Arkansas branch of the same, the Cairo, Arkansas, and Texas Railroad Company, and the Cairo and Fulton Railroad Company, each of which, prior to the creation of the defendant company, had constructed separate lines of railway and mortgaged the same. These companies were merged into the defendant company, which took the property subject to these several mortgages—which will be referred to hereafter as the divisional mortgages—and amounting, at the time, in the aggregate, to $21,689,000. A leading purpose of the mortgage sought to be foreclosed—known as the consolidated mortgage, and which covers all of the property embraced in the several divisional mortgages—was to convert these various mortgage debts into one mortgage debt by an exchange of the consolidated mortgage bonds for the divisional mortgage bonds. For this purpose $23,000,000 of the consolidated bonds were set apart by the consolidated mortgage to be thus exchanged. To raise additional means, to provide "for other existing debts and otherwise," $5,000,000 of the consolidated mortgage bonds were authorized to be sold by the defendant company. The scheme for the exchange of consolidated bonds for divisional bonds failed almost entirely; but a considerable portion of the additional $5,000,000 have been issued, the exact number of bonds outstanding and in the hands of bona fide holders not being stated in the bill, and being a matter of contest between the bondholders. The consolidated mortgage recites these divisional mortgages, and declares the purpose of its execution to be to secure the consolidated bonds proposed to be issued; and, further, to secure the performance of the covenants in respect to a sinking fund to be

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

commenced January 1st, 1880, in respect of which, however, no question now arises.

The conditions of deleasance in the consolidated mortgage are: (1) Payment of the principal and interest of the consolidated bonds; (2) maintenance of the sinking fund as provided for; (3) performance of the covenants on the part of the defendant railroad company in respect to the payment of taxes; and also, (4) payment of interest by the defendant upon bonds secured by prior divisional mortgages; and, (5) payment or discharge by the defendant of such prior divisional mortgages as might be necessary or material to the protection of the security thereby created. In case of default in the performance of these conditions, the mortgage provides that the trustee may, upon the application of one-eighth of all the then outstanding consolidated bonds, take and hold possession of the mortgaged property, as mortgagees in possession; and in case such default should continue for three months, upon application of the holders of one-eighth of the then outstanding consolidated bonds, to proceed to sell, out of court, in the manner specified.

The defaults alleged in the bill are the failure to pay interest upon the various classes of bonds maturing as follows: One-half interest on St. Louis and Iron Mountain second mortgage, maturing November 1st, 1876; entire interest on St. Louis and Iron Mountain first mortgage, maturing May 1st, 1877; one-half interest on Cairo, Arkansas, and Texas first mortgage, maturing December 1st, 1876; entire interest on Cairo, Arkansas, and Texas first mortgage, maturing June 1st, 1877; one-half interest on St. Louis and Iron Mountain (Arkansas Branch) first mortgage, maturing December 1st, 1876; entire interest on St. Louis and Iron Mountain (Arkansas Branch) first mortgage, maturing June 1st, 1877; one-half interest on Cairo and Fulton first mortgage, maturing January 1st, 1877; entire interest on Cairo and Fulton first mortgage, maturing July 1st, 1877; entire interest on consolidated mortgage, maturing April 1st, 1877; entire interest on St. Louis and Iron Mountain first mortgage, maturing August 1st, 1877. Certain payments were made after the filing of the bill, so that at the hearing of this cause, in April, 1878, the interest due and unpaid, failure to pay which is assigned as defaults, authorizing foreclosure of the consolidated mortgage, was the following —one-half of the interest upon the several classes of bonds maturing as follows: St. Louis and Iron Mountain second mortgage, November 1st, 1877; St. Louis and Iron Mountain, second mortgage, May 1st, 1877; St. Louis and Iron Mountain second mortgage, November 1st, 1877; Cairo, Arkansas, and Texas first mortgage, December 1st, 1876; Cairo, Arkansas, and Texas first mortgage, June 1st, 1877; Cairo, Arkansas, and Texas first mortgage, December 1st, 1877; St. Louis and Iron Mountain (Arkansas Branch) first mortgage, December 1st, 1876; St. Louis and Iron Mountain (Arkansas Branch) first mortgage, June 1st, 1877; St. Louis and Iron Mountain (Arkansas Branch) first mortgage, December 1st, 1877; Cairo and Fulton first mortgage, January 1st, 1877; Cairo and Fulton first mortgage, July 1st, 1877; Cairo and Fulton first mortgage, January 1st, 1878; Consolidated mortgage, April 1st, 1877; Consolidated mortgage, October 1st, 1877; Consolidated mortgage, April 1st, 1878.

The bill, after alleging the defaults as stated, avers the application of the holders of upwards of one-eighth of all the outstanding consolidated bonds to the complainant trustee to proceed to enforce the consolidated mortgage by entry, and to commence and carry on appropriate proceedings, by suit in equity or otherwise, and "for the foreclosure of said mortgage," and avers the action taken by the trustee "in pursuance of such application and request." There were four applications to the trustee, each of which requested the complainant to commence and carry on appropriate proceedings by suit in equity for the possession of the mortgaged property and foreclosure of the consolidated mortgage—the first dated April 3d, 1877; the second dated May 3d, 1877, signed by "Baring Brothers & Co., by S. G. & G. C. Ward, Attorneys, holders of sixteen hundred and twenty-three of the consolidated bonds of the St. Louis, Iron Mountain, and Southern Railway Company;" the third dated May 7th, 1877; and the fourth dated August 3d, 1877, signed by "Baring Brothers & Co., by S. G. & G. C. Ward, Attorneys, sixteen hundred and twenty-three bonds; Russell Sturgiss, by S. G. & G. C. Ward, Attorneys, twenty-three bonds; Kirkman D. Hodgson, by S. G. & G. C. Ward, Attorneys, fourteen bonds; J. Stewart Hodgson, by S. G. & G. C. Ward, Attorneys, thirteen bonds; Edward C. Baring, by S. G. & G. C. Ward, Attorneys, seventeen bonds; H. Bingham Mildmay, by S. G. & G. C. Ward, Attorneys, seventeen bonds; C. L. Norman, by S. G. & G. C. Ward, Attorneys, nine bonds; Hope & Co., by S. G. & G. C. Ward, Agents, fifty bonds; Louisa, Lady Ashburton, by S. G. & G. C. Ward, Agents, six bonds; Samuel Gray Ward, by George Cabot Ward, nine bonds; George Cabot Ward, fourteen bonds; D. G. Bacon, six bonds." Samuel Gray Ward and George Cabot Ward were copartners, and were jointly and severally the attorneys in fact of Kirkman D. Hodgson, Russell Sturgiss, J. Stewart Hodgson, E. C. Baring, H. B. Mildmay, W. Moier, C. L. Norman, and T. C. Baring, individual members of the partnership firm of Baring Brothers & Co., of London, under the power of attorney in evidence; the agency of the Wards, dating from September, 1871, for the firm and for the individual members of Baring Brothers & Co., is conceded by all parties in this proceeding. The Wards were also agents of Hope & Co., from the time Baring Brothers & Co. acquired their Iron Mountain securities. It

also appears that the bonds of Lady Ashburton were held and registered in the name of S. G. & G. C. Ward, Attorneys. Thus it appears that S. G. & G. C. Ward, either personally or individually, held, or as agents or attorneys in fact represented the holders of, every bond subscribing the several applications to the trustee, with the single exception of Mr. D. G. Bacon, and of ten bonds once owned by the complainant, and since sold.

The bill prays: 1. That complainant may be put intc possession of the property. 2. That the amount of principal and interest upon the outstanding bonds, issued under and secured by the consolidated mortgage, be ascertained, and payment thereof be ordered to plaintiff. 3. That said consolidated mortgage be decreed a lien on the mortgaged property, and that the company be decreed to pay all moneys now due or to become due and payable under or by virtue of said mortgage. 4. That all the mortgaged property be sold, and the net proceeds, less payments for taxes, assessments, and prior liens, be applied to payment of amounts adjudged due and owing on consolidated bonds and interest, and for general relief.

The answer sets forth the defence with much detail, but it is in substance as follows: Coupons on the several classes of bonds having been funded, in pursuance of the terms of the circular dated February 23d, 1875, it was obligatory upon the company to pay in full its interest coupons upon all classes of bonds maturing on and after November 1st, 1876. That the company, represented by its chief executive officers—Mr. Allen, president, and Mr. Marquand, vice-president,—on and prior to October 12th, 1876, desired and intended to make such payments in full, and was ready and able to do so. That S. G. & G. C. Ward, being consolidated bondholders, and agents and attorneys of other large holders of consolidated bonds (the first coupons of which, due after such intended resumption, matured April 1st, 1877), strenuously opposed payment in full as proposed and intended by the company on November 1st, 1876, when the semi-annual coupons on the St. Louis and Iron Mountain second mortgage matured, followed chronologically by the Cairo, Arkansas, and Texas first mortgage, December 1st, 1876; St. Louis and Iron Mountain (Arkansas Branch) first mortgage, December 1st, 1876; and Cairo and Fulton first mortgage, January 1st, 1877,—all of which were prior to the consolidated coupons in point of lien and time of payment—and instigated and procured the company to pay one-half only of such interest on the prior divisional mortgages, except the interest on the St. Louis and Iron Mountain first mortgage, on and after November 1st, 1876; and to apply the means of the company, which it was designed to use for payment of such interest, to other purposes, being payment of the floating debt and betterment of the mortgaged property, until such time as should be found consistent with the proper management and development of the road, which time was by them suggested as being the close of 1878; and by their words, acts, conduct, and expressions, led the defendant to believe that, in the event such course of action was taken by it, they, as holders of consolidated bonds and representatives of other holders, would withhold any exaction or demand of payment exceeding one-half of coupons of consolidated bonds held or represented by them, maturing on April 1st, 1877, and thereafter, until such period as the income of the road should be adequate to pay them, which period was by them suggested as being November 1st, 1878. That the company, by its executive committee, authorized thereunto, accepted these propositions of the Messrs. Ward, made the agreement as stated, and in good faith has ever since, in all respects, acted upon it, and in so doing has expended its revenue and income, which would have been available and used for payment of interest, for the other purposes indicated, and thereby has irrevocably changed its position, by destroying its credit and by placing beyond recall the moneys disbursed in performance of the plan agreed upon. so that if it should be rescinded or repudiated, the company could not be restored to its former position, and would sustain ruinous and irreparable injury. This defensive matter is set up in the answer as a valid agreement between the bondholders and the company to change the time of paying interest, as well as the amount to be paid; as waiver by the bondholders of strict performance in the payment of interest at the covenant day, and also as an estoppel on them to bring suit on the unpaid half of the coupons of the consolidated mortgage at any time prior to November 1st, 1878.

[For prior proceedings relating to the appointment of a receiver, see Case No. 14,402.]

A general replication was filed, and a voluminous mass of testimony was taken, covering over one thousand five hundred printed pages. The cause is before the court on final hearing.

W. H. Peckham, Evarts, Southmayd & Choate, Henry Hitchcock, G. A. Madill, and Noble & Orrick, for complainant.

Glover & Shepley, Thoroughman & Warren, Ashbell Green, and W. R. Donaldson, for defendant.

Before DILLON, Circuit Judge, and TREAT, District Judge.

DILLON, Circuit Judge. The consolidation of the four companies into the defendant company took place in May, 1874. The total mortgage debt of the constituent companies at that time was the sum of $21,689,000, and the floating debt was over $4,000,000. The

defendant company came into existence under the weight of this heavy indebtedness. To provide for retiring all of the bonds of the several companies and to meet the floating indebtedness, the mortgage in suit, known as the consolidated mortgage, was executed May 6th, 1874, for the nominal sum of $28,000,000, at seven per cent interest, payable semi-annually, on the first days of April and October. Twenty-three millions of the consolidated bonds were, by the terms of the mortgage, set apart to exchange for the divisional bonds; but very few were ever exchanged, and the main issue of bonds under the consolidated mortgage were out of the surplus of five millions authorized by that instrument to be used to provide for the general wants of the company.

Baring Brothers & Co., large owners of divisional bonds, in August, 1874, to aid the company in meeting its floating debt, purchased sixteen hundred and twenty-three of the consolidated bonds, amounting to $1,623,000, at seventy-one and one-half cents, currency. These bonds are still owned by this firm, of whom the Messrs. Ward, or rather Mr. Samuel G. Ward, is the American agent, with plenary powers.

As a part of the arrangement by which the sixteen hundred and twenty-three consolidated bonds were taken by the Barings, it was required that Messrs. Allen and Marquand and their friends on this side of the Atlantic should provide for an extension of the floating debt. In order to effect this, Allen and Marquand became endorsers for the company in a large amount. The company was not earning enough to extinguish the floating debt and pay all of its interest; and in February, 1875, the company, finding that the floating debt "interfered with the economy of management and depressed its securities," appealed to the bondholders to fund all of the coupons which would mature down to the last day of October, 1876.

The Barings, owners of five millions or more of the securities of the company, aided this funding scheme, on certain conditions not now material to notice, and it was acquiesced in and distinctly agreed to by the large mass of the bondholders. Mr. Allen and Mr. Marquand, respectively president and vice-president of the company, are also large owners of its securities. The Barings were represented in the board of directors of the company by Mr. George C. Ward and by Mr. Morison. The rest of the directors seem to have been friendly to the Allen interest. In the funding scheme of February, 1875, it was promised that on November 1st, 1876, the company would resume the payment in full of interest on all classes of its bonds, divisional and consolidated. The amount of floating liabilities had, by mistake, been under-estimated in the circular of February, 1875, which set forth the funding scheme, and the expected net earnings of the company had fallen short of the estimates.

One of the leading objects of the funding scheme was to extinguish the floating debt, but, owing to the reasons just stated, this expectation had not been realized, for, although this debt had been reduced, it still amounted, on August 31st, 1876, to the sum of $1,702,778.70. The efficiency of the road, however, had been well maintained; it had a full equipment, and its earnings, under adverse circumstances of an exceptional or accidental character, had constantly increased. The system of railways in Texas with which the defendant's road connected was being gradually developed, and more than compensated the company for the loss of earnings resulting from the depression of the iron industry. The net earnings of the company were not sufficient to extinguish the floating debt, to pay interest in full, and to maintain the road and its equipment in good condition. It was nearly or quite sufficient to pay full interest if it could all be appropriated to that end. The credit of the company was good. About $250,000 of the floating debt was due employes on back pay-rolls; in September, 1876, the men had not been paid for services performed in May. Some of the floating debt bore ten per cent. interest.

Such is a brief outline of the company's condition in the summer of 1876. Up to this time the Barings, represented by the Messrs. Ward, and the management, represented by Mr. Allen, had worked together in harmony. Unfortunately for the great interests here concerned, causes of difference gradually arose, which, in March, 1877, resulted in mutual distrust and alienation. It is not material to any legal question now presented to determine on which side the blame lay.

The duty of the court is to ascertain the legal effect on the rights of the holders of the consolidated bonds of what took place in October, 1876, between the Messrs. Ward, as the representatives of the Barings and certain other bondholders, on the one side, and the defendant company, through its officers, on the other. At this time a radical conflict of views as to the policy to be adopted by the company displayed itself. The parties were still working in concert, and we find no satisfactory proof in this record that at this time each was not acting from a sense of duty and in entire good faith. In the situation of the company's affairs, there was ample room for difference of judgment respecting the course to be pursued. Which would prove to be the wiser, no sagacity could forecast with certainty, for it would depend upon the amount of future earnings, and upon the disposition and views of a large number of creditors, scattered over the world.

It appears, with clearness, that the purpose of the company's officers was to commence to pay interest in full November 1st, 1876, on the expiration of the funding plan. Mr. Allen and several of the directors strongly favored this policy and Mr. Marquand urged it with emphasis. The Messrs. Ward were of a dif-

ferent opinion. They insisted that, as the earnings were not sufficient to pay the floating debt and to pay and continue the payment of interest in full, the true policy was to pay only one-half interest on the great body of the secured indebtedness, and to appropriate the rest of the net earnings to the extinguishment of the floating debt, and to maintaining the efficient condition of the property.

Several hundreds of closely-printed pages of oral evidence touching this difference of opinion, and the views and arguments of the several actors in the transaction, and as to what was intended, have been taken, in portions of which there is considerable conflict. It is not my purpose to refer to this at length, for what was concluded appears in the official records of the company's action, in the circular of President Allen of the 20th day of October, and in the letter of Mr. Samuel G. Ward of October 21st, accompanied by an abstract of Mr. Morison's report on the condition and prospects of the road, of date October 16th, made at the instance of Mr. Ward, and addressed to him, and in the accompanying correspondence. The oral testimony does not vary the legal effect of the record, documentary and written evidence; and it is altogether more satisfactory to make this the basis of judgment than the parol evidence of statements and intentions. To become thoroughly informed concerning the road, its condition, wants, earnings, and prospects, Mr. Samuel G. Ward, for himself, but mainly for the foreign bondholders whose interests he represented, of whom the Barings were the largest, in September, 1876, procured Mr. Morison, a civil engineer of large experience and a director in the company, to make an examination of the road and report the result. Mr. Morison, who had the confidence of Mr. Ward, made such examination and a report dated October 12th, 1876. This report gives a detailed view of the company's situation; and, after referring to the condition of the floating debt and the probable earnings of the road, says: "Under these circumstances, an attempt to pay these maturing obligations in full would lead to a rapid increase, instead of diminution, in the floating debt, and must early result in disaster. While, however, it would appear very unwise to attempt to pay this interest in full, the revenues of the road are sufficient for the payment of a portion of it. The wisest course, in my judgment, would be to continue to pay in full the interest upon the St. Louis and Iron Mountain Railroad first mortgage bonds, and upon the funded interest certificates; to pay one-half of the interest coupons of the several other unconsolidated bonds, while action as regards the consolidated mortgage bonds may safely be suspended to abide the developments of this winter's traffic." (The earliest interest on the consolidated bonds would not fall due until April 1st, 1877.)

His report concluded with this recommendation: "Under the circumstances, it would appear to me most desirable to pay one-half of each coupon of the divisional bonds in gold as they mature, and to issue scrip for the remaining half, such scrip to be redeemed with compound interest at seven per cent before the payment of any dividend upon the stock. The coupons should have the amount paid stamped upon them, and be placed with a trust company as security for the scrip. I see no advantage to be gained by asking the formal approval of the bondholders to this plan, as the implied approval which the acceptance of such half payment would give would be all that is necessary. A circular should be prepared stating the circumstances and expectations of the company, and showing plainly the inability to make payment in full; it should also state that it is the belief of the directors that they will be unable to pay more than one-half of each of the four next maturing coupons, but that after that time they confidently hope to be able to resume payment in full, but it should contain no absolute pledge to that effect, as there are many contingencies attending the development of trade with a newly-settled country, which may vitiate the most careful calculations and overturn the best grounded hopes."

These recommendations had the approval of the Messrs. Ward, and the report was read at the meeting of the board of directors held in the city of New York on the 12th day of October

The Allen party still insisted on the payment of interest in full as the true policy. It seemed to be admitted on all hands that the company could pay interest in full for a few months, but the Wards insisted that it could not continue to do this and do what else ought to be done, while Allen and Marquand and their friends in the directory, urged that what the earnings might fall short could be supplemented by the credit of the company, or by a sale of its remaining consolidated bonds, or in some other way. The Messrs. Ward were firm, and after several meetings of the board and the executive committee, at which the subject was discussed, Mr. Allen finally yielded, and with him the executive committee. Mr. Allen, as president, prepared the circular of October 20th, above referred to, addressed to the bondholders, and read the same to the executive committee, "who unanimously voted to issue it and to send copies to the bondholders."

On motion of Mr. George C. Ward (a member of the executive committee), "the treasurer was authorized to prepare the proper stamps and to mark upon the coupons, as they shall be presented, the one-half payment"

The draft of this circular had been prepared by Mr. Allen on the day before (October 19th), and was on that day submitted to Mr. Samuel G. Ward. The draft thus submitted contained a clause providing that the

bondholders, on presenting their coupons, would be paid one-half in cash and be given for the unpaid half, at their option, interest-bearing certificates or consolidated mortgage bonds, or the coupons stamped as half paid. Mr. Ward objected to this provision, and it was stricken out from the draft. The draft also stated that the company would follow this course for two years, beginning with November 1st, 1876. This clause also was stricken out on Mr. Ward's objecting to it, so that the draft, as finally amended, simply stated that the company would pay one-half of each coupon as presented, and fixed no time at which the company would pay its coupons in full.

The circular of the president, as thus amended, and as authorized to be issued by the executive committee, is dated October 20th, 1876, addressed "to the bondholders," and, after stating in detail the financial condition and prospects of the company, concludes as follows:

"The floating debt of the company on the 1st of January next will amount to about $1,595,000. It is a variable quantity, more or less of which must always remain with a railroad in operation. About $750,000 of it should be paid in 1877. The interest which will accrue in 1877 upon all kinds of indebtedness, including gold premium, will be about $2,150,000. New constructions, steel rails, and other necessary improvements for the maintenance of the property in good order and efficiency, may require near twelve per cent of the earnings. The operating and general expenses and taxes will consume about fifty per cent. Without a large increase of earnings, therefore, it becomes apparent that the time for the resumption of the payment of the interest in full, with a fair expectation of maintaining it, has not yet arrived. The company will, therefore, pay, on and after November 1st, 1876, all the interest, as heretofore, on the first mortgage (St. Louis and Iron Mountain Railroad bonds), and all interest upon all classes of the funded certificates, and half the interest coupons on other classes of bonds as they mature and are presented for payment. The object of this arrangement is to enable the company the more completely to effect the purpose of the circular of February 23d, 1875, by the continued reduction of debts, and thereby to save a large amount in interest now paid on supply bills, and to effect an important saving in the cost of labor by prompt payment, and to make the renewals, betterments, and constructions which experience may prove to be necessary for the economical and profitable operation of the road."

This circular, it will be perceived, required no consent of the bondholders, or action on their part; nor did it state how long the plan of half payment would continue.

The Messrs. Ward and the officers of the company were still acting in concert; and it was understood that Mr. Samuel G. Ward, as the main representative of the largest bondholders, would give the plan adopted (which was in reality his own) his public approval, and thus aid in securing the approval of the bondholders at large.

With this view Mr. Ward caused Mr. Morison to make a careful abstract of his report, with some modifications, which was to be sent to the bondholders with a circular-letter of Mr. Ward approving the plan embodied in the above-mentioned circular of President Allen. The portion of the original report of Mr. Morison, above quoted in the abstract prepared to be sent to the bondholders, was changed so as to read as follows:

"This amount of interest will manifestly be materially in excess of any earnings which we can hope for. If the interest on the St. Louis and Iron Mountain Railroad first mortgage bonds and the funded interest certificates were to be paid in full (as had already been done), and one-half of the interest be paid upon the other classes of bonds, the floating debt would be gradually extinguished, and within a reasonable length of time the company might hope to see itself relieved from its embarrassments. Under this course the amount of interest to be paid from this date to and including January 1st, 1877, would be about $530,000; this amount covers the gold premium and the floating debt interest. Should the estimated earnings be realized, there would remain $420,000, which would suffice to bring up the payroll arrears and leave a surplus to be applied to other items of the extended and current debts. The interest to be paid for 1877, including gold premium and floating debt interest, would be about $1,350,000, which would leave a balance of $400,000 from the estimated net revenue, a portion of which would probably be needed for special betterments to meet the growth of traffic, and the remainder could be applied to the floating debt. Before the close of 1878, if the hoped-for growth of business is realized, the full payment of interest could probably be resumed."

It will be seen that this differs materially from the recommendations of the original report to Mr. Ward. That recommended half interest on the divisional bonds for the four next maturing coupons reserving action for the present as respects the consolidated bonds. The original report provided for the issue of scrip for the unpaid half of the four coupons, with a pledge of the coupons in trust as security for the scrip. This provision is omitted from the abstract of the report. The original report expressly named four coupons; this the abstract omits, and in lieu of it contains the vague statement that "before the close of 1878 * * * full payment of interest can probably be resumed."

Mr. Ward prefaced this abstract of Mr. Morison's report with this letter:

"New York, October 21st, 1876. The continued depression of the business of the coun-

try has caused such a disappointment as to the receipts which it seemed reasonable to anticipate for the St. Louis, Iron Mountain, and Southern Railway Company, at the time when the funding arrangement was adopted, as to make it apparent to the directors that it would be premature at this time to resume payment of interest in full. The plan which has been proposed by them of paying one-half the interest in cash, continuing payment in full on the first mortgage bonds and the funding certificates, and at the same time continuing the reduction of the floating debt, and developing the business of the road, in connection with the newly-finished lines leading to it, has had my careful consideration and approval, as the representative of several of the largest bondholders. Since the circular of February, 1875, I have caused thorough examination of the accounts of the road to be made by Mr. William E. Warren; and Mr. George S. Morison has, at my request, made a careful and repeated personal examination of the condition and business of the road; the results of which, up to the latest dates, will be found in his accompanying report to me. With these facts before me, and taking into account the large and growing receipts of the road, at a period of the greatest depression, it has seemed to me that the directors have found the wisest solution of the problem that presents itself, in paying such portion of the interest as can be met consistently with the continued reduction of the floating debt, while keeping up the efficient condition of the property. Samuel G. Ward."

This letter and the abstract of Mr. Morison's report were printed and sent by Mr. Ward to his principals and to his personal friends among the bondholders; and President Allen's circular of October 20th was likewise printed and sent by the company's officers to all of the holders of divisional and consolidated bonds.

On November 1st, the semi-annual coupons of thirty-five dollars each of the divisional second mortgage bonds of the St. Louis and Iron Mountain Railroad Company fell due. They were presented by the holders, who were paid one-half thereof, and the following words being stamped on the coupons: "Paid $17.50 on this coupon, November, 1876," they were returned to the respective holders. The Messrs. Ward presented coupons owned by themselves and others, and received half payment in this manner without objection. Coupons matured December 1st on the divisional mortgage of the Cairo, Arkansas, and Texas Railroad Company, and also on the Arkansas branch, which were presented and one-half paid, and the coupons stamped as above and returned to the holders. On January 1st, 1877, coupons for interest on the bonds of the Cairo and Fulton divisional mortgage fell due, and on being presented one-half was paid and stamped thereon and returned to the holders. In March, 1877, if not before, a misunderstanding arose between Mr. Samuel G. Ward and Mr. Allen, and when the coupons of the consolidated bonds fell due, April 1st, 1877, Mr. Ward demanded payment in full; the company offered to pay one-half, which was refused, and a bill of foreclosure filed in this court by the trustee, April 6th, 1877, asking for a receiver, which was refused. [Case No. 14,402.]

This bill was afterwards voluntarily dismissed by the trustee, and soon afterwards, viz., August 9th, 1877, the present bill was filed, based on the defaults above mentioned, in paying only one-half of the amount of the coupons on the divisional mortgages and one-half of the coupons due April 1st on the consolidated mortgage, one-half having subsequently been paid and received by the Messrs. Ward under protest, reserving all rights. Meanwhile, since October, 1876, the company has been acting upon the theory that it was only bound to pay one-half, and has been appropriating the residue of the net income to the reduction of the floating debt, giving preference, as the Messrs. Ward complain, to the extinguishment of debts on which Mr. Allen and Mr. Marquand were indorsers, rather than to the payment of arrearages on the pay-rolls.

Upon these facts three questions of law arise: 1. Was there a valid agreement, founded upon a sufficient consideration, whereby the payment of one-half interest on the bonds, both divisional and consolidated, so far as owned or controlled by the Messrs. Ward, was extended to November 1st, 1878? 2. Whether what was thus said and done by the Messrs. Ward in October, 1876, created as to them and their principals an equitable estoppel to instigate and maintain a foreclosure bill prior to November 1st, 1878? 3. If there was no such valid agreement or estoppel, what is the legal effect on the rights of the bondholders of the transactions of October, 1876?

Briefly of these questions in their order: It is to be recollected that the divisional bonds (excluding the Iron Mountain firsts, which were to be paid in full), amounted to about $20,000,000, in some of which the Barings and Wards had but little interest, and in none of which, perhaps, a controlling interest. They did own and control a majority of the consolidated bonds then outstanding. What was finally concluded put the divisional bonds and the consolidated bonds on the same footing.

The Messrs. Ward refused to make any separate arrangement as respects bonds owned and controlled by them different from the other bondholders. There is nothing in the circular of President Allen of October 20th, and nothing in what was done under it, from which it can be claimed that bondholders not represented by the Messrs. Ward had made an agreement to extend the time for the payment of interest. They still hold

their coupons; they have accepted nothing in the place of them; they have simply received one-half of the amount due thereon.

When we consider that the circular of the president (the only act of the company from which any agreement on its part is to be deduced) asks for no extension for any specified time, and for no agreement of any kind from the bondholder, but simply says, "The company will, therefore, pay, on and after November 1st, 1876, * * * half the interest coupons on other classes of bonds as they mature and are presented for payment," it is difficult to see any solid foundation for the claim that there was a contract for a definite extension. This is made more evident from the fact that the words in the original draft of the circular looking to a specific agreement for two years from November 1st, 1876, were stricken out at the instance of Mr. Ward before the circular was adopted by the executive committee.

The question as to the estoppel upon the Messrs. Ward and those whom they represent, is one of much more difficulty. It is clear that the company adopted the plan of half payment of interest against the judgment of its officers, and upon the urgent requirement of Mr. Ward; and that it had appropriated, between that time and April 1st, its earnings to the reduction of the unsecured debts and purposes other than it would have done if it had expected to resume full payment of interest as early as April, 1877.

It is, perhaps, clear enough that it was hoped that the bondholders, at least those represented by the Messrs. Ward, would be content to receive half interest, if the company should continue to desire the indulgence, for the period of two years; but the difficulty is that the Messrs. Ward made no distinct or specific promise to that effect. The company was free to pay in full at any time it might find itself able to do so.

It is also equally clear that if Mr. Allen and the executive committee had anticipated the trouble that afterwards arose, and that full payment would be demanded on and after April next, they would never have consented to the plan urged by Mr. Ward. Grant all this, and that Mr. Ward's subsequent course disappoints expectations which his previous course might justly raise, still this falls short of establishing that he has estopped himself and his principals to enforce the payment of interest on their bonds, for two years, when it is evident that such an estoppel would not exist against any other bondholders. All of the bonds were put upon the same footing, and if there is an estoppel upon the Wards and the Barings as respects the consolidated bonds, it equally applies to the divisional bonds owned by them; the result of which would be that a portion of the bondholders would be disabled during two years from enforcing the payment of interest, and the rest not. This was never intended. It is also true that the changed course of the Messrs. Ward in April, 1877, and subsequently, in demanding full payment of the interest on the consolidated bonds, would, if it had been complied with, have worked injustice to the holders of divisional bonds who had, through the influence of the Messrs. Ward, accepted, in November, December, and January, half payment of their coupons, although these had a prior lien to the consolidated bonds. To pay on the latter interest in full, and only half on the others having a superior lien, would be manifestly inequitable to the holders of the divisional bonds.

The estoppel for the period of two years from November 1st, 1876, fails, because the time during which the payment of half interest should be made was left indefinite. Although this point was not adjudged in the application for the receiver, yet such seems to have been the impression that the transaction, which was then fully brought to view, made upon Mr. Justice Miller, who says that the plan of the Messrs. Ward contemplated "that half of each coupon represented should be paid, relying upon the leniency of the holders for such extension of time as should be necessary or useful." [Case No. 14,402.]

In my view, the true legal effect of what was done by the Messrs. Ward in October, 1876, was, as respects bonds owned or controlled by them, to consent to the company's paying only half interest for an indefinite time, supposed not to exceed two years. They were not bound to wait two years, because they did not so agree or promise; but within that time they could not suddenly terminate the plan which had been entered on, without reasonable or fair notice to the company; and, therefore, it is doubtful whether the first bill filed could have been maintained. Fears that it could not, led, perhaps, to its voluntary dismissal.

But on April 3d, 1877, and constantly thereafter, the company and other bondholders had notice that, so far as the Messrs. Ward and those whom they represented were concerned, the half payment plan was at an end; that full payment of interest would thereafter be, as in fact it was, demanded, and the present suit was not commenced until August, 1877.

The principle on which Albert v. Grosvenor Inv. Co., L. R. 3 Q. B. 123, was decided is applicable here. In that case, on the 28th of August, the day on which, by the terms of the mortgage, an installment was due, the wife of the mortgagor asked the mortgagee to wait until the 11th of September, to which he assented. The mortgage provided that on "default" of payment at the time covenanted, the mortgagee might take possession and sell. On the 7th of September the mortgagee took forcible possession and sold the property. In an action by the mortgagor against the mortgagee to recover damages, it was held that there was no "default," and that a default could not be

predicated of an omission to pay at the covenant day when that "omission was with the concurrence of the other party." In this view Lord Chief Justice Cockburn, and Lush, J., concurred, the latter observing: "Default must mean something wrongful, some omission to do that which ought to have been done by one of the parties, and this cannot be when the omission to make payment has the concurrence of the other party. It is true that the defendants (mortgagees) were not bound by this license or giving of time, as there was no consideration, and they might have revoked it at any time and demanded payment of the installment, and if it had not been paid there would have been a default."

The only failure in the payment of interest on the consolidated mortgage which had occurred when the present bill was filed was in respect of the April, 1877, coupons. The defaults in the payment of interest on the divisional bonds, from the very nature of the case, are not available in this suit (which is solely on the consolidated mortgage) as the basis of a decree of foreclosure. The complainant has not paid the divisional bondholders, so as to become subrogated to their rights. And if it had, such rights pertain and are limited to separate divisions of the road, and must be asserted against the specific property mortgaged. We cannot decree to the complainant in this suit any sum in respect of the defaults on the divisional mortgages, since it has no right to receive the money due on those mortgages; and the court on this bill has no authority to order the sale of specific property covered by the several divisional mortgages.

The complainant, as the trustee representing all the bondholders, is only entitled to a decree as respects the non-payment of interest on the consolidated mortgage. There is no provision in the instrument that a default in the payment of interest will cause the principal sum to fall due; and hence, there can in no event be a foreclosure except for the interest due and unpaid on the consolidated mortgage. Judge Treat is of the opinion that the transactions of October, 1876, work an equitable estoppel on the promoters of this suit to maintain it, and, if desired, we will finally certify a division of opinion on this point to the supreme court. Meanwhile, the cause will stand for further hearing as to the contested bonds, or be referred to a master to state an account and report.

TREAT, District Judge (dissenting). A large mass of evidence has been presented, and many points suggested, which, in the view I take of the case, are of little moment, so far as the principal controversy is concerned, viz, the right of the complainant to the foreclosure sought under the facts and circumstances developed.

As to the advisability of the plan adopted in October, 1876, with respect to payment of half interest, or the comparative merits of the various schemes suggested at that time, this court has nothing to do, further than they tend to show the nature and extent of the conclusion reached and its operative effect in law or equity. It may be that Allen and Marquand were too sanguine and the Wards too timid, but no comments upon that point are required. Parties interested in a common enterprise of great magnitude may fairly and justly differ as to the best plan for present and future operations, especially when their conclusions must be based, to a large extent, upon prospective earnings, etc. Such differences are natural, and are in no way censurable; for one important purpose in having a board of direction, instead of a single manager, is to secure the benefits resulting from the respective views of many minds. The then condition of the defendant, and its estimated income, justified an honest difference of opinion.

The following brief statement of facts, as established by the evidence, suggests the rules of law and equity by which the case should be controlled.

The defendant corporation came into existence by the consolidation of several distinct corporations, each of which owned some part of the main line, or some of the branches. Each of said distinct corporations owed bonded and other debts. To provide for those debts, this defendant formed the plan, sufficiently explained in the mortgage now made the basis of this suit, reciting the indebtedness of each of the prior corporations, and setting apart twenty-three of the twenty-eight millions of consolidated bonds for the redemption or exchange of divisional bonds. It seems to have been then supposed that the holders of the latter bonds could be induced to make the desired exchange. In that the defendant was disappointed, for only a few bonds were so exchanged. The five millions in consolidated bonds, not reserved out of the twenty-eight as just stated, would be needed to complete the work contemplated and pay the floating debt.

In that condition of affairs, the defendant, early in 1875, became unable to prosecute its work, pay the floating debt, and meet the interest on the consolidated and divisional bonds. To provide for the difficulty, it was agreed to fund coupons falling due prior to November, 1876, issuing therefor fund certificates running for several years and bearing semi-annual interest.

As early as September, 1876, the parties commenced suggesting plans with respect to the payment of interest falling due after October of that year. The prior funding plan embraced no coupons falling due after October, and evidently contemplated that subsequent thereto interest as it matured would be promptly paid in full.

The Wards represented large interests, and had caused Mr. Warren, and subsequently Mr. Morison, to make full and careful exami-

nations into the condition and prospects of the road. Before Mr. Morison had finished his work, Mr. George C. Ward had suggested the propriety of funding one more of each of the series of coupons. He was a director of the defendant, and also a member of the copartnership of S. G. & G. C. Ward. His suggestion received no support. Allen, the president of the defendant, H. G. Marquand, vice-president, and the majority of the directors, insisted upon full payment of all interest as it thereafter matured. To meet objections raised principally by the Wards, who were of opinion that payment in full could not be maintained, Allen and Marquand made many suggestions. The Wards, for themselves and the Barings, deemed it very important that the large floating debt should be reduced, and the needed betterments secured, which objects they supposed could not be effected if interest were paid in full. They preferred the plan of paying only half interest. On the return of Mr. Morison to New York, where the board was to meet, he made a full and careful report to Mr. S. G. Ward, who had the more immediate charge of the Barings' interests. In that report half payments were suggested for at least two years. with a certificate for the other half, bearing compound interest. The result of all the discussions was that Allen, Marquand, and the other members of the board (a majority aganist its expressed views), consented to the plan finally urged by S. G. Ward, which was the payment of half interest for an indefinite period of time, with the expectation that full resumption could be had late in 1878, but the defendant to be left free to resume in full at an earlier day if practicable.

It is unnecessary to enter upon a critical examination of the various plans suggested and of the modifications proposed from time to time. When a draft of the plan to be issued in the form of a circular to the bondholders was submitted by Mr. Allen to Mr. S. G. Ward, the latter caused to be erased all other provisions than what announced the proposed payment of only one-half interest, except on the Iron Mountain firsts and the funded certificates. What thus occurred is very significant. It is evident that Mr. Allen was anxious to the last to use some of the consolidated bonds, unissued, to meet the then condition of affairs; for he and Marquand had zealously urged that full payments would appreciate the securities, whereby the unissued bonds could be utilized.

Mr. Morison states what occurred at that interview, as to the draft of the circular, viz.: "Mr. Allen read the draft of a circular to be sent to the bondholders, and various changes were made in this draft as he read it; there were some small changes in some of the figures and estimates, though none that were material. The draft of the circular contained a clause providing that the bondholders, on presenting their coupons, would be paid one-half in cash and be given for the unpaid half, at their option, interest-bearing certificates or consolidated mortgage bonds, or the coupons stamped as half paid; Mr. Ward objected to this provision, and it was stricken out from the draft. The draft also stated that the company would follow this course for two years, beginning with November 1st, 1876. This clause was also stricken out on Mr. Ward objecting to it; so that the draft, as finally amended, simply stated that the company would pay one-half of each coupon as presented, and fixed no time at which the company would pay its coupons in full."

The conferences, correspondence, and expressed views of the several parties, before the defendant's circular was issued, October 20th, 1876, as well as the apprehensions expressed by Allen and Marquand concerning the plan after its adoption, and S. G. Ward's replies thereto, render the foregoing statement by Mr. Morison not only credible, but entirely consistent with the views and conduct of the negotiating parties.

It must be borne in mind that several of the sets of coupons under consideration were attached to securities prior in right to the consolidated mortgage, although they pertained to separate divisions of the road only. Hence, it might have well been doubted whether the holders of those coupons, who had refused to exchange them and the bonds to which they were attached for consolidated bonds and coupons, would be content to have them put on a par with the consolidated coupons. Why should they receive half payments only, and the subsequent or consolidated security receive the same? Why not stand on their strict rights?

In that connection, it was promised by S. G. Ward that he would issue, simultaneously with the defendant's circular, a circular signed by himself endorsing the plan, and that his recommendation as the representative of large interests, he declared, would probably induce general assent to the plan adopted. His circular was to be accompanied by an abstract of Morison's report; and was issued accordingly, and so accompanied.

Pursuant to that plan, the defendant paid one-half of each coupon up to April, 1877, stamping on each, as presented, half paid, and leaving the coupon so stamped in the hands of the holder. Instead of paying the other half, it applied the surplus funds to the reduction of the floating debt, etc.

Semi-annual coupons on the consolidated mortgage which fell due April 1st, 1877, so far as controlled by the Wards, were presented to defendant and full payment then demanded. The defendant offered to pay one-half, which offer was refused. Promptly thereafter, a bill to foreclose the consolidated mortgage was filed in this court, an application for receiver made and refused, and the suit left pending until August, 1877, when it was dismissed and the present bill filed. In the meantime, the defendant failed to pay any sum on the divisional coupons maturing,

but since this suit was brought, and before the hearing, paid one-half, which was received under protest, etc.

These are the salient facts; and to my mind they establish not a contract between the defendant and the body of the bondholders to postpone half payment for two years, or for any specified time, but they do show an agreement or assent on the part of the defendant and the Wards, in behalf of those whom they represented, that they, at least, would not interfere with defendant in consequence of its failure or refusal to pay more than one-half on maturing coupons, leaving the defendant to pay the other half as soon as it could justifiably do so, even within six months or a year, if it desired.

Hence the statute of frauds has no application to the case. The distinction is a clear one as to an agreement between defendant and the Wards, concerning their respective rights and obligations, inter sese, and an agreement between defendant and all the bondholders The Wards did not represent all bondholders, and could bind only those whom they did represent.

When they induced and endorsed the plan, they purposely caused it, unlike the funding agreement of 1875, not to depend, so far as they were concerned, on the assent of eighty per cent or of any specified number of bondholders. The vice of the argument, it seems to me, springs from a failure to observe the broad distinction mentioned.

Other bondholders did not enter into a specific agreement, oral or otherwise, to postpone full payment of their coupons, and hence, as to them, the doctrine of license or dispensation may have some force. When they become promoters of a suit, that question will arise and may have to be determined, for this suit is not based "on the option" of plaintiff as trustee, but on the request of the prescribed one-eighth of the bondholders.

But if the statute of frauds could be invoked, it would not apply, because: 1. The deferred payment was not necessarily for two years, but as the Wards compelled it to be made, viz., for an indefinite time, with leave to defendant to resume in full within one year. McPherson v. Cox, 96 U. S. 404; Walker v. Johnson, Id. 424. 2. There was assent in writing by S. G. Ward to the written circular of the defendant, as evidenced by his circular and many letters. There was a printed proposal by defendant, and a printed and published endorsement and assent by S. G. Ward, which would affect the interests represented by him.

If the statute of frauds, however, were applicable, the defence is complete on the ground of equitable estoppel; and all the elements of which appear from the foregoing statement of facts

This suit is based on the consolidated mortgage, and at the time it was brought only one set of coupons, that of April, 1877, had matured. If a foreclosure were to be decreed it could be only for the amount of the default in such payment. What may have been the rights of the plaintiff (the trust company), if any, as to taking possession, etc., on breach of covenant to keep down prior incumbrances, such a breach cannot be ground for an independent suit for foreclosure under the consolidated mortgage; for the foreclosure would still leave outstanding all prior mortgages, which are respectively on separate divisions of the road and not on the whole road. Under those prior mortgages, there would have to be distinct suits as to each division, no one division being bound for a mortgage on another. The plaintiff in this suit is in no sense the assignee of the other mortgagees, nor has he been in any manner subrogated to their rights. And even if he were, he could not consolidate such rights, and bring one suit on all of the divisional mortgages against the whole road, instead of separate suits against each division. The plaintiff did not pay the coupons on the divisional mortgages, nor, as trustee under the consolidated mortgage, had he power to do so. A failure to pay coupons on the divisional mortgages did not vest the trustee under the consolidated mortgage with a right to foreclose under the divisional mortgages. If no such right exists, then the basis of this suit was solely the non-payment in full of the April coupons on the consolidated mortgage and non-compliance with mortgage covenants. Payment of one-half of the coupons under the consolidated mortgage was tendered and refused.

The plaintiff is in no better position under the present than under the former bill. The court should therefore eliminate from the case all other grounds of default; for parties in interest under the divisional mortgages are not here complaining. Looking, then, solely to that alleged default, and to what occurred in October, 1876, between the Wards and the defendant, and to the other evident fact that, omitting the Wards, the required one-eighth have not promoted this suit, it must be decided whether the relief asked can be granted according to equitable rules. This is not a controversy between the Barings (or Wards) and Allen and Marquand; but a suit between the trustee and the defendant corporation. There are larger interests at stake than are represented by those persons as private individuals. The directors of the defendant are trustees of the stockholders, all of whose rights are sought to be destroyed. If the right to foreclose exists, it must be enforced, even if so disastrous a result follows. But a court of equity should, when such a catastrophe is probable, and perhaps unnecessary, investigate most rigidly the grounds on which the alleged right is based, so that the enforcement of a pretended equitable right may not be productive of gross inequity.

Whatever view may be taken concerning

the October plan and the course pursued thereunder, without objection and with the full assent, at least, of the Wards, their conduct in April involved, among other inequitable results, extreme injustice towards the holders of divisional coupons. The latter had a prior right to payment in full, but had been induced to forego that right for a time. Until full payment to them, in strict law there should have been no payment on the consolidated coupons. But when they had been induced—say, at the instance of the Wards—to postpone the assertion of their full rights, and the time had come, in April, 1877, when the consolidated coupons could be presented for payment for the first time, is it not clear that if the demand of the Wards had been acceded to, and full payment made, an unjust and inequitable advantage would have been granted? Suppose the arrangement had never been made, and yet only half payment had on the divisional coupons —and then suppose the holders of those coupons were lulled to sleep by a vague understanding or a positive statement that no more could be paid, consistently with the interests of all concerned—and then suppose the holders of the consolidated coupons in April demanded full payment of their coupons—what would, in strict justice, have been the duty of the defendant, if it had not ample funds to meet all of its bonded requirements? Should it not have replied that, before you are paid anything, we must pay in full the other and prior sets of coupons? If, on the other hand, it had acceded to the request of the Wards, would it not have enabled them to secure full payment at the expense of others, prior in right? If the defendant is unable to stagger, as is urged, under its bonded indebtedness and accruing interest, where were the fairness and honesty of absorbing its assets in the payment of interest on the last in right, and leaving the other, prior in right, unsatisfied? Certainly, it could not have been a part of the October plan to have such injustice wrought? If so, it fraudulently concealed such plan from the unsuspecting holders of divisional bonds, and the party thereto would be estopped, even under the narrowest rules on the subject.

The case, however, is one where the defendant was induced, by the persistent course of the promovents, to adopt a plan of action, in the pursuit of which it became unable to meet the changed course they required. They now seek to escape from their promises, and take advantage of what they caused to be done, to the probable ruin of the defendant corporation, and, possibly, the divisional interests.

There are many minor questions presented in the arguments which it is unnecessary to comment upon.

What was reasonable notice that the October agreement was at an end? Was it to demand full payment on the consolidated mortgage when the April coupons fell due in 1877, on the very day when they fell due, although bondholders prior in right had by the promovents been induced to accept half payments? If no such practical fraud was permissible, how do these promovents better their standing by dismissing their original bill, and, when further payments on the divisional mortgages had not been made, and no further payment on the consolidated was due, by proceeding de novo, on the ground that only half payments were made under the divisional mortgages, etc.?

Is the basis of the new right the demand in April for full payments of the sums due under the consolidated mortgage? That demand was not then enforceable. Since then, and prior to the filing of this bill, no interest had fallen due under that mortgage. But interest had fallen due under the divisional mortgages, and the covenants in the consolidated mortgage required that interest to be kept down. The failure to keep down that interest would, of course, have been a breach of the mortgage covenants, unless waived. Was it not waived under the facts in evidence?

It is not my purpose to go further into details. It seems to me that, under the recognized doctrine of equitable estoppel, this action cannot be maintained. If different views obtain, the practical workings of this suit under a decree, looking to all the legal and equitable rights involved, will only wreck the defendant, to the destruction of interests resting on the consolidated mortgage, and possibly the divisional mortgages. Well might this plaintiff, as trustee under the consolidated mortgage, shrink from instituting this suit, on its own motion, and base its conduct on the request of the enumerated one-eighth in interest. True, courts do not fail to enforce the clear rights of parties because the course sought might not be the most prudent for them; but when the larger interests of many persons are involved in the fate of a common enterprise, they should carefully ascertain what are the rights of the contestants, and not decree forfeitures against the equities of the case, to the unnecessary destruction of interests not represented.

The value of the defendant's enterprise evidently rests, to a large extent, upon the consolidation of the various parts or divisions.

That I may be clearly understood, let it be borne in mind that, despite the arrangement in 1876, the bill filed in April, 1877, proceeded on the ground that only half interest had been paid on the divisional coupons, and only half tendered on the April coupons under the consolidated mortgage. The parties to the divisional mortgages had made no complaint, and were not before the court complaining of what had not been done at the instance of their promovents. Hence, the doctrine of waiver applies to them. As,

stated in the opinion of my brother judge, it was doubtful if these promovents could have maintained the bill filed in April (and I doubt not that it could not have been maintained)—how, then, is their position improved under this bill? The promovents had, in April, 1877, instituted proceedings for foreclosure on the ground of only half payments on divisional coupons, and, substantially, on consolidated coupons due in April; consequently, the defendant was, by such suit, put in the embarrassing condition to pay thereafter, in violation of the understanding, no coupon falling due until the litigation was ended, or of paying half interest according to the understanding, or of paying full interest. It stood still, waiting the action and orders of the court.

After this new suit, it did pay the half interest without waiting for the orders of the court; thus preserving its original status or rights under the agreement of 1876. If the relationship of the parties under the divisional mortgages and the consolidated mortgage are observed (the former waiving or not complaining), then the action of these promovents under the latter mortgage, seeking mainly, from non-payment of divisional coupons, to enforce their subsequent mortgage, we will have a clearer view of the supposed equities on which this bill is based. True, it was important to the bondholders under the consolidated mortgage that the interest on the divisional mortgages should be paid at maturity; and it is equally true that to give value to the former, under this uncompleted enterprise, the payment in full under the latter should be delayed. Where that delay was caused by the former (so far as these promovents are concerned), for their special benefit, why should they be heard to assert in a court of equity that what was done at their special instance and request, for their alleged benefit, gave them a right to take advantage of their own wrong, to the destruction, it may be, not of the interests of the stockholders alone, but also of the holders of other bonds. I refrain from amplifying further. My opinion is that the bill should be dismissed.

Interlocutory decree.

NOTE. The following decree was entered, in accordance with the opinion of the circuit judge:

"It is found that the equities in this case are with the complainant, and that the defendant is in default of the interest coupons upon the bonds secured by the consolidated mortgage described in the bill, which coupons matured and fell due on the 1st of April, 1877, and that the complainant is entitled to recover the amount thereof.

"And it is further adjudged and decreed that it be referred to a master, to inquire, compute, and report to the court what amount is due and unpaid on such of said coupons as matured on the 1st day of April, A. D. 1877.

"And it is further ordered that said master do compute and report to the court what amount is due and unpaid on such of said coupons as shall have matured after the 1st day of April, 1877, and which remain unpaid to the date of the filing of the report of said master; and that the said master, in computing the amounts of such coupons as aforesaid, do separately compute the amounts of all such of said coupons, if any, whereof the ownership or the title thereto may be contested before him; also that the said master ascertain and report what persons were, at the date of filing said bill, and also what persons now are, the bona fide holders and owners of all outstanding bonds claimed to be secured by said consolidated mortgage, and that the complainant have leave to contest before the master the right of any person claiming to be a bona fide holder of any of such bonds.

"And it is further ordered that any person who may be a bona fide holder and entitled to any of the bonds or coupons secured by said consolidated mortgage, be permitted to intervene and contest before the master any claim of any other person to be the bona fide holder of any of such bonds or coupons claimed to be outstanding, and that the master take proof and report as to the ownership of any bonds so contested before him, and also as to the ownership of any coupons which may be or may have been attached to any of said bonds secured, or claimed to be secured, by said consolidated mortgage, of which coupons the ownership may be contested before him. And for the better discovery of the matters aforesaid, the parties are to produce before the said master, upon oath, all deeds, books, papers, and writings in their custody or power relating thereto, and are to be examined, etc., as the said master shall direct.

"And the consideration of all further questions in the cause is reserved; and it is further ordered that the complainant shall be at liberty to apply to this court, or to either of the judges at chambers, at any time as it may be advised, for any further order in the premises."

The cause was soon afterwards settled by the parties, and the bill voluntarily dismissed by the complainant.

UNIT, The. See Cases Nos. 2,748, 2,752, and 2,753.

Case No. 14,404.

UNITED HYDRAULIC COTTON-PRESS CO. v. The ALEXANDER McNEIL.

[20 Int. Rev. Rec. 175.]

District Court, D. Georgia. Aug. Term, 1874.

MARITIME LIENS—COMPRESSING COTTON—STORAGE—BOARD OF SAILORS—MONEY ADVANCED—MORTGAGE.

1. The bark Alexander McNeil, owned by a citizen of New York travelling in a foreign country, was libelled by various claimants for expenses incurred by her master and her consignee in the port of Savannah. Schuchardt and Sons, of New York, intervened in all of these suits, and claimed the proceeds of the vessel's condemnation by virtue of a mortgage of $30,000 they held against her. *Held*, that the claims for the compressing of cotton and for its storage upon the vessel were not in the nature of maritime service, and could not be enforced by a suit in rem.

2. The liens for wharfage and dockage, and for the board, as well as for the wages, of the marines employed on the vessel, were the subjects of a maritime lien, the subsistence of the marines being held to be, if not synonymous with wages, at least the complement of wages, and as such entitled to protection.

3. A loan lawfully made to supply wants or necessities of the vessel and upon her credit alone is enforceable by a suit in rem, even though after the advancement of the money the master squanders it, the lender not being responsible for any abuse or misappropriation of the fund.

4. The mortgagees are entitled to the surplus remaining in the registry, after the payment of

all the costs arising out of the subject-matter of the several libels filed, and after all the claims superior in dignity have been paid and discharged.

In admiralty.

Mr. Guerard, for libellant.

Jackson, Lawton & Basinger, contra.

ERSKINE, District Judge. The libel states that the bark is owned in New York, and hails from that port; that the master of the bark employed libellant to compress bales of cotton with which she was to be loaded; that the master agreed to pay said libellant sixty cents per bale for compressing the cotton, and twelve and a half cents per band for the extra bands required upon the cotton; that libellant did compress 1,547 bales, and placed 1,114 extra bands on the cotton, and it is now on said bark; that there is now due libellant $1,067.45, etc. After the sale of the bark, by order of this court, libellant filed an amendment to his original libel, alleging that libellant was a wharfinger at the port of Savannah; that the bark lay at the wharf of said libellant for sixty-four days, for which there is due $83.25, and claims a lien upon the bark, her tackle, etc. Schuchardt and Sons, of New York, intervened, and claimed a lien as mortgagee on the bark, etc., as in the other libels filed against the bark and now pending in this court. Proof was made showing that libellant had pressed the said cotton and placed the extra bands upon the bales; the charge for wharfage was also proved to be correct.

I have considered the subject-matter of the original libel with care, but I cannot amplify remedies so far as to entertain this case. The compressing of cotton is mere shore business, performed in cotton presses on land, the sole object being to prepare and fit it for more convenient carriage and stowage. It is not a maritime service and is not suable in rem.

As to the amended libel for wharfage upon the bark Alexander McNeil, of New York, in the state of New York. A lien for wharfage or dockage is somewhat analogous to the lien of material-men which, in this country, is held to be given by general maritime law and to be enforced without regard to possession, and has a priority over express or implied hypothecation. The master and owner of the ship, and the ship herself, or the proceeds arising from her sale by order of a court of admiralty, may be proceeded against in admiralty to enforce the payment of wharfage, dockage, or pierage, whether the vessel lie alongside the wharf or at a distance, and only use the wharf temporarily for boats or cargo.

It is, therefore, adjudged and decreed that the clerk do pay from the proceeds of the sale of the bark in the registry, to libellant $83.25, with interest from the date of the filing of the amended libel, with costs to be taxed by the court.

Case No. 14,405.

UNITED NICKEL CO. et al. v. AMERICAN NICKEL-PLATING WORKS et al.

[4 Ban. & A. 74.] [1]

Circuit Court, D. Massachusetts. Dec., 1878.

PATENTS—ASSIGNMENT—"INVENTION"—IMPROVEMENTS.

1. The word "invention" used in a contract for the assignment of a patent therein recited, and to which it refers, includes only the invention described in the patent to be assigned, and reissues and extensions thereof; it cannot be held to cover other improvements in the same art, although the patent to be assigned would be worthless without them.

2. The question of license under particular circumstances, considered.

In equity.

T. W. Clarke, for complainants.

Benjamin F. Butler and D. H. Rice, for defendants.

LOWELL, Circuit Judge. This bill is brought under two patents taken out by Isaac Adams, Jr., and assigned to the plaintiffs; one is dated August 3d, 1869, No. 93,157, and the other May 10th, 1870, No. 102,748. These patents are for a process, and an anode to improve the art of electroplating with nickel, and have been adjudged valid in two suits brought in this court by this plaintiff corporation, reported United Nickel Co. v. Anthens [Case No. 14,406]; United Nickel Co. v. Keith [Id. 14,408]. The validity and title are admitted, but the defendants maintain that, in equity, they are licensed or authorized to use the invention. A great body of evidence appears in the record, too much of which is hearsay, and otherwise inadmissible. I have, however, carefully read the whole of it.

Isaac Adams, Jr., the plaintiffs' assignor, has taken out several patents connected with the art of plating with nickel. The first was No. 57,271, dated August 21st, 1866, which is said to be the earliest patent on this subject. In the specification, Adams declares that he has invented an improvement in coating metals with [nickel], and that his principal object is to protect gas-tips or burners from oxidation. It is well known, he says, that the action of flame upon common gas burners soon impairs their orifices by oxidation, and that he has discovered that by coating their surfaces with a thin deposit of nickel, the heat and flame will have no detrimental effect upon the tips. "From the cheapness and ease of the application of nickel," he adds, "by electroplating or otherwise, and the protection which the coating imparts, it will be obvious that this invention is of great practical utility." He claims "rendering gas-tips and other similar articles anti-corrosive to heat or moisture, by surfacing them with nickel, substantially as set forth."

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

No process of plating is described or set forth in this patent, and it appears that plating with nickel, though it could be accomplished, was by no means the easy thing which the patentee assumed it to be, and that he himself, in the inventions for which he obtained the later patents now sued on, produced a process much more satisfactory than any which had preceded it, and indeed rendered the art commercially valuable for the first time.

Before these patents were applied for, one Cook, in making inquiries upon the subject, discovered that the Adams patent of 1866 was the earliest upon the subject, and he appears to have thought, and to have been advised, that, if he could obtain the title to this patent, he could control and subordinate all future improvements or patents for plating with nickel. Cook, who was a ship master, intended at first to apply the invention only to ships, and Adams gave him a license or assignment, for that purpose, without charge. He afterwards thought to acquire the whole patent, and, with this object in view, he obtained from Adams a contract under seal, dated December 5th, 1868, reciting the patent of 1866, and the assignment for use on ships, in which Adams agreed to convey to Cook all his remaining right, title and interest in said invention at any time on or before March 1st, 1869, upon payment of $5,000.

Cook proceeded to procure the money in order to complete the purchase of this patent, and to put it into the hands of a company at a valuation of half a million dollars. In the course of the inquiries and investigations of Cook and his friends, Adams appears to have discovered what their hopes were, and when the time came for conveying the patent, his counsel, on his behalf, informed them publicly and emphatically that Adams did not consider the patent to be of much value or to be a controlling patent, and that it did not carry with it, and that Adams did not intend to convey to Cook and his assigns, the process or processes which he had, in his own mind, wholly or partly worked out; but, on the contrary, that he had agreed to sell them to other persons. Cook and his friends insisted on taking the conveyance, and, after they had taken it in the simple form of an assignment of the patent, they notify Adams that, in their opinion he had not fully complied with his contract, and that they should try to obtain what they thought themselves entitled to, namely, some invention not included in the patent of 1866, but included in the contract, as they maintained. They have brought no action for damages, nor any suit for specific performance for the insufficient fulfillment of the contract. They organized the American Nickel-Plating Company with the intended capital, and that company took from Cook an assignment of the patent of 1866. The United Nickel Company, which is the principal plaintiff here, was organized to take, use and sell the processes and patents to be issued afterwards. In June, 1869, immediately after the latter company was organized, the two companies arranged their disputes, and the American Company assigned the patent of 1866 to the plaintiff company, receiving in return a large number of its shares; so that the plaintiff company appears to own all three of Adams' patents. But the defendants allege that the compromise, above mentioned, and the assignment to the plaintiff company of the patent of 1866, were not duly voted and passed in accordance with the laws of New York concerning corporations. In 1875, acting on this assumption, the American Company granted a license under that patent, which license the defendants hold, and in 1876 they procured a conveyance from Cook of the "invention" which they assumed him to hold or to have the right to acquire as the residue of the contract with Adams, of December, 1868, and at once granted to the defendants a license to use this "invention."

The defendants, therefore, contend that Cook equitably owns some invention besides the patent of 1866, because his contract contains the word "invention," and the patent really contains, as they say, no invention at all, or none of any value, and certainly none worth $5,000; and since Adams has made inventions which would render that patent valuable if united with it, he is equitably bound to convey them to Cook and his assigns; that they are his assigns; and that equity will hold that to be done which ought to be done, and, therefore, they may successfully defend this suit as the equitable owners of these inventions.

This somewhat artificial structure wants a foundation. The contract of Adams with Cook, made in December, 1868, is in a usual form, promising to convey to him the patent of 1866 and the invention therein patented, and nothing more. If there was no invention described in that patent, none was to be conveyed. The word "invention" was made use of in order to include reissues and extensions, in accordance with a practice which has grown out of certain familiar decisions of the courts. There was no fraud perpetrated on Cook or his assigns, because this, which is the true construction of the contract, was pointed out and insisted on by Adams before the deed was delivered. There is no ground whatever, of law or fact, for holding that Cook was ever entitled in law or equity, by estoppel or otherwise, to the inventions for which the patents in suit were taken out by Adams in 1869 and 1870. This fundamental defect renders the other links of the chain of defence useless, and their validity will not be considered. Decree for the complainants for an injunction and an account.

[For other cases involving these patents, see note to Case No. 14,406.]

Case No. 14,406.

UNITED NICKEL CO. v. ANTHES.

[1 Holmes, 155; 5 Fish. Pat. Cas. 517; 1 O. G. 578; Merw. Pat. Inv. 672.] [1]

Circuit Court, D. Massachusetts. May 6, 1872.

PATENTS—NOVELTY—ABANDONED EXPERIMENTS—NICKEL PLATING.

1. Abandoned experiments, however suggestive, producing no practical and useful result, do not affect the validity of a subsequent patent to an original inventor.

[Cited in United Nickel Co. v. Pendleton, 15 Fed. 740; Hood v. Boston Car-Spring Co., 21 Fed. 69.]

2. The patents granted Isaac Adams, Jr., for improvements in the electro-deposition of nickel, dated Aug. 3, 1869, and May 10, 1870, *held* valid.

[Followed in United Nickel Co. v. Keith, Case No. 14,408. Approved in United Nickel Co. v. Harris, Id. 14,407.]

[Final hearing on pleadings and proofs. Suit brought upon letters patent [Nos. 93,157, 102,748, and 113,612] for "improvements in the electro-deposition of nickel," granted to Isaac Adams, Jr., August 3, 1869, May 10, 1870, and April 11, 1871. The difficulties attending the previous processes by which the electro-deposition of nickel had been attempted, are stated in the opinion. The description of the method by which the patentee prepares the solution from which the nickel is deposited is too lengthy to admit of quotation.] [2]

James B. Robb, for complainant.

R. Lund and L. R. Batchelder, for defendant.

SHEPLEY, Circuit Judge. The complainant corporation is the owner, by assignment from the patentee, of letters-patent granted to Isaac Adams, Jr., dated respectively Aug. 3, 1869, May 10, 1870, and April 11, 1871, for discoveries and improvements made by him in the electro-deposition of nickel.

Before the date of the experiments of Dr. Adams, the electro-deposition of nickel was as well known as that of other metals. Chemists and lecturers in scientific schools and experimenters in metallurgy had practically demonstrated that many different solutions could be made to yield a simple deposit of nickel. In experiments made to determine the value of electrolysis as a method of analysis, and to determine the laws of electro-chemistry which govern its reduction, and especially in experimental attempts to utilize it as a plating or coating for other metals, the electro-deposition of nickel had been made out of solutions of several of its salts. The object of those who were experimenting in the attempts to utilize this metal as a coating for other metals for practical uses appears to have been to discover a mode by which this metal could be deposited by the battery, readily, uniformly, and especially as continuously, as copper, silver, and gold, were deposited by the processes well known and in common use in the application of electro-metallurgy to the useful arts.

While it was well known that nickel possessed certain qualities which would render it of great value in the arts if it could be deposited thus readily, uniformly, and continuously by the battery, the practical difficulties, which had never been overcome, had prevented it from being used, except to a very limited extent and under very unfavorable conditions, as to the cost and the quality of the work, in the useful arts. One of these difficulties is, stated in the edition of 1867 of the "Manual of Electro-Metallurgy," by James Napier, as follows: "The great difficulty experienced is to obtain a positive electrode; the metal is very difficult to fuse, and so brittle, that we have never been able to obtain a plate or a sheet of it. Could this difficulty be overcome, the application of nickel to the coating of other metals would be extensive; and the property of not being liable to tarnish would make it eminently useful for all general purposes."

The evidence in the record, however, shows that the difficulties in the way of the practical electro-deposition of nickel were not confined to the positive electrode, but were also inherent in the character of the solutions of the salts of the metal which were employed. Different solutions of nickel salts, when subjected to the action of a galvanic current, were found to behave in very different ways: some of them depositing a mixture of reguline metal and secondary products; others depositing only an oxide, a sub-salt, or some secondary product, without any metal. Some solutions did not dissolve the anode, while others dissolved it so imperfectly, that, by use, the solution grew gradually weaker in metal. And these difficulties were not only inherent in the character of the solutions themselves, but in other cases were due to the presence of foreign elements, or the temperature or density of the solutions, or to the density of the current employed.

The patentee claims to have discovered the causes of all these difficulties, and a practical process, by which all these difficulties are obviated, so as to fulfil all the required conditions of electro-plating with nickel, so that the anode will supply the solution with nickel as fast as it is deposited, maintaining a uniform density in the solution, and so that the solution itself shall yield an amount of metal exactly or substantially equivalent to the amount of battery-power expended, and deposit the metal uniformly and continuously, so that the coating of nickel shall be compact, coherent, and tenacious.

The difficulties attending the practical de-

[1] [Reported by Jabez S. Holmes, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 1 Holmes, 155, and the statement is from 5 Fish. Pat. Cas. 517. Merw. Pat. Inv. 672, contains only a partial report.]

[2] [From 5 Fish. Pat. Cas. 517.]

position of the metal, and the nature of his improvements, are well described by the patentee in his several patents. They relate to the method of preparing the solutions, to the method of preparing nickel plates for the anode of the depositing cell, and to the properties and condition and character of the deposit itself.

In the patent of Aug. 3, 1869, the patentee claims: "1. The electro-deposition of nickel by means of a solution of the double sul phate of nickel and ammonia, or a solution of the double chloride of nickel and ammonium, prepared and used in such a manner as to be free from the presence of potash, soda, alumina, lime, or nitric acid, or from any acid or alkaline reaction. 2. The use, for the anode of a depositing cell, of nickel combined with iron, to prevent the copper and arsenic, which may be present, from being deposited with the nickel, or from injuring the solution. 3. The described methods for preparing the solution of the double sulphate of nickel and ammonia, and the double chloride of nickel and ammonium. 4. The electro-plating of metals with a coating of compact, coherent, tenacious, flexible nickel, of sufficient thickness to protect the metal upon which the deposit is made from the action of corrosive agents with which the article may be brought in contact. 5. The deposition of electrotype-plates of nickel, to be removed from the surface on which the deposit is made, and to be used separately therefrom."

In the patent of May 10, 1870, the patentee claims: "1. The combination with nickel to be used for anodes of a metal or metalloid, electro-negative to the nickel in the solution employed. 2. A nickel anode, combined with carbon, and cast in the required form."

The patent of April 11, 1871, claims: "A cast nickel anode as a new article of manufacture." All these claims are contended by the complainant to have been infringed by the defendant, except the fifth claim in the patent of Aug. 3, 1869.

The defendant, to prove that Adams was not the original and first inventor of the things patented to him, relies in his answer upon the following published works: Schubarth's "Chemistry," published in 1835; Gove's "Theory and Practice of Electro-Deposition," published in 1860; "The Chemical News," of Sept. 6, 1862. In an amendment to the answer, he also relies upon Brande's "Manual of Chemistry," published in London in 1848.

The passages referred to in Schubarth contain no allusion to the electro-deposition of nickel. The processes described on page 60, § 118, of Gove's "Theory and Practice of Electro-Deposition," are clearly proved, by the uncontradicted testimony of experts, not only to be dissimiliar to the processes described in the patent, but to be practically useless for the continuous deposition of nickel. Four different solutions are mentioned: the first, the nitrate of nickel solution, is demonstrated by experiment to be useless; and the three other solutions are proved, by reason of their alkalinity, to be practically useless for the purpose of the useful arts, as not properly dissolving the anode, and affording a uniform deposition or a continuous process.

The process described in the "Chemical News and Journal of Physical Science," No. 144, p. 126, is obviously a different process from the process described in the patent. This process does not contemplate the use of an anode to keep the solution in its normal state of density or concentration. It describes two methods of keeping up the density of the solution, and maintaining the uniformity of concentration. These methods of supplying the solution are by means of the oxide of nickel or the salt of nickel, placed at the bottom of the depositing cell. The difficulties attending these modes of supplying the waste in the solution are fully explained in the testimony of the experts in the case. It is sufficient for this case, however, to remark, that the processes are obviously inferior to and different from the process of the patentee, and do not anticipate his invention. Brande's "Manual of Chemistry" does not describe any mode of electro-deposition of nickel. Two methods are described of making the sulphate of nickel, neither of them, according to the proofs, capable of producing a salt free from acidity or impurity.

These are the only published works referred to by the defendant in his answer, and there is nothing in them to invalidate the complainant's patents for want of novelty. The other published works referred to in the evidence for defendant do not describe any process of depositing the metal from a solution by means of electricity, excepting in the case of Smee's "Elements of Electro-Metallurgy," and "The Contributions to Chemistry" by Professor Gibbs, both of which refer rather to processes by which nickel can be electrolyzed out of a solution; but neither of them names a solution, or describes a process, which would meet the requirements and afford the conditions of, a process for practical use in the art of electro-plating other metals with nickel.

The testimony of Professor Sharples, relied upon by the defendant, only proves the use by him of the process and solution described by Professor Gibbs in his paper before referred to, called "Contributions to Chemistry." He testifies that his solution was different from the one described in the patent, and different from the one used by the defendant. The evidence in the record incontestably proves that the art of electro-plating of metals, or the electro-deposition of one metal upon the surface of another, was old and well known. The mere electrolysis of nickel out of a salt of that metal was well known to chemists and metallurgists.

A solution of the double sulphate of nickel and ammonia does not appear to have been unknown to experimenters in making experiments in electrolysis for the purposes of analysis. So the fusibility of nickel at a high temperature was known; and that fusion of nickel may have been, and probably was, conducted accidentally, and without any design, and without any reference to any useful result, under such conditions as might, and perhaps did, leave an admixture of carbon and iron.

But it proves as incontestably that, prior to the discoveries of the patentee, the electro-deposition of nickel by means of such solutions as are described in the complainant's patent, prepared and used in the described manner, so as to be free from foreign substances, and acid or alkaline reactions, which would interfere with the uniform, continuous, and coherent deposition of the metal, was unknown in any practical application of it to the useful art of electroplating metals with nickel. It is equally clear that the use of such an anode as the patents describe, cast from the commercial nickel in the desired form, and combined with carbon and a metal or metalloid electronegative to the solution employed, was first successfully and practically made by him. The evidence of Remington shows an experiment with a cast-nickel anode; and we may perhaps reasonably conclude, from the conditions under which that experiment was made, that the product of the casting was a carbide of nickel; but if such was the result, it was one apparently not designed, appreciated, or discovered. The experiments of Remington with a cast-nickel anode appear to have been suggested by the discoveries of the patentee, and to have been unsuccessful and abandoned experiments. However suggestive the experiments of others may have been in electro-deposition of nickel from different solutions, or in the mere casting of nickel, they cannot be made available to defeat a patent granted to one who, after all other experimenters had failed to secure a practical and useful result, beneficial to the community and a valuable contribution to the useful arts, first succeeded so as to be able to disclose to the public a practically useful and successful process, by him first brought to perfection and first made capable of useful application.

The evidence of infringement is found in the defendant's admission that his process was the same as that of the Boston Nickel-Plating Company, which was the process described in the patents carried on by the company as licensees under the complainant. It is apparent, from the testimony of Professor Sharples, that the solutions used by the defendant, and from the admission of the defendant himself, that the anodes used by him were substantially the solutions and anodes described in the patent.

As it is clear that the defendant has infringed the patents of Aug. 3, 1869, and May 10, 1870, both of which under the true construction of their claims, the court considers to be good and valid patents; it is not necessary in this case that the court should decide whether the patent of April 11, 1871, is, or is not, defective, although the impression of the court is, that as one process of casting is given by reference to a former patent, the patent itself may be maintained, if the evidence of the previous state of the art should correspond with the statements and claims of the patent. The decree and injunction in this case will therefore have reference to the patents of Aug. 3, 1869, and May 10, 1870.

Decree for account as prayed in the bill; injunction to be made perpetual as to the patents of Aug. 3, 1869, and May 10, 1870.

[NOTE. For other cases involving this patent, see United Nickel Co. v. Keith, Case No. 14,408; United Nickel Co. v. Manhattan Brass Co., Id. 14,410; United Nickel Co. v. Harris, Id. 14,407; United Nickel Co. v. Melchior, 17 Fed. 340; United Nickel Co. v. Pendleton, 15 Fed. 739; United Nickel Co. v. California Electrical Works, 25 Fed. 475.]

Case No. 14,407.

UNITED NICKEL CO. v. HARRIS et al.

[15 Blatchf. 319; 3 Ban. & A. 627; 17 O. G. 325.] [1]

Circuit Court, S. D. New York. Oct. 30, 1878.

PATENTS—NICKEL PLATING—CLAIMS—SOLUTIONS.

1. The letters patent granted to Isaac Adams, Jr., August 3, 1869, for an "improvement in the electro deposition of nickel," are valid, the first, third and fourth claims of the patent being: "(1) The electro deposition of nickel by means of a solution of the double sulphate of nickel and ammonia, or a solution of the double chloride of nickel and ammonium, prepared and used in such a manner as to be free from the presence of potash, soda, alumina, lime or nitric acid, or from any acid or alkaline reaction." "(3) The methods herein described, for preparing the solution of the double sulphate of nickel and ammonia, and the double chloride of nickel and ammonium. (4) The electroplating of metals with a coating of compact, coherent, tenacious, flexible nickel, of sufficient thickness to protect the metal upon which the deposit is made from the action of corrosive agents with which the article may be brought in contact."

[Cited in United Nickel Co. v. Pendleton, 15 Fed. 740.]

2. The first claim is a claim to the electro deposition of nickel by means of any solution of the double sulphate of nickel and ammonia, or of any solution of the double chloride of nickel and ammonium, however such solution may be prepared, provided such solution is so used as to be free, while the electro deposition of the nickel is going on, from the presence of potash, soda, alumina, lime or nitric acid, or from any acid or alkaline reaction.

3. Although a sulphate or a chloride of potash or soda may be introduced into a solution of the double sulphate of nickel and ammonia, or into a solution of the double chloride of nickel and am-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 3 Ban. & A. 627, and here republished by permission.]

monium, yet, if the solution is so used, in the electro deposition of nickel, that the sulphate or the chloride will not be decomposed, the first claim is infringed.

4. The fourth claim is a claim to the product or coating named in it, having the qualities described in it, when such product or coating is produced by employing the invention covered by the first claim.

[This was a bill in equity by the United Nickel Company against George J. Harris and Edward Weston.]

Dickerson & Beaman, for plaintiff.

Frost & Coe and Charles F. Blake, for defendants.

BLATCHFORD, Circuit Judge. This suit is brought on two patents granted to Isaac Adams, Jr., one on the 3d of August, 1869 [No. 93,157], and the other on the 10th of May, 1870 [No. 102,748], each for an "improvement in the electro deposition of nickel." In the proofs, no evidence is given as to any infringement of the patent of 1870. The case rests on the patent of 1869 alone. The specification says: "It has long been well known that nickel possesses certain qualities which would render it of great value in the arts, if it could be readily and surely deposited by the battery in such a manner as to make those qualities available. These qualities are, first, its infusibility; second, its color, which is nearly that of silver; third, its hardness, which is nearly equal to that of steel, and by reason of which it resists wear and abrasion to a much greater degree than silver; fourth, its power of resisting oxidation and the tarnishing and corrosive effects of many gases and liquids. The two last named qualities render it, for many purposes, greatly superior to silver, which it much resembles in appearance, for electroplating other metals, and for making articles of solid metal. To these advantages should be added its cheapness, as compared with silver. It has long been known that nickel could be deposited from certain solutions by electricity, but the character of the deposits has been such that the valuable qualities of the metal could not be secured to such an extent as to render it practically useful for general purposes. The difficulties in the way of its deposition have arisen mainly from the character of the solutions employed, and the nature of the nickel used for anodes in the depositing cell. I have discovered the causes of certain difficulties in the practical deposition of this metal, and am able to remove them, and to point out methods of preparing solutions, and the conditions which they must satisfy, and under which they must be used, so that solid, coherent, tenacious and flexible nickel can be deposited to any desired amount. I can thus render the electrodeposition of nickel practically valuable, not only for electroplating other metals, but for that branch of the art of electrodeposition known as electrotyping, that is, the deposition of nickel upon a surface, not to remain upon it as a permanent coating, but to be removed and used independently of it. My improvements relate, first, to the method of preparing certain solutions from which the nickel is to be deposited, and to the properties and conditions which such solutions must possess; second, to a method of preparing nickel plates for the anodes of the depositing cell; third, to the character of the deposits obtained. In order to explain fully the nature of my invention, it is necessary to refer to certain facts relating to the electro-deposition of metals generally, which have been long known. It is well known that metals are deposited in three conditions, viz., first, as a black powder; second, in a state called reguline metal, that is, in a condition which exhibits the ordinary qualities of the metal; third, in a hard, crystalline condition. For most purposes in the arts, it is necessary that the metals should be deposited in the reguline state, the applications which are made of the powdery or crystalline deposits being very few. There are two applications of the art of electro-deposition which are usually recognized as two distinct branches of the art, and which embrace nearly all its practical uses. One is called electroplating, and consists in depositing a coating of one metal upon another metal, to remain upon it as a permanent coating. The other application is called electrotyping, and consists in depositing one metal upon another, or upon a prepared surface of some other substance, from which it is to be removed, to be used separately from the surface upon which the deposit is made. For each of these purposes the metal must be deposited in the reguline state. It has long been known that the metals differ greatly in the facility with which they can be deposited by the electric current, especially in the reguline form. So, also, different solutions of the same metal differ greatly in respect to the deposits which may be obtained from them. With some solutions it is difficult, if not impossible, to obtain a deposit of reguline metal under any circumstances. The difficulty seems, in some cases, to be inherent in the character of the solution itself. In other cases, it is due to the presence of foreign elements, or to the density or temperature of the solution, or to the density of the current employed. Different solutions also differ greatly in the amount of metal which can be deposited with a given strength of current. Some solutions give a deposit of metal which is the full chemical equivalent of the electricity passing through the solution, while others fall far below it. Solutions also differ within wide limits in respect to the intensity and density of the current required to give a reguline deposit. The differences in solutions, in these respects, are of great importance with reference to the cost of depositing the metals. The higher the intensity required to effect

the deposition of the metal, the greater the cost; and it is obvious that the cost of the deposit will increase in proportion as it falls short of the full amount due to the electricity passing through the solution. Another circumstance is of great importance in the depositing of metals. It often happens that a thin film may be obtained of one metal upon another, but that the process of deposition cannot be carried on to such an extent as to obtain a coating of any appreciable thickness. As soon as the metal to be coated has received a mere film, the conditions are so changed that the deposit is practically stopped. A characteristic of this filmy deposit is, that, though the particles of the metal adhere separately to the metal on which the deposit is made, the deposit is so thin that the particles of the deposit have no such coherence among themselves as will allow the deposit to be removed from the surface on which it is deposited, nor will such a deposit afford any substantial protection against abrasion or the ordinary wear to which most plated articles are subjected, nor to the action of corrosive agents It is obvious, therefore, that it is impossible to make electrotype plates from such deposits, and that such deposits are practically useless for most purposes to which electroplating is applied. Although it has long been known that nickel could be deposited to some extent from various solutions, yet I believe, that, prior to my improvements, it has not been practicable to obtain deposits of such character and thickness as are required for electrotyping or even for most of the purposes of electroplating. The solutions from which nickel has been heretofore most successfully deposited, are, I believe, the chloride of nickel, the cyanide of nickel and potassium, the double sulphate of nickel and ammonia, and the double chloride of nickel and ammonium. Of these solutions, as heretofore prepared, I believe the chloride is the best, but the deposits obtained from it are very far from what is required for the general purposes to which the electro-deposition of this metal may be applied.'

The specification then points out the difficulties attendant and consequent in the use of the chloride of nickel and of the cyanide of nickel and potassium. It then proceeds: "Neither of these solutions, so far as I have seen them used, gives, for any great length of time, the full equivalent of metal for the electricity employed; and, so far as I have been able to discover, these two solutions are inherently incapable of giving a coherent, tenacious, flexible metal, such as is required in the arts of electrotyping and electroplating. Of the other two solutions named, I believe that, before my improvements, the best results were obtained from the double chloride of nickel and ammonium. But the metal deposited from it is of such a character as to be worthless when deposited to any appreciable thickness. It is accompanied with the deposit of the peroxide, and is, therefore, black or brown. It is extremely liable to split up into thin scales, which may be rubbed off even with the hand. This want of coherence and tenacity unfits it for the requirements of the arts. The metal deposited from the double sulphate of nickel and ammonia is substantially the same as the above, but it is not so easily obtained. If, with these solutions, a battery power is used of an intensity of two Grove cells or thereabouts, a white deposit may be obtained of considerable thickness, but still with such a tendency to split up in scales, that it is practically useless; and neither solution gives the full equivalent due to the current. I have discovered, however, that the difficulties attending the use of these last named solutions and the character of their deposits are not inherent in the nature of the solutions, but are due to the modes of preparing them, or to the presence, in minute quantities, of certain substances which are generally, and, I believe, universally employed in making them, or in the reduction of the nickel used in making them. In order, therefore, to prepare these solutions in such a manner as to give the results I have reached, it is necessary to adopt processes in their preparation and observe precautions, which shall either dispense with the use of the substances altogether, or shall effectually remove them if they are employed, and which are wholly unnecessary in their preparation for any other use with which I am acquainted. In preparing my solution, I prefer to use pure nickel, but commercial nickel may be used. Commercial nickel almost always contains more or less of the reagents employed in the purification or manufacture of the metal, such as sulphate of lime, sulphide of calcium, sulphide of sodium or potassium, chloride of sodium and alumina. When any of these substances are present, it is necessary to remove them."

The specification then describes how this may be done, and also how zinc, copper, arsenic and antimony can be removed from the nickel. It then describes the patentee's method of preparing the double sulphate of nickel and ammonia, by first preparing a solution of the sulphate of nickel, and then a solution of the sulphate of ammonia, and then uniting the two and diluting the mixture with sufficient water to leave one and a half to two ounces of nickel to each gallon of solution. Specific directions are given how to prepare the solution of the sulphate of nickel, and how to prepare the solution of the sulphate of ammonia. The patentee's mode of preparing the solution of the double chloride of nickel and ammonium is then described. It is then stated that another important part of the patentee's invention is the preparation of the nickel plates to be used as anodes in the depositing cells. This consists in preparing an anode of nickel combined with iron, to prevent the copper and arsenic which are present in almost all commercial nickel from being

deposited with the nickel, or injuring the solution. It is further set forth, that, when copper and zinc are present to any considerable extent in nickel, it may be melted in a crucible and cast into plates for anodes, and a mode of doing this is described; and that "it is necessary to melt commercial nickel, not only to cast it into plates for anodes and combine it with iron, when copper and arsenic are present, but to remove any potash, soda, lime or alumina left adhering to it in the process of reduction, these substances being removed, as before stated, as slag." One of the methods before described in the specification, for purifying commercial nickel for use in making the patentee's solutions, so as to remove the re-agents before mentioned, was to melt the nickel, whereby "the foreign substances collect on the top of the melted nickel in the form of a slag."

The specification proceeds: "Having prepared the solutions and anodes, as herein described, nickel may be readily deposited, but, in order to carry on the deposition continuously, it is necessary to observe certain precautions: First, the use of a battery of too high an intensity must be avoided. An intensity of two Smee cells is sufficient. A high intensity decomposes the solution and liberates free ammonia, thus rendering the solution alkaline and impairing its value. Whenever the smell of free ammonia arises from the decomposing cell, the operator may be certain that the solution is being injured. It is important that the depositing shall not be forced by the use of too strong a current. Second, it is important that great precaution should be used to prevent the introduction into the solution of even minute quantities of potash, soda or nitric acid. When an article to be coated is cleaned in acid or alkaline water, or is introduced into it for any purpose, the greatest care must be taken to remove all traces of these substances before the article is introduced to the nickel solution, as the introduction of the most minute quantities of acids or alkalies will surely be injurious. It is important that the solution be kept free from all foreign substances, but its purity from those above named is especially important. Third, the anode of the depositing cell should present a surface to the action of the solution somewhat larger than the surface upon which the deposit is being made, particularly in the double sulphate solution. The reason is, that nickel dissolves so slowly, that, if the exposed surface is not larger than the surface on which the deposit is made, the solution will not keep saturated. On the other hand, if the anode is very much larger than the positive pole, it tends to give a deposit of black powder. Fourth, if zinc is to be coated, it should first be coated with copper, as it is difficult to make nickel adhere to zinc, and there is danger that the zinc may be acted on and injure the solution. With solutions and anodes thus prepared and used, the deposition of nickel can be carried on continuously and almost as surely and certainly as the deposition of copper from the common sulphate solution, though the limits of the battery power which may be used are narrower. The metal deposited is compact, cohesive and tenacious. It may be deposited of nearly uniform thickness over any surface, however large. The deposited metal is capable of being annealed by a heat below a red heat. It then becomes flexible, malleable and ductile. The deposit may be made of any required thickness, either to furnish effectual protection to the metal on which it is deposited, or to be removed and used separately from the surface on which it may be deposited. Thus, electroplate of nickel may be produced, either as copies of irregular surfaces which it is desired to reproduce, or as plain sheets of nickel, which, after being annealed, may be rolled, hammered or spun into a variety of forms or articles. These solutions also give the full equivalent of nickel for the electricity employed. I believe deposits possessing these qualities were never produced except by means of my improvements. I therefore claim: (1) The electro-deposition of nickel by means of a solution of the double sulphate of nickel and ammonia, or a solution of the double chloride of nickel and ammonium, prepared and used in such a manner as to be free from the presence of potash, soda, alumina, lime or nitric acid, or from any acid or alkaline reaction. (2) The use, for the anode of a depositing cell, of nickel combined with iron, to prevent the copper and arsenic which may be present from being deposited with the nickel or from injuring the solution. (3) The methods herein described, for preparing the solution of the double sulphate of nickel and ammonia, and the double chloride of nickel and ammonium. (4) The electroplating of metals with a coating of compact, coherent, tenacious, flexible nickel, of sufficient thickness to protect the metal upon which the deposit is made from the action of corrosive agents with which the article may be brought in contact. (5) The deposition of electrotype plates of nickel, to be removed from the surface on which the deposit is made and used separately therefrom."

Only the first and fourth claims of the patent are alleged to have been infringed by the defendants. The principal contest is as to the first claim.

The third claim is a claim to "the methods herein described, for preparing the solution of the double sulphate of nickel and ammonia, and the double chloride of nickel and ammonium." This is the same thing as a claim to each solution prepared by the method described for preparing each. The specification sets forth, that the solutions prepared by the methods described in it will be free from the presence of potash, soda, alumina, lime and nitric acid, and from everything which will cause an acid or an alkaline reaction. The means of securing this result, by removing from commercial nickel, when em-

ployed in making the solutions by the patentee's methods, the re-agents named in the specification, are set forth. If these re-agents are removed, and the directions given as to the removal of the other foreign substances mentioned are followed, the solutions made by the patentee's methods will be free from the presence of the injurious substances mentioned in the first claim. But, the properties and conditions mentioned in the specification as those which solutions prepared according to the patentee's methods will possess, are stated in the specification to be properties and conditions which must be possessed, not only by solutions prepared according to the patentee's methods, but by all solutions of the double sulphate of nickel and ammonia, and all solutions of the double chloride of nickel and ammonium, so far as regards freedom from the presence of the substances mentioned in the first claim; and, in respect to the use of solutions of such double sulphate and of solutions of such double chloride, it is stated, not only that the solutions prepared by the patentee's methods must be so used as to be free, in and during the operation of plating, from the presence of the substances mentioned in the first claim, but that all solutions of such double sulphate, and all solutions of such double chloride, by whatever method prepared, must be so used as to be free, in and during the operation of plating, from the presence of such substances. Thus, the specification states that the patentee has discovered that the difficulties which he mentions as attending the use of a solution of the double sulphate of nickel and ammonia, and the use of a solution of the double chloride of nickel and ammonium, are due to the presence of certain substances employed in making the solutions, or in reducing the nickel used in making them. It also states, substantially, that such employment of those substances results in producing solutions, in which, in and through their use, the substances mentioned in the first claim will be present, while the electro-deposition of the nickel is going on. It states, also, that, in order to prepare the solutions in such manner as to give the results which the patentee has reached, the substances referred to as employed in making the solutions, or in reducing the nickel used in making them, must either not be so employed, or must be effectually removed if they are employed. These substances are enumerated as sulphate of lime, sulphide of calcium, sulphide of sodium, sulphide of potassium, chloride of sodium and alumina. But, it is also further stated, that no quantity, however minute, of potash, soda or nitric acid, or of any acid or alkali, must be allowed to be present in the solution; and then the claim states, that the solution used must be free from the presence of potash, soda, alumina, lime and nitric acid, and from every thing which will produce an acid or an alkaline reaction, while the electro-deposition of nickel is going on. Lime, soda and potash are likely to be produced in the solution, while the electro-deposition is going on, if the sulphate of lime and the sulphide of sodium and the chloride of sodium and the sulphide of potassium are employed in making the solutions, or in reducing the nickel used in making them, and are not removed. So, they may be produced in using a solution, if the sulphate of lime and the sulphide of sodium and the chloride of sodium and the sulphide of potassium are introduced into the solution after it is prepared. But, if those substances are introduced into a solution, and then the solution is used under such conditions that those substances remain inert, so far as the production in the solution of free lime or free soda or free potash is concerned, and no free lime or free soda or free potash is produced, then none is present, and the solution is used in such manner as to be free from the presence of those articles.

Viewed in the light of these considerations, it is manifest that the first claim is a claim to the electro-deposition of nickel by means of any solution of the double sulphate of nickel and ammonia, or of any solution of the double chloride of nickel and ammonium, however such solution may be prepared, provided such solution is so used as to be free, while the electro-deposition of the nickel is going on, from the presence of potash, soda, alumina, lime or nitric acid, or from any acid or alkaline reaction. This is a valid claim, and the invention covered by it is a patentable invention, if the patentee was the first discoverer of the fact, that the difficulties in the way of securing proper results in the electro-deposition of nickel with the two solutions in question, were due to the existence or development in them, while being used, of the substances named in the claim, and if he describes methods of making such solutions which will secure the absence of such substances. A person learning, from the specification of the patent, what such difficulties are, may proceed to make the solutions by other methods than those described by the patentee and covered by the third claim; but, if he avails himself of the knowledge imparted by the specification, that he must take care to secure the absence of the substances named in the first claim, and prepares solutions which, in use, are free from those substances, and then practises the electro-deposition of nickel by means of such solutions, he infringes the first claim of the patent. So, too, a person infringes such claim, who, taking such solutions made by another person, by such other methods, practises the electro-deposition of nickel by means of them, provided he so uses such solutions, that, in use, they are free from the substances named in the first claim, and thus avails himself of such knowledge imparted by the specification.

The patent being based on the discovery by the patentee, that the difficulties he sets forth

are due to the presence, in the use of the solutions in question, in the electro-deposition of nickel, of the substances named in the first claim, the evidence shows satisfactorily, that such difficulties existed and were due to the causes assigned; and that the patentee discovered, and was the first to discover, what such causes were. It also shows, that he invented and described practical methods of getting rid of such causes. As a consequence, he was the first person who obtained, as practical results in the electro-deposition of nickel, the results set forth in the specification as those due to the use of the invention covered by the first claim.

On the question of infringement, the defendants claim, that, if they introduce into a solution of the double sulphate of nickel and ammonia, or into a solution of the double chloride of nickle and ammonium, a sulphate or chloride of potash or soda, they do not infringe the first claim. The evidence shows, that these sulphates and chlorides may be introduced into the solutions, and that then the solutions may be so used, in the electro-deposition of nickel, that the sulphate or the chloride will not be decomposed, and there will not result, from such introduction, the presence of potash or soda, in the sense in which the word "presence" is used in the first claim. The injurious substance is inert, by being in the chemical state of a sulphate or a chloride, as inert as if it were enclosed in an impervious bottle. The defendants used solutions which were free from the substances named in the first claim, otherwise than as such solutions had in them the sulphate or the chloride of potash or soda, and, in the use of the solutions, the presence of such sulphates or chlorides had no more effect to cause free potash or soda to be present, than if such sulphates or chlorides had not been introduced. If the introduction of such sulphates or chlorides is otherwise of any benefit, their use is but an improvement, and the invention of the patentee is availed of, notwithstanding their introduction.

On the question of the novelty of the invention covered by the first claim of the patent, I am of the same opinion announced by Judge Shepley, in his decision in the case of United Nickel Co. v. Anthes [Case No. 14,406], in May, 1872, that, prior to the discoveries of the patentee, the electro-deposition of nickel, by means of such solutions as are described in his patent, "prepared and used in the described manner, so as to be free from foreign substances and acid or alkaline reactions, which would interfere with the uniform, continuous and coherent deposition of the metal, was unknown in any practical application of it to the useful art of electroplating metals with nickel." I concur, also, on all the evidence in this case, in what was said by Judge Shepley, in his decision in the case of United Nickel Co. v. Keith [Id. 14,408], in February, 1874, that, prior to the discoveries of the patentee, "electroplaters and electro-metallurgists well understood how desirable a result it would be to be able to plate the surface of baser metal with a coating of nickel, resembling silver in lustre and color, without its liability to tarnish on exposure to the air," but that, after great research and investigation, it has not been shown that the electroplating of metals with nickel had any practical existence as a useful art, accessible or beneficial to the public, before the date of the inventions of the patentee; while, on the contrary, he was the first person who effected "the uniform, continuous and coherent deposit" of nickel upon the surface of other metals, "so as to produce a coating of the desired thickness, purity, uniformity, coherence and permanency of adhesion." In saying this, I have not overlooked the additional evidence in this case, as to what was done by Remington, nor the Muspratt-Stohmann publication. I do not find in the evidence, on the point of novelty, any thing which shows that the invention covered by the first claim of the patent, as I have construed that invention, was not new with the patentee, or existed before he made such invention.

Great stress is laid, by the defendants, on the view, that the patentee describes his own methods of preparing the solutions referred to, as the only methods by which the injurious substances named in the first claim can be excluded from the solutions; that he does not state that there are other methods than those which he describes, by which the solutions may be so prepared as, when prepared, to be free from such injurious substances; and that he does not show how, when the solutions are used, they are to be used so as to prevent the development or presence of such injurious substances. The answer to this view is, that the patentee sets forth clearly that the substances he names in his first claim are injurious, that the solutions should be prepared by such methods as not to use what may produce such substances, or to remove what is so used, and then, that care should be taken not to introduce into the solution, after it is prepared, and while it is being used, any of the injurious substances, and not to use a battery of too high intensity. The evidence shows, that what is so not to be used in preparing the solution, or, if used, is to be removed, is something which, if decomposed, will produce the injurious substances, and that the directions of the patent, if followed, will prevent such decomposition, and the consequent production of the injurious substances, in the use of the solution in the electro-deposition of the nickel.

The proper construction of the fourth claim of the patent of 1869 is, that it is a claim to the product or coating named in it, having the qualities described in it, when such product or coating is produced by employing

the invention covered by the first claim. Under this construction, the novelty of the fourth claim is not successfully attacked. As the defendants have infringed the first claim, they have also infringed the fourth claim. There must be the usual decree for the plaintiff on these two claims.

UNITED NICKEL CO. v. JACKSON. See Cases Nos. 14,409 and 14,410.

Case No. 14,408.

UNITED NICKEL CO. v. KEITH.

[Holmes, 328; 1 Ban. & A. 44; 5 O. G. 272.] [1]

Circuit Court, D. Massachusetts. Feb. 13, 1874.

PATENTS—NICKEL PLATING—SOLUTION—INFRINGEMENT.

1. A claim for the electro-deposition of nickel by means of a solution of the double sulphate of nickel and ammonia, or a solution of the double chloride of nickel and ammonium, prepared and used in such a manner as to be free from the presence of potash, soda, alumina, lime, or nitric acid, or from any acid or alkaline reaction, is infringed by the use, in the electro-deposition of nickel, of a solution of the double sulphate of nickel and ammonia; although such solution contains a small proportion of tartrate of ammonia, and ammonia, the first of these being an inert substance in the solution, and the second being speedily eliminated by evaporation when the solution is used.

2. The patents of Isaac Adams, Jr., dated Aug. 3, 1869, and May 10, 1870, for improvements in the electro-deposition of nickel, *held* valid.

[Approved in United Nickel Co. v. Harris, Case No. 14,407. Cited in United Nickel Co. v. Pendleton, 15 Fed. 740.]

[This was a bill by the United Nickel Company against N. S. Keith for an injunction to restrain the infringement of certain patents.]

James B. Robb, for complainant.

A. J. Todd, for defendant.

SHEPLEY, Circuit Judge. The defendant is charged with infringement of letters patent of the United States, granted to Isaac Adams, Jr., for "improvements in the electro-deposition of nickel," dated August 3, 1869 [No. 93,157], and May 10, 1870 [No. 102,748], both of which patents have been duly assigned to the complainant. Defendant denies the infringement, and alleges that Adams was not the original and first inventor of what is claimed as his invention in either of the patents.

The history of the state of the art of electro-plating with nickel, or what should with more propriety, in view of the progress then made in the art, be denominated the electro-deposition of nickel, prior to the discoveries of Dr. Adams, is sufficiently given in the opinion of this court in the case of United Nickel Co. v. Authes [Case No. 14,406], not to require repetition here otherwise than by reference to and reiteration of the views expressed in that case. Much additional evidence has been introduced in the record in this case upon the issue of novelty; yet, after a careful review of the whole evidence, both in relation to what was alleged in that case as anticipating the discoveries and inventions of Dr. Adams, and is again alleged in this record accompanied with further proof, as well as what additional and new matter is here introduced, I am confirmed in the conviction that the electro-deposition of nickel by means of the described solutions prepared and used, as described in his patents, and of such an anode as his patents describe, was unknown in any practical application of it to the useful art of electro-plating of metals prior to the discoveries of the patentee. By electro-plating of metals as a useful art, I mean the uniform, continuous, and coherent deposit of one metal upon the surface of another, so as to produce a coating of the desired thickness, purity, uniformity, coherence, and permanency of adhesion, as distinguished from the mere electrolysis or electro-deposition of a metal out of a solution, whether such electro-deposition be or be not on the surface of another metal. And herein, in my view, consists the difference in the state of the art prior and subsequent to the discoveries of the patentee. Prior to his discoveries and inventions, electro-platers and electro-metallurgists well understood how desirable a result it would be to be able to plate the surface of baser metals with a coating of nickel, resembling silver in lustre and color, without its liability to tarnish on exposure to the air. Yet while it was thus well understood, as stated by Napier, that if the practical difficulties could be overcome, "the application of nickel to the coating of other metals would be extensive, and the property of not being liable to tarnish would make it eminently useful for all general purposes," yet, with all the research and investigation which has been so lavishly bestowed on this case, the defendant has signally failed to show that electro-plating of metals with nickel had any practical existence, as accessible or beneficial to the public, before the date of the inventions of Dr. Adams. Since that time, under the processes described in his patent, the art is so extensively practised, both in this country and Europe, that, as stated by one of the witnesses in this case, it would be less difficult to name articles used in the mechanic arts which have never been nickel-plated than those to which nickel-plating has been applied. The claims in the two patents are as follows: In the patent of August 3, 1869—

"1. The electro-deposition of nickel by means of a solution of the double sulphate of nickel and ammonia, or a solution of the double chloride of nickel and ammonium,

[1] [Reported by Jabez S. Holmes, Esq., and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

prepared and used in such a manner as to be free from the presence of potash, soda, alumina, lime, or nitric acid, or from any acid or alkaline reaction.

"2. The use for the anode of a depositing-cell of nickel, combined with iron to prevent the copper and arsenic which may be present from being deposited with the nickel, or from injuring the solution.

"3. The methods herein described for preparing the solution of the double sulphate of nickel and ammonia, and the double chloride of nickel and ammonia.

"4. The electro-plating of metals with a coating of compact, coherent, tenacious, flexible nickel, of sufficient thickness to protect the metal upon which the deposit is made from the action of corrosive agents with which the article may be brought in contact."

Also, but which is not involved in this suit—

"5. The deposition or electrotype-plates of nickel, to be removed from the surface on which the deposit is made, and used separately therefrom."

In the patent of May 10, 1870, the claims are as follows:

"1. The combination, with nickel to be used for anodes, of a metal or metalloid electro-negative to the nickel in the solution employed.

"2. A nickel anode combined with carbon, and cast in the required form."

As the defendant has infringed the patent of May 10th, 1870, by the use of anodes in the electro-deposition of nickel, substantially like those described and claimed in that patent, and has also infringed the first claim of the patent of August 3, 1869, by the use, in the electro-deposition of nickel, of a solution of the double sulphate of nickel and ammonia, prepared and used in such a manner as to be free from the presence of potash, soda, alumina, lime, or nitric acid, or from any acid or alkaline reaction, it is not necessary to decide the questions presented on the construction of the fourth claim of the patent of August 3, 1869.

In deciding that the evidence in the record proves an infringement of the first claim of that patent by the use of the solution therein described, I do not overlook the fact that defendant's solution contained one one-thousandth part of tartrate of ammonia, and one eight-hundredth part of ammonia. The evidence in the case satisfies me that in the defendant's solution the first was an inert substance, and the second would be, and was, speedily eliminated from the solution in use, by evaporation. Decree for injunction and account.

Case No. 14,409.

UNITED NICKEL CO. v. MANHATTAN BRASS CO.

[Cited in The Horman Pat. Manuf'g Co. v. Brooklyn City R. Co., Case No. 6,703. Nowhere reported; opinion not now accessible.]

Case No. 14,410.

UNITED NICKEL CO. v. MANHATTAN BRASS CO. et al.

SAME v. JACKSON et al.

[16 Blatchf. 68; 4 Ban. & A. 173.] [1]

Circuit Court, S. D. New York. March 11, 1879.

PATENTS—NICKEL PLATING—SOLUTION—INFRINGEMENT.

1. The decision in United Nickel Co. v. Harris [Case No. 14,407], sustaining the validity of the letters patent granted to Isaac Adams, Jr., August 3d, 1869, for an "improvement in the electro-deposition of nickel," reviewed and confirmed.

[Cited in United Nickel Co. v. Pendleton, 15 Fed. 740.]

2. The said patent is infringed, although the salts of potash and soda are introduced into the solution, provided the solution is not so used as to liberate free potash or free soda.

[3. Cited in Hood v. Boston Car-Spring Co., 21 Fed. 69, to the point that a patent is not invalidated by statements in an earlier publication, unless those statements are full and definite enough to inform those skilled in the art how to put in practice the invention now patented.]

[These were suits by the United Nickel Company against the Manhattan Brass Company and others, and by same plaintiff against William H. Jackson and others. Heard on motions for preliminary injunctions.]

Dickerson & Beaman, for plaintiffs.

Roscoe Conkling and Frost & Coe, for defendants.

BLATCHFORD, Circuit Judge. It is set forth, in the moving affidavits, that the defendants in these suits united with various other nickel platers, in the defence of the suit brought by the plaintiffs, in this court, against Harris and Weston [Case No. 14,407], and contributed to the expenses, and have, in these suits, employed the same counsel, and made substantially the same defences and answers, as in said suit against Harris and Weston. There is no denial of these allegations.

It is also set forth, in the moving affidavits, that the step nickel plated by the defendants in the first suit, and the grate crown nickel plated by the defendants in the second suit, are plated each with a coherent, compact and tenacious coating of nickel; that said step and said grate crown have each been plated by a process described in the Adams patent of August 3d, 1869 [No. 93,157], and could have been plated by no other process; and that no practical nickel plating can be done, unless the process described in said patent is followed, or some material or substantial part thereof. Professor Chandler sets forth, that he has examined said step

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 4 Ban. & A. 173, and here republished by permission.]

and said grate crown; that, in his opinion, the coating on each of them is a coating of compact, coherent, tenacious and flexible nickel, of sufficient thickness to protect the metal on which the deposit is made from the action of corrosive agents with which said articles may be brought in contact; that, without knowing exactly the composition of the solution in which each article has been nickel plated, he is very confident that it has been nickel plated in a solution which, in use, is free from the presence of potash, soda, almumina, lime or nitric acid, or from any acid or alkaline reaction; and, that the solution was a double sulphate of nickel and ammonia, or a double chloride of nickel and ammonium, or a mixture of the two, that is, the solution which was used by the defendants in said suit against Harris and Weston. Professor Morton makes an affidavit to the same effect. These affidavits are not contradicted. If the articles in question were not nickel plated in a solution and by a process such as stated, the defendants, knowing the facts, and having the means of stating them, have not set forth to the contrary, or by what solution or process the articles were plated.

The step and the grate crown were so nickel plated in January, 1878. The defendants produce affidavits to show, that, in November, 1878, they each used, in nickel plating, a solution which did not contain any ammonia, or any of the compounds of ammonia, and was not a solution of the double sulphate of nickel and ammonia, or a solution of the double chloride of nickel and ammonium, and was not a mixture of said two solutions, and was not the same solution as, nor a similar solution to, the solution which was decided, in the suit against Harris and Weston, to be an infringement of the said Adams patent, and is not an infringement on said patent. The affidavits swear to the above conclusions and deductions, in the above language, but nowhere set forth what was the chemical composition of the solutions of November, 1878, although it is set forth that analyses of them were made on which such conclusions and deductions are based. The nickel plating done by said solutions of November, 1878, is set forth, in one case, to have been "a perfectly uniform, coherent and beautifully colored coating of nickel," and "a tenacious, coherent and flexible coating of nickel, amply sufficient in thickness to protect the surfaces" of the objects which were nickel plated in it, "from exposure to the air," and, in the other case, to have been "a coating of compact, coherent, tenacious and flexible nickel," and "a perfectly uniform, coherent and beautifully colored coating of nickel." It is not shown, by the defendants, that the step or the grate crown complained of was plated in a solution made like that of November, 1878. We are not trying, in these cases, the solutions of November, 1878, or the articles plated in them, nor have the plaintiffs had any opportunity to produce evidence as to such solutions or articles. We are concerned now only with the step and the grate crown, and the solutions and processes by which they were plated.

The opposition to the motions for injunctions in these cases is based upon the affidavits of four chemical experts, Professor Seeley, Mr. Weston, Professor Doremus and Dr. Antisell. Professor Seeley was an expert for the defendants in the suit against Harris and Weston Mr. Weston was one of the defendants, and also a witness, in that suit, and the other two gentlemen were not witnesses in that suit. The object of these affidavits is to establish that this court reached an erroneous conclusion in the suit against Harris and Weston, and that it ought now to reverse that conclusion. I have read these affidavits with care, and have re-examined the testimony in the suit against Harris and Weston, and have considered with attention the argument of the eminent counsel for the defendants, both as orally delivered and since in print, and am unable to see that anything now advanced was not presented in evidence and argument in the suit against Harris and Weston, or that the judgment rendered in that case did not advert to all the points now urged for the defence.

Professor Seeley testifies, that he has served as expert on the part of the defence in seven suits brought by the United Nickel Company on the Adams patent of 1869; that the defence in the suit against Harris and Weston was intended to be complete and exhaustive; that every theory of the construction of the first claim of the patent, which had any color of plausibility, was carefully scrutinized and tested; that the relation of caustic potash, &c., to the solution, and the theory of Professor Babcock, came under an investigation which employed the best resources of practical experiments and scientific knowledge on the part of the defence; and that the conclusion arrived at was, that the first claim of the patent could not be interpreted to mean or imply that the substances therein named were in a free or caustic state. Professor Seeley states Professor Babcock's theory to be, not only that the words, potash, &c., of the first claim are used to indicate those substances in a free or caustic state, but that those substances are eliminated, developed or produced in the solution during the operation of electro-deposition; and that such theory considers the salts of potash per se not injurious, but that, being in the plating solution when they are under the influence of the electric current, their bases are set free, and such bases are then present and become actively injurious. In opposition to such theory, Professor Seeley states, that free or caustic potash and soda cannot possibly, in any circumstances whatever, for a moment exist in a solution either of salts of ammonia or salts of nickel, or in a solution of the double salts mentioned in the claim of the patent; and that potash and soda, in contact with the

solution of the double salts, instantly and completely go out of existence as caustic potash and caustic soda.

Dr. Antisell states, that no injurious consequences arise from any possible presence of basic elements, such as potash, soda, &c., since those elements, if so produced, cannot exist but for a moment, and are at once converted into sulphates of those alkalies, by robbing the sulphate of ammonia of its acid.

Professor Doremus states, that free, basic or caustic potash, soda or lime, when introduced into a solution of the double sulphate of nickel and ammonia, or when produced at the negative pole by the electric current, will instantly combine with the sulphuric acid, and form therewith sulphates of potash, soda or lime; and that the same is true in regard to those substances and a solution of the double chloride of nickel and ammonium, chlorides of potassium, sodium or calcium being instantly formed.

Mr. Weston's affidavit is to the same effect as the affidavits of the other three gentlemen.

The gist of the argument on the part of the defence, based on these affidavits, is, that, if the first claim of the patent is for the exclusion of sulphates and chlorides, it has not been infringed, because the sulphate of potash and the chloride of soda are freely introduced into the solution used by the defendants; and that, if such claim is for the exclusion of free or basic or caustic potash or soda, it is a claim to the exclusion of what cannot, under the laws of chemistry, exist in the solution. But, the views urged in the affidavits of the experts for the defendants, and in the argument of their counsel, do not meet the case as established by the evidence taken in the suit against Harris and Weston. That case is this: The salts of potash and soda, in the solution, are harmless, under certain conditions. Under certain other conditions they are injurious. If the concentration of the solution, its resistance, the strength of the current, and, perhaps, other matters, are not carefully adapted to the presence of such salts, the effect of the current will be to decompose those salts and liberate, for the moment, the potash or the soda. Potash, when so produced or liberated in the solution, causes a precipitation of the oxide of nickel, which attaches itself to the article that is being plated, and affects the adhesion and character of the nickel deposit, and also its color. The same thing is true of soda and its salt. The patentee, in his specification, sets forth, with great distinctness, that potash and soda are injurious, and will prevent the result of obtaining a coating of compact, tenacious, flexible nickel, of adequate thickness. The precipitation of the oxide of nickel is injurious, and prevents such result. The production of potash or soda in the solution, in such wise as to cause the precipitation of the oxide of nickel, leads to such injurious effect. Potash or soda may be produced in the solution, if the salts of potash or soda are introduced into the solution, unless such care is taken as to the surrounding conditions, that such salts are not decomposed. The patentee points out the fact, that the solution must be so used as to be free from the presence of potash or soda. The salts of potash and soda are not potash and soda, and, unless decomposed, so as to liberate potash and soda, produce no injurious effect. When it is shown that the liberation and consequent presence, but for a minute space of time, of potash and soda, but sufficiently long to produce a precipitation of the oxide of nickel, result from the decomposition of the salts of potash and soda, and produce the injurious consequence referred to, and when it is also shown that those salts, though present, produce no such injury, if not decomposed, it requires very strong evidence to arrive at the conclusion that the patentee, in saying that the solution must be so used as to be free from the presence of potash or soda meant that it must be so used as to be free from the substances that are not injurious and not free from the substances that are injurious. Yet that is what the court is asked to say. The evidence, instead of being to that effect, is decidedly the other way. The language and proper interpretation of the specification were fully considered in the decision rendered in the case against Harris and Weston, and nothing has been presented to cause any change in the views there expressed. On the contrary, the case on the part of the plaintiffs is fortified by the affidavits of Professor Henry Morton and Professor Charles F. Chandler, chemists of eminence, who were not witnesses in the suit against Harris and Weston. Professor Morton says: "I have examined into the state of the art of nickel plating prior to August, 1869, at which time certain letters patent were granted to Isaac Adams, Junior, for improvements in electro-deposition of nickel. I have read said letters patent, bearing date August 3d, 1869, and believe that I understand the same, the processes therein described, and the precautions therein given. From my knowledge of the state of the art prior to the publication of said letters patent, there was nothing in any book or journal that would have given such instruction to one familiar with the processes in use for electroplating with other metals, as would enable him to successfully practice the art of nickel plating, and I believe that the matter set forth in the above mentioned letters patent first gave to the world a process by which electroplating with nickel could be practiced as an art. The conditions under which metals may be successfully deposited from their solutions by means of an electro-current, vary greatly with different metals, so that what would be favorable for one metal may be fatal to success with another; and there is no

evidence, that, at the date of the Adams' patent, anything whatever was known of the particular conditions which are essential to success where nickel is employed. It was well known that nickel could be deposited by the battery, and, in a few instances, good deposits had actually been obtained, but, though it had been stated that a deposit of nickel upon various articles by means of the galvanic current would be very valuable if it could be practically carried on in the arts, yet no such practical electroplating with nickel had ever been carried on. Repeated attempts had only resulted in as many failures, and the conditions necessary to the successful prosecution of this art had never been made public, nor, as I believe, were they known. I have read all the quotations offered as exhibits in the suit of these complainants against George J. Harris and Edward Weston, having reference to the electro-deposition of nickel, published prior to August 3d, 1869, and have given especial attention to the quotation from Muspratt-Stohman's Chemie, Theoretische, Praktische, und Analytische, in Anwendung auf Künste und Gewerbe,' vol. 2, page 1,188, published in Braunschweig, in 1866, by C. A. Schwetschte und Sohn, and am certain that there is nothing found in any of these books which would so instruct a practical plater as to enable him to carry on electroplating with nickel, as a business or practical art. As regards the process given in the work just named, and which, as I understand, is conceded to contain the fullest information about nickel plating published prior to August 3d, 1869—in the first place, I do not consider that it gives sufficient information to enable a practical nickel plater, by simply following its directions, to make even an efficient nickel-plating solution; secondly, it does not even suggest any of the conditions which are necessary to successfully carry on the art of electroplating with nickel, after a practical solution has been made. Dr. Adams was, in my opinion, the first to establish or discover the conditions under which successful nickel plating can be carried on, and I am convinced, by the result of my own experiments, that the conditions essential to practical success are correctly set forth in his patent of August 3d, 1869, and that it is necessary for the successful use of a nickel plating solution, that it should be prepared and used in such a manner as to be free, while the electro-deposition of the nickel is going on, from the presence of potash, soda, alumina, lime or nitric acid, or from any acid or alkaline reaction, and I know, from experiment, that, by a solution so prepared and used, a metallic article can be practically electroplated with a coating of compact, coherent, tenacious and flexible nickel, of sufficient thickness to protect the metal upon which the deposit is made, from the action of corrosive agents with which the article may come in contact." Professor Chandler gives like testimony in his affidavit.

The patent in question has been sustained, on final hearing, in the first and second circuits. The plaintiffs show that they have granted some sixty licenses under it, in Massachusetts, Connecticut, New York, Ohio, Pennsylvania, Maryland, Maine, and Rhode Island, and that they are willing to grant licenses to responsible manufacturers, on fair and reasonable terms. They are entitled to be protected in their rights, and preliminary injunctions must issue in these cases, as prayed.

UNITED POWER PRESS CO. (BOOMER v.). See Case No. 1,638.

Case No. 14,411.

Ex parte UNITED STATES.

[1 Gall. 338.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1812.

JUDGES—DISABILITY—CERTIFIED CAUSES—DEATH.

Under the act of March 2, 1809, c. 94 [2 Story's Laws, 1121; 2 Stat. 534, c. 27], if the disability of the district judge terminates in his death, the circuit court must remand the certified causes to the district court.

In consequence of the extreme indisposition of the Honorable David L. Barnes, district judge of Rhode Island district, an application was made by the district attorney to STORY, Circuit Justice, for an order in the nature of a certiorari, to remove the suits and proceedings pending in the district court into the circuit court at this term, pursuant to the act of March 2, 1809, c. 94 [2 Story's Laws, 1121; 2 Stat. 534, c. 27]. The certiorari was granted accordingly, and, at the commencement of the term, due return thereof was made by the clerk of the district court, and all the suits and proceedings were ordered to be entered. After the issuing of the order, and before the commencement of the term, Judge Barnes died. A question was thereupon made, as to what disposition should be made of the suits and proceedings so certified—and as being a question of general interest, it was spoken to by several members of the bar. It is unnecessary to state the arguments for and against the jurisdiction of the court, as they are summed up in the opinion of the court.

STORY, Circuit Justice. The act of March 2, 1809, c. 94 [2 Story's Laws, 1121; 2 Stat. 534, c. 27], provides for a removal of all actions from the district court to this court, "in case of the disability of the district judge of either of the districts of the United States to hold a district court, and to perform the duties of his office;" and further directs, that during the disability of the district judge all

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

subsequent actions brought to the district court from time to time shall be certified into the circuit court, and "that when the disability of the district judge shall cease or be removed, all suits and actions then pending and undetermined in the circuit court, in which by law the district courts have an exclusive original cognizance, shall be removed," &c. By the same act, the circuit court, during such disability, is invested with all the original jurisdiction of the district court, as to certified causes; and the judge of the supreme court is also invested with all the powers and authority vested by law in the district judge; and the district clerk is authorized, with the leave of the circuit judge, to make interlocutory orders, &c. in causes of admiralty and maritime jurisdiction.

It has been argued, that when causes are once certified into the circuit court, that court is bound to proceed to hear and determine them, unless "the disability of the district judge shall cease or be removed," and that in the present case, so far from having ceased, the disability has become permanent by death; and that even if a new district judge had been appointed, such certified causes must still receive their decision here, because the case, in which they are to be remanded, would not have happened. I cannot accede to this reasoning. If it were well founded, it would follow, that the new district judge would be completely ousted of his jurisdiction, or at least the circuit court would have acquired a permanent concurrent jurisdiction. The same disability is intended in all the provisions of the statute, and consequently on the death of the district judge, the disability having become permanent. the causes would be certified from time to time into the circuit court, who would thereby possess itself of all the causes in the district court. Surely such a construction could never be contended for. The language of the statute evidently supposes a district judge in existence, to whom the causes may be remanded. It does not direct a certiorari on his death, but on his disability. It does not suppose a vacancy, but an incumbency in the office. It might as well be contended, that a deceased judge was entitled to salary, inasmuch as his death was only a permanent disability: and certainly, in a case of ordinary disability, there can be no doubt that he is so entitled, for he holds his office during good behavior. The meaning of the statute must be, that while there is a judge in office, who is disabled to hold a court, his duties shall be performed by the circuit court during the disability. With his death the disability ceases; a vacancy ensues in the office, and a new appointment awakens in full vigor the powers of the district court. The very case of the death of a district judge is provided for by the act of September 24, 1789, c. 20, § 6 [1 Stat. 76]. I have no doubt, therefore, that this court is bound to remand the certified causes to the district court for a hearing and determination.

Perhaps it might have been convenient to all parties, that the legislature should have made provision as to certified causes, which would have prevented delay, and enabled this court to have pronounced a final decision. I am aware, that the ultimate decisions must now be postponed at least six months, and probably longer. But I bow to the legislative will, and should not lightly interpose my private judgment as to public inconveniences. In order to obviate all improper inferences, I wish it to be understood, that although I am well satisfied, that the legislature may at will give or take away the jurisdiction of the circuit and district courts; yet I entertain extreme doubts, whether the legislature can constitutionally impose upon a judge of the supreme court of the United States, the authority or duty to hold the district court. There is a great difference between giving new jurisdiction to a court, of which such a judge is a member, and appointing him pro hac vice to a new office. And I do not perceive any sound distinction between an appointment to a new office, and an appointment to perform the duties of another office, while it remains a separate and distinct office. Many reasons might be offered to support this opinion; but as the occasion does not require them, I have only intimated my present opinion, with a view that my silence should not be construed into acquiescence. The duties before me were such as I most cheerfully would have performed, and correctly construed perhaps. There is nothing in the statute under consideration. which may not fairly be warranted by the constitution. Causes remanded.

Case No. 14,412.

UNITED STATES ex rel. WEEDEN et al.

[2 Flip. 76;[1] 4 Law & Eq. Rep. 149.]

Circuit Court, D. Kentucky. July 11, 1877.

STATE AND FEDERAL JURISDICTION — CRIMINAL ACTS — HABEAS CORPUS — UNITED STATES OFFICERS EXECUTING PROCESS—PRACTICE—REMANDING TO STATE COURT.

1. A federal officer, executing process, when actually innocent of the crime imputed and justifiable in all that he really did, is not obliged to show, in order to procure his discharge, that he has done nothing except what he was justified in doing by process, nor to show that he was justified in doing the very thing imputed to him, and for which he is in confinement.

2. The doctrine laid down in U. S. ex rel. Roberts v. Jailer [Case No. 15,463] modified.

3. When on habeas corpus the evidence does not show the shooting was done in order to enable the officer to execute the process in his hands, the federal court will not discharge the prisoner but turn him over to the state court there to stand his trial.

[Cited in U. S. v. Fullhart, 47 Fed. 805.]

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

The relators were arrested by the sheriff of Barren county, Ky., in May, 1877. They were charged with the offense of willfully and maliciously shooting at and wounding Thomas Reynolds and Isaac Reynolds, etc. A petition was presented to the court on the part of each relator, which alleged that although he was, ostensibly, in custody for the offense above stated, he was, in truth, in confinement for acts done in his capacity as a deputy marshal of the United States, or his posse, and in pursuance of the law of the United States and of process of a judge thereof; and praying for a writ of habeas corpus. The writ was granted in each case, and the return of the sheriff discloses the warrant aforesaid. The return was traversed by the several relators; they reiterating the allegations of their several petitions. The facts show that on the 5th day of May, 1877 (at night), the relators were proceeding on the public highway in Barren county, having the prisoners in custody, and who had been arrested under regular warrants, when Weeden turned out from the road and stopped at the dwelling of one Reynolds, ostensibly to get a drink of water, but, in fact, as he alleges, to arrest one Foster, for whom he had a warrant also. Calling for water, he indulged in some offensive language towards one of the Reynolds, when he was assaulted by the two. He discharged his pistol, twice, and wounded both men.

Mr. Moss, Atty. Gen., for the State, cited Ex parte Lange, 18 Wall. [85 U. S.] 166; In re McDonald [Case No. 8,772]; U. S. ex rel. Roberts v. Jailer [Id. 15,463].

BALLARD, District Judge. I can discharge Weeden only on its appearing that what he did was done under and by virtue of the warrant in his hands. The evidence before me does not justify me in finding the shooting was done in order to enable the officer to execute the process in his hands, and as I cannot so find, I cannot discharge him. He must be remanded to the state court there to stand trial. He may be excusable for what he did—he may have acted in self-defense — but these matters belong solely to the state court, and the jury there. Being an officer of the United States furnishes no immunity for violating state laws. The state court has jurisdiction to try him. I claim the right only to pronounce on the fact whether or not what he did or is accused of doing, was justified by the process in his hands.

The other relators were not present at the shooting or in any way connected therewith, but were on the highway with the prisoners in their custody, arrested under due process, and unconscious of the shooting, except as their attention was attracted by the pistol shots. They did nothing which they were not justified in doing by the process in their hands. They must be discharged.

In writing the opinion in U. S. ex rel. Roberts v. Jailer [Case No. 15,463], I was inclined to think that a federal officer was not entitled to claim his discharge by simply showing that he had done nothing except what he was justified in doing by process, but that he was obliged to show that he was justified by his process in doing the very thing imputed to him, and for which he was in confinement. I am constrained, in deference to authority, to modify what that opinion indicates would be my action, when it appears that the officer is actually innocent of the crime imputed, and was faithful in doing all that he really did. Ex parte Jenkins, 2 Wall. [69 U. S.] 537. [Weeden remanded, and the other relators discharged.] [2]

Case No. 14,413.

UNITED STATES v. ——.

[1 Brock. 195.] [1]

Circuit Court, D. Virginia. Nov. Term, 1811.

BONDS—STATUTORY REQUIREMENTS—SURPLUSAGE—OMISSION—EMBARGO.

1. A statutory bond, which superadds a condition that the statute does not authorise, is not vitiated by the surplus matter, but the court will reject the surplusage as a mere nullity, and construe the bond as if such surplus matter was not contained in it.

[Cited in U. S. v. Mynderse, Case No. 15,851; Hawes v. Marchant, Id. 6,240.]

[Cited in Berrien Co. Treasurer v. Bunbury, 7 N. W. 704, 45 Mich. 84.]

2. But a statutory bond is vitiated by the omission of a material condition required by the statute, viz.: "dangers of the seas excepted."

[In error to the district court of the United States for the district of Virginia.]

At law.

MARSHALL, Circuit Justice. This is a writ of error to a judgment rendered in the district court, in favour of the defendant, on a bond taken to the United States, under the act laying an embargo. It is such a bond as was declared void, in the case of United States v. Dixon [Case No. 3,934], and is now brought up for the purpose of revising that decision. It is unquestionably the duty of every court, to review its own judgments with the same impartiality, with which it reviews the judgments of other tribunals; and if this court fails in the performance of that duty, the failure is unknown to itself. Previous to his entering on his argument, the attorney for the United States called the attention of the court to an inconsistency in the different parts of the opinion, rendered in the case of U. S. v. Dixon [supra]. In that case, as in this, the condition of the bond was in part unauthorized by law, and a condition was omitted, which the law was supposed to require. In its

[2] [From 4 Law & Eq. Rep. 149.]

[1] [Reported by John W. Brockenbrough, Esq.]

reasoning, the court inclined to the opinion, that the surplusage did not vitiate the bond; but determined that it was vitiated by the omission of a material condition required by law. The reason for determining the two objections differently, is this. The court supposed itself competent to say, on a bond containing every thing required by law, and something more, that the surplusage might be considered as an absolute nullity, and the bond construed as if such surplus and void matter was not contained in it. This is not a novel principle. There are many cases in which surplus matter is rejected. By rejecting it in this case, the bond conforms to law, and it is an effort to give validity to the instrument. It is possible, the effort may not be defensible. But where an essential circumstance required by law, is omitted in the bond, the court does not believe itself competent to supply the omission, and to make the bond conform to the statute. No analogous case is known, in which a court of law exercises such a power. The court may reason erroneously, in supposing itself competent to reject surplus matter, stated in a statutory obligation, which contains every thing required by law, and incompetent to insert in such obligation, matter which it does not contain; or it may apply the principles improperly in the case. But the inconsistency of the two opinions is not perceived. If there be hostility between them, if there be any irreconcilable opposition, between the two positions, that a court may reject surplus matter in an instrument, but cannot aid the want of substance, that hostility, that opposition, is not yet discovered.

Passing by this supposed inconsistency, on the existence or non-existence of which the cause certainly does not depend, the court will proceed to consider the arguments urged to show, that the judgment below is erroneous. The first position to be examined is this: It is contended that the law does not require the words "dangers of the seas excepted," to be inserted in the bond.[2] The statute itself must decide how far this position is correct. The words are, "the master, &c., of such vessel shall first give bond, &c." If no more was intended by this position, than to say that the very words in which the obligation should be expressed are not prescribed in the statute, the position would be true in itself, but the court would be at a loss to discern its application to this case. On a statute which prescribes, not the words, but the substance of a bond, the force of that argument is not perceived, which contends, that because the precise form is not given, the substance which is given may be disregarded. If it was intended to say that the statute does not require the exception in some form to appear in the bond, the correctness of the construction cannot be admitted. The statute directs that no registered vessel, having a cargo on board, shall be allowed to depart from one port of the United States for another, unless the owner, &c., shall first give bond, &c. The bond is certainly directed by the statute. The sum in which it shall be taken is directed. The purpose for which it shall be taken, is certainly directed by the statute. It is not supposed that this law will be so construed by the attorney for the United States, as to be satisfied with a bond of any description which the caprice of the officer taking it might suggest. All, it is presumed, will admit that a penal sum must appear in the bond as being double the value of the vessel and cargo. But is this obligation to stand single and unconditional, as a positive debt due to the United States, on the execution of the bond? Certainly not. The law does not consider an immediate debt as existing, and if the bond were to bear that form, its appearance would be in precise opposition to its real nature, and to the effect the law means to give it. It would be, too, in opposition, as the court conceives, to the very words of the act. The bond is, by the statute, to be taken in double the value, "that the goods, wares, and merchandise, shall be relanded in some port of the United States." The bond is certainly to secure the relanding of the goods; and how are the words, "that the goods, &c., shall be relanded in some port of the United States," to be satisfied, otherwise than by inserting those, or equivalent words, in the bond? To me it seems, that by the language of the statute, they are peremptorily required. If this be correct, then the exception also must form a part of the condition. It is impossible to distinguish between the necessity of inserting one and inserting the other. They are completely identified in this respect. They are equally required in the same sentence and the same words. I understand the statute, then, as requiring, that the exception shall appear in the obligation. On this point, its mandate is positive. This point will, if possible, be made more clear, by comparing the language of the original embargo act, which prescribes the bond, with a sentence in the additional act, which directs that such bonds shall be put in suit. It is obvious that "other unavoidable accidents"[3] are to form no part of the bond.

The establishment of the construction which has been considered, was, in some degree necessary to the operation of the next argument urged against the judgment of the district court. It was, that the insertion of the exception was perfectly useless, since without its insertion, the defence would be precisely the same, because (1) being in the law, the exception would avail the defendant

[2] See the second section of the original embargo act of the 22d of December 1807 [2 Stat. 451], quoted at length in note 1 to the case of Dixon v. U. S. [supra].

[3] Act March 12, 1808, c. 33, § 3 [2 Story's Laws, 1079; 2 Stat. 453, c. 8].

though not in the bond; (2) the common law exception is as broad as the statutory exception.

First. I am, certainly, not prepared to say, that on a suit instituted on a bond given under the act, the obligor might not avail himself of this defence, though the exception should not appear in the instrument, and the instrument should be deemed valid. Neither am I absolutely prepared to assert the affirmative of this proposition. I speak of the act as standing alone. There is no penalty affixed to the failure to reland the goods except the bond, no duty except what appears in the condition, no excuse for the non-performance of that duty, but what appears in the exception. The law does not declare that loss by sea shall excuse the failure to reland the goods in the United States, but declares that such exception shall appear in the condition. If, without such exception, the bond could be declared valid as a statutory obligation, then the defence must be made by pleading an extrinsic matter, which is no otherwise stated to be a sufficient defence than by being required as a part of the condition. The rules of pleading and the technical doctrines respecting specialties, would expose an obligor under such circumstances to difficulties to which the law did not mean to expose him.

Second. The second objection to the judgment is, that the words omitted are immaterial, because the common law gives an exception as broad, indeed broader, than that given by the statute. Neither am I prepared to accede to this proposition. The term "perils of the seas" in marine insurances, is inserted among a long list of damages which are enumerated in the same instrument. Marsh. Ins. 414.[4] In consequence of being placed with so many other perils, particularly mentioned, this is construed in policies of insurance to have a more restricted meaning than the words of themselves import. It does not mean dangers from men of war, &c., because those dangers are particularly recited. But, standing alone, those words would be much more extensive. Id. 416. But however this may be, the legislature have commanded that the exception form a part of the condition of the bond. If such condition do not appear, it is not such a bond as the statute has directed, and has authorized the collector to take. The exception is, in itself, very material, and, therefore, the officer is not at liberty to dispense with it, although it should be true that by skilful pleading, the defect might be cured. The act does not permit him to impose this risk on the obligor. The bond to be good as a statutory bond, ought to contain what the law requires.

NOTE. A brief review of some of the cases decided in the courts of the United States, involving the questions which have been discussed and settled in the above opinion, and in that of Dixon v. U. S. [Case No. 3,934], seems called for in this place. They amply sustain the principal positions taken in the above cases by Chief Justice Marshall.

In the case of U. S. v. Morgan [Case No. 15,809], a suit was brought by the United States, (as in both of the above cases) upon an embargo bond, taken under the second section of the original embargo act of December 22, 1807. The defendant's plea set forth the following objections to the bond: (1) That the bond should have been made payable to the collector, and not to the United States. (2) That the words "dangers of the seas excepted" were omitted in the condition of the bond. To this plea the plaintiff demurred. Judge Washington admitted that the bond was properly made payable to the United States, but in reference to the second objection, he said, that as the collector "had no authority to take such a bond but in virtue of a power conferred upon him by the government of the United States, the power should have been, at least, substantially pursued. The embargo law, under which this obligation was taken, does not set out, in precise terms, the form of it; but the material parts of it are clearly prescribed. It is to be in a sum of double the value of vessel and cargo, with condition that the goods shall be relanded in some port of the United States, dangers of the seas excepted. If it be taken in a greater sum than the law directs—if the condition stipulate a relanding elsewhere than in the United States—if it stipulate a relanding absolutely when the law requires it to be done on a certain condition, &c., it is not the bond which the officer was authorized to take, and all is void. A contrary doctrine might be productive of the most intolerable oppression to the citizen, as well as of detriment to the government." "Applying the above principles to this case, the bond is void." The demurrer to the plea was overruled, and judgment was rendered for the defendants. This case was decided in Pennsylvania, at the April term, 1811, of the circuit court of the United States.

In the case of U. S. v. Smith [Case No. 16,334], it was urged as an objection to the validity of an embargo bond, that it was made payable to the United States, instead of to the collector. The objection was overruled.

In relation to the general principle, that statutory obligations must conform strictly to the law, by virtue of which they are taken, the decisions, both in England and this country on the subject, are examined, very carefully and with much ability, by Judge Hopkinson, in a case before the district court of the United States, for Pennsylvania. See U. S. v. Brown [Case No. 14,663], decided in February, 1830. That was a suit upon an official bond, taken under acts of congress, of the 22d of July 1813 [3 Stat. 19], and of the 9th of January, 1815 [Id. 164]. The condition of the bond was, "that the aforesaid N. R., has truly and faithfully discharged, and shall continue truly and faithfully to discharge the duties of said office, &c.' and the condition prescribed by the law was, "for the true and faithful discharge of the duties of his office, according to law." The officer had given a similar bond, with the same condition, two years before, but the sureties were changed, and the suit was brought against the representative of a surety to the second bond. The second act contained a proviso, that nothing contained therein, should "be deemed to annul or impair the obligation of the bond heretofore given," &c. The principal question raised by the pleadings in the cause, was, whether the bond was good as a statutory obligation, the condition of the bond, so far as it was retrospective, not conforming to the condition prescribed by the statute, which was prospective only: or, in other words, (as the judge stated the question in general terms,) "whether if the condition of a statutory bond, contains more than is required by the statute, the bond is wholly void?" The question was, the judge

[4] 2 Marsh. Ins. (2d Am. Ed. from 2d London Ed.) bk. 1, c. 12, pp. 485, 487.

said, not whether the court could give the bond this retrospective effect, according to its tenor: that was not pretended on the part of the plaintiffs: but whether this retrospective condition, departing from the statute, rendered the bond wholly void, so that no recovery could be had for breaches of the condition, made after the execution and delivery of the bond?

After a thorough investigation of all the cases on this subject, the judge concluded as follows: "From the examination of the case, we may consider it as settled, that if a bond be taken at the common law, with a condition in part good, and in part bad, a recovery may be had on it for a breach of the good part. This being the general common law principle, it is incumbent on the defendant to show, that a different rule is established, in regard to a statutory obligation, on a bond authorised and required to be taken by a statute. An able and laborious endeavour has been made to sustain this distinction by the cases, and arguments drawn from them, to which I have referred with a careful examination. In my opinion, the distinction is not supported, as applicable to a case like the present, in which there is nothing in the statute declaring, that bonds that vary from the prescribed form shall be altogether void, and in which the good part of the condition may be easily separated from the bad. Nothing is required to be added to the contract, and nothing to be taken from it, but what is favourable to the obligor; by diminishing the extent of his responsibility." Judgment on the demurrer rendered for the United States. This opinion of Judge Hopkinson, is in conformity with those of Washington, J., in Armstrong v. U. S. [Case No. 549], decided in 1811, and in U. S. v. Howell [Id. 15,405], decided in 1826.

Case No. 14,414.

UNITED STATES v. ——.

[12 Law Rep. 90.]

District Court, N. D. New York. 1849.

COUNTERFEITING—UTTERING COUNTERFEIT COIN—CONSTITUTIONAL LAW.

Whether congress has power to provide for the punishment of the offence of passing counterfeit coin, quære.

This was an indictment for passing certain pieces of counterfeit coin in the similitude of the current coin of the United States. The prisoner having been brought into court for trial, his counsel moved the court to quash the indictment on the ground that the offence charged was not within the jurisdiction of the court. The authority upon which reliance was chiefly placed in support of the motion, was Fox v. State of Ohio, 5 How. [46 U. S.] 410.

B. F. Hall and D. Andrews, for the prisoner.
George W. Clinton, U. S. Dist. Atty.

CONKLING, District Judge, in deciding on the motion, expressed himself substantially as follows:

This question is not new in this court. The same objection was made in the case of another similar indictment at a late session of the court and the indictment, on this ground, was transmitted, under the late act of congress, for trial, to the circuit court, for the purpose of having the question brought to the consideration of the presiding judge of that court. In the interim I have again examined the case of Fox v. State of Ohio, 5 How. [46 U. S.] 410; and I am constrained to say that the ground, on which the decision in that case is placed, seems to me to forbid the exercise of jurisdiction in the case before the court. The question in Fox's Case was, whether the several states have authority to provide by law for the punishment of the offence for which it is proposed to put the prisoner on trial. The question was of course supposed on all hands to depend on the sound construction of those clauses of the 8th section of the first article of the constitution of the United States, by which it is ordained that congress shall have power "to coin money, and regulate the value thereof, and of foreign coin:" and "to provide for the punishment of counterfeiting the securities and current coin of the United States." The counsel for the plaintiff in error insisted that the authority of congress, in virtue of these provisions, to provide for the punishment of the offence of uttering base coin, no less than that of making it, is vested exclusively in congress: while, in behalf of the state of Ohio it was contended that this power was not granted to congress at all, and belonged, therefore, exclusively to the states. This latter proposition, I understand the supreme court distinctly to have sanctioned and adopted. "We think it manifest," say the court "that the language of the constitution, by its proper signification, is limited to the facts, or to the faculty in congress of coining and of stamping the standard value upon what the government creates or shall adopt, and of punishing the offence of producing a false representation of what may have been so created or adopted. The imposture of passing a false coin creates, produces, or alters nothing; it leaves the coin where it was,—affects its intrinsic value in nowise whatsoever." It is true that in noticing the argument of the counsel for the plaintiff in error, that unless the power to inflict punishment for the offence in question is held to belong exclusively to the national government, there will be danger that the offender will be twice punished for the same act, the court proceed to combat the reality of this danger, even conceding the power to be rightfully concurrent. But this concession is made only for the sake of argument, and its supposed immateriality does not appear to have been considered essential to the decision.

Mr. Justice McLean dissented from the decision. He agreed with the court, however, in considering the power in question to be exclusive, but maintained, in opposition to the court, that it was vested, not in the states, but in congress. His argument to show that the power, if it exists, ought to be deemed exclusive, on the ground that its exercise would, in the language of the Federalist, be "contradictory and repugnant," is very strong. Mr. Justice McLean did not, however, attempt to maintain that the power was expressly conferred by the constitution. Indeed, it would seem to be idle to insist that the grant of

power to provide for the punishment of "counterfeiting the current coin," conferred, ex vi termini, the power to provide for the punishment of passing counterfeit coin. The offences are widely dissimilar in their nature and in point of aggravation, and have always been so considered. Had the constitution been altogether silent, with respect to the power of penal legislation, in regard to this, as well as other subjects to which it pertains and has been exercised, it would then have been left in this as in the other cases, to reasonable intendment, as incidental to the general power of legislation, or, in other words, it might have been considered as depending on that provision of the constitution which confers the power to pass all laws necessary and proper for carrying into execution the other enumerated powers. No one, it is presumed, would, in that case, have questioned the authority of the nation to punish the crime of coining, and by parity of reasoning, the power to punish the offence of passing counterfeit coin might not unreasonably have also been inferred. At any rate, the power in each instance would have rested upon the same general footing, and the whole subject being thus committed reasonably to the discretion of congress, the constitutionality of a law providing for the punishment of passing false coin, would not have been likely to be even entertained by the courts as a judicial question. I cannot, however, but think, that the force of the learned and able opinion of Mr. Justice McLean, to prove that the power to punish the offence of passing, as well as that of counterfeiting, ought to belong to the nation, is, in no slight degree, diminished by the above-mentioned provision of the constitution, expressly conferring the power to punish the crime of coining. "Expressum facit cessare tacitum." With the exception of "piracies and felonies committed on the high seas, and offences against the laws of nations," which are sui generis, and which there were the most cogent reasons for bringing under the cognizance of the national tribunals, and with the exception also of the power of penal legislation embraced in the grant of exclusive legislative authority over ceded territory, the offence of counterfeiting is the only one expressly named in the constitution, over which the legislative power of congress is declared by the constitution to extend. The authority to punish depredations upon the mail; frauds in obtaining pensions; enticing soldiers to desert; conspiracies to defraud underwriters, and bottomry-bond holders; perjury, &c. &c.; is left to be inferred from the general grant of legislative power over the several subjects to which these offences respectively relate. Why was the power to punish the offence of coining expressly given, unless it was, by defining, also to limit the power of penal legislation relative to the coin? On the other hand, however, it must be conceded, that serious embarrassments are likely to arise from the recognition of a concurrent power over the subject by the states. If the power to punish coining belongs exclusively to the nation, and that of punishing the offence of passing to the states, where is the power to punish the mischievous and common offence of importing spurious coin from Canada, vested? Perhaps the subject may hereafter, upon maturer consideration, be placed by the supreme court, on a more satisfactory footing—either by deciding the power to punish all offences against the coin, to be concurrent in the nation and the states; or, which would still more effectually remove the difficulty, by reconsidering the decision of Fox v. State of Ohio [supra], and adopting the doctrine maintained by Mr. Justice McLean. But so long as that decision remains unshaken by the authority from which it emanated, I must decline to exercise jurisdiction of the offence of passing counterfeit coin.

Case No. 14,415.

UNITED STATES v. ABBOTT.

[Cited in Johnson v. Chapman, Case No. 7,378. Nowhere reported; opinion not now accessible.]

Case No. 14,416.

UNITED STATES v. ABBOTT.

[9 Int. Rev. Rec. 186.]

Circuit Court, D. Massachusetts. 1869.

PENAL ACTION—INTERNAL REVENUE—FAILURE TO AFFIX STAMP.

A party sold a box of sardines without affixing thereto an appropriate revenue stamp, and was indicted to recover the penalty thereby incurred. Defendant demurred. *Held*, that the indictment would lie as a proper proceeding under the provisions of Act July 13, 1866, § 9 (14 Stat. 145); Dept. Compilation, § 165, p. 121; Id. § 169, p. 124.

[This was a prosecution by the United States against James E. Abbott for a penalty for the omission to affix a proper revenue stamp to a package sold by defendant. Heard on demurrer to the indictment.]

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. Divested of all mere formal allegations, the indictment in this case charges against the defendant that he, at Boston, in this district, on the third day of September, 1868, did unlawfully and knowingly sell to the person therein named, a certain box containing sardines, not exceeding two pounds in weight, without affixing to the same an adhesive stamp or label denoting the tax or duty imposed thereon by law. 13 Stat. 296; 14 Stat. 145. When set at the bar to be arraigned, the defendant demurred to the indictment, and the district attorney joined in the demurrer. Views of the defendant are that the penalty prescribed for the omission to affix a stamp to the package sold as alleged, cannot be recovered by in-

dictment, and the demurrer was filed to raise that question. Single packages of that character which do not exceed two pounds in weight are by law subject to a tax or duty of one cent, and the requirement of the act of congress is that a stamp or label denoting the tax or duty shall be affixed to the package before the same is sold or removed, either for consumption or sale. 14 Stat. 145. Packages, such as the one described in the indictment, are included in that requirement, and the provision is that if any person, &c., shall make, prepare and sell or remove for consumption or sale, any such package as is therein enumerated and mentioned, without affixing thereto an adhesive stamp or label denoting the tax or duty imposed upon the same by law, he shall incur a penalty of fifty dollars for every omission to affix such stamp. 14 Stat. 144, 145.

Federal courts have no jurisdiction of any crime or offence, except that of treason, which is defined in the constitution, and such as are defined in some act of congress, as the United States have no unwritten criminal code to which resort can be had as a source of jurisdiction in such cases. U. S. v. Hudson, 7 Cranch [11 U. S.] 32; U. S. v. Coolidge, 1 Wheat. [14 U. S.] 415; U. S. v. Beavans, 3 Wheat. [16 U. S.] 336; U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76; Conk. Prac. 165. Power to try and punish an offender does not exist in a federal court, unless the defence is defined as before explained, nor unless the punishment is prescribed by an act of congress. No such difficulty, however, arises in this case, as the provision already referred to shows that the offence as charged, is clearly defined in the act of congress, and that the punishment annexed to it is a penalty of fifty dollars. Exclusive original cognizance of seizures under laws of impost, navigation or trade, whether made on water or on land, was conferred upon the district courts by the ninth section of the judiciary act, and also of all suits for penalties and forfeitures incurred under the laws of the United States. 1 Stat. 77. But the provision applicable to this case is that all fines, penalties and forfeitures, which may be imposed or incurred (under that act), shall, and may be sued for and recovered, where not otherwise provided, in the name of the United States, in any proper form of action or by any appropriate form of proceeding, before any circuit or district court of the United States for the district within which said fine, penalty or forfeiture may have been incurred, &c. 14 Stat. 145; 13 Stat. 305. Evidently the phrase "by any appropriate form of proceeding," was intended to be more comprehensive than the phrase "in any proper form of action," which precedes it, and it is difficult to see what other procedure than indictment could be meant, as informations in revenue cases are exclusively cognizable in the district courts, except on appeal or writ of error.

Examined in any point of view it is quite clear that the decision as to the construction of the eighty-ninth section of the act of the second of March, 1799, does not control the case before the court. 1 Stat. 695, 697; 3 Stat. 782; U. S. v. Andrews [Case No. 14,453], Cir. Ct., Maine Dist., Sept. Term, 1868. Material provision of that section is, that all penalties accruing by any breach of the act, shall be sued for and recovered with costs of suit, in the name of the United States, in any court competent to try the same, and that the trial of any fact which may be put in issue, shall be within the judicial district in which any such penalty shall have been incurred. Penalties and forfeitures incurred by force of the act of the third of March, 1823, are required to be sued for, recovered, distributed and accounted for in the manner prescribed in the act next before referred to, and this court held that such penalties and forfeitures could not be recovered by indictment; but it is obvious that that decision has no just application to this case. Different remedies are often given to recover the same penalty, but the general rule is that when a statute prohibits a matter of public grievance, or commands a matter of public convenience, and no special mode is expressly or impliedly directed, it may be prosecuted by indictment. Colburn v. Swett, 1 Metc. [Mass.] 235. When a statute, says Bacon, commands or prohibits a matter of public concern, the person guilty of disobedience to the statute, besides being answerable to the party injured, is likewise liable to be indicted for the disobedience. 9 Bac. Abr. 259, per Bouv.; 5 Bac. Abr. 56. Where a statute, says Chitty, prohibits an act to be done under a certain penalty, though no mention is made of indictment, the party offending may be indicted and fined for the amount of the penalty, which is the precise case under consideration. 1 Chit. Cr. Law, 163. Authorities to the same effect are numerous, but they all agree that where a statute creates an offence, and points out a particular remedy, that the mode pointed out in the statute must be observed. 1 Chit. Cr. Law, 163; U. S. v. Mann [Case No. 15,717]; U. S. v. Simms, 1 Cranch [5 U. S.] 252. The rule at common law was that if a statute prohibited a matter of public grievance or commanded a matter of public convenience, all violations of the prohibition or commands of the statute were at least misdemeanors, and as such were punishable by indictment, unless the statute specified some other mode of proceeding. 1 Am. Cr. S. § 10; 2 Hawk, P. C. c. 25, § 4; Rex v. Davis, Leach, 273; Rex v. Sainsbury, 4 Term R. 451; State v. Fletcher, 5 N. H. 257; Rex v. Harris, 4 Term R. 202; Keller v. State, 11 Md. 525; People v. Bogart, 3 Park, Cr. R. 143; Wilson v. Com., 10 Serg. & R. 375. Application of that rule was not defeated at common law, because the statute did not in terms annex a penalty to the offence, but the rule can only be applied in the jurisprudence of the United States in cases where the offence is defined,

and the punishment is prescribed, in the acts of congress containing the prohibition or command, or in some other applicable to the same subject matter. Additional explanations to show that the offence is defined in the act of congress, and that the punishment is also prescribed, are unnecessary, and in our opinion there are no words in the provision to exclude a remedy by indictment. On the contrary it is our opinion that the phrase "by any appropriate form of proceeding" was intended to authorize a public prosecution by indictment. Demurrer overruled.

Case No. 14,417.

UNITED STATES v. ABLE et al.

[15 Int. Rev. Rec. 41, 50.]

District Court, D. Missouri. 1872.

OFFICERS — NEW APPOINTMENT — SURETIES — OLD DEFALCATION — COLLECTOR OF INTERNAL REVENUE—LIST OF ASSESSMENTS.

1. Under the well established doctrine that where an officer becomes his own successor, he, as such successor, is to be governed by the same rules as if another person had been appointed, it is *held* that in the absence of formal receipts, the fact that the government funds were turned over so as to make the officer and his sureties under the new appointment liable, is to be inferred from what his accounts show were in his hands at the commencement of the new term, and the moneys of the second term, in which new sureties are interested, cannot be taken to pay off an old debt or defalcation with which they had no concern.

2. A collector of internal revenue should be credited with so much of the list of assessments transferred to his successor as the commissioner found he could not collect with due diligence, within the meaning of section 34 of the act of 1866 [14 Stat. 158], and he is at liberty to show that by due diligence he could not collect the same before the expiration of his term of office, or that, as to some of the items, the day prior to which they ought to be collected had not arrived, the action of the commissioner on his accounts not being final.—Ed. Int. Rev. Rec.

At law.

TREAT, District Judge. This is a suit against the principal and sureties on an official bond of Barton Able, collector of the First collection district of Missouri, for the amount of moneys alleged to be in his hands as such collector, "evidenced by a transcript of the books and proceedings of the treasury department, filed and made part of the proceedings;" which amount he has not paid on demand made. The suit is brought pursuant to the act of 1797, c. 20 (1 Stat. 512) which provides as follows:

Section 1. "That when any revenue officer, etc., shall neglect or refuse to pay into the treasury the sum or balance reported to be due to the United States upon the adjustment of his account, it shall be the duty of the comptroller, etc., to institute suit." etc.

Sec. 2. "That, etc., a transcript from the books and proceedings of the treasury certified, etc., shall be admitted as evidence, and the court trying the cause shall be thereupon authorized to grant judgment," etc.

The 36th clause of rule 29, regulating the practice in this court, prescribes that "it shall not be necessary for a party to set forth in a pleading the items of an account therein alleged, but if they be not set forth, he shall file with his pleading, referring to it therein a copy of the account, which shall be deemed to be a part of the record, and shall be answered or replied to as such." In accordance with the spirit of that rule and the act of 1797, the petition has been framed, and the transcript of the account filed. Although this suit, under the act of 1797, is technically on the official bond, yet really it is as on an account stated, for the balance alleged to be due; and under the rulings by the United States supreme court the transcript should give at least the balances at the quarterly or other rests on a continuing account; therefore the district attorney very properly considered the foregoing rule of this court as applicable, and the defendants have in their answer treated said treasury transcript as a part of the record. The object of that rule is to compel the plaintiff to disclose on what he relies, and to give the defendant full opportunity to admit or deny, in detail, the matters charged against him—to prevent resort to common counts—and instead of driving defendants to crave oyer and move for a bill of particulars, to require of the plaintiff to file with his petition in the first instance (or give oyer), the contract or instrument on which the suit is instituted, and if the action is based on an account to file the account with the petition. This should especially be done under the act of 1797, where the transcript of the account is prima facie evidence of the amount due. Hence, as a matter of practice, the attorneys of plaintiff and defendants are substantially correct; and consequently, on the pending motion of the district attorney, which is, in substance, to strike out certain parts of the answer, the grave questions of law, so fully argued, are fairly and fully before the court. The suit is on the bond, and the transcript is relied on, as sufficient, prima facie, to establish plaintiff's right, not only to recover, but to recover the precise amount stated therein as the balance due. The defendants under the practice stated, are therefore fully advised of the matters which they have to meet. Sections 3 and 4 of the act of 1797, and the decisions of the United States thereupon, leave no room for doubt or difficulty. Thus, the United States on the one hand, and the defendants on the other, are brought to a direct issue as to their respective rights in the premises, without concealments or confusion—issues clear and positive and certain, as all issues should be where the logic of pleading obtains.

This suit, then, is on a bond executed by the defendants February 20, 1867; but the

petition does not disclose the fact that said Able had held the same office previously and had given a previous bond. The treasury transcript, however, commences from September 1, 1866, and is continuous in its quarterly balances to the final statement of the account at the close of said Able's second term of office, May 16, 1869, the balances for each quarter and fractional quarters from September 1, 1866, to May 16, 1869, being brought forward into each succeeding quarter, regardless of the fact that there were two distinct terms of service, and two separate bonds for the distinctive terms, and also regardless of the fact that there should (so far as the sureties are concerned), have been a final rest or adjustment of the balance at the expiration of the first term of office. Although the petition does not, in the body thereof, disclose these facts, yet the transcript filed under the rule of the court does do so, and defendants avail themselves thereof. If there could be any doubt as to what the law requires in such cases, that doubt was long ago put to rest by the United States supreme court. The original and temporary appointment would have terminated, if no further action had been had, at the close of the next session of the United States senate, viz., in 1866–7. But before the close of that session the defendant Able was appointed by the president, "by and with the advice and consent of the senate," his own successor to the said office of collector, and gave the required bonds under the new appointment. Each term, therefore, was as distinct as if different persons had held the office for the respective terms. U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 721; U. S. v. Eckford's Ex'rs, 1 How. [42 U. S.] 250. It would seem to follow, logically, and ex necessitate rei, that the rests or balances should be stated accordingly, and in the two cases just cited it was so held. Although in Kirkpatrick's Case [supra], which is the same as this in all respects so far as this point is concerned, the accounting officers considered the defendant as holding his office under what was termed a reappointment, and continuously, and therefore ran the accounts of his first term of office into the second, the United States supreme court held that such a course was not lawful; that at the close of his first term a balance should have been struck, just as if some other person had been appointed to succeed him. In no other way is it possible to determine the liabilities of the sureties on the respective bonds.

In the case of U. S. v. Eckford's Ex'rs [supra], those rulings being before the accounting officers they restated the accounts accordingly, making the proper rests and striking the balances properly. One of the questions in that case was, whether such restatements of the account were within the act of 1797, and the court held that they were. Indeed, in that case several points were clearly decided which pertain to the questions now under consideration—decided, too, in such a way as not only to be binding on this court, but as to carry with them the fullest assent of right, reason, and sound legal judgment. The general transcript in that case, as in this, ran the accounts of one term, by quarters, into another, without reference to the fact that the terms of office expired in the middle of a quarter; whereby the general transcript gave no balance or rest for a distinctive term of office, and without reference also to the fact that uncollected revenue bonds, etc., might still be in the hands of the collector. The court, therefore, said: "From this, it appears that the general transcript affords no sufficient data on which to charge the sureties for any term of office, where, as in the present case, the same person has served as collector for several terms." That case, and the earlier case of Kirkpatrick, as well as the laws concerning accounting, determine that the United States, when plaintiff, must make out its case by competent evidence, and that the treasury transcript is prima facie evidence of the balance due, as to all items which arise in the ordinary course of treasury transactions with a collecting or disbursing officer; yet, that the plaintiff must present such a treasury transcript as will enable the jury to determine what was due for the precise term for which the bond was given. How can the jury, with no other evidence before them than the transcript in question, determine what was the state of the accounts between the United States and the defendant Able on February 20, 1867, or since? The case of U. S. v. Bruce, 17 How. [58 U. S.] 449, does not change the rule. In the report of that case, it is not stated whether the balance was struck for the close of the antecedent term of office; yet it is inferable that such was the fact. The doctrine then enunciated is simple enough, and evidently just, viz.: That when an officer becomes his own successor, he, as such successor, is to be governed by the same rules as if another person had been appointed—a doctrine laid down in all preceding cases. Thus, if at the close of his term of office, a collector, in accordance with law and treasury regulations, turns over to his successor moneys, bonds, etc., he should, as a general proposition, be credited therefor and the successor charged therewith. The successor and the sureties on his official bond are liable for such successor's action, with respect to the moneys and bonds so received by him. So, when the same person is again appointed, and he has not taken a receipt from himself as successor in favor of himself as predecessor, and it is shown by the treasury balance that there were in his hands certain moneys, etc., as he passed from the one term of office into that next succeeding, it was properly held that the amount in question did come to his hands in the second term, just as if he had passed formal receipts therefor from himself to himself. Hence, that

court said, when the treasury transcript shows that such balance struck was in his hands at the time he passed from the old to the new official term, the burden was on the sureties to the last bond to prove that, although the treasury transcript (which is prima facie evidence), indicated that he did receive in the new term what was in his hands at the close of the old term, still that indicated fact or prima facie case was not correct, because he had really misapplied previously the funds which seemingly were then in his hands. If a preceding collector turns over funds to his successor, the latter and his sureties are liable therefor. How is it to be proved that the funds were turned over? When different persons fill the office for the respective terms, the receipts given show the fact; but when the same person fills both terms and no formal receipts pass, the fact is to be inferred from what his accounts show were in his hands at the commencement of the new term. The doctrine in Bruce's case is thus simple enough.

In the case now before the court the transcript does not show what was in the defendant's (Able's) hands at the close of the first term, and consequently with what precise sums he is chargeable under the second bond. Then, again, another difficulty arises as to the appropriation of payments made by him during the second term. The manner in which the account is made out, is insufficient for that purpose. The debtor, it is true, may, ordinarily, make his own appropriation of payments, and when he fails to do so, the creditor may elect; and in the absence of any appropriation made by the debtor or creditor before suit is brought, the court will so appropriate the payments as to work out justice to all concerned. But that general rule the supreme court has rightly held as not applicable to sureties under different official bonds, for obvious reasons. It says: "The rule adopted in ordinary cases is not applicable to a case where different sureties under distinct obligations are interested." The reason is this: A public officer acting under an official bond with certain sureties is liable, together with his then sureties, for his conduct during the term to which that bond applies. If at the close of that term, he is a defaulter—say for $100,000—his sureties are held therefor. Should he enter upon a new term, under a new bond with different sureties, he cannot take the moneys belonging to the new term and apply them to the payment of his defalcation during the previous term, nor can the United States do so, and thus shift the obligations of the first sureties from them to the second sureties, or in other words, take the moneys of the second term in which the sureties are interested to pay off an old debt or defalcation with which they have no concern. The last sureties are liable only for the payment to the United States of the moneys received by their principal during the last term, and cannot by a misappropriation of the sums paid be thus mulcted for defalcations or obligations never incurred during the term for which they are liable. But the modes of accounting, as prescribed by the internal revenue act, although differing in some details from those indicated by other acts of congress, are essentially the same, and therefore the foregoing doctrines are equally applicable to each class of cases. Collectors of customs may have uncollected bonds, etc., in their possession at the expiration of their terms of office, for which they must account; and the modes of accounting therefor are sufficiently explained in the acts of congress and the decisions of the supreme court. See cases cited ante, and [Hoyt v. U. S.] 10 How. [51 U. S.] 109.

Section 34 of the act of 1864 was changed by the act of July 13, 1866, the latter being applicable to this case. In the act of 1866, § 34 (14 Stat. 110), as amended, reads: "That each collector shall be charged with the whole amount of taxes, whether contained in lists delivered to him by the assessors, respectively, or delivered or transmitted to him by assistant assessors from time to time, or by other collectors (or by his predecessor in office), and with the additions thereto, with the par value of all stamps deposited with him, and with all moneys collected for passports, penalties, forfeitures, fees, or costs, and he shall be accredited with all payments made into the treasury as provided by law, with all stamps returned by him uncancelled to the treasury, and with the amount of taxes contained in the lists transmitted in the manner above provided to other collectors, and by them receipted as aforesaid, and also, with the amount of the taxes of such persons as may have absconded or become insolvent prior to the day when the tax ought, according to the provisions of law, to have been collected (and with all uncollected taxes transferred by him or his deputy acting as collector to his successor in office:) provided that it shall be proved to the satisfaction of the commissioner of internal revenue that due diligence was used by the collector. (these words in act of 1864 are omitted in act of 1866, 'and that no property was left from which the duty or tax could have been recovered,') who shall certify the facts to the first comptroller of the treasury. And each collector shall also be credited with the amount of all property purchased by him for the use of the United States, provided he shall faithfully account for and pay over the proceeds thereof upon a resale of the same as required by law. (In case of the death, resignation or removal of the collector, all lists and accounts of taxes uncollected shall be transferred to his successor in office as soon as such successor shall be appointed and qualified, and it shall be the duty of such successor to collect the same.)" The parts in brackets were inserted in the act of 1866, as to the transfer of uncollected lists; whereby the successor was to be charged therewith

and the predecessor credited, and whereby it became the duty of the successor to collect the same. Those amendments necessarily involved a change in the mode of accounting. It should be remembered that section 35 permits, as in previous acts concerning revenue officers, warrants of distress to issue for the amount found due on balances struck at treasury department. Pursuant to the act of July 13, 1866, applicable to these accounts, defendant Able is charged with the list of uncollected taxes received by him from his predecessor, but he is not credited with the list of uncollected taxes transferred to his successor or with any part thereof. It is stated in the argument that the commissioner's instructions issued under the act of 1864 have been continued in force, and applied to the act of 1866, just as if the statute had not been changed. How that may be does not appear on this motion, in such a way as to authorize judicial notice thereof. It is evident that congress had its attention called to the deficit in the act of 1864, and endeavored to remedy it in the act of 1866; and that thereafter the system of accounting ought to have conformed to the positive requirements of the amended law. The act of 1866 is as important to the revenue interests of the country as to the protection of public officers. An outgoing collector may have had placed in his hands a list of taxes for collection a few days before the expiration of his term of office, and the time in which they "ought, according to the provisions of law, to have been collected," may not have terminated when it became his duty to turn the same over to his successor, and take the latter's receipt therefor. And in this case it appears that such a list was received by the collector within a month of the close of his official term. Whatever difficulty may exist as to the true construction, in some respects, of section thirty-four, as amended by the act of 1866, there ought to be no doubt that the section in question contemplates that the outgoing collector shall be credited with a list of such uncollected taxes transferred to his successor, as the law did not require to be collected previously. The acts of congress contain various provisions, not only as to the times, but as to the modes of collecting taxes, and also as to penalties and forfeitures. Hence, at the expiration of a term of office, there may be many taxes not yet collected, because not yet collectible; there may be many suits pending for penalties, forfeitures, etc.—also, other proceedings pending whereby the payment of taxes is to be secured or enforced. The embarrassment consequent thereon in a final adjustment of the outgoing collector's accounts may be very great, unless some just and uniform system is adopted and pursued in the accounting department. So far as congress has prescribed the rule, it must be followed, and any instructions or rules inconsistent therewith are invalid. From the letter of the statute, as cited above, the successor in office is chargeable with the tax list transferred to him by his predecessor for collection, and it is made the duty of the predecessor to transfer "all lists and accounts uncollected," and of the successor to collect the same. If no other provisions of section 34 are considered, the rule for accounting would be very simple, viz.: the outgoing collector would transfer to his successor "all lists and accounts uncollected," and receive credit therefor—just as he had been previously charged with such lists and accounts transferred to him by his predecessor. His successor, then, being charged with what was so transferred, would have to account therefor. Thus the accounts of the outgoing collector could be speedily settled. But if he is not, despite the act of 1866, to be credited at once for the transferred lists and accounts, but only with the amounts from time to time collected by his successor, and as they are collected; and if consequently his liabilities and those of his sureties are made to depend on the diligence of his successor, over whose conduct they have no control, then he and his sureties are to be held responsible, not for his faithful discharge of duty, but for the faithful discharge by his successor of the duties devolved solely on the latter; for section 34, under the act of 1866, devolves on the successor the duty of collecting the uncollected lists transferred. The act evidently contemplates the speedy adjustment of accounts with each collector. As one succeeds another, and uncollected demands may be still outstanding which ought to be collected, the law provides that the outgoing collector, instead of retaining in his hands the uncollected lists for the purpose of enforcing the collection of the same, and instead of waiting also for the termination of suits or other pending proceedings, shall give place to his successor, who shall from his entrance into office be charged with the completion of the unexecuted duties of his predecessor. If full and correct lists in detail are transferred, as the act contemplates, there will cease to be either confusion or divided responsibility, and the accounts can be readily adjusted and closed. For illustration, by the act of September 24, 1789 [1 Stat. 73], United States marshals, after the expiration of their terms of office or removal, have power to execute all precepts in their hands, but the internal revenue acts are framed to prevent a predecessor in a collector's office from collecting taxes after his term of office has ended. It is obvious that the policy thus enacted is not only wise, but essential to the prompt and methodical collection of revenues; and to the due responsibility which should attach to those, respectively, who are charged with such important trusts. It is also important that the transition in office should not work an interruption in the accounts of the government, or a delay in collections and settlements.

While such seems to have been one of the main objects of the amended section, and a

guide is thereby furnished to the accounting officers, yet there is another and equally important question to be determined. The section states what shall be charged to the successor, but is not equally explicit as to what shall be credited to the predecessor. It would seem that for accuracy in accounting, the predecessor in transferring his uncollected lists should be credited therewith, if his successor is charged with them; otherwise there may be a double charge for the same accounts on the treasury books. It is said, as abovementioned (and a circular to the same effect is produced), that the old system of regulations under the act of 1864, is still continued, whereby the defects of the act of 1866 were designed to be remedied in these respects. How that may be is not known to the court, nor can it be now determined whether such a system is wiser than the law, for it must suffice that courts must hold the wisest course to be the lawful course—that no other course, or rather that no course, inconsistent with that prescribed by law, is permissible.

But what is the course prescribed by law? While section 34 states what shall be charged to the successor, and what his duty shall be as to the transferred lists, it only provides concerning credits to be given to the predecessor (so far as the point under consideration is concerned), as follows: "And also with the amount of the taxes of such persons as may have absconded or become insolvent prior to the day when the tax ought, according to the provisions of law, to have been collected, (and with all uncollected taxes transferred by him, or by his deputy acting as collector, to his successor in office): provided, that it shall be proved to the satisfaction of the commissioner of internal revenue that due diligence was used by the collector, who shall certify the facts to the first comptroller of the treasury." The whole of this section has been previously quoted and reference made to the parts thereof amendatory of the act of 1864. As seen, the act of 1864 made no provision with respect to the uncollected lists in the hands of the outgoing collector, and the amendments with regard thereto in the act of 1866 are interjected into the former act in such a way as to create doubts and difficulties concerning the true interpretation of what the commissioner should certify. The collector is required to return his accounts to the commissioner, and the section prescribes what shall be charged against him. Do the words, "who shall certify the facts to the first comptroller of the treasury," refer only to the opinion of the commissioner on the question of "due diligence," or to all the facts connected with the collector's accounts? There is nothing in the section whereby, in express terms, the accounts in the commissioner's office are to be sent to the first comptroller, unless the clause quoted so requires. True, there are other statutes concerning the treasury department, bearing on the subject, from which such a duty might be inferred; but the present object is to ascertain what section 34 exacts, in order to determine for what an outgoing collector and his sureties are liable, and what treasury transcript of his accounts shall be prima facie evidence against them, and what they are permitted to prove by way of credits. The "due diligence," under the act of 1864, was with reference to absconding and insolvent debtors; and is it now to be held to apply to all uncollected taxes, irrespective of the previous limitation to absconding and insolvent debtors? Such seems to be the true meaning of the act, not from the collocation only, but from the whole tenor of the section, as fully shown not only from its detailed requirements and the objects to be accomplished (the evil and the remedy), but also from other statutes in pari materia; and therefore the outgoing collector is to receive credit for only so much of the uncollected list transferred to his successor, which ought to have been previously collected according to the provisions of law, as he can prove to the satisfaction of the commissioner that he had used "due diligence" to collect. Still, if that be the true construction, the same rule of interpretation should apply to the charge to be made against his successor. Thus, if out of a list of $100,000 uncollected taxes to be transferred, the commissioner holds that the outgoing collector can receive credit for only $50,000 in consequence of lack of due diligence, and the successor is notwithstanding charged with the $100,000, does not $50,000 thereof stand charged twice on the books of the treasury? And further, if suit is brought on the bond of the outgoing collector, charging him with the $50,000 not collected through lack of diligence, and his successor collects and pays into the treasury every dollar of the rejected $50,000, shall the transcript originally filed as prima facie evidence against the outgoing collector and his sureties be the basis of the judgment to be rendered, exclusive of any proof that the $50,000 have been collected by his successor and paid into the treasury? Under the act of 1797, he cannot be permitted to prove, for the purpose of reducing the treasury balance named in the transcript, any items of credit except such as were previously submitted to the treasury officers and were by them disallowed, and, therefore, if he is not to be credited with what he has transferred to his successor, except where due diligence has been proved to the commissioner's satisfaction, and the judgment of the commissioner is final with respect thereto—then the outgoing collector and his sureties must pay the $50,000, although the same is already in the treasury. On such a theory the $50,000 would be recovered—whatever the form of suit used—rather as a penalty for lack of due diligence. This raises the distinct question presented in the argument: "Is the decision of the commissioner on that point final?" The

rule under the act of 1797 makes the transcript prima facie evidence, but allows the defendant to prove such disallowed credits as he is legally entitled to receive. Such must be the rule in this case unless section 34 establishes a new rule with respect to the accounts of internal revenue collectors. There is no express repeal of the old rule to be found in section 34 of the act of 1866; nor does this court discover any such repugnancy between the two acts, as works a repeal of the former. They are entirely reconcilable and consistent with each other. Under the old and new acts concerning revenue officers, warrants of distress may issue on balances struck, and the character of such proceedings was fully discussed and settled in Murray's Lessee, 18 How. [59 U. S.] 272. It is in the power of congress thus to enforce such revenue demands, without leaving them open to review by judicial tribunals; but when resort is had to judicial tribunals, as in this case, then the requirements of law are to be fully considered, and the action of the treasury officers to be subjected to review in the light of the law and facts applicable to the case made.

Without analyzing the various analogous acts of congress, it must suffice to call attention to the act of March 3, 1791 (1 Stat. 199), and of July 22, 1813 (3 Stat. 22). The twenty-seventh section of the latter act provides: "That each collector shall be charged with the whole amount of taxes by him receipted, whether contained in the lists delivered to him by the principal assessor or transmitted to him by other collectors, and he shall be allowed credit for the amount of taxes contained in the lists transmitted in the manner above provided to other collectors and by them receipted as aforesaid; and also for the taxes of such persons as may have absconded or become insolvent, subsequent to the date of the assessment and prior to the day when the tax ought, according to the provisions of this act, to have been collected; provided it shall be proven to the satisfaction of the comptroller of the treasury that due diligence was used by the collector, and that no property was left from which the tax could have been recovered," etc. It will be seen that the act of 1813 was nearly the same as the act of 1864, and made no provision for lists of uncollected taxes transferred to successors in office. It will also be observed that the proof of due diligence was to be made to the comptroller. No case has been found which determines whether the action of the comptroller in admitting or rejecting a credit under the requirement of due diligence, was held to be final, or open for review under that act. It would seem that the substitution in the acts of 1864 and 1866 of the commissioner of internal revenue for the comptroller, does not work any change in the rule; nor is there aught in any of the several acts of congress which makes one act of an accounting officer as to adjusting accounts of more obligatory force than another. If his rejection of an item of credit claimed on one ground is open for review, why not, when another item is based on another ground? Is there any distinction to be found in the acts of congress or in the reasons on which they are founded which makes the comptroller's or commissioner's ruling on one item of credit more authoritative than his ruling on another? A revenue officer submits his accounts for audit, and some of the credits claimed by him are disallowed. He is permitted, when sued on his bond, to show that the disallowed items are just and lawful. Now, if the disallowance on the transferred lists is because the commissioner was not satisfied that due diligence was used for their collection, is the defendant to be precluded from showing that they were wholly uncollectible, or that they have been since collected by his successor and paid into the treasury? There is not, in the opinion of this court, any distinction of the kind; and the defendant is at liberty to show that according to the requirements of law he transferred the uncollected lists; that he could not prior to their transfer collect the same, etc.; in short that, under the law, he did what his official duty demanded, and having so done, he presented said amounts as credits to the proper accounting officers, who disallowed the same. In brief, this court holds that the action of the commissioner thereon is not final and conclusive; that his action could be reviewed by the comptroller, and may be reviewed in court under the act of 1797. The introduction of the internal revenue system, and the provisions whereby its affairs are primarily entrusted to a new bureau in the treasury department, did not make that bureau an independent department and detach it from the ordinary laws and regulations controlling the revenues of the country. The matters immediately pertaining thereto, that bureau was to control in the first instance; and instead of having the accounts of its officers pass primarily into an auditor's office, without the cognizance of the commissioner, the law demanded that those accounts and the conduct of the internal revenue business generally should be under the primary supervision of the commissioner. It may be that in some matters his decisions are final; but whether so or not, the point now to be decided is whether his accounting is final; whether no one, comptroller, secretary of the treasury or the courts can go behind his action, and review the same in the light of law and testimony. That it is in the power of congress to vest such authority in treasury officers is fully settled in the Case of Murray's Lessee; but that it has not, for the purposes of this case, vested any such final authority in the commissioner or comptroller is evident for reasons already stated.

As to the proper application or appropriation of payments during the second official

term, sufficient has been said, under the decisions of the United States supreme court, to show that such subsequent payments are to be appropriated as follows: All sums collected on accounts transferred from the preceding term are to be applied to those accounts, and all sums collected on other accounts or lists coming to the collector's hands must be applied to the latter. In other words, because Able was his own successor, moneys collected by him from lists coming to him, not from his predecessor, cannot, when paid, be applied to the payments of debts due from his predecessor, whether he or some one else was that predecessor. What collections and payments were made by him on his predecessor's transferred accounts or lists must be applied to them, but all other collections and payments must be applied to the subsequent accounts and lists to which they have reference. There can be no misappropriation, either by Able or the United States, of payments due to the respective official terms whereby the rights of parties under the different bonds can be prejudiced. Hence the portions of the answer objected to, under this head, indicates the main difficulty with respect to the transcript. It sets out that the collector is charged in the transcript as balance due December 31, 1866, $233,155 95, and with amounts of assessors' lists for said December and January following, $478,516 74; and for beer stamps during the months of January and February, 1867, $43,254 36—a sum, it will be perceived, equal to $754,927 54, and that said sum total is made to counterbalance payments made after the new bond of February 20, 1867, was given. The answer thus avers that of the payments made after the new bond was given, an illegal appropriation to that amount was made in discharge of obligations incurred under the prior bond. It does not so state with the precision which would have been necessary if the transcript had been made out with reference to the close of Able's first official term, but it is as precise as the transcript enables it to be. If the transcript had been made out as it should be, with the balance struck at the close of the first term, then the answer should have specified what payments made during the second term were of sums collected on lists of the prior term; so that legal appropriation of the payments could be made. But the answer is as definite and precise as the petition and transcript enable it to be. The answer is, to a large extent, drafted on the hypothesis that under the rules of practice in force in this court the defendants can treat the treasury transcript as a part of the petition or declaration, which hypothesis this court holds to be substantially correct. Although the instrument formally sued on is the bond, yet the recovery thereon is based on the treasury transcript under the act of 1797, and the amount of the recovery is dependent on the accuracy or inaccuracy of that transcript. From the views expressed, it is evident that the defendants have gone further in their defence than might have been technically necessary; yet it is well that they have done so, because they have thus enabled the district attorney to elicit, by motion, the opinion of the court on the several difficult, yet important questions of law, on which the case would have turned, were the same now before a jury. Were the case now on trial before a jury, or before the court without the intervention of a jury, the court would have to rule that the treasury transcript is admissible in evidence, but would have also to rule that it furnishes insufficient data on which to charge the defendants. [U. S. v. Eckford] 1 How. [42 U. S.] 250. It would also have to rule that the appropriations of payments must be made in accordance with the principles stated. How to ascertain what is due under the second bond sued on, there is "no sufficient data." The account should be restated at the treasury department in accordance with the requirements of law, as interpreted by the repeated decisions of the United States supreme court. That rule was determined substantially as early as Kirkpatrick's Case, and was more fully enforced in the Case of Eckford's Ex'rs. If not so restated, the mass of evidence to supply its defects will serve only to confuse a jury.

Under the act of 1866, Able is charged with the lists of his predecessor transferred to him. It does not appear whether he is so charged with the sum total of said lists, respective or irrespective of the question of due diligence. He is not credited with any part of the lists by him transferred to his successor. This court holds that he should be credited with so much of the list transferred to his successor as the commissioner found he could not collect with due diligence within the meaning of section 34 of the act of 1866. As to the residue of that list for which he received no credit, and for which it is said he demanded credit before suit was brought, and which demand was disallowed, he will be at liberty at the trial to show that by due diligence he could not collect the same before the expiration of his term of office, or that, as to some of the items, the day prior to which they ought to have been collected had not arrived. There may be, for aught that is known to the court, many suits instituted by him for the enforcement of demands not yet determined, and large sums of moneys collected under the transferred lists by his collector, the benefits of which he is entitled to receive.

It is of vast moment to the United States that the collecting and disbursing officers should be held to rigid accountability, and it is equally important that the laws should be so enforced as at all times to show for what they are accountable. If the accounts are so kept as to show the true balance, the

judgment of the courts will be as speedy as the trials will be brief; but if the accounts do not conform to the acts of 1797 and of 1866, in cases like the present, the trial may be so protracted as to work vast injury to the United States on the one hand, and the defendants on the other, whatever may be the final result. Hence, this court has, as a guide to the trial, expressed in detail what it holds the rules of law to be, which must control the ultimate decision of this cause. It is desirable that the merits should be reached; and that if any sum be due to the United States, it should be recovered. It is also desirable that revenue officers should be held to a prompt and diligent settlement of their accounts. It is still more desirable that such clear and definite rules of law should prevail as will insure fidelity and diligence and accuracy on the part of all connected with the public revenue.

The accounts in this case purport, on their face, to be, in large part, for sums claimed to be due under two bonds, without discrimination as to what is due under one or the other, and therefore furnish, in the language of the United States supreme court, no sufficient data on which a judgment can be rendered. Thus on the face of the account No. 5,559, "Supplemental for Suit," there is stated as due "under bond dated August 21, 1866, renewed February 20, 1867," the sum claimed in this suit. There is no such "renewed" bond. What is due under each of the bonds respectively does not appear. In the "statement of differences" credits appear for collections made by the successor in office, and also an explanatory note that several of the differences "arise in consequence of the collector's failure to render his account for the period from January 1, 1869, to May 16, 1869," when his official term ended. Thus, as late as February, 1871, no return by the collector for the period last named had reached the fifth auditor's office. How this occurred is not known to the court—whether the collector was guilty of the gross neglect not to make the required return for so long a time as indicated, or whether a return was sent to the commissioner's office and there remained awaiting final action. It is to be inferred, perhaps, from the manner in which the account is finally stated, that Able is credited only on uncollected taxes for what his successor had collected on transferred lists; and he still stands charged with the whole amount of the lists delivered to him originally, without abatement, except as mentioned in previous quarterly adjustments. It is apparent that for the lists delivered to him after December, 1868, no abatement has been made under the proviso in section 34; and, if he made no return subsequent to that date, there evidently could be no such abatement. He would not have returned even the fact of the transfer of uncollected lists to his successor, and of course would not have furnished any data on which credits were allowable thereunder. What the precise facts are has not as yet been disclosed to the court; but, as it is important, so far as practicable, to settle in advance the rules by which the parties are to be governed at the trial, it may be as well to remark now that, if no such return was made, there could have been no legal claim for credits, and consequently no proofs with reference thereto can be received, except in accordance with section 4 of the act of 1797, viz.: "That he is at the time of trial in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States or some unavoidable accident."

It is the obvious design of the various laws on this subject to hold revenue officers to a strict and prompt accounting with the treasury department, and not permit them in any, save the exceptional instances named, to first set up in the courts, after suits brought, claims for credits. Their duty exacts prompt accounting; and it is only when they and the department disagree as to some matter distinctly presented and considered at the department that the courts can review the question. Were this not so, the auditing and adjustment of accounts would fall mainly on the courts, the revenue of the country be involved in litigation, and the resources of the treasury be withheld from the daily recurring wants of the government. The doctrines in Murray's Lessee, 18 How. [59 U. S.] 272, fully explain that only such questions in accounting as the acts of congress permit can be heard in the courts.

But the point is made in the argument that the breach of the bond, as to uncollected taxes, should not be for the failure to pay over money, but for not diligently or faithfully performing the duty to collect within the prescribed time. That technical distinction is of no avail under the act of congress. The system of accounting is prescribed, and each list of taxes delivered is to be charged as a money demand. The credits given are on the same basis, as, for instance, for uncollected taxes from absconding and insolvent debtors. The balance struck on the treasury books is for money thus charged, and it is immaterial whether it was money actually put into the hands of the officer for disbursement or money's worth placed in his hands to be accounted for. The collector must pay into the treasury the amounts for which the lists call (as it his duty to collect them and pay them over), or he must show that by due diligence he could not collect them, and thus secure a credit by way of abatement. His accounts, presented and audited on such a basis, will through the "statement of differences" show, generally, wherein he and the accounting officers disagree. When suits are

instituted on official bonds, the courts will be confined to such "differences," except, as before mentioned, under section 4 of the act of 1797. That there may be no misunderstanding, attention is called to the "statement of differences," "supplemental for suit." The defendant, Able, claims for credits presented and disallowed; and the treasury transcript should show such disallowances. How far, in the absence of such disallowances appearing in the treasury transcript, the defendant will be permitted to go is a grave question. He should not be precluded from showing the fact, if it exists, although the transcript is silent on the subject. As to the extent or sufficiency of proofs, it will be for the court to rule when the question arises. If he made no return, the question is closed. He cannot withhold a return, and yet claim credits. He must present his accounts, debit and credit, and not forward a demand for credits without making the full return exacted by law. If he has made the full return, and charges appear which he disputes, or credits have been thus legally claimed which were disallowed, then as to those items the court will hear evidence; but it will not hear evidence as to any other items, unless they fall within the fourth section of the act of 1797. Hence, if the account is restated, there will be no difficulty in ascertaining precisely what are the items in dispute. If the defendant, Able, claims credits for items not in the statement of differences, it will have first to be shown that he made the proper return and claim therefor. By reference to the restatement, when made, the issues can be exactly framed so as to leave no doubt as to the items in dispute. The motion to reform is overruled.

Case No. 14,418.

UNITED STATES v. ABORN et al.

[3 Mason, 126.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1822.

EXECUTORS—CUSTOMS ENTRY—PROBATE BOND—CUSTOM-HOUSE BOND.

1. An executor, as such, has a right to enter goods belonging to his testator at the custom-house; and, as executor, to give bonds for the duties. Such bonds bind the estate of the testator.

[Cited in U. S. v. Boyd, 24 Fed. 694.]

2. If the executor become insolvent, the United States may, in equity, claim payment of the debt due for duties, from the sureties upon the probate bond of the executor, where the executor has wasted the assets, and are not obliged to resort for payment to the surety on the custom-house bond in the first instance.

[Cited in Pratt v. Northam, Case No. 11,376; Pierpont v. Fowle, Id. 11,152.]

This was a bill in equity, brought by the United States against Daniel T. Aborn, the sole acting executor of Samuel Aborn deceased, against the sureties of the same executor on his probate bond, against the heirs and devisees of the testator, and against Edward Carrington, to whom Daniel T. Aborn had assigned, and conveyed all his estate. The bill charged that Daniel T. Aborn was insolvent, and had wasted the personal estate of the testator. That at the decease of the testator he was the owner of certain merchandise on board of the ship Midas, which afterwards arrived at Salem, in Massachusetts, and was there regularly entered at the custom-house by Daniel T. Aborn, as executor, who gave bonds for the payment of the duties thereon, as executor, one of which bonds remained unpaid. The object of the bill was to obtain payment of this bond (viz. $580) from some, or all of the parties to the bill, according to the order in which they might be liable by law. The defendants put in various answers, according to their respective rights, denying the equity of the United States against them, and alleging that Samuel Ropes, the surety upon the custom-house bond, was still alive and solvent, and that the remedy of the United States, if the bond remained unpaid, was against him. The answer of Edward Carrington admitted the conveyance to him; but asserted that he was a bona fide purchaser for a valuable consideration without notice. It is unnecessary to give the substance of the answers at large, as the opinion of the court did not go into their particular merits.

The cause came on to be heard upon the whole evidence, the general replication having been filed, and was argued by:

U. S. Dist. Atty. Pitman, for the United States.

Mr. Crapo, for one of the devisees.

Searle & Brigham, for other defendants.

STORY, Circuit Justice. There are very few facts in controversy in this case, and upon these I shall have occasion to comment, as I proceed in the consideration of the merits of the suit. The testator was the owner of certain goods on board of the Midas, which, after his death, arrived at Salem, and were there regularly entered at the custom-house by Daniel T. Aborn, as executor, and bonds were duly given by him, as executor, with Samuel Ropes, as surety (who is admitted to be solvent), for the full amount of the duties. Two of these bonds have only been paid. The third has never been paid. But the same, after it became due, was sent to the district attorney of Massachusetts for suit, who, on application of the counsel and friends of the surety, asserting that Ropes was but a surety, and the estate of the testator was abundantly sufficient to pay the debt, consented to postpone the suit, and institute proceedings in Rhode Island against the executor of the testator, and other proper parties, to procure

[1] [Reported by William P. Mason, Esq.]

payment of the bond out of the assets, upon a special deposit being made in the Branch Bank of the United States to the full amount of the sum due on the bond, as collateral security for the payment, if it should not be otherwise discharged. The special deposit was made and the present suit was accordingly brought. In this transaction there is certainly nothing which constitutes in law or equity a discharge of the bond. It was on the part of the district attorney a very proper exercise of discretion, and there is certainly much equity in not insisting upon payment from a surety, when the principal is able to pay, and the United States is secure against any ultimate loss. Nor is there any hardship on the other side; for the collection act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22], has, in cases of insolvency, given to a surety on custom-house bonds the same rights of priority and advantage, which the government itself possesses. Collection Act 1799, c. 128, § 65 [1 Story's Laws, 573; 1 Stat. 627, c. 22]. Courts of equity are in the constant habit of administering relief in favour of sureties wherever they can (see Parsons v. Briddock, 2 Vern. 608; Wright v. Morley, 11 Ves. 12, 22; King v. Baldwin, 2 Johns. Ch. 554; Id. 17 Johns, 384; Hayes v. Ward, 4 Johns. Ch. 123); and certainly will not compel a creditor against his will to resort in the first instance to the surety, when he can enforce payment from the principal and those claiming under him. There is a great difference between interfering to aid a surety against the creditor, and interfering to prevent the creditor from his choice to aid the surety. The answers then, so far as they proceed upon the existing liability of Ropes, as surety, afford no defence to the suit, for the government is not compellable to resort to such party. The special deposit is in no just sense a payment of the bond. It is expressly proved to have been given as collateral security.

The next consideration is, whether this is a mere personal obligation, binding the executor in his individual capacity only, or a security binding the estate, and to be discharged out of the assets of his testator. It appears to me that the debt is a debt due ultimately from the estate. No person but the owner or consignee, his agent, or factor, is permitted by law to enter goods and give bonds for the duties. The duties accrued upon the importation, and are a charge upon the goods. The goods constituted a part of the testator's estate. The executor entered them as his legal representative; and in no other capacity had he the slightest right to intermeddle with them. But it is suggested that there is no clause in the collection act which authorizes the entry by an executor, as such. In terms this may be true; but not in intendment of law. The executor, as qualified owner, in his capacity of executor, is entitled to enter the goods, and give the bonds. If he pays the duties, they are a charge upon the estate. If he gives bonds he may thereby render himself personally liable; but he does not necessarily exonerate the estate. Suppose the surety in this case had paid the debt, could he be obliged to look to the insolvent executor, and might he not recover the money from the testator's estate? The debt is not payable by the executor on his own account, but as a debt due from the estate; and if paid by the surety it would be a payment for the principal in his capacity as executor. Whoever in the first instance may pay the debt, it is ultimately chargeable to the estate, for that receives the whole benefit; and a court of equity will make that party directly liable who must ultimately pay. Riddle v. Mandeville, 5 Cranch [9 U. S.] 322. This applies a fortiori where the immediate party is insolvent. If it were necessary to go farther, I might rely on the more general grounds, that bonds for duties do not create or constitute the debt. They are collateral security for the payment of duties. The debt is due to the government upon the importation; and if no bond is taken, it is not thereby gone; but may be enforced against the importer or consignee. This was so settled, as far as the opinion of this court can settle it, in the case of U. S. v. Lyman [Case No. 15,647]; and I have not seen any reason to change that opinion. The right, therefore, of the United States to proceed against the estate of the testator for the duties, which is a debt primarily due from the estate, is in my judgment entirely clear. I meddle not with the question, how far that right may be controlled by other intervening equities of third persons, where bonds have been taken as security. That would embrace very extensive considerations. For the same reason I pass over the questions, how far devisees, legatees, and heirs, taking the real estate (which in this state is assets for payment of debts), ought in a court of equity to be held liable to pay debts like the present, upon a deficiency of assets, occasioned by the waste or mismanagement of the executor; and how far an assignee (such as Carrington is asserted to be in the bill), bound by an undertaking to discharge such debts upon the execution of the assignment, may be made liable here as upon a trust. Neither of these questions are necessary for the decision of this suit. The former could only arise where the sureties to the probate bond were also insolvent, which is not the present case. The latter does not arise upon the facts, for no such assignment clothed with such a trust is established in proof.

It is very clear that the sureties upon the probate bond are liable for any misapplication of the personal assets by the executor. It is in proof that more personal assets were received than were sufficient to discharge the bond due to the United States, and all

other claims having priorities. It was waste to discharge any inferior debts before discharging these; and the payment of legacies out of the assets before such discharge was a wrongful administration. But the account rendered in 1819 shows a clear balance in the hands of the executor of more than $5000, which was ordered to be distributed according to law, and has not been accounted for. For the deficit of the personal estate to pay the debt so due to the United States, the sureties upon the probate bond of the executor are ultimately liable, since it arises from misapplication of the assets. If the devisees or legatees were compellable to pay it, they would have a right of reimbursement from the sureties. Such a circuity is not here to be insisted on. A court of equity will decree them to pay the sum directly, which they in the end are responsible to pay. I shall accordingly direct a decree declaring the debt, in this case, to be a charge on the estate of the testator; that the executor has wasted the assets in his hands, and by reason of his insolvency is now unable to pay the debt; and, therefore, that the defendants, who are sureties upon the probate bond, be decreed to pay it with interest from the time the bond became due with costs. As to all the other parties, the bill is to be dismissed without costs to either party. See Riddle v. Mandeville, 5 Cranch [9 U. S.] 322.

Case No. 14,419.

UNITED STATES v. A BOX OF DRY GOODS.

[Cited in U. S. v. The Francis Hatch, Case No. 15,158. Nowhere reported; opinion not now accessible.]

UNITED STATES v. The ACORN. See Case No. 29.

Case No. 14,420.

UNITED STATES v. The ACTIVE.

[5 Hall. Law J. 543; 2 Car. Law Repos. 192; 3 Wheeler, Cr. Cas. 264.]

District Court, Territory of Mississippi. Dec., 1814.

INTERNATIONAL LAW — APPLICATION TO PRIZE CASES — RIGHTS OF CAPTORS — VESSEL CAPTURED BY LAND FORCES.

[1. International law is limited to questions affecting the mutual relations of nations. Therefore, in its application to prize cases, it only determines under what circumstances prizes may be taken, and does not attempt to declare to whom the property shall go after it is taken,—whether to the captors themselves, or to their government. These latter questions must be regulated exclusively by the municipal law of the captors' own country.]

[2. Soldiers belonging to the land forces of the United States have not, in the absence of statute, any right of property in a vessel captured by them on the sea; and no such right has been given to them by any act of congress. Such a right has not to be inferred from the provisions of the fifty-eighth article of the rules and articles of war in respect to property captured in camps, etc., and the act of April 23, 1800 (2 Stat. 45), for the better government of the navy, etc., as well as the act of June 26, 1812 (2 Stat. 759), concerning letters of marque, prizes, and prize goods, has no application to captures made by land forces.]

[This was a libel filed in the name of the United States against the schooner Active and cargo to procure their condemnation as prize of war.]

TOULMAN, J. This is the case of a vessel and cargo belonging to the enemy taken in sight of the fort at Mobile Point, by the troops stationed at that place under the command of Major Wm. Lawrence. It appears from the testimony of two of the persons who boarded the vessel, that a boat with six men was sent out by the commanding officer to examine a vessel which, on approaching, they found to be British; that after being fired upon by the fort, she was boarded and taken without opposition, at the distance of about a mile, or perhaps more, as one of them says, or about two miles, as the other thinks; that she was under British colors; that the persons on board acknowledged themselves to be British subjects, and said they were detached from the Sea Horse to bring the schooner Active and cargo (consisting of flour captured at Alexandria) to Pensacola; and that the crew, consisting of six men, were armed with muskets, cutlasses and pistols. The log book shows her to be British. The libel prays the condemnation of the vessel and cargo as good and lawful prize to the United States. A plea, however, is filed by Lewis Judson, (in the character of consignee and agent for the captors,) to the jurisdiction of the court, on the ground that as this court has jurisdiction only in cases in which the United States are parties, it cannot legally entertain a suit in which the private captors (as it is alleged) are the only parties who have a right to claim the captured property. The said plea farther alleges that the "schooner Active and cargo were captured by Wm. Lawrence and others on the high seas, and not in the enemy's forts, camps, or barracks, and, therefore, by the usages of the laws of nations and the laws of war, as enemy's property, become forfeited to the said private captors."

No question has been made as to the regularity (see Teasdale v. The Rambler [Case No. 13,815]) of the plea, nor as to the legitimacy of the conclusion, that the government is in no sense to be regarded as a party, if the proceeds of a capture are suffered to go to the troops engaged in making the capture; but the whole has been liberally left by the attorney (Mr. Haines) prosecuting on behalf of the United States, to depend on the simple question whether the troops of the United States thus making a prize are entitled by law to the benefit of it? The general belief that they are so entitled, the want

of a knowledge of correspondent cases, and the little attention which, in this part of the country, we have had occasion to give to inquiries of this nature, have apparently created doubts even in the mind of the attorney acting for the United States, and have rendered both parties desirous that the question should be judicially settled. The most satisfactory mode probably of coming to a conclusion on this subject will be to have recourse to general principles.

"1. What is war? It is a contest," says Bynkershoek, "carried on between independent persons for the sake of asserting their rights." Where society does not exist,—where there is no such institution as that which we call government,—there individuals, being strictly independent persons, may carry on war against each other. But whenever men are formed into a social body, war cannot exist between individuals. The use of force among them is not war, but a trespass, cognizable by the municipal law. Bynk. War, p. 128. If war, then, be the act of the nation, whatever is done in the prosecution of it, must either expressly or implicitly be under the national authority. Whatever private benefits result from it must be from a national grant. "War," says Vattel (page 368), "is that state in which a nation prosecutes its right by force." The right of making war belongs alone to the sovereign power. Individuals cannot control the operations of war, nor commit any hostility, (except in self defence,) without the sovereign's order. The generals, (adds that writer,) the officers, the soldiers, the partizans, and those who fit out private ships of war, having all commissions from the sovereign, make war by virtue of a particular order. And the necessity of a particular order is so thoroughly established, that even after a declaration of war between two nations, if the peasants themselves commit any hostilities, the enemy, instead of sparing them, hangs them up as so many robbers or banditti. This is the case with private ships of war. It is only in virtue of a commission granted by the sovereign or his admiralty, that they are entitled to be treated like prisoners taken in a formal war. Vatt. Law Nat. pp. 365, 366. If, then, on the general principles of civil society, the whole operations of war, depend upon the will and authority of the government, surely the appropriation and distribution of the property acquired in consequence of those operations must equally be subject to the control of the government, and depend on those regulations which it may establish.

2. What indeed is the object of war? Is it to aggrandize individuals, or is it to maintain the rights of the nation? "The just and lawful scope of every war," observes Vattel (page 280), "is to revenge or prevent injury. If, to accomplish this object, it be expedient to encourage individual warfare, by granting all the profits arising from it to the parties engaged, the nation has a right to promise this encouragement; but until this encouragement be actually offered, it must follow that every thing which is required by individuals, whether acting as private persons or as a part of the public force, must belong to the nation under whose authority they act."

3. What rights are acquired by a state of war? "A nation," says Bynkershoek (page 4), "who has injured another is considered, with every thing that belongs to it, as being confiscated to the nation which receives the injury." The rights accruing, therefore, are national altogether. They are not individual rights. The case seems analogous to that of the internal administration of justice. A civil society—a nation—has the right of punishing those who are guilty of violating the public laws. Though the guilty be members of their own community, they may forfeit their property or their lives. But the right of the body politic does not attach itself to the individual members of it. The nation, indeed, might authorize individuals to take the lives or the property of known offenders; but, without an authority delegated by the nation, individuals have no such right. A right in private persons to avenge violations of the law does not follow as a natural consequence from the circumstance of their being members of the great political body. On the contrary, the very same act which would be retributive justice when emanating from the sovereign power would become murder or robbery in the individual. Why should it be otherwise, as it regards our intercourse with other nations? Why should a nation be less jealous of its rights with regard to hostile nations than with regard to hostile individuals? Why less jealous when they are encroached upon on a large scale than when they are encroached upon on a scale truly small and insignificant? And even admitting that in the one case the public authority permits an individual to execute the sentence of the law, and in the other to attack and vanquish the public enemy, it will not follow that in either case the property of the enemy is to become the property of the individual by whom the national will is carried into execution. This, it should seem, must depend on express stipulations made in behalf of the nation. Agreeably to these principles, the celebrated M. De Vattel, after observing that a nation has a right to deprive the enemy of his possessions and goods, of every thing which may augment his forces and enable him to make war, goes on to remark, that booty, or the moveable property of the enemy taken in war, belongs to the sovereign making war, no less than his towns and lands: for he alone (the sovereign authority) has such claims against the enemy as warrant him to seize on his goods, and appropriate them to himself. His soldiers (he adds) are only instruments in his hand, for asserting his right. He maintains and forms them. Whatever they do is in his name and

for him. Vatt. Law Nat. 335. These principles are equally applicable to every form of government. It is perfectly immaterial with whom the sovereign authority resides. With whomsoever it resides, its power is erected on the doctrine of its being the legitimate representative of the nation; and the rights of the nation are not surely to be considered as being less, under a republican, than under a monarchical, form of government.

The nation, however, as I have observed before, may give a bounty to individual captors—may relinquish a part of its rights to those who fight under its banners. Agreeably to this the same writer goes on to observe that "the sovereign may grant to the troops what share of the booty he pleases. At present most nations allow whatever they can make on certain occasions, when the general allows of plundering what they find on enemies fallen in battle; the pillage of a camp when it has been forced and sometimes that of a town taken by assault." The cases here enumerated seem to be those where either the object was too trifling to become a matter of national attention, or where the services previously rendered by the troops called for a degree of vigour and exertion which would merit extraordinary encouragement. The whole, however, is made to depend on the will of the nation, expressed through their commanding general. The soldier (he adds) in several services has also the property of what he can take from the enemy's troops, when he is on a party, or in a detachment, excepting artillery, military stores, magazines, and convoys of provisions or forage, which are applied to the wants and use of the army. He then goes on to observe, that, when even this custom is introduced into an army, the same right should be allowed to auxiliaries as to the national troops, but proceeds to inform us, that among the Romans, the whole booty was carried to the public stock, and sold under the direction of the general, who then gave a part of the proceeds to the soldiers, and remitted the rest to the public treasury. Vatt. Law Nat. 335, 336. It is evident from the whole strain of this passage, that the author is not attempting to lay down general principles by which nations are to be governed in the disposition of property taken from an enemy; but is merely describing the practice of different nations. In several services, says he, that is in the service of several governments, the soldier has, on certain occasions, the property he takes from the enemy; but it was otherwise, he adds, among the Romans.

I have been more particular in stating the principles laid down by writers on the law of nations, (or the dictates of justice and common sense, as applied to national intercourse,) because the attorney for the claimant, whilst acknowledging that the laws of the United States are silent on the present case, places a great reliance on the injunctions of national law. It is contended that the law of nations gives the booty in this case to the captors, and the principal authority appealed to, is that passage in Vattel which I have just quoted, where, as I conceive, he is simply narrating the usages of some governments, and not laying down principles which are binding upon all.

What, indeed, is the law of nations? It is that rule of conduct which regulates the intercourse of nations with one another; or in the words of the author last cited, "the law of nations is the science of the law subsisting between nations or states, and of the obligations that flow from it." Vatt. Law Nat. 49. It is a law for the government of national communities as to their mutual relations, and not for the government of individuals of those communities in their relation towards one another—nor can it control the conduct of nations towards their own citizens, except in cases involving the rights of other nations. Property once transferred by capture must be subject to the laws of the nation by which the capture is made. The question whether it shall be public or private property must depend on the regulations adopted by the nation making the capture, and cannot naturally be regarded as subject to the control of a system of laws which has respect to the laws and duties of nations towards one another. What our author states as to the practice of nations towards their own citizens, is not, truly speaking, a delineation of the laws of nations. The conduct of nations towards their own citizens, must depend on their own municipal regulations. It is by the laws of nations that we must determine the circumstances under which prizes may be taken, but what is to become of them when taken under the sanction of that law cannot depend upon the law of nations, but must depend upon the will of the nation by which the capture is made. Individuals of the capturing nation can have no right independent of the nation to which they belong. It is by a reliance on the authority of their nation, that they shelter themselves from the charge of robbery or piracy. The sovereign, however, may distribute the booty as he pleases. He may do it by a general law, or by special regulations, issued by his generals, subject to the emergency of the case; provided the form of government admits of such a delegation of authority. Even the property acquired by privateers depends on stipulations made with the supreme power of the country to which they belong. "Persons," says Vattel (page 367), "fitting out ships to cruize on the enemy, in recompense of their disbursements and the risk they run, acquire the property of the capture; but they acquire it by grants of the sovereign who issues out commissions to them. The sovereign either gives up to them the whole capture or a part—this depends on the contract between them." Vatt. Law Nat. p.

367. As to those who without any authority from their sovereign, commit depredations by sea or land, they are regarded as pirates and plunderers, and things taken by them do not thereby undergo a change of property. Bynk. p. 127. The discussion therefore entered into by Bynkershoek in his 20th chapter, respecting captures made by vessels not commissioned, for the purpose of determining whether they should belong to the owner of the ship, the mariners, or the shipper, (and on which a good deal of stress has been laid in argument,) has really but little or nothing to do with the present case. That writer, having previously laid down the established doctrine about robbery and piracy, proposes in his 20th chapter to examine to whom a prize would belong which was taken by a non-commissioned vessel, attacked by the enemy, and in her own defence, seeing the enemy's vessel making the attack. He seems to take it for granted, that the government would put in no claim under such circumstances; and under this supposition, is merely canvassing the respective claims of the sailors, the shipper, and the owner. He afterwards states an objection which may be raised against him in the following words: "It will be said, perhaps, that I am wasting words on an idle and useless question, as it is unlawful to make captures without a commission from the states-general, or the admiral; and so far from the one who takes a prize without such a commission being entitled to it, he is rather to be considered as a pirate, agreeably to the principles which I have above contended for." Page 161. He then quotes Grotius, to show that a prize taken under circumstances of necessity belongs to those who take it.

The doctrine, therefore, which he contends for, has relation simply to the case of mercantile vessel, which being attacked at sea by the enemy, successfully resists the attack and makes a prize of the adverse party. It has clearly no relation to the case now before the court. His reasonings have in general a reference to the laws of the states-general of the United Provinces; and the learned translator in a note upon this chapter seems to state the discussion of the author as founded on the supposition merely, that any persons, other than the sovereign of the captor, may be considered as entitled to the prize. Page 156. Again, in a note at the end of the chapter, he observes: "In France and Great Britain, prizes taken by non-commissioned vessels belong to the lord high admiral, as a droit of his office. No distinction is made whether the captor did, or did not make the capture in his own defence, or from some other justifiable motive. But as in Great Britain the office of high admiral is vested in the king, and has for a long time been executed by commission, suitable rewards are given, at the discretion of the government, in meritorious cases." Page 162.

The English law on this subject seems to be pretty clearly laid down in the course of argument on the case of Lord Camden v. Home, and I do not observe anything in the decision of the court to impeach its accuracy. "Whatever is taken by any of the king's subjects from an enemy in the course of naval operations appertains to the king, either as a jure coronae, or as a droit of admiralty, according to the circumstances. If taken by a private ship, without any commission from the king, the prize belongs to him as a droit of admiralty. If such a ship had a commission, only one tenth of the prize belongs to the king, as a droit of admiralty, and the rest is the property of the owner of the privateer. But where the capture is made by the king's ships or forces, the property is vested in the king's jure coronae; and in such cases it is adjudged by the admiralty lawful prize to the king. But that adjudication by no means imports the capture to have been made by the king's ships exclusively; for, if it were made by his forces, the adjudication would be the same. Now, there are three sorts of joint captures: One by the king's ship and privateer, with letters of marque, the distribution whereof is made, according to the number of persons on board the several ships; the king's share being adjudged to him in the jure coronae. The second instance is of a capture by the king's ship and a non-commissioned privateer. There the king is entitled to the whole. To the privateer's part thereof, it is a droit of admiralty, and the other in jure coronae according to the same mode of distribution. The third is the instance in question, of a capture by the king's army and navy conjointly; and there the whole rests in him jure coronae." 4 Term R. 387.

Agreeably to this statement, we find that Sir William Scott granted a monition against the master and owner of a privateer not commissioned against the Dutch, to bring in the proceeds of a Dutch prize. The party appearing acknowledged that he had no commission, but prayed to be admitted as a joint captor. The court did not even suffer the case to be argued, but observed: "The person admits that he had no commission. It is therefore impossible for him to contend for a legal interest in joint capture. If he thinks he has any equitable claims, arising from any services he has performed, they may be represented to the admiralty. The former proceedings (of condemnation at Jamaica) on the part of the non-commissioned captor are mere nullities; and the property must be proceeded against as droits of admiralty." 4 C. Rob. Adm. 72. The case of The Rebeckah, which was a question of interest in the capture of a vessel made by naval officers from the island of St. Marcou, a naval station, used for the temporary accommodation of the crews of ships of war, gave occasion to remarks from Sir William

Scott, very applicable to the case now before me. "I accede," says he "entirely to what has been laid down, that a capture at sea, made by a force upon land, (which is a case certainly possible, though not frequent,) is considered generally as a non-commissioned capture, and inures to the benefit of the lord high admiral. Thus, if a ship of the enemy was compelled to strike by a firing from the castle of Dover, or other garrisoned fortress upon the land, that ship would be a droit of admiralty, and the garrison must be content to take a reward from the bounty of the admiralty, and not a prize interest, under the king's proclamation. All title to sea-prize must be derived from commissions under the admiralty, which is the great fountain of maritime authority; and a military force upon the land is not invested with any commission so derived, impressing upon them a maritime character, and authorizing them to take, upon that element, for their own benefit. I likewise think cases may occur in which naval persons, having a real authority to take upon the sea for their own advantage, might yet entitle the admiralty, and not themselves, by a capture made upon the sea, by the use of a force stationed upon the land. Suppose the crew, or part of the crew, of a man of war were landed, and described a ship of the enemy at sea, and that they took possession of any battery or fort upon the shore, and, by means thereof, compelled such ship to strike. I have no doubt that such a capture, though made by persons having naval commissions, yet being made by means of a force upon the land, which they employed accidentally, and without any right under their commission, would be a droit of admiralty, and nothing more." C. Rob. Adm. 227.

Another case in which the right of a party not commissioned for the purpose, to share in a prize, came into view, was that of The Providence, a commissioned vessel, and The Spitfire, a vessel not commissioned, against the Dutch, and who jointly took a Dutch ship. The judge of the high court of admiralty gave to the Spitfire half the share she would have been entitled to, if she had been commissioned; but the lords of appeal pronounced the whole share of the Spitfire liable to confiscation, as a droit or perquisite of admiralty. And yet, in this case, the Spitfire had not only applied for letters of marque, but had obtained a warrant for them to the judge of the admiralty, who, on account of the pressure of business, did not issue them till the day after the capture. 2 Rob. 235, note. An English act of parliament provides, "that in all conjunct expeditions of the navy and army against any fortress upon the land, directed by instructions from his majesty, the flag and general officers and commanders, and other officers, seamen, marines and soldiers, shall have such proportionate interest and property, as his majesty, under his sign manual, shall think fit to order and direct." 2 Rob. 237. The prize act of 21 Geo. III. gives to the officers, seamen, and soldiers, &c., on board every ship and vessel of war in the king's pay, the sole interest in prizes taken by them. 4 Term. R. 391. It should seem as if their courts adhered pretty strictly to the words of their laws in adjudging to whom captured property belongs, and took care to give it to the crown, where there is any doubt about the right of individuals. Thus, in the case of ships taken at Genoa, which were given up on payment of £17,000 by the owners, Sir William Scott said: "I am not aware that the prize act authorizes me to condemn to the captors, in such a case as the present. The act gives them ships, goods, &c., afloat. This is a sum of money, which is not exactly of that description of things." On this account, and another which he mentions, he made the condemnation pass to the crown. 4 C. Rob. Adm. 262.

In the course of argument in the case before me, the counsel for the military force at Mobile Point laid some stress on the observations of Sir William Scott in the case of The Dordrecht [2 C. Rob. Adm. 55] which was a case of joint capture between the army and navy; and where the judge seemed to admit that there might be grounds for making the condemnation partly to the benefit of the army, although the cases did not come within the provisions of the act of parliament, which directed the army to share, in some case, in conjunction with the fleet. It has from hence been concluded that a condemnation might have been made to the army under the law of nations. It is possible, however, that there are other British statutes, besides the 33 Geo. III. (the statute there referred to), under which the army preferred its claim. It may have been built on some royal proclamation; but that it could not have been founded on the law of nations, or on any general principles growing out of a system of national law, must surely be sufficiently apparent from the observations and authorities which have already been brought into view. But the main stress seems to be laid on the consideration that the duty of the army is to fight on the land; that our troops are employed for that especial purpose; that land forces are not required to fit out boats and go to sea; and that fortune having thrown this prize in their way, it ought, on the principles of national law, to be condemned to their benefit. The view, however, which has been already taken of the law of nations, and the objects to which it can apply, seems to take off the weight of this argument. And how much soever one may regret that the gratification is not within the reach of this court to be the medium of awarding a prize to the gallant defenders of Fort Bowyer, it is its duty not to interfere with the prerogatives of the legislative or executive branches of the government; and it must not be disguised, that if the troops at the fort were not, as it seems

to be alleged, under any obligation of noticing the approach of an enemy, unless it were made on terra firma; if everything done to obstruct or capture the enemy on the sea, were merely gratuitous, and beyond the line of their duty, (a doctrine which those gallant men themselves most certainly never would advance,) then their conduct in so transgressing their line of duty would rather stand in need of apology than of reward. "Soldiers," says Vattel (page 367), "can undertake nothing without order either express or tacit, of their officers. Obedience and execution are their province. They are not to act from their own opinions. They are only instruments in the hands of their commanders. Let it be remembered here, that by a tacit order, I mean the substance of what is included in an express order, or in the functions committed to us by a superior; and what is said of soldiers must also be understood of officers, and of all who have any subaltern command. Thus, with respect to things the care of which is not committed to them; they may both be compared to mere private persons, who are to undertake nothing without order. The obligation of the military is still more strict, as the laws of war forbid expressly acting without order; and this discipline is so necessary that it scarcely leaves anything to presumption. To fight without command, is almost always considered in a soldier as fighting against commands, or against the prohibition." For my own part, I do not believe that our valiant soldiers, who but a short time before so much distinguished themselves at Fort Bowyer, would be considered with regard to this vessel as fighting without command. A fort so situated, on a narrow, barren point of land, unconnected with any settlement of moment, but commanding the entrance by water into an extensive and valuable country, must, from the very nature of it, be considered as intended to prevent the ingress of enemy's vessels; and it became the duty of the garrison stationed there, to guard the pass, and to lay hold of everything belonging to the enemy, whether the object could be accomplished by means of the guns at the fort, or by means of boats or other vessels attached to it.

The only question, then, which remains to be considered, is, have the laws of the United States given to the military any share in prizes taken by troops so circumstanced? It may be desirable that they had done so. But this ground seems to be abandoned by the counsel for the army. A kind of negative argument has indeed been raised on the 58th article of the rules and articles of war. It is said that this article confirms to the United States property taken in camps, &c., but not at sea. The words of the article in question are, that "all public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, clothing, forage, or provisions, shall be secured for the service of the United States; for the neglect of which the commanding officer is to be accountable." Hence it is concluded, that if they be not public stores, or be not taken in the enemy's camp, towns, forts, or magazines, they are not to be appropriated to the government, but belong to the captors. The object of this article is clearly not to ascertain anything about the right of property, but merely to provide for the safe keeping of public stores belonging to the enemy, and to render the commanding officer responsible for any neglect respecting them. Had a prosecution been commenced against the officer commanding at Fort Bowyer, for any inattention to the preservation of the cargo of the schooner Active, this 58th article, possibly, (inasmuch as the property in question was not taken in the enemy's camp, towns, forts, or magazines,) might not have afforded a legal basis for the prosecution; but no fair deduction from it certainly can ever be carried as far as to show, that because the property captured was not expressly required by this article to be secured for the United States, therefore it must be regarded as the private property of the captor. Whether it be so or not, must depend on established principles, and not on so very strained an implication, and these have already been sufficiently examined.

As to the laws of the United States respecting property captured by the public force, the most material is the act of the 23d April, 1800, for the better government of the navy. This act gives to the captors the proceeds of vessels and goods taken on board of them when adjudged good prize. But this act is a law expressly for the government of the navy of the United States; and, indeed, it does not appear to be contended, that it can by any rule of construction, be extended to the army. Private commissioned vessels, in like manner, deserve their right to appropriate to themselves the prizes they make, from the "act concerning letters of marque, prizes, and prize goods," passed on the 26th day of June, 1812. This act, after stating the conditions on which authority should be given to our vessels to capture the vessels and property of the enemy, proceeds to vest the same, when taken under such authority, in the owners, officers, and crews of the vessels by which prizes should be made. 11 Laws [Weightman's Ed.] p. 240 [2 Stat. 759]. Had it been the intention of the government that non-commissioned vessels should be entitled to the proceeds of prizes made, or that any persons in the employ of the United States, and not belonging to the navy or marines, should be entitled to the benefit of all enemy's property taken by them, it would surely have been natural that such intention should have been expressed in these or some other legislative acts. Moreover, indeed, it does not appear what occasion there could be to provide regulations and bonds for the government and good conduct of vessels applying for commmissions to make prizes; if all ves-

sels of any description were authorized to take and to appropriate to their own use the property of the enemy, merely because, as it hath been contended, the fortune of war had thrown it in their way.

It has been stated that a case occurred in New England, soon after the war commenced, where a vessel, which had approached near to a fort of the United States, was condemned for the benefit of the troops by whom it was captured; and it is likewise urged that libels have been filed in behalf of military captors in the federal court of the state of Louisiana. As to the former case, it is only stated on a recollection, which I cannot help believing to be in this instance somewhat inaccurate; and as to the latter, how much soever it may afford a precedent sufficient to justify a practitioner at the bar in putting in a claim, it can afford no precedent to justify a court in sustaining it. In the whole view of the case, therefore, now before the court, it is adjudged and decreed, that the plea be overruled, and dismissed, with costs in court occasioned by the plea, and that the schooner Active and cargo be condemned as good and lawful prize to the United States.

Case No. 14,421.

UNITED STATES v. ADAMS et al.

[1 West. Law J. 315; 10 Hunt, Mer. Mag. 80.]

District Court, S. D. New York. Nov., 1843.

POST-OFFICE LAWS—CARRIAGE OF LETTERS BY PRIVATE EXPRESS.

Construction of the post-office law relating to the carrying of letters by private express. *Held*, that the carrier of letters in a package is not liable to the penalty, unless he knew that the package contained letters.

This action was brought under the act of congress of 1825, to recover a penalty for a violation of the post-office laws. The following are the sections of the act relied upon: "No stage, or other vehicle, which regularly performs trips on a post road, or on a road parallel to it, shall convey letters, nor shall any packet boat or other vessel which regularly plies on a water declared to be a post road, except such as relate to some part of the cargo." "No person other than the post master general, or his agents, shall set up any foot or horse post for the conveyance of letters and parcels upon any post road, which is or may be established by law, and every person who shall offend herein shall incur a penalty of fifty dollars for each letter or package so carried."

For the prosecution, an agent of the post-office testified that he had seen Stephens, an agent of Adams & Co., take a large pile of letters and some money from a man on board the steamer New Haven, connected with the Norwich & Boston Railroad, and told him he had no right to take the letters. The letter on the top of the pile was directed to London, and a packet sailed the next day. It also appeared that several persons were in the habit of sending letters by Adams & Co.'s Express, but they were sent in packages, and it did not appear that A. & Co., who had positively refused to carry letters, knew that letters were in the packages. They had instructed their agents not to carry letters,—and that Stephens only went on the Norwich route once, in the absence of the regular agent, and, if he received any money for carrying letters, had done so in violation of the instructions, and had not paid it over. Another ground of defence was that the defendants could be held liable only for procuring the steamboat New Haven to carry letters. That the owners of the boat were not liable in this action, and, as Adams & Co. were only liable for the same penalty as the owners would be, they, defendants, were not liable. And it was shown by the testimony of the captain and the owners of the steamboat that they had no knowledge or suspicion of such letters being carried.

Counsel for prosecution laid great stress on the alleged fact that those expresses operated extensively to the injury of the post-office, and endeavored to elicit testimony to show that such was the case. Some two or three postmasters, or post-office agents, gave it as their opinion that those expresses considerably lessened the post-office revenue. On the other side it was contended that the increased facilities which those expresses gave to traders, and merchants and manufacturers, caused more letters to be written and sent through the post-office than would otherwise be the case.

Hoffman & Watson, for the United States.
Mr. Bushnell, for defendants.

BETTS, District Judge (charging jury). This case presents one of those questions in which courts are so frequently called on to say whether or no a state of facts, which was probably not within the view of the legislature when the penal law was enacted, now comes within the purview of that law. It is said that the business of the defendant was so conducted as to be a violation of the post-office law. The business of defendant has been prosecuted about three years, but a branch of that business has existed for seven years, and it is said that it infringes on the post-office laws. The important questions to be considered are what are the facts proved by argument, and what is the law in relation to them. The government say that the defendants carried letters between New York and Boston, in three different ways: First, in packages of goods, the communication going with the goods to the persons who receive the goods. And that, whatever form they assume, they are still letters, and subject to postage, and that every communication between one individual and another falls within the denomination of "mailable matter," and, whatsoever shape it may be placed in, it is still liable to postage, if carried by mail.

They say that defendant carried letters in packages from merchants, and that letters were carried by express through their carriers, and that Fisher received parcels with money, and delivered them, and that the necessary implication is that all the packages contained money. They say that letters were given to the agents of defendants, and were carried by them from New York to Boston.

There has been some controversy on the other side whether either of those instances was proved. It is said, in regard to the letters carried by Stephens, that the papers delivered to him were actually letters, and were carried by Stephens from New York to Boston, and that Stephens, in doing so, was acting under the authority of defendants. The latter facts must be shown by direct proofs, or by implication. If it was his own act, and was not done as agent for defendants, they cannot be held liable for it under a penal law, though it might be a violation of the statute.

As regards the consummation of the offence, how far is the government obliged to show that it was a letter? It is necessary only to show that the party took what purported to be a letter. The government had no power to open or examine it in order to ascertain if it was a letter. But, if it had the appearance and purports to be a letter, it must be assumed that it was so, until the contrary is shown in evidence. The government need only show that a paper, which seemed to be a letter, was carried, and the person charged with carrying must clear himself, in order to obviate the deduction that it was a letter. If the testimony is that the individual received a letter, with direction to carry it, and that he took it, and went from New York to Boston, the implication is that he performed the trust, and, if there are any facts to show the contrary, it is for him to show them, and leave the jury to say how far it negatives the assertion that he did carry letters. The individual who saw it delivered said that the upper paper was directed to London. He did not see the superscription of the other letters, but they appeared to him to be a pile of letters, and in law that is sufficient to show that it was a letter, and until the contrary is proved the natural signification is that the whole pile was what the upper one appeared to be,—a letter. And it is for defendants to show that the others were but waste paper. Taking it to be proved that Stephens carried a pile of letters from New York to Boston, and Fisher also, and that the packages carried by them ordinarily contained letters, the question arises, is this the act contemplated by the statute? What congress had in view was to interdict the carrying of letters on post roads on which letters were carried by the mail, and also to prevent water craft conveying letters. What does this import? Does it prevent stages or water craft from carrying individuals with letters on their persons? Do stages on post roads, carrying passengers with letters, violate the post-office law? Does the steamboat carrying a man with his trunk full of letters, amount to a conveyance of letters under the act of congress? I apprehend not. We must give a business construction to the act. Congress only intended to prevent letters being carried by vessels or coaches.

In order to illustrate this, it may be well to advert to the manner in which it was done twenty years back. At that time, some open box was kept in vessels, in which letters were deposited, and the master did not know where the letters were to go, but he knew that the letter was there, and the vessel was thus in the direct act of carrying letters; and if she carried letters, unless with some portion of goods, she then carried letters contrary to law. But when the master conveyed a box which he could not open, though such box contained one or a thousand letters concealed from him, the act did not apply to it, and it was not carrying letters, but carrying baggage, and was not an offence against which congress had legislated. Their intention was to prevent the open carrying of letters by vessels or stage coaches. So, also, stage coaches, which had places purposely to carry letters, violated the law by carrying trunks containing letters, or passengers with letters in their pockets. But it was found that congress had not gone far enough to protect the post-office, and an act was passed to prevent persons from starting a horse or foot post on a mail road. But it is not to be supposed that a man going from one place to another could not carry a letter. The act only intended that carrying letters should not be his ordinary business. If it was, then he violated the act. Seven or eight years back this running of expresses commenced, and it is said that it has been a great means of withdrawing from the regular mails a large portion of its appropriate business. It may be an evil of great magnitude; and, from the testimony which has been produced, there is reason to suppose that government loses greatly by it. But that is not the question we have to consider. It is only for us to enquire, is it an offence, under the act of congress? If it is an evil, congress had sufficient time to rectify it during eight years. And whether they deemed it not worth regulating, or not within their power, they have not legislated on those facts; and the court is now called on to say, do these acts come under the act of 1825?

My instructions to you are that it must be proved to you, in order to charge the defendants, that these parties either had some carriage which was engaged in carrying letters on a post road, or on one parallel to a post road. It must be proved that the steamboat New Haven was in the practice of carrying letters, distinct from their enclosure in trunks or merchandise in the vessel. And,

if that is proved, it must be also shown that defendants advised or assisted the owners of the vessel in carrying letters, distinct from their enclosure in trunks or merchandise in the vessel. And, if that is proved, it must be also shown that defendants advised or assisted the owner of the vessel in carrying letters If so, they were liable to a penalty of fifty dollars for each offence. I think that the 24th section of the act presents some difficulty so as to make it reach the steamboat New Haven. But, in order to give it as much scope as possible, I will say that, if it is proved that the steamboat carried letters under the advisement of defendants, it is a violation of the act. Or if defendants used any sort of carriage or conveyance, no matter what you may call it,—a cart, or anything else,—to carry letters from this to Boston, they are liable to the penalty. But under this law they are not liable for letters in a package, concealed from them, unless they knew it contained letters. If congress chooses to prevent letters being so carried, they may pass an act in relation to the land as well as to the water, rendering a man liable for having prohibited articles, though ignorant that they were there. But, as long as congress does not use such language, the court will not suppose that congress meant to punish a man who was ignorant that he was doing wrong. You must find that the steamboat carried letters, and that defendants were assisting in it; or that they had a vehicle in which they were carried; or that they aided and assisted others in carrying letters on a mail road or a road parallel to it.

As to the individual acts of Stephens and Fisher, if the defendants forbid their agents to carry letters, and that yet they did so, the offence becomes that of the agents, and not theirs. Though these men were then agents, the defendants are not liable for their acts, further than they conformed to their positive or general instructions. But, if it is proved that Fisher was employed by defendants to carry letters, then they are liable. But nothing in the prosecution calls on you to denounce them as liable, because they carried letters If defendants carried letters on their persons, this suit does not come under the act, as the offence charged is that they employed the steamboat to carry letters.

Verdict for defendants.

Case No. 14,422.

UNITED STATES v. ADDATTE.

[6 Blatchf. 76.] [1]

Circuit Court, E. D. New York. March 14, 1868.

WITNESS—COMPETENCY—WIFE OF CODEFENDANT.

Where one of two defendants, in a joint indictment against the two, is tried separately, the wife of the defendant who is not on trial, is a competent witness for the defendant who is so tried separately.

This was an indictment against the prisoner [John B. Addatte], jointly with another person, for counterfeiting the currency. The other defendant not being in custody, the case went to trial against the prisoner, separately. On the trial, the wife of the other defendant was offered as a witness for the prisoner, and, on objection, was excluded. The prisoner having been convicted, a motion was now made for a new trial, on the ground of error in such ruling.

BENEDICT, District Judge. I am of the opinion that the ruling at the trial was wrong, and that the witness was improperly excluded. On examining the question, I find the rule to be, that, when trials are separate, the wife may testify in favor of or against any one other than her husband, except in cases where the acquittal of one defendant works the acquittal of the rest, as in cases of conspiracy, and the like. It is not contended, in this case, that the acquittal of the prisoner would work the acquittal of the other defendant, and the wife of the latter was, therefore, a competent witness. The motion for a new trial is granted.

[A motion in arrest of judgment was granted, and the prisoner was discharged. Case No. 14,423.]

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

Case No. 14,423.

UNITED STATES v. ADDATTE.

[6 Blatchf. 132.] [1]

Circuit Court, E. D. New York. May 2, 1868.

COUNTERFEITING—POSSESSION OF COUNTERFEIT PLATES.

The 12th section of the act of June 30th, 1864 (13 Stat. 222), does not cover a case of the possession of false or counterfeit plates, in the similitude of genuine plates of the currency of the United States, but applies only to genuine transferred plates made after the similitude of other plates.

This was a motion in arrest of judgment. The prisoner [John B. Addatte] was indicted under various statutes relating to counterfeiting the currency of the United States. The evidence given on the trial was such as to make a conviction impossible under any statute, except the 12th section of the act of June 30th, 1864 (13 Stat. 222). The case was given to the jury, on a count in the indictment founded on that section, and the prisoner was convicted. That count charged him with having had in his custody, without the written authority of the secretary of the treasury, or of the comptroller of the currency, a certain counterfeit plate or block, made after the similitude of a plate or block from which fractional notes had been printed, contrary to the provisions of the said 12th section.

[See Case No. 14,422.]

BENEDICT, District Judge. The motion in arrest of judgment is made on the ground

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

that the 12th section of the act of 1864 is only applicable to the case of an unauthorized possession of genuine plates, and does not provide for the offence here presented. This point is, I am inclined to think, well taken. It is quite manifest, from the wording of the section, that the qualifying clause, "without the written authority or warrant of the secretary of the treasury," is intended to apply to all the plates, blocks, and electrotypes subsequently mentioned in the section. This qualification of the possession which is, by the act, made an offence, indicates an intention to restrict the effect of the act to the case of an unauthorized possession of such plates as may be within the authority of the secretary of the treasury, or the comptroller of the currency. Therefore, it does not cover a case of the possession of false or counterfeit plates, which cannot, under any law, be authorized by the secretary of the treasury, and which his warrant cannot protect. I was, at first, disposed to think that the possession of a plate in the similitude of a plate from which obligations of the government, authorized by law, have been, or may be, printed, could only refer to counterfeit plates; but a more careful examination of the act has satisfied me that this provision is intended to apply to the transferred plates which are used by the department in making fractional currency, and which are, of course, genuine, although made after the similitude of other plates from which the currency may be printed. The construction thus given to the 12th section of the said act is confirmed, by referring to the 11th section of the same act, and to the 7th section of the act of February 25th, 1862 (12 Stat. 347), both of which provide for a case of the possession of a counterfeit plate, and make the intent to use, or suffer the same to be used, a part of the offence. In the section under consideration, an intent to use the plate is not made a part of the offence, and for the reason that, as the section is applicable only to the genuine plates, which are intended to be kept within the control of the government, the unauthorized possession is to be considered as itself an unlawful act, without regard to any intention to use the plates. The judgment must, accordingly, be arrested, and the prisoner be discharged.

Case No. 14,424.

UNITED STATES v. ADLER et al.

[8 Chi. Leg. News, 11; 15 Am. Law Reg. (N. S.) 45; 21 Int. Rev. Rec. 316; 1 N. Y. Wkly. Dig. 182.] [1]

District Court, W. D. Missouri. 1875.[2]

INTERNAL REVENUE LAWS — FAILURE TO EFFACE STAMPS—LIABILITY OF EMPLOYERS—INTENT.

[A person engaged in rectifying, whose employees empty spirits from casks and packages, is one who "causes" such emptying, so as to be guilty of a felony, under Rev. St. U. S. § 3324, if the marks, brands, and stamps on such casks or packages are not effaced or obliterated at the time of emptying them.]

[This was an indictment against Simon Adler and Furst for failing to deface and obliterate from casks or packages of distilled spirits, at the time of emptying, marks, brands, or stamps required by law to be thereon.]

James S. Botsford and H. B. Johnson, for the United States.

Chester H. Krum and Jeff. C. Chandler, for defendants.

KREKEL, District Judge (charging jury). Under a statute of the United States regarding internal revenue, Adler & Furst, the defendants, have been indicted for failing to deface and obliterate from casks or packages of distilled spirits, at the time of emptying, marks, brands or stamps required by law to be thereon. The indictment, in fifty-eight counts, charges this offense, varying in manner and the packages regarding which the omission occurred, so as to meet the testimony in the case. The United States Revised Statutes, in section 3324, under which the indictment has been found, provide that "every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits from a cask or package bearing any mark, brand or stamp required by law, shall at the time of emptying such cask or package, efface or obliterate said mark, stamp or brand. * * * Every person who fails to efface and obliterate said mark, stamp or brand at the time of emptying such cask or package, shall be deemed guilty of felony, and shall be fined, etc." I have cited such parts of the section only as bear directly upon the issues. You will observe, in the first place, that the section begins with declaring it to be the duty of every person who empties or draws off, or causes to be emptied or drawn off, any spirits, at the time of emptying such cask or package, to efface and obliterate said mark, stamp or brand. The object of the provision obviously was to secure the destruction of the mark, stamp or brand at the time of emptying; and the words "shall efface and obliterate" are apt words to express that intention. The language, "at the time of emptying such cask or package," leaves no room for construction as to the time when the act of effacing and obliterating is to be done. It must be done at the time of emptying and at no other time. The object in so providing was no doubt to prevent the opportunity of defrauding the government by an improper use of the package or stamps, or both. The law, however, will not require an impossibility, and if a case was presented in which the person whose duty the law makes it to efface and obliterate, without any fault of his own, was prevented from the discharge of

[1] [1 N. Y. Wkly. Dig. 182, contains only a partial report.]

[2] [Affirmed in Case No. 16,255.]

the duty imposed on him, the law might excuse him. Such a case, however, is not before you, for there is no evidence tending to show even that the party upon whom the obligation to "obliterate and efface" rested was in any way interfered with or prevented from doing so. But the important inquiry is, upon whom, under the testimony before you, did the law impose the duty of cancelling and effacing? Was it upon Adler & Furst, the defendants? And if so, are they responsible for the acts of their employees? In reading the clause of the section pronouncing the penalty as a separate and distinct part of the section, countenance may be found for the construction that the penalty was denounced against the person only who did the act of emptying. A close examination of the language of the part of the section denouncing the penalty shows beyond a doubt that it refers to the duty which the section in its beginning imposes, for it provides that every person who fails to efface and obliterate said mark, stamp or brand at the time of emptying, etc. As we have already seen, the provisions of the section imposing the duty to efface and obliterate is of such mark, brand or stamp only, as are required by law to be upon casks or packages, and hence the language in the penalty clause—said mark, stamp or brand. To read the penalty clause without reference to the preceding one would leave us without any designation as to what mark, brand or stamp the law is applicable to. To read the provision providing the penalty, in connection with the clause imposing the duty of effacing and obliterating such mark, brand or stamp required by law to be upon casks and packages, gives us an intelligent reading of the statute. But it does more. The construing of the duty and penalty clause together enables us to ascertain to whom the statute applies, namely: to "every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits." Such a construction, in entire harmony with the provisions of the statute, accomplishes its evident object to hold those responsible, among others, who cause the drawing off. This leads us to the question under the evidence whether a person or partnership engaged in rectifying and employing persons who empty distilled spirits from casks and packages bearing marks, brands and stamps required thereon by law, can be said to cause the emptying or drawing off of such spirits. The owners, possessors and operators of a rectifying establishment engaging hands, furnishing the materials and receiving its products, may be said to cause the emptying of spirits used in their business by those in their employ. And any failure on their part to efface and obliterate marks, stamps or brands at the time of emptying casks or packages of distilled spirits on which cask or package marks, stamps or brands were required by law, or cause the same to be done, such person or persons so causing the emptying without effacing or obliterating such mark, brand or stamp is amenable to the law. The jury is instructed that if they find from the evidence that Adler & Furst were rectifiers and carrying on a rectifying establishment in the Western district of Missouri; that they emptied or caused to be emptied by their employees, as explained, any distilled spirits from casks or packages bearing any mark, brand or stamp required by law, and failed to efface and obliterate said mark, stamp or brand, at the time of emptying such cask or package, as charged in the indictment; they should find the defendants guilty, otherwise acquit. It was the duty of Adler & Furst, the defendants, to efface or obliterate the marks, brands and stamps on emptying, or cause it to be done, and the failure of their employees to do what the law imposes as a duty on them does not excuse them.

The jury then retired, and after an absence of an hour returned with a verdict of "Guilty on all counts of the indictment except the first."

[See Case No. 16,255.]

UNITED STATES v. The ADMIRAL. See Case No. 85.

Case No. 14,425.

UNITED STATES v. The ADVANCE.

[Cited in The Acorn, Case No. 29. Nowhere reported; opinion not now accessible.]

Case No. 14,426.

UNITED STATES v. ALBERTY.

[Hempst. 444.] [1]

Circuit Court, D. Arkansas. April, 1844.

CRIMINAL LAW—FEDERAL JURISDICTION—INDIAN COUNTRY.

1. The circuit and district courts of the United States can take cognizance of civil and criminal matters only so far as the power so to do is conferred upon them by statutes of the United States.

2. The jurisdiction of these courts, so far as it results from the terms of their creation, or is necessarily implied in their constitution, is restricted to the territorial limits within which they are placed.

[Cited in Ex parte Kang-gi-shun-ca, 109 U. S. 560, 3 Sup. Ct 396.]

3. Acts of congress of the 30th of March, 1802 [2 Stat. 139], and of the 30th of June, 1834 [4 Stat. 729], to regulate intercourse with the Indian tribes and preserve peace on the frontiers; the act of 3d of March, 1825 [4 Stat. 115], relating to crimes against the United States; the act of 15th June, 1836 [5 Stat. 50], admitting Arkansas into the Union, and the act of March 3d, 1837 [5 Stat. 176], amendatory of the judicial system of the United States, commented on and explained.

4. Courts of the United States are of limited, though not of inferior, jurisdiction; and hence

[1] [Reported by Samuel H. Hempstead, Esq.]

their jurisdiction must, in every instance, be apparent on the face of the pleadings.

5. The circuit court of this district, in the absence of any statute attaching the Indian country west of Arkansas thereto, has no jurisdiction over such Indian country, and cannot punish an offence committed therein.

[Cited in U. S. v. Starr, Case No. 16,379; U. S. v. Ivy, Id. 15,451.]

Indictment [against Moses Alberty] for murder.

G. D. Royston, U. S. Dist. Atty.

A. W. Arrington and Albert Pike, for the prisoner.

Before DANIEL, Circuit Justice, and JOHNSON, District Judge.

DANIEL, Circuit Justice. At the very threshold of this case the court is met by the important inquiry, whether it has jurisdiction to try the offence with which the prisoner stands charged. This offence is murder, alleged to have been committed by the prisoner, who is an Indian, upon the body of a white man, without the limits of the state and district of Arkansas, within the Indian country. On either side of the question here propounded, it is admitted that the circuit and district courts of the United States can take cognizance of matters, civil or criminal, so far only as the power so to do is conferred upon them by statute; and it would seem to be a proposition equally plain as a general one, that the jurisdiction of those courts, so far as it results from the terms of their creation, or is necessarily implied in their constitution, is restricted within the territorial limits within which they are placed. Amongst the exceptions to this general principle, or perhaps it might with stricter propriety of language be said, amongst the instances which extend the powers of these courts beyond the restrictions above laid down (and there are unquestionably such), are said to be certain provisions in the acts of congress which vest this court with cognizance of the offence on which the accused now stands before us; that is, which authorize the trial before the circuit court of the district of Arkansas of a murder committed by an Indian upon a white man out of the district of Arkansas, as defined by the law creating the state, without the limits of any circuit of the United States, and within the Indian country. Let the provisions relied on for this position be traced and compared, in order to ascertain how far the position can be sustained by them. By the act of congress "to regulate trade and intercourse with the Indians, and to preserve peace on the frontiers," approved on the 30th March, 1802, the government of the United States assumed jurisdiction over the Indian country, by enumerating many acts which should be punished as offences, if committed within that country, and by authorizing certain courts designated in the statute to take cognizance of them. It will be perceived, however, that most of the offences thus denounced are such as should be committed by white men, and that in the enumeration in that statute is not included murder committed by an Indian, within the Indian boundary, on the body of a white man.

It is presumed, therefore, that the statute of March 30th, 1802, can have no application to a case like that at bar. On the 3d day of March, 1825, was passed the law entitled "An act more effectually to provide for the punishment of certain crimes committed against the United States." The crimes enumerated in this act, so far as locality beyond the limits of the state is imparted to them by the law, will be found to belong naturally and properly to the maritime jurisdiction of the Union, or to be in some degree connected therewith by operation of express law. The 14th section of the above statute contains the following clause, at the close of that section: "And the trial of all offences which shall be committed upon the high seas, or elsewhere, out of the limits of any state or district, shall be in the district where the offender is apprehended, or into which he may be first brought." The offence charged in the indictment being committed in the Indian country, and consequently out of the limits of a state or district, it is insisted for the prosecution that the clause of the law above mentioned brings it within the jurisdiction of the circuit court for this district, the accused having been first brought therein. With regard to this argument it may, in the first place, be remarked, that implications of power are scarcely allowable in any cases in relation to the courts of the United States. They have repeatedly, even in civil cases, been adjudged to be courts of limited, though not of inferior, jurisdiction; and it has been in like manner required that their jurisdiction must in every instance be apparent on the face of the pleadings. A fortiori, then, would such implications be discountenanced in penal or criminal proceedings, and still more would they be disclaimed where the issues of life and death are involved. But, conceding for the present that such implications could be permitted, it may be asked whether there is not enough on the face of the act of 1825 fully to answer and satisfy the clause of the 14th section, without attempting to extend that clause so as to embrace other matter than that which the statute expressly and plainly embraces. Amongst the offences of which the statute was treating, many of them were of a character which might be consummated within the limits of the states and districts of the Union. Others, as for instance those touching the maritime rights of the nation and its citizens, were of a nature to be committed beyond those limits, such as the destruction of ships on the high seas and in foreign ports, and the abandoning of seamen in

foreign countries; for these delinquencies it was necessary to designate a forum, and public convenience pointed to the state or district in which the offender might be apprehended, or that into which he should happen to be first brought. This interpretation of the statute appears to satisfy both its language and its reason, and to forbid forcing its provision to purposes within neither its natural nor necessary scope.

On the 30th June, 1834, there was passed an act of congress with a title similar to the act of 1802, namely, "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." In most of its provisions, this act is a literal transcript from the act of 1802, and like the latter law, it comprises nowhere in the enumeration of offences the crime of murder by an Indian on the body of a white man, committed within the Indian country; but the act of 1834, in its 24th and 25th sections, contains the following provisions. It declares, "that so much of the laws of the United States as provide for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country, provided, that the same shall not extend to crimes committed by one Indian against the person or property of another Indian; and that for the sole purpose of carrying into effect that act, all that part of the Indian country west of the Mississippi river that is bounded north by the north line of lands assigned to the Osage tribe of Indians, produced east to the state of Missouri, west by the Mexican possessions, south by Red river, and east by the west line of the territory of Arkansas and state of Missouri, shall be and the same is hereby annexed to the territory of Arkansas." The region thus described is admitted to be Indian country, and it is within its limits that the crime alleged in the indictment is charged to have been committed. As cognizance of crimes and offences generally, and certainly of the crime of murder, by whomsoever committed, within forts, dockyards, arsenals, on the high seas, and in all other places within the exclusive jurisdiction of the United States, is unquestionably given to the courts of the United States designated by law for the trial of those offences, and as the Indian territory above described has been placed under this exclusive jurisdiction of the courts of the United States, and by the same law has been annexed to the territory of Arkansas, as little can it be doubted that by virtue of this statute of 1834 jurisdiction of the like crimes was vested in the courts of the United States for the territory of Arkansas. But how and by what means, and to what extent, was this jurisdiction so vested? Solely by the extension to the Indian country of the laws punishing crimes in places within the exclusive jurisdiction of the United States, and by the annexation of that country, for the purpose of enforcing those laws, to the territory of Arkansas; for it cannot be reasonably contended, that the mere creation of the territorial government would clothe it with power over a people, and over regions beyond the boundaries of the territory, and with which it had no inherent or necessary connection.

These special provisions, made by congress, are in themselves an admission of their necessity, of their previous non-existence as a part of the territorial jurisdiction, and of their peculiar and limited annexation to that jurisdiction by force of that statute alone. By an act of congress approved on the 13th June, 1836, the state of Arkansas was admitted into the Union; its limits and boundaries as a state were by that act ascertained and fixed, and the state was created a judicial district. By the operation of this act of congress, the territorial government of Arkansas may be said to have been annihilated. Its political and civil powers were transferred to other functionaries; those of a peculiarly internal character, to functionaries of the newly formed state; those which bore any relation to the system of which the state formed a part, to functionaries holding new and distinct commissions under that system, and possessing no powers save those to be derived from those commissions. Then as one of the states of the Union, and in virtue of that character forming one of the districts of the United States, the state of Arkansas and the federal powers within that state would possess no peculiar jurisdiction or authority; none which did not appertain to other districts and the circuit court having cognizance of matters within those districts. To invest the federal courts within the state and district of Arkansas with such peculiar powers, some special legislation would appear to be indispensable. Has any such special legislation taken place? We have been able to perceive nothing of the kind in the act which invested the district court of the state of Arkansas with circuit court powers; and if the act of March 3, 1837, entitled "An act supplementary to the act entitled an act to amend the judicial system of the United States," which created a circuit court within the state of Arkansas, be examined, it will be found equally destitute of any similar provisions. This act last mentioned first revokes simply the circuit court powers theretofore existing in several district courts, of which the district court of Arkansas was one, and declares that within the several districts named circuit courts shall be held by the chief or associate justices of the supreme court of the United States, assigned or allotted to the circuit to which such district shall belong, and the district judges of such districts severally and respectively; either of whom shall constitute a quorum. Nay, this act would seem to inhibit and exclude the exercise of any extraordinary or peculiar power, either by the circuit or district judges, within the newly created districts or circuits, for the law proceeds to declare: "Which circuit courts, and the judges thereof, shall have

like powers and exercise like jurisdiction as other circuit courts and the judges thereof, and the said district courts and the judges thereof shall have like powers and exercise like jurisdiction as the district courts and judges thereof in other circuits."

Upon the whole, then, we conclude that no power exists by law in the circuit court of the district of Arkansas which does not appertain to other circuit courts of the Union; that the power and jurisdiction now claimed for the court is a peculiar and extraordinary power, and does not belong to it regularly by its constitution, nor has been bestowed upon it by any special legislation. We think, therefore, that it cannot be legally and properly exercised, and that the court cannot take cognizance of the prisoner's case. Prisoner discharged.

Case No. 14,427.

UNITED STATES v. ALDEN.

[1 Spr. 95; 7 Law Rep. 469.] [1]

Circuit Court, D. Massachusetts. Oct., 1844.

SEAMEN—PUNISHMENT—RIGHT OF MASTER TO USE—MALICE.

1. The master of a ship has a right to use coercive measures, to compel obedience to his lawful orders.

2. In case of desertion and persistent refusal to perform duty, the master may inflict punishment, and use means of coercion; but they must not be such as would be permanently injurious to the health or constitution of the seaman.

3. Where the mode of punishment is unjustifiable, the question whether it was from malice, hatred, or revenge, is a question of fact, to be determined by the jury.

Silas P. Alden, of Fairhaven, master of the whaling bark Bruce, was tried upon an indictment, under the United States statute of March 3d, 1835, § 3 [4 Stat. 776], for imprisoning, "from malice, hatred and revenge, and without justifiable cause," Barzillai McFaden, one of the seamen. It appeared that McFaden, a young man from Maine, who had worked a short time as waiter in one of the Boston hotels, shipped on board the Bruce as a green hand. In the course of the voyage, he did not appear to be an energetic seaman, and was roughly dealt with by the captain. At one of the southern islands he deserted from the ship, and upon being retaken, he refused to do duty. The captain informed him that he should keep him in irons until they were out at sea, and then should imprison him in the run of the ship, until he returned to duty. Accordingly, in a day or two, the captain took off his irons, and offered McFaden the alternative of remaining in the run, or returning to duty. The latter said he would do no more duty, but objected to the run, as an improper place of imprisonment. The captain informed him there was no other proper place in the ship, and accordingly placed him in the run, under the cabin floor, and ordered the steward to give him bread and water only. The place of imprisonment was low and contracted, and a most wretched place of confinement; the sailor being unable to stand up, or sit erect in it, and there being but very little light. But the captain repeatedly offered to take him out, if he would go to work, which McFaden constantly refused to do. He remained there about five months, until the ship arrived home, when he was discharged. Just before the termination of the voyage, he informed the captain that his health was suffering, and he was then allowed to come into the cabin occasionally. He became very much emaciated, and is still suffering from the effects of his confinement. He testified on the stand with great fairness, exhibited no feeling against the captain, and frankly admitted that he might have been released at any time, if he would have consented to perform duty. The whole evidence showed one of the most remarkable instances of stupidity, or obstinacy, or both, ever exhibited in a court of justice.

F. Dexter, U. S. Dist. Atty.
T. G. Coffin, for defendant.

SPRAGUE, District Judge, in charging the jury, instructed them, that in no view of the evidence, was there any legal justification, either of the desertion, or of the subsequent persistent refusal of duty by McFaden. That the master had a right to inflict reasonable punishment for the offence of desertion, and to use means of coercion to compel obedience to his orders, and the performance of duty; but that the punishment inflicted, and the means of coercion used, must not be such as would be likely to be permanently injurious to the health or constitution of the seaman. That there might, indeed, be extreme cases, as of mutiny, where the master might resort to extreme measures, even to the taking of life. But the present did not partake, in any degree, of that character. It was a mere question of discipline, and compelling the performance of service. The authority of a master over his crew has been sometimes likened to that of a parent over his children; but there is a very material difference, particularly in this, that the power of the master is given only for the purposes of the voyage, and is to be limited in its use to those purposes. But to the parent belongs the whole moral training of his child; and the discipline exercised may have reference not only to his whole life, but also to his future well-being. If the imprisonment, in this case, was such, from its nature and duration, as was likely to be permanently injurious to the health or constitution of the seaman, then it was not justifiable. It was necessary for the government to prove, not only that

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

the imprisonment was unlawful, but that it was inflicted by the master from malice, hatred, or revenge; and that was a question of fact, to be determined by the jury, upon the consideration of all the evidence. The judge made some further remarks upon this point, and upon the testimony. The jury returned a verdict of guilty.

Case No. 14,428.

UNITED STATES v. ALEXANDER et al.

[4 Cranch. C. C. 311.] [1]

Circuit Court, District of Columbia. May Term, 1833.

BANKS—EXPIRATION OF CHARTER—PLEADING IN EQUITY—JOINDER.

1. If the charter of a bank, indebted to the United States, expires, the United States have no remedy against the debtors of the bank, if there were no actual assignment to the United States before the expiration of the charter.

2. Several defendants, who have no connection with each other in interest, in estate, or in contract, and against whom, jointly, the plaintiffs have no cause of suit either at law or in equity, cannot be joined in one bill.

This was a bill in equity, brought by the United States against [Amos Alexander and others] the debtors of the Franklin Bank, about three years after the expiration of the charter of the bank, charging that the directors had agreed to assign the effects of the bank to the United States, to whom it was indebted.

The defendants demurred to the bill because it appeared, upon its face, that the charter had expired, and the defendants were, therefore, not debtors of the bank at the time of filing the bill; and also because it joined parties as defendants who had no joint interest, &c.

Mr. Taylor, for defendants, as to the joining of several defendants, cited 1 Har. Ch. Prac. pp. 289, 406, § 8; Davoue v. Fanning, 4 Johns. Ch. 199; Brinkerhoff v. Brown, 6 Johns. Ch. 139; 1 Har. Ch. Prac. 93; and as to the expiration of the charter, 1 Bl. Comm. c. 18, last page.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). We think the demurrers in this case must be supported:

1. Because, by the plaintiff's bill, it appears that the charter of the bank expired in 1822, and the bill was not filed until 1825; so that the defendants were not indebted to the bank at the time of filing the bill.

2. Because the bill joins several defendants who have no connection with each other in interest, in estate, or in contract, and against whom, jointly, the plaintiffs have no cause of suit either at law or in equity.

3. Because the bill does not show an assignment of the debts, or any agreement to assign, with the assent of the defendants.

4. Because there is no representative of the bank before the court to controvert the assignment.

We are of opinion, therefore, that the bill ought to be dismissed as to the defendants who have demurred.

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

UNITED STATES (ALFONSO v.). See Case No. 188.

Case No. 14,429.

UNITED STATES v. The ALLEGHENY.

[10 Pittsb. Leg. J. 276; 2 Pittsb. Rep. 437.]

District Court, W. D. Pennsylvania. 1863.

PRIZE — OWNER — RESIDENCE WITHIN INSURRECTIONARY STATES—LOYALTY.

1. After seizure, by the surveyor or collector of a port of the United States, a libel is filed to declare the forfeiture.

2. A claimant, who is an inhabitant of an insurrectionary state, takes his status from such state.

3. Whether his capital be great or small, it contributes to swell the means of resistance, and is liable to confiscation.

4. Even his loyalty will not protect him, because, being an integral part of a state in rebellion, he is treated as a public enemy.

5. New Orleans (the residence of claimant) having elected members of congress, the government of the state of Louisiana being yet under the control of the insurgents, the position of the claimant is not changed.

6. The persons "exercising the functions of government" there, not having disclaimed the acts of the insurgents, or suppressed the insurrection, the laws of the United States have not yet been fully vindicated.

7. A vessel owned, in whole or in part, by a resident of New Orleans, found in any other port of the United States, is subject to condemnation.

In admiralty.

Mr. Watson, for claimant.

Mr. Carnahan, U. S. Dist. Atty.

McCANDLESS, District Judge. This was a seizure by the surveyor of the port of Pittsburgh, under the provisions of the act of congress of the 13th July, 1861 [12 Stat. 255]. The libel is filed upon information of the United States district attorney, to declare a forfeiture of the boat. Robert Watson, a citizen and inhabitant of New Orleans, in the state of Louisiana, is the owner of one-fourth of the vessel, the residue being the property of citizens of Pennsylvania. Louisiana is in a state of insurrection against the government of the United States. The act provides that if the insurgents fail to disperse by the time fixed by the president, and when such insurgents claim to act under the authority of any state or states, and such claim is not repudiated, or disclaimed by the persons exercising the functions of government in such state or states, nor such insurrection suppressed in such state or states, then the

president shall declare, by proclamation, that the inhabitants of said state, or parts thereof, are in a state of insurrection against the United States, and all commercial intercourse between them and the rest of the United States shall cease and be unlawful, so long as such condition of hostility shall continue. It is further provided that any ship or vessel belonging, in whole or in part, to any citizen or inhabitant of a state or part of a state so in a state of insurrection, found at sea or in any port of the rest of the United States, shall be forfeited to the United States.

Independent of the admitted facts of this case, the history of this wicked rebellion, of which we have judicial knowledge, places the Louisiana claimant within the category of this law. Even his loyalty will not protect him, for his capital, whether it be great or small, contributes to swell the means of resistance upon the part of the insurgents. Having the misfortune to be an integral part of an insurrectionary state, he takes his status from it, and is treated as a public enemy. His vessel must therefore be condemned, unless we can sustain the defence upon which he relies.

It is contended that inasmuch as New Orleans, his place of residence, is now in possession of the United States, and its citizens have so far returned to their allegiance as to elect members to congress, the reason for seizure has ceased, and the boat should be released from the custody of the officers. After much reflection the court cannot concur in this view of the case. New Orleans was captured by a naval and military force under Commodore Farragut and General Butler, and its possession now is a military occupation by the army of the United States. Its government is a military government; and if, for a single day, it should be divested of the panoply of war, surrounded as it is by the public enemy, the action of its loyal citizens in the election of national representatives would be repudiated by the traitors within its municipal limits. Only a part of Louisiana is in possession of the United States, and, in the language of the act of congress, "the persons exercising the functions of government in such state" have not "disclaimed" the acts of the insurgents, nor has "such insurrection been suppressed by said state." War, with all its tragic incidents, exists there yet, and the whole power of this great nation is brought into activity, to restore the constitutional jurisdiction of the United States. The state government is in the hands of the Confederates, and although the national forces hold its capitol, its principal city, and a large portion of its territory, the laws have not yet been fully vindicated, nor have the people returned to their allegiance. Although by law we are bound to declare a sentence of forfeiture, the secretary of the treasury has power to relieve. And, as we are satisfied of the inflexible loyalty of Robert Watson, we recommend that it be remitted by the secretary upon payment of costs. Decree accordingly.

Case No. 14,430.

UNITED STATES v. ALLEN.

[9 Ben. 154;[1] 9 Chi. Leg. News, 330; 23 Int. Rev. Rec. 192.]

District Court, S. D. New York. May, 1877.

INTERNAL REVENUE—SUCCESSION TAX—LEGATEE.

1. By the will of H., his executors were directed to apply the income of a legacy to the use of his cousin, F., and on the death of F. to pay the legacy, which amounted to $10,000, to such person as F. might appoint. The legacy was taxed, as though payable instanter to F., the sum of $300, under subdivision 3, § 111, Act July 1st, 1862 [12 Stat. 485]. F. died, and appointed the defendant, A., a stranger in blood to H. and to F., as the person to receive the legacy, and A. received the same. More than six years afterwards suit was brought by the United States, in personam, against A., to recover $600, claimed to be due to the United States from him as a tax on the legacy. *Held*, that sections 111, 112, Act 1862, so far as they impose a tax in personam, impose it only on the executor or trustee and not on the legatee or cestui que trust.

2. As it is not provided that a suit shall lie against the legatee in personam, to recover the tax, but that proceedings in the nature of proceedings in rem shall be brought to enforce and realize the lien on the property of the deceased, judgment must be entered for the defendant.

[Cited in U. S. v. Trucks' Adm'r, 27 Fed. 542.]

[This was a suit by the United States against Horatio P. Allen to recover the interest on an unpaid legacy.]

R. M. Sherman, U. S. Asst. Dist. Atty.

D. R. Jacques and H. P. Allen, for defendant.

BLATCHFORD, District Judge. This suit has been tried by the court on an agreed written statement of facts. The suit is an action against the defendant, in personam. In the complaint, the plaintiffs claim to recover from the defendant the sum of $600, with interest from the 1st of April, 1869. The complaint alleges, that, on that day, the defendant received, and became entitled to the possession and enjoyment of, a legacy of $10,000, under the last will of one Harsen, theretofore deceased, upon which the tax imposed by law upon legacies has not been paid; that the defendant was a stranger in blood to Harsen; and that thereupon, by force of the statute, there became due and payable from the defendant to the plaintiffs a duty or tax at the rate of $6 for every $100 of the amount of said legacy, to wit the sum of $600. Harsen died December 31st, 1862, leaving a will, which was admitted to probate February 3rd, 1863. In his will he directed his executors to invest the sum of $10,000, and apply the income thereof to the

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

use of his cousin, one Fay, and on her death to pay over the said sum of $10,000 to such person or persons as she might appoint, to which person or persons he gave and bequeathed the said sum of $10,000. The legacy was taxed as though payable instanter to Fay, and, on the 11th of February, 1864, the executors of Harsen paid to the United States thereon, as such tax, the sum of $300, being the full tax on the entire amount of $10,000, under subdivision 3 of section 111 of the act of July 1st, 1862 (12 Stat. 485), according to the relationship of Fay to Harsen, which was that of a cousin. The executors deducted the $300 from the $10,000 and invested the balance, $9,700. Fay died April 10th, 1869. By her will, which was proved September 28th, 1869, she appointed the defendant, who was a stranger in blood to Harsen and to her, as the person to receive said legacy, and, on October 1st, 1869, the $9,700 was paid over to him.

The answer of the defendant insists that neither as a legatee under the will of Harsen, nor as the receiver of the money or of the legacy, did he become liable to pay any duty or tax thereon, nor did there, by force of any statute of the United States, become due or payable from him to the United States any duty or tax whatsoever.

By section 111 of the act of 1862, it is provided, "that any person or persons having in charge or trust, as administrators, executors or trustees, of any legacies or distributive shares arising from personal property, of any kind whatsoever, where the whole amount of such personal property, as aforesaid, shall exceed the sum of one thousand dollars in actual value, passing from any person who may die, after the passage of this act, possessed of such property, either by will or by the intestate laws of any state or territory, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows, that is to say: * * * Third. Where the person or persons entitled to any beneficial interest in such property shall be * * * a descendant of a brother or sister of the father or mother of the person who died possessed as aforesaid, at and after the rate of three dollars for each and every hundred dollars of the clear value of such interest. * * * Fifth. Where the person or persons entitled to any beneficial interest in such property * * * shall be a stranger in blood to the person who died possessed as aforesaid * * * at and after the rate of five dollars for each and every hundred dollars of the clear value of such interest." Section 112 of the same act provides, "that the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid, until the same shall be fully paid to and discharged by the United States;" that "every executor, administrator or other person who may take the burden or trust of administration upon such property shall, after taking such burden or trust, and before" distributing any portion of such property to legatees, pay to the proper collector the amount of such duty or tax, and make to the assistant assessor a sworn statement of the amount of such property, and of the amount of duty thereon, which statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, and shall be delivered by the assistant assessor to the collector; and that, on such payment and delivery of statement, the collector shall grant to such person paying such duty or tax a receipt for the same, which "shall be sufficient evidence to entitle the person who paid such duty or tax, as having taken the burden or trust of administering such property or personal estate, to be allowed for such payment by the person or persons entitled to the beneficial interest in respect to which such tax or duty was paid, and such person administering such property or personal estate shall be credited and allowed such payment by every tribunal which, by the laws of any state or territory, is or may be empowered to decide upon and settle the accounts of executors." The same section then goes on to provide, that, if "such person who has taken the burden or trust of administering upon any such property or personal estate" shall refuse or neglect to pay such tax or to deliver such sworn statement or shall deliver a false statement as to legacies or names or relationship, or shall not truly set forth therein the clear value of such beneficial interest, "the proper officer of the United States shall commence such proceedings in law or equity, before any court of the United States, as may be proper and necessary to enforce and realize the lien or charge upon such property or personal estate, or any part thereof, for which such tax or duty has not been truly and justly paid. Under such proceedings the rate of duty or tax enforced shall be the highest rate imposed or assessed by this act, and shall be in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description, to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid, under its direction, to such person or persons as shall establish their lawful title to the same."

These provisions of law, so far as they impose a tax in personam, impose it only on the executor or trustee. They do not impose it on the legatee or cestui que trust. The executor is made subject to the tax, not the

legatee. The executor is to pay the tax, not the legatee. The executor is to make the statement, not the legatee. The executor is to receive the receipt from the collector, not the legatee. If the executor neglects to pay the tax, or to deliver the statement, or violates the requirements of the statute, it is not provided that a suit shall lie against the legatee, in personam, to recover the tax, but that there shall be proceedings to enforce and realize the lien on the property or personal estate of the deceased. Those proceedings are to be in the nature of proceedings in rem, to subject the property of the deceased in the hands of any person who may have the custody or possession of it, to sale, to pay the tax. The present suit is not a proceeding of that character. It was commenced more than six years after the executors paid the legacy to the defendant. There is no allegation, in the complaint, that the defendant has the custody or possession of any of the property of the deceased, or of any of the money which was paid to him as and for the legacy. The complaint is based on the personal liability of the defendant, and no such liability is created by the statute. Judgment must be entered for the defendant.

Case No. 14,431.

UNITED STATES v. ALLEN.

[1 Brunner, Col. Cas. 94; [1] 4 Day, 474.]

Circuit Court, D. Connecticut. April, 1810.

PENAL ACTION—EMBARGO ACT—ACTION—AMOUNT OF PENALTY.

An action of debt will lie in favor of the United States to recover the penalty given by the embargo act [2 Stat. 451], for being knowingly concerned in a foreign voyage in violation of that act. If in such action the defendant plead nil debet, and the issue be found against him, the jury, and not the court, are to fix the amount of the penalty.

[Cited in Walsh v. U. S., Case No. 17,116; Stockwell v. U. S., 13 Wall. (80 U. S.) 543.]

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

This was an action of debt brought to the district court, alleging that the defendant [Robert Allen] was master of the schooner Amazon, was concerned in fitting her out, and that by his procurement she escaped without any clearance or permit, and departed from the port of New Haven, and proceeded to a foreign port, contrary to the provisions of the embargo acts, particularly the first supplementary act, approved January 9, 1808, and demanding the penalty of $20,000. The defendant pleaded nil debet, and the jury found a general verdict that "the defendant doth owe," without assessing damages. On this verdict the court assessed damages, and rendered judgment for the amount against the defendant.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

An appeal being taken to this court, Mr. Staples, for the appellant, urged a reversal of the judgment below on two grounds: 1. That an action of debt is not sustainable in this case. Peake, Ev. 272; 1 Chit. Pl. 105. 2. That if sustainable, the jury, and not the court, ought to have assessed the damages.

The District Attorney, contra.

LIVINGSTON, Circuit Justice. This penalty may be recovered as under the collection law. The eighty-ninth section of that act (1 Stat. 695) authorizes a civil action only to recover the penalty for a breach. The word "suit" implies ex vi termini, a civil action. No part of the collection law contemplates an indictment. The difficulties suggested are real, but the statute has prescribed this course. It has been held by the circuit court in Vermont and in Virginia that the district attorney had no option, but was obliged to bring an action of debt until the enforcing law passed. Till then he was obliged to proceed by suit, and there is no suit adapted to the case but debt.

As to the other point, his honor said, he chose to keep the case sub judice until the next term, and learn the practice in Virginia and New York, where similar actions had been brought. He added, at the same time, that he had an opinion of his own, which was, that the jury ought to have assessed the damages.

At the next term the judgment of the district court in this case was reversed, one of the grounds of reversal being that the jury ought to have assessed the damages.

Action of Debt—Penalties and Forfeitures Recoverable by. The action of debt will lie at the suit of the United States to recover the penalties and forfeitures imposed by statutes. Stockwell v. U. S., 13 Wall. [80 U. S.] 543; Walsh v. U. S. [Case No. 17,116], citing above case.]

Case No. 14,432.

UNITED STATES v. ALLEN et al.

[7 Int. Rev. Rec. 163.]

Circuit Court, E. D. New York. 1868.

VIOLATION OF INTERNAL REVENUE LAWS—BONDS FOR WITHDRAWAL OF SPIRITS—DUTIES OF REVENUE OFFICERS — FRAUDS AGAINST THE UNITED STATES — CRIMINAL LAW — EVIDENCE OF GOOD CHARACTER.

[1. The requirements of the internal revenue laws in respect to the taking of bonds, or the withdrawal of spirits from warehouse, cannot be dispensed with by any revenue officer because he deems the government sufficiently protected by other provisions. Nor can any officer excuse himself from a strict compliance with all the statutory regulations by pleading previous practice by other officers in that respect.]

[2. A deputy collector, who accepts a bond for the withdrawal of whiskey from a warehouse, knowing that the signatures thereto have been forged by another, or who, knowing that they were made by another, certifies upon the bond, as required by the regulations, that the persons whose names are signed thereto personally appeared before him and signed the same in his

presence, is guilty of executing, or conniving in the execution of, a document in fraud of the internal revenue laws, and is subject to the punishment prescribed by the act of July 13, 1866, § 42 (14 Stat. 98).]

[3. In order to constitute a conspiracy to defraud the United States, under section 30 of the act of March 2, 1867 (14 Stat. 484), it is not necessary that there should be a pecuniary consideration, or a definite, absolute contract between the parties. It is sufficient if there are a concert of action and a concert of intent.]

[4. Previous good character is only to be considered, in favor of defendants, when the jury have a doubt on the question of guilt. If they have no doubt, defendants can take no benefit from proof of good character.]

This was an indictment containing seven counts,—four under section 42 of the act of July 13, 1866 [14 Stat. 163], charging the defendants [John S. Allen and Richard C. Enright] with executing, and procuring to be executed, certain fraudulent bonds for the withdrawal of whiskey from warehouse, and three counts under section 30 of the act of March 2, 1867 [14 Stat. 484], charging them with conspiracy to defraud the revenue. One of the defendants, Allen, was a deputy collector of internal revenue. The trial lasted several days, and a great many witnesses were examined.

Mr. Tracey, U. S. Dist. Atty., and Mr. Allen, Asst. Dist. Atty.

E. L. Sanderson, for Allen.

Underhill & Hollis, for Enright.

BENEDICT, District Judge (charging jury). This case, important as it is, has occupied a period of time quite disproportioned, as it appears to me, to any difficulties attending the questions of law or of fact which it involves. As to these questions of law there is no room for doubt. Whether there is any doubt about the facts is for you to say, for upon you alone is the responsibility of passing upon the facts. As has been said by the counsel, there are seven counts in this indictment—seven charges, each complete in itself—any one of which having been passed against either of the defendants, requires a verdict of guilty against such defendant. These charges may be divided into two classes. The first four belong to one class, all founded upon the same portion of the statute. The remaining three, which may be called the conspiracy counts, are all founded upon another and different section of the statute. They are all of the same nature, however, being all misdemeanors, and all relate to a single feature of the internal revenue law, the provisions for distiller's bonds. The nature of these bonds has been fully explained to you by counsel, their importance to a proper administration of the internal revenue law being manifest. But whether important or not they are required by law. Being so required, no man, whether he be collector, or deputy collector, or commissioner of internal revenue, or secretary of the treasury, can dispense with them. The proposition that it is competent for any officer of the revenue to disregard a requirement of the law because he thinks it useless, or because he deems the government protected by other provisions, finds no favor in this court. It is an idea that should never have been entertained, and must be at once abandoned. The duties of the citizen and of the officer in regard to these bonds are plainly set forth. About them there can be no mistake, and these duties must be performed. So, too, that other proposition so often urged in your hearing upon this trial, that the duty of one officer may be measured by the practice of some other officer must be dismissed.

The question of this case, and of every case when it arises, is, what did the defendants do, and with what intent? And what they were in the habit of doing in the Second collection district, or what persons formerly in office were in the habit of doing, is a matter wholly immaterial. What these defendants are charged in the first four counts with having done, is this, that they executed original certain false, fraudulent bonds or fraudulently caused them to be executed, or connived at the execution thereof. This is the charge set forth in each of the first four counts of the indictment. They differ from each other only as to the particular bond which is charged as having been executed with fraudulent intent. If any of these charges are proven, they are all of them made an offence by this 42d section, which I propose to read: "Be it further enacted, that any person or persons who shall execute or sign any false or fraudulent bond, permit, entry, or other document, required by law or regulation, or who shall fraudulently permit the same to be executed, or who shall connive at the execution thereof, by which the payment of any internal revenue tax shall be avoided, * * * or which shall in any way be used or attempted to be used in fraud of the internal revenue laws and regulations"—this constitutes the offence. In this case these bonds are bonds required by law, and, upon the evidence as given, they were used—if they were false and fraudulent—in fraud against the internal revenue law. The question then raised as to these first four counts is, did the defendants or either of them execute or sign the bond, or fraudulently procure or connive at the execution? As to Enright, the charge is that he forged the signatures upon these bonds. If he did, he must be found guilty. Whether he did is for you to say, the evidence, the bonds, the absence of the man who did, if he did not, the non-production of the subscribing witnesses, all may be considered by you in determining this question. It is not pretended that Allen forged any name upon any of the bonds, but it is charged that he connived at the execution of the bonds. Mr. Allen was the deputy collector of this district who accepted these bonds. If Allen knew that these signatures had been made by Enright, then when he ac-

cepted the bonds without objection he connived at the execution. The bonds are not only charged to be false, but fraudulent, that is, constructed with false description of powers, false enumeration of property united with intent to make a worthless bond appear to be valid. That this is true seems quite clear, and if either Allen or Enright knew them to be fraudulent, they are upon the admitted evidence of these acts, guilty of having connived at the execution of them. The certificate upon form 33 is a document required by regulations. It was executed by Allen alone upon each of the bonds and filed as part of the papers. In it he certifies as follows: "Personally appeared before me Frederick Adams, who being duly sworn, says," etc. If the signatures upon any of the bonds were not, in fact, placed there in his presence, he made a false document, and is guilty. If you find that Enright wrote any of the names of the sureties upon any of the bonds, then Allen must be guilty, for if Allen saw him commit the forgery, and then accepted the instrument, he connived at its execution. If Enright signed the name and Allen did not see him sign it, then he made a false certificate, for he says he saw it signed.

The remaining counts charge a conspiracy, a corrupt agreement of understanding between these persons that false or fraudulent bonds should be executed and accepted. These offences are framed under a different section of the act of 1867, the 30th, a very sweeping section—a very important section—which provided that if any two or more persons conspire either to commit any offense against the laws of the United States, or to defraud the United States in any manner whatever, and one or more of them shall do any act to effect the object thereof, the parties concerned in the conspiracy shall be deemed guilty of a misdemeanor. The gist of this offense is combination between two or more parties to do an act which by the act is made an offense against the United States, and some act of one or more of the parties in furtherance of the common design that makes the gist of the offense created by the 30th section, and charged in the latter counts of this indictment. They are charged with this conspiracy, and the overt act alleged, as required by the law, is the accepting of the bonds. In order to find them guilty under these counts you must be satisfied that there was this combination. Whether there has been such a conspiracy you are to gather from the circumstances of the case as they have been narrated to you. It is not necessary that there should have been a pecuniary consideration, a definite, absolute contract; but there must have been between them a concert of action, a concert of intent, which makes the offense.

Now I shall not go over the circumstances. They have been fully explained to you. From them all you are to judge whether the latter counts are sustained; whether these men had a corrupt understanding between themselves or with others, or between some one of them and others, that bonds which were false or fraudulent should pass through the collector's office as good. I have in these remarks confined myself to the bonds set out in the indictment. I intend to speak of no other bonds. But other bonds have been proved in the case. They are only to be considered by you as throwing some light on the question of the guilty intent and knowledge of these parties. They tend to show a state of mind in the parties, and afford more or less evidence, as they may be viewed by you, of the corrupt intent which, with the commission of the act, constitutes the offense. There must be a criminal intent, and it must be carried out by some act. If you find the intent, and if you find the act, that intent being to conspire to connect together, and if you find the act committed in pursuance thereof by either one of these defendants, and it is an act charged in the indictment, then they are to be found guilty under the latter counts. If not, then they are to be acquitted. Your verdict in this case, then, must be guilty or not guilty. If you find them not guilty, it is not guilty under all the counts of the indictment. If you find them guilty under any of the first four counts, you will except from your verdict whichever one of those counts you find to be not proven. If you find them guilty on the conspiracy counts, you may find them guilty excepting such of the counts as you may find not proven. You will have the indictment before you, you will have the bonds before you, and you will ascertain from the papers the counts which may apply to each bond.

Now, gentlemen, I do not think it necessary to take up your time further to elucidate this matter. The case is very important. The magnitude of the fraud is extraordinary—$500,000 fraudulent bonds in a single month, passing through a single office, is a startling fact. The importance of acquitting these men, if they are not clearly found guilty, is very great. It is so in every case. An innocent man should never be found guilty. Better a guilty man should escape, far better, than that any innocent man should be convicted. But the importance of convicting them, if guilty, is very great. For you are aware, as we all are aware, of the importance of the emergency of the government in regard to the enforcement of the internal revenue laws. And one office of all these prosecutions, painful as they are, is to teach the officers of the revenue that they must obey the law. They must understand that these laws of the United States are binding on them as well as on the citizens. Until that lesson is learned, no revenue law, framed however wisely and well, will be of any avail. And when that lesson is learned, then, and not until then, is the community safe.

This is a criminal case; and the defendants and each of them, are entitled to the benefit

of every reasonable doubt. If you have any reasonable doubt of their guilt, give them the benefit of that doubt, and acquit them. If you find from the evidence that they are guilty beyond any reasonable doubt of an intelligent man; if you are thus satisfied from the evidence, then it is your duty to find them guilty.

Mr. Hollis here asked the judge to charge the jury that the motive must be to defraud the government of some definite amount of tax to make them guilty. The judge charged that there must have been a criminal intent, or such an amount of carelessness and total indifference as amounted to criminality, in order to make an offence. In regard to some of the bonds the evidence pointed to the defendant, Allen, alone, and did not affect Enright.

Mr. Sanderson—I ask your honor to call the jury's attention to the printed instructions on the bonds.

THE COURT—The documents will be in the hands of the jury for perusal.

I desire further to add that the good character given to the defendants must be taken into consideration, in case the jury were not absolutely satisfied of the guilt of the parties. When any measure of doubt existed, the defendants were entitled to benefit from previous good character, but not otherwise.

The jury retired, and after an absence of three hours, returned with a verdict of guilty on all the counts, but recommended John S. Allen to the mercy of the court. The jury were then discharged.

Mr. Sanderson—I ask a stay of proceedings for 30 days to move an arrest of judgment on behalf of Mr. Allen.

THE COURT directed the motion to be made in the latter part of the month, and said he would consider whether he would allow Allen to go on his present recognizance.

Mr. Enright was then placed in the custody of Marshal Higgins to be taken to the county jail.

UNITED STATES (ALLEN v.). See Case No. 240.

UNITED STATES v. ALLEN. See Case No. 14,820.

UNITED STATES v. The ALLIANCE. See Case No. 245.

UNITED STATES v. ALL THE DISTILLED SPIRITS, ETC., AT 307-9 AVE. A, NEW YORK. See Case No. 3,923.

Case No. 14,433.

UNITED STATES v. ALMEIDA.

[2 Whart. Prec. Ind. § 1061, note; 4 Leg. Int. No. 5.]

District Court, E. D. Pennsylvania. Feb., 1847.

CRIMINAL LAW—INDICTMENT—CERTAINTY.

[An indictment against several defendants, which charges that on a certain day they, being seamen of an American vessel named, "with force and arms, did then and there feloniously make a revolt on board the said ship, contrary," etc., fails to charge with sufficient certainty an offence under the act of congress of 1835 (4 Stat. 775), providing that if any one or more of the crew of an American vessel shall, with force, or by fraud, threats, or other intimidations, usurp the command of such ship from the master, or deprive him of his authority and command, or resist or prevent him in the free exercise thereof, or transfer such authority and command to any other person, the person so offending, and his aiders or abettors, shall be deemed guilty of a revolt or mutiny, and shall be fined and imprisoned according to the nature and aggravation of the offence.]

KANE, District Judge. The indictment on which these prisoners were convicted a few days ago charges that on the first day of November, last, upon the high seas, &c., they, being "seamen of an American vessel, to wit, the barque Pons, with force and arms, did then and there feloniously make a revolt on board the said ship, contrary," &c. A motion has been made in arrest of judgment, on the ground that the offence is not set forth in the indictment with adequate certainty; and it has been contended that, under the acts of congress now in force, it was incumbent on the prosecution to set out more specifically the acts which make up the offence charged. The question presented by the record is more interesting than difficult; but as it appears to be of the first impression, it properly invites an exposition of the views of the court in deciding it.

The law secures to every man who is brought to trial on a charge of crime, that the acts which constitute his alleged guilt shall be set forth with reasonable certainty in the indictment which he is called upon to plead to. This is his personal right—indispensable, to enable him to traverse the facts, if he believe them to be untruly charged; to deny their asserted legal bearing, if in his judgment they do not establish the crime imputed to him; or to admit at once the facts and the conclusions from them, if he be conscious of guilt. It is important to his protection, also, in case he should be a second time charged for the same offence, that there should be no uncertainty as to that for which he was tried before. And besides all this, which may be supposed to regard the accused alone, it is necessary for the proper action and justification of the court, that it should clearly appear from facts patent on the record, that a specific, legally defined crime has been committed, for which sentence is to be awarded according to the laws that apply to it. There are exceptions, or rather limits to the application of this principle; but they all refer themselves to the peculiar character of the offence charged. Thus, an indictment against a "common barrator," or for "keeping a common gaming-house," or "a house of ill-fame," is good without a specification of acts; for the essence of the offence in these cases is habitual character. So, also, where the charge is not

the absolute perpetration of an offence, but its primary characteristic lies in the intent, instigation, or motion of the party towards its perpetration; the acts of the accused, important only as developing the mala mens, and not constituting of themselves the crime, need not be spread upon the record. Such are certain cases of conspiracy, and those of attempt or solicitation to commit a known crime; where the mental purpose may not have been matured into effective action, or has had reference to criminal action by a third party,—a class of exceptions, this last, which vindicates much of the judicial action under this statute. But these are only exceptions: the principle is as broad as the common law. It is not enough, and never has been, to charge against the party a mere legal conclusion, as justly inferential from the facts that are not themselves disclosed on the record. You may not charge treason, murder, or piracy, in round, general phrases. You must set out the act which constitutes it in the particular case. Following out the principle, it has always been held that where various acts have been enumerated in a statute, as included in the same category of crime, and to be punished alike, it is not enough to charge the violation of such a statute in disjunctive or alternative terms. That is to say, you may not charge its violation to have been in this or that or another particular, leaving the defendant uncertain which or how many of the enumerated particulars he is to answer to. He is entitled to precise notice of the accusation against him.

All these are long recognized rules of the criminal law framed for the protection of innocence, and not unfrequently essential to its safety. The court has no right to disregard them, if it would; on the contrary, it is called upon, by the highest duty that man can owe his fellow, to see to it that they lose none of that efficiency for good which is due to the uniformity and certainty of their application. The defendants have asserted of record, that in their case these rules of pleading have not been conformed to, that they have not had such notice of the offence charged against them as the law requires, and that there is not now within the judicial knowledge of the court that precise and specific assurance of their guilt, which can warrant us in pronouncing sentence upon this verdict. If it be so, they are not too late in bringing the fact to our notice.

The indictment, it is understood, is in accordance with the precedents under the crimes act of 1790 [1 Stat. 112]. By the 8th section of that act it was enacted, that if any seaman shall lay violent hands on his commander, thereby to hinder him from defending his ship, or the goods committed to his trust, "or shall make a revolt in the ship, he shall be adjudged to be a pirate and a felon"; and by the 12th section it was enacted, that if any seaman shall confine the master of any ship or vessel, or "endeavor to make a revolt" in such ship, he shall on conviction suffer imprisonment and fine. Almost all the indictments that have been framed under this act for offences similar to the present, have charged the offence in the words of the 12th section, for "endeavoring to make a revolt." U. S. v. Bladen [Case No. 14,606]; U. S. v. Smith [Id. 16,344]; U. S. v. Smith [Id. 16,345]; U. S. v. Kelly [Id. 15,516]; U. S. v. Smith [Id. 16,337]; U. S. v. Hamilton [Id. 15,291]; U. S. v. Keefe [Id. 15,509]; U. S. v. Hemmer [Id. 15,345]; U. S. v. Haines [Id. 15,275]; U. S. v. Gardner [Id. 15,188]; U. S. v. Barker [Id. 14,516]; U. S. v. Savage [Id. 16,225]; U. S. v. Thompson [Id. 16,492]; U. S. v. Morrison [Id. 15,818]; U. S. v. Ashton [Id. 14,470]; U. S. v. Cassedy [Id. 14,745]; U. S. v. Rogers [Id. 16,189]. Now, as we have already remarked, a charge for such an offence as was the subject of all these cases, resting merely in the endeavor, not going to the perfected act, was, according to all the authorities, well laid in the succinct descriptive words of the section; and in the only cases under the 8th section, in which the principal offence of making a revolt was charged—U. S. v. Sharp [Cases Nos. 16,264 and 16,265] and U. S. v. Haskell [Id. 15,321]—the indictment was quashed or the judgment arrested on other grounds, or else the acquittal of the prisoner made it unnecessary to discuss the question which is now before us. No sentence has ever been pronounced on such a conviction. Indeed, the courts before whom the cases were tried on indictments like this, though the particular question was not raised upon the pleadings, felt themselves embarrassed by the undefined phraseology of the act of congress, and Judge Washington more than once recommended to the jury not to find the defendant guilty of either making or endeavoring to make a revolt, however strong the evidence might be. See U. S. v. Sharp, and U. S. v. Bladen, ut supra. The question of the meaning of these terms was at last submitted to the supreme court of the United States, in a case that went up on a certificate of division from this circuit (U. S. v. Kelly, ut supra, and 11 Wheat. [24 U. S.] 417), and in the spring of 1826 the import of the act of congress of 1790 was judicially determined. In 1835 [4 Stat. 775], however, a new act of congress was passed, which, obviously referring to the language of the supreme court in Kelly's Case, yet not adopting it, proceeded to declare what violations of law should thereafter be deemed to constitute the crime of revolt. The language of the first section of this act is as follows: "If any one or more of the crew of any American ship or vessel on the high seas, or on other waters within the admiralty or maritime jurisdiction of the United States, shall unlawfully, wilfully, and with force, or by fraud, threats, or other intimidations, usurp the command of such ship or vessel from the master, or other lawful commanding officer thereof, or deprive him of his authority and

command on board thereof, or resist or prevent him in the free and lawful exercise thereof, or transfer such authority and command to any other person not lawfully entitled thereto, every such person so offending, his aiders or abettors, shall be deemed guilty of a revolt or mutiny and felony; and shall, on conviction thereof, be punished by fine not exceeding two thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years according to the nature and aggravation of the offence."

The unlawful acts, which now fall within the definition of a maritime revolt, are distributed by the language of this section into four categories or classes: (1) Simple resistance to the exercise of the captain's authority; (2) the deposition of the captain from his command; (3) the transfer of the captain's power to a third person; (4) the usurpation of the captain's power by the party accused. It is impossible to analyze the section as I have done, without remarking that the offences which it includes, however similar in character, differ widely in degree. The simple act of unpremeditated resistance to the captain cannot be identified with his formal degradation from the command, still less with the usurpation of his station, without overlooking the gradations of crime, and confounding the accidental turbulence of a heated sailor with the deliberate and daring triumphant conspiracy of mutineers. This indictment, however, makes no reference to these statutory distinctions. It pursues the precedents in use before the act, and charges all the prisoners, simply and alike, with "making a revolt"; and in this, we are told, it conforms to other indictments which have been framed by different attorneys for the United States since the act was passed. But is there in this such a clear and specific description of the offence of each of these men as the rules of criminal pleading prescribe, and the language of the act has made easily practicable? Is it more than a charge in the alternative or disjunctive, when the terms in which the charge is made must be resolved into alternative or disjunctive propositions in order to be understood? Does this court see, on inspecting the record of this conviction, and will other courts, who may hereafter refer to it for a precedent, see here that clear reference to the grades of guilt recognized by the act of congress, which should explain the difference properly to be made in the sentences of the prisoners?

The circumstances of the case, as they are known to the judge who presided at the trial, illustrate the force of this last question. Among the prisoners is a principal officer of the ship, who according to the evidence upon which the jury convicted him, was the moving spirit and principal actor of the revolt, who struck the captain to the deck with a deadly weapon, imprisoned him, bound, in a darkened state room, with a sentry at the door, while he himself usurped the command of the ship, continuing to exercise it till he was within two hours' travel of the city. Another prisoner is a simple seaman, whose offence consisted in omitting to interfere for the captain's rescue, rather than in any more direct agency against him. Had the several categories of crime which the 8th section indicates formed the subjects of charge in as many counts of the indictment, is it not altogether possible that, upon the same evidence, one of these would now stand convicted on several charges, the other on but one, and that the lightest on the list? But this is illustration merely: the argument is independent of it. The party accused is entitled to the most clear specification of his offence that its character and circumstances reasonably admit of; and it cannot be said that he has had this, when a more direct description is furnished in the very words of the act under which he is indicted. The judgment, therefore, must be arrested.

In thus deciding upon the insufficiency of the indictment, the court is not insensible to the consideration that perhaps very little of essential wrong might have been sustained by either of the prisoners, if we could lawfully have proceeded to the sentence. The facts cannot be more faithfully examined, nor the merits of the case more ably developed in argument, nor, as it seems to us, more candidly and intelligently apprehended by the jury, than they were in the protracted and laborious trial which recently closed. But we have no right to consider policy, at best probably, in reference to a single case, when we are called on to apply the general principles of established law, and to register a precedent for the future action of the court. We perform a single and unmixed duty, when we declare, upon the call of the accused, what are their legal rights.

Case No. 14,434.

UNITED STATES v. ALVISO.

[Nowhere reported. Opinion not now accessible.]

Case No. 14,435.

UNITED STATES v. ALVISU.

[Cal. Law J. & Lit. Rev. 56.]

District Court, N. D. California. Oct. 27, 1862.[1]

MEXICAN LAND GRANT—OBJECTIONS TO SURVEY—DISENO.

[When it plainly appears that it was the intention of the draughtsman of the diseno fixing the location of the land that the north and south lines should run at right angles to a range of hills forming the eastern boundary, but that, under the mistaken impression that such range ran due north and south, he ran these lines due east and west, it is proper to alter the running of such lines so as to keep them at right angles to the range.]

[This was a claim by José Maria Alvisu (or Alviso) for the rancho of Milpitas, one square

[1] [Affirmed in 8 Wall. (75 U. S.) 337.]

league in Santa Clara county, granted September 28, 1835, by José Castro to José Maria Alvisu. Claim filed March 30, 1852. Confirmed by the commission March 14, 1853, and on appeal by the district court March 3, 1856. Case unreported. It is now heard upon objections to confirmation of survey.]

HOFFMAN, District Judge. On the 28th September, José Maria Alvisu obtained from the governor a grant of a tract of land called "Milpitas," described in the first part of his title papers as of the extent of one league from north to south, and one-half a league from east to west, and in the fourth condition as one league in latitude and one-half a league in longitude, as shown by the map, &c. On the 2d October, 1835, another title paper was issued to him, by which there was granted an additional half league in width, by a league in length, lying on the west of the half league first granted, making in all one square league of land. No boundaries whatever were mentioned in the title papers. We are therefore necessarily referred to the diseno to ascertain the location of the land. The diseno shows a tract of land bounded on the east by a range of hills, near the base of which, towards the north, is the house of Higuera, and towards the south, the houses of Alvisu, who had, at the time he applied for a grant, been residing on the land for a considerable period, by permission of the authorities of the pueblo. The western boundary is an estero and brook not named on the diseno, but ascertained and admitted to be the Arroyo de la Penitencia. On the north the tract is bounded by a line drawn near a large tree, at which, on the first diseno presented, it stopped; but on the second, made after the augmentation was obtained, it is produced to the west across the Penitencia, so as to include the additional half league granted to Alvisu. On the south a similar line is drawn, marked "Lindero al Sur," or southern boundary. It commences at a grove marked "Montecito," and is drawn at right angles to the course of the hills, striking the latter a short distance to the south of the point where an arroyo issues from them. This arroyo, though named on the map the "Arroyo del Finado Martinez," is identified with the Milpitas creek. The distance between these lines, as shown by the scale, is 5,000 varas, or one league. And it is evident from the terms of the grant, that they were intended to be drawn so as to give to the tract that length. The distance from the hills to the Penitencia is only about 3,000 varas; but as an additional half league was granted, and the northern boundary produced across or to the west of that creek, there seems to be no reason why it may not be crossed to obtain the requisite quantity.

Shortly after this grant was issued, complaint was made by Higuera, Alvisu's neighbor on the north, that a portion of his land was included in the diseno of the latter. The dispute was finally settled by the adoption of an agreed line drawn considerably to the south of the line delineated on the diseno. This boundary is not now in controversy. The only dispute relates to the southern boundary. In the official survey, this line has been run from the Montecito due east to the hills, striking the latter more than a mile and a half to the south of the point where the Milpitas issues from them. The quantity thus included in the official survey exceeds one square league by nearly 400 acres—notwithstanding that the survey does not extend to the west of the Penitencia. The line was no doubt adopted in obedience to the indication of the diseno, which shows by the compass marks that the southern boundary was intended to run east and west. But I think it plain that this indication or call should not be received as controlling. It is evident that the draughtsman of the diseno supposed that the range of hills ran due north and south, and he has so laid them down on his map. As the tract was to have the extension of one league from north to south, he has bounded it by lines running east and west, but he meant that those lines should run at right angles to the course of the hills. As, then, the range of hills is found to run to the west of north and to the east of south, the obvious intention of the diseno is satisfied by making a corresponding deflection in the course of the side lines, so as to preserve their perpendicularity to the mountain range which formed the eastern boundary of the tract.

Again: the southern boundary line is represented as striking the hills at right angles to, and at the distance of about fifteen chains to the south of the point where the Milpitas issues from them, but if run due east from the Montecito, as in the official survey, it will form with the hills an acute angle, and will strike them more than a mile and a half to the southward of the Milpitas. If, however, a line be run from the Montecito at right angles to the course of the hills, it will strike within a very few chains of the point indicated on the diseno as the easterly termination of the southern boundary. It will, however, in one respect fail to conform to the diseno, for it will cross the Milpitas twice, leaving a portion of that stream to the south and a portion to the north of it; whereas the diseno represents that line as drawn wholly to the south of the Milpitas. But the points of beginning and of termination of this line will very accurately conform to the indications of the diseno, for it will strike the hills, as before stated, at or near the point represented; and it starts at the Montecito at about the distance shown on the diseno from the point where the Milpitas loses itself in the plain. It is not probable that it was intended accurately to delineate the course of the Milpitas. That stream is represented on the diseno as mak-

ing a considerable bend to the north, shortly after leaving the hills, whereas it in fact makes a much more marked bend to the south. At least such is its present course, as shown on the topographical map of Stratton.

A number of witnesses were examined to prove the boundaries of the land actually occupied by Alvisu, and by Berreyesa, his neighbor on the south, and their declarations as to the dividing line between them. This testimony is, as usual, unreliable and conflicting. On the one side it is asserted that Alvisu's possession extends far to the south of the Milpitas, and that he gave rodeos south of the house of the Berreyesa, who, it is stated, was allowed by Alvisu to build upon his land. This last statement is on its face extremely improbable. On the other hand, it is testified that the Milpitas creek was recognized by both as the boundary between them. This, again, is improbable, for the Milpitas creek is nowhere mentioned as a boundary, and the diseno shows that the line inscribed "Lindero al Sur," was drawn to the south of it. The only safe guide we can adopt in locating the tract, is the representation on the diseno; and if that be consulted, there does not appear to be much room for controversy. I think that the southern line should be drawn from the centre of the Montecito, at right angles to the general course of the hills. The quantity of one square league may then be completed by increasing the width of the tract towards the east, so as to embrace a portion of the foot-hills, or towards the west by crossing the Penitencia, at the election of the claimants. An order to that effect will be entered.

[NOTE. An appeal from the decree confirming the survey was taken by the claimant to the supreme court. The appeal was dismissed for want of citation 5 Wall. (72 U. S.) 824. It was subsequently reinstated. 6 Wall. (73 U. S.) 457. Upon the hearing on the merits the decree of the district court was affirmed. 8 Wall. (75 U. S.) 337.]

Case No. 14,436.

UNITED STATES v. ALVISU.

[Hoff. Land Cas. 176.] [1]

District Court, N. D. California. Dec. Term, 1856.

MEXICAN LAND GRANT—VALIDITY.

No objection to the validity of the claim.

[Cited in Re Lady Bryan Min. Co., Case No. 7,978.]

Claim [by Manuel Alvisu] for three leagues of land in Santa Clara county [the Rancho Quito], confirmed by the board, and appealed by the United States.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

William Blanding, U. S. Atty.

Thornton & Williams, for appellee.

BY THE COURT. The claim in this case was confirmed by the board. It has been submitted to this court without argument or the statement on the part of the appellants of any reasons for reversing their decree. No doubt seems to have been entertained by the commissioners as to the authenticity of the grant. The original is produced, and the expediente is found in the archives. The land was occupied and cultivated by the original grantees, and has continued in their possession and that of persons claiming under them until the present day. Its boundaries are well known, and described with considerable precision in the grant and accompanying map. We see no reason for reversing the decision of the board. The claim must therefore be confirmed.

UNITED STATES (ALVORD v.). See Case No. 269.

Case No. 14,437.

UNITED STATES v. AMADOR.

[Hoff. Land Cas. 76.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT—VALIDITY.

The confirmation of this claim not disputed.

Claim [by José Maria Amador] for four leagues of land in Alameda county [part of the Rancho San Ramon], confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

E. W. F. Sloan, for appellee.

BY THE COURT. The board of commissioners have confirmed this claim without suggesting any doubt as to its entire validity. The genuineness of the grant is not disputed, and it appears to have been approved by the departmental assembly. The conditions have been fully complied with, and the premises granted have been the family residence of the grantee from a period prior to the issuing of the grant, and he has continued to cultivate and improve his land down to the present time. A part of his land has been conveyed by him to other parties, and he now asks for a confirmation of his claim to the remainder. A decree to that effect was made by the board of commissioners. A decree must therefore be entered in this court affirming the decision of the board and confirming the claimant's title to the extent solicited.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

Case No. 14,438.

UNITED STATES v. AMANN et al.

[1 Cin. Law Bul. 13.]

Circuit Court, S. D. Ohio. 1876.

INTERNAL REVENUE—RECTIFIERS AND WHOLESALE LIQUOR DEALERS—ENTRIES IN BOOKS—WHO MAY MAKE—OMISSIONS.

1. The entries required to be made by section 3318 of the Revised Statutes of the United States by rectifiers and wholesale liquor dealers in the government books may be made by the clerks of the dealers.

2. The dealers in that case are charged with the duty of seeing that the entries are properly made, and if by their want of care the entries are omitted, they are liable for such neglect.

3. To render the party liable under this section for neglect, it must appear that the entries were omitted through carelessness or design, and not by pure accident.

4. The same rules applied to the making of notices of rectification.

[This was an indictment against Edmund, Anthony, and Daniel Amann.]

W. M. Bateman, U. S. Dist. Atty., C. Richards, and A. Dyer, for the Government.

W. M. Ramsey and Col. Moulton, for defendants.

SWING, District Judge. The defendants are rectifiers and wholesale liquor dealers, and were indicted under section 3318 of the Revised Statutes of the United States for unlawfully neglecting to make in their government book the entries required by such section, in relation to the spirits shipped by them, and also under section 3451 of said Statutes for executing false notice of rectification. Upon the trial of the cause it was shown that the entries required by the statute in two or three instances were not made, and that in two instances notice of intention to rectify had been given in relation to two lots of spirits, a portion of which had not been rectified. This was admitted by the defendants, but they claimed they had placed a competent bookkeeper in charge of that branch of their business, who made the entries in the government book, and who prepared the notices for rectification; and that the omission to make the entries was without design, and purely accidental; and that, after the giving of the notices of rectification they had disposed of a portion of the spirits without rectifying, which by like accident they had failed to erase from their notices; and that on all the spirits in each case the tax had been fully paid, and no loss resulted to the government from such mistakes. Upon this state of facts, the court holds that, in order to constitute the offense of neglecting to make the entries, there must not only be an omission to make the entries, but the omission must be in consequence of carelessness or design. The word in the statute is "neglect," which signifies, "To omit by carelessness or design; to omit proper attention; to forbear discharge of duty; to be without care." This statute does not compel the dealer to make these entries, or prepare these notices, with his own hand. He may employ the hands of another to do it; but if he does so, he is not thereby discharged from liability. He is bound to exercise due care in the conduct of his business, and if he intrusts his work to an employé, he must see that the latter does it properly. The law imposes upon them the duty, and they must see that it is done; and they are called upon to exercise a high degree of care in the conducting of their business, and see that all the requirements of the law are complied with.

As a general rule of law, the principal is responsible for the acts of the agent, in and about the business of his principal, while engaged therein, and the supreme court of the United States have said: "That whatever is said or done by the agent in reference to the business in which he is at the time employed, and within the scope of his authority—is said or done by the principal, as may be proved as well in criminal as in civil cases, in all respects as if the principal were the actor or the speaker." American Co. v. U. S., 2 Pet. [27 U. S.] 362; Cliquot's Champagne, 3 Wall. [70 U. S.] 114. This doctrine may be considered somewhat modified by the opinion in the case of Stockwell v. U. S., 13 Wall. [80 U. S.] 531. I will not say that the principal is liable for the criminal acts of the agent; but where the law imposes upon the principal a duty, and he employs an agent to do it, he is bound to see that it is fully performed, and if, through the carelessness or neglect of the principal, it is not performed, he is responsible. If the omission of the clerk to make the entries was the result of the want of due care or design on the part of the defendants, they would be guilty of a violation of the law. If, however, the defendants gave due care, and used every reasonable effort to make the entries required, and had done so regularly and properly for years, it is for the jury to determine whether this omission was by neglect or by accident. If purely accidental, the defendants should not be responsible. The same rule of law, as given in respect to the omission to make the entries in the government book, were given in relation to the false notices of rectification.

Verdict of not guilty.

Case No. 14,439.

UNITED STATES v. AMERICAN GOLD COIN.

[Woolw. 217.] [1]

Circuit Court, D. Missouri. Oct. Term, 1868.

FORFEITURE — GOLD COIN — INTRODUCTION INTO CONFEDERATE STATES—INTENTION—ARTICLE OF MERCHANDISE.

1. The object of the 22d rule of the trade regulations of September 11, 1863 [3 House Ex. Doc.

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

(1862) p. 416]. was to prevent gold coin reaching the rebels in any manner, as well by gift, trade, or exchange, as even by being exposed to being taken by violence by them.

2. In order to attain this object, the terms of the rule absolutely prohibit the introduction of gold coin into the region declared to be in insurrection.

3. The intention with which a party transports gold coin into such territory, alleged to be merely to convey it to his home therein, and retain it as an investment, does not relieve the transaction from a charge of violating the rule.

4. Gold coin would at any time be held to be included within the terms "goods and chattels, wares and merchandise."

5. At the time the 22d rule was made, the fact was, that gold coin was bought and sold as personal property, in open market, at fluctuating relations to the actual current money of the country.

6. It was competent for the president and secretary of the treasury to act on this fact in framing those rules and regulations.

7. And even without such action on their part, the court should take judicial notice of the fact, well known to every citizen, that gold coin has ceased to be used in the business of the country as money, and has become an article of merchandise and traffic.

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

On the 13th day of July, 1861, congress passed an act, entitled, "An act further to provide for the collection of duties on imports, and for other purposes," the 5th section of which is as follows: "Sec. 5. And be it further enacted, that whenever the president, in pursuance of the provisions of the 2d section of the act entitled 'An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and to repeal the act now in force for that purpose,' approved February 28, 1795 [1 Stat. 424], shall have called forth the militia to suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the president, and when said insurgents claim to act under the authority of any state or states, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such state or states, or in the part or parts thereof in which said combination exists, nor such insurrection suppressed by said state or states, then and in such case it may and shall be lawful for the president, by proclamation, to declare that the inhabitants of such state, or any section or part thereof where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said state or section into the other parts of the United States, and all proceeding to such state or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such state or section, be forfeited to the United States: provided, however, that the president may, in his discretion, license and permit commercial intercourse with any such part of said state or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the secretary of the treasury. And the secretary of the treasury may oppoint such officers, at places where officers of the customs are not now authorized by law, as may be needed to carry into effect such licenses, rules, and regulations; and officers of the customs and other officers shall receive for services under this section, and under said rules and regulations, such fees and compensation as are now allowed for similar service under other provisions of law." 12 Stat. 257. And on the 11th day of September, 1863, under the authority so conferred, the secretary of the treasury prescribed, and the president approved "trade regulations," the 22d of which was as follows: "22. All transportation of coin or bullion to any state or section heretofore declared to be in insurrection, is absolutely prohibited, except for military purposes, and under military orders, or under the special license of the president. And no payment of gold or silver, or foreign bills of exchange, shall be made for cotton or other merchandise within any such state or section. All cotton or other merchandise purchased in any such state or section, to be paid for therein, directly or indirectly, in gold or silver, or foreign bills of exchange, shall be forfeited to the United States." For the forfeiture of certain gold coin taken while the claimant here was transporting the same to Tennessee, this libel was filed.

The answer of Robeson, the claimant, contained the following statement: He resided near Memphis, and had been to St. Louis. Here he had purchased the gold, and was carrying it on his person to his home when it was seized. He had purchased it as an investment, and was using it in the payment of his travelling expenses as far as was necessary. He had no purpose of using it in trade or commerce, but only to defray his personal expenses on his journey home, and in his living at home. Nor did he design to convey it to the Confederates. The question was, whether these facts constituted a defence.

Mr. Noble, U. S. Dist. Atty.
Glover & Shepley, for claimant.

MILLER, Circuit Justice. The claimant insists, in the first place, that the case is not within the terms of the 22d rule prescribed by the secretary of the treasury. He admits that he was carrying the gold from St. Louis to Memphis without a license; but he attempts to qualify the character of his act by claiming that it was his own money, which he was carrying to his own home, and that he was doing so as one might carry about his person the means of defraying the expenses of his journey. By these statements he excludes the idea of his transporting the coin for any commercial purpose; and thus he claims that he committed no infraction of the rule.

The object of the rule will appear from a slight consideration of the circumstances under which it was made. The people of a large section of the country had revolted against the government, and succeeded in excluding therefrom its authority, and in establishing a government of their own, and in putting large armies in the field. It became necessary for the national government to restrict and cripple the means of the new organization for its maintenance, on every hand, and by every measure possible, and at the same time consistent with the laws of war. The rebels were compelled to provide themselves with munitions of war and other supplies necessary for its prosecution from abroad. Gold coin was the only money with which these purchases could be made. Anything which would prevent their getting such money was an efficient measure for disabling them from continuing the struggle. And this was the object of the 22d rule.

It was not a matter of consequence how the rebels should obtain the gold with which to make their necessary purchases. It was all the same to them, so far as that was concerned, whether they obtained it by gift or trade, or exchange of commodities, or by capture. If it were in an exposed place, where by violence they could make booty of it, their purpose was answered just as perfectly as if they sold cotton for it. What they wanted, was to get it; what the national government wanted, was to effectually prevent their getting it.

Accordingly the terms of the rule are general and imperative. "All transportation of coin or bullion to any state or section heretofore declared to be in insurrection, is absolutely prohibited, except for military purposes, and under military orders, or under the special license of the president." No exception is made here. We cannot make any. The intention of the claimant in transporting the coin into the insurrectionary district, as he has declared the same in his answer, does not relieve the transaction of the charge of violating the rule.

The claimant, in the second place, insists, that if that be the construction of the rule, the act of congress does not authorize the secretary to prescribe it.

The argument here is substantially the same as it was upon the just construction of the rule. On the one side, it is said, that the statute prohibits commercial intercourse, and not personal intercourse, in which the parties may carry on their persons necessary money for their private expenses. On the other side, it is urged, that all intercourse not of a warlike character is prohibited, as well that of private persons and private property for private purposes, as that of trade and commerce.

What is said above as to the object of the rule, applies equally to the statute.

But it is further urged, that the gold coin was not "goods and chattels, wares and merchandise," which by the act are forfeited.

It does not admit of doubt that gold coin would, at any time, be held technically to be included within the terms "goods and chattels, wares and merchandise;" and especially so at the time the rule was made. Whatever was its legal character as money, it had, in point of fact, ceased to be used as a medium of exchange, and had become an article of merchandise, bought and sold in open market as such, at varying and fluctuating relations to the actual current money of the country. It was proper for the president and secretary to ascertain and act upon this fact. This court will adopt their determination, and sustain the rule which, in their proper discretion, they have prescribed.

And even if we were not to be guided by their action, we should take judicial notice of this notorious fact. The court is not bound to shut its eyes to a fact known to every man in the United States, that one hundred nominal gold dollars are worth, in open market, two hundred dollars of the recognized currency of the country; that gold coin is no longer used in its character as money, and is a standing article of trade, and its price quoted in reports of the market as regularly and exactly as wheat or stocks.

In Bronson v. Wiman, 10 Barb. 406, it was held that the courts will take judicial notice of the ordinary modes of transacting commercial business within the state. In Oppenhiem v. Wolf, 3 Sandf. Ch. 571, it was held that facts which are a part of the experience and common knowledge of the day—e. g., the usual time for steam passage across the Atlantic—are legitimate grounds for the judgment of the court. In Smith v. New York Cent. R. Co., 43 Barb. 225, it was said that the rule that the courts may take judicial notice of whatever ought to be generally known within the limits of their jurisdiction, includes notice of the great lines of public travel and transportation of property, and their connection with each other, and the general course of trade and transportation through the country.

In Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519, the supreme court of the United States said: "It is a matter of history, which

this court are bound to notice, that corporations created in this country have been in the open practice for many years past of making contracts in England of various kinds, and to very large amounts."

These are all cases relating to private matters. The question here, arising upon the currency of the country, the medium not only of private exchanges, but of the measures of the government, touches the public concerns. Our right to notice such a fact of common knowledge cannot be doubted.

Whatever it once was, we know that gold coin now is an article of merchandise, and, as such, it is, when proceeding to an insurrectionary state, liable, under this act of congress, to be forfeited.

In insisting that his intention shall be regarded as qualifying the nature of his act of conveying this gold coin to Tennessee, the claimant falls into one serious error. He should remember that congress enacted this statute, and the executive prescribed this rule, at a time of great public distress, for the safety of the state. Its necessities rise above individual interests. To relieve them, it may, it often does, it must, enforce upon the citizens severe measures. At such times, before such measures, his convenience must yield. His intentions cannot qualify the rule of the state, nor protect him from the consequences, however severe, of the most innocent breach of its prohibition. With his eye fixed on his personal act, and blind to the public good, this may seem harsh; but the state is above the citizen, and its necessities are above his interests. The judgment of the district court must be affirmed. Judgment affirmed.

Case No. 14,440.

UNITED STATES v. AMES et al.

[Trans. Rec. Sup. Ct. U. S. Oct. Term, 1878, p. 4145.]

Circuit Court, D. Massachusetts. April 4, 1876.[1]

RES JUDICATA — JUDGMENT AGAINST PARTNERS — EQUITY JURISDICTION—RELEASE BOND IN ADMIRALTY.

[1. A judgment against one partner is a bar to a subsequent suit against the other partners, though the latter were dormant partners at the time of the contract, and were not discovered by the plaintiff until after the judgment.]

[2. The fact that a creditor of a partnership has lost his remedy at law against some of the partners by recovering a judgment against one partner alone, in ignorance of the existence of the partnership, is no ground for affording relief against them in equity.]

[3. After the remedy has been exhausted against a principal and his sureties upon a bond or stipulation in admiralty for the release of the res, and the process issued against them is returned unsatisfied, the court cannot follow the res, or its proceeds, into the hands of any persons to whom they may have passed.]

[This was a bill in equity brought by the United States against Oakes A. Ames and Oliver M. Second, executors of Oakes Ames, deceased, and Peter Butler.]

SHEPLEY, Circuit Judge. Since the decision of the supreme court of the United States in Mason v. Eldred, 6 Wall. [73 U. S.] 231, overruling Sheey v. Mandeville, 6 Cranch [10 U. S.] 253, the doctrine may be considered as fully settled in all the courts of the highest authority, both in this country and England, that a judgment recovered against one of two partners is a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment. The question is elaborately considered in King v. Hoare, 13 Mees. & W. 495, and the conclusion reached that the original demand had passed in rem judicatam, and could not be made the subject of another action. In Trafton v. U. S. [Case No. 14,135], Mr. Justice Story refers to the case of King v. Hoare, as one in which the court of exchequer pronounced what seemed to him a very sound and satisfactory judgment. "No principle," say the court, in Smith v. Black, 9 Serg. & R. 142, "is better settled than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the matter nor the parties can be severed, unless, indeed, where the cause of action is joint and several, which, certainly, actions against partners are not." To the same effect are the decisions in Robertson v. Smith, 18 Johns. 459; Ward v. Johnson, 13 Mass. 148; Wann v. McNulty, 2 Gilman, 359. Mr. Justice Field, in Mason v. Eldred [supra], says: "The general doctrine maintained in England and the United States may be briefly stated. A judgment against one, upon a joint contract of several persons, bars an action against the others, though the others were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation. They cannot be sued jointly with the others, because judgment has already been recovered against the latter, who would otherwise be subjected to two suits for the same cause." When, therefore, judgment was rendered against Mansfield, the principal, and his sureties, on what is described in the decree and record as the "release bond," which was substituted for the cotton which had been seized and libeled in the district court, the original demand, if it had ever existed against Mansfield, Butler, and Ames, as copartners under the name of A. S. Mansfield, passed in rem judicatam, and if the United

[1] [Affirmed in 99 U. S. 35.]

States subsequently discovered that Butler and Ames were partners, and might have been joined in the "release bond," or the judgment rendered upon it, it was too late to proceed afterwards against Butler and Ames, who were never severally liable, and who could not be proceeded against jointly with Mansfield, against whom judgment had already been recovered.

The remedy at law having been lost, the question is then presented whether such a state of facts presents a case which entitles the party to relief in a court of equity. This precise question was answered in the negative by Chancellor Kent, in Penny v. Martin, 4 Johns. Ch. 566; and the authority of that eminent jurist, and the force of the reasoning in the opinion in that case, would seem to be conclusive upon this point. The omission to make the dormant partners parties in the action of law arose, according to the allegation in the bill in Penny v. Martin, from ignorance of the fact that they were such partners. "Is that ignorance," asks the chancellor, "a sufficient ground for transferring to this court jurisdiction of a matter properly, if not exclusively, cognizable at law? The ignorance might have been removed by due vigilance and inquiry, and perhaps by the assistance of a bill of discovery here. The plaintiffs have no particular equity entitling them to relief. Ignorance, as Lord Loughborough said, is not mistake. They never inquired whether R. and M. had secret partners, and they gave the whole credit to them. If they have now got into embarrassment and difficulty, in respect to their legal remedy, by pursuing the ostensible partners at law, without such inquiry, I do not know of any principle that will authorize this court to take jurisdiction of a case, where the remedy was, in the first instance, full and adequate at law, because the party may have lost that remedy by ignorance founded on negligence, not on accident or mistake, or on any misrepresentation or fraud."

In the appendix to the brief of the learned counsel for the complainant, the remedial jurisdiction of a court of equity is invoked upon the further ground that, after the cotton which had been libeled had been condemned, and after the final process against the stipulator and his fide jussores had been returned unsatisfied, the complainants were then for the first time informed that Ames and Butler, together with Mansfield, the claimant, had, in the copartnership capacity, received the proceeds of the cotton that had been seized and condemned, and which had been previously surrendered upon the substitution for it in open court of what the decree of the court called a "release bond" (which it appears to be in form), and which the complainants style "a stipulation." This presents the question whether, after the remedy had been exhausted upon the process issued against a principal and his sureties, or fide jussores, in a bond or stipulation given in an admiralty or prize court, upon the surrender of the res to the claimant, and when that process is returned unsatisfied, the court may resume the possession of the res, or follow the res and the proceeds of its sale in the hands of any party into whose possession it may have passed. I am unable to find any case in which this has been done by an admiralty or prize court. I do not find, anywhere, that these tribunals, after a decree against the stipulator and his fide jussores, or the principal and sureties on the bond, claim or exercise the right to resume the possession of the res, which has been once surrendered, upon the entering into the stipulation or filing the release bond ordered by the court. On the contrary, Dr. Lushington says: "But the effect of taking bail is to release the ship in that action altogether. It would be perfectly absurd to contend that you could arrest a ship, take bail to any amount, and afterwards arrest her again for the same cause of action. The bail represents the ship, and when a ship is once released upon bail, she is altogether released from that action." The Kalamazoo, 9 Eng. Law & Eq. 557. See, also, The Union [Case No. 14,346]; The White Squall [Id. 17,570].

Another ground of equitable jurisdiction relied upon is that the estate of Oakes Ames, in the hands of his executors, is insufficient to pay all the debts due from the estate, and that the United States are entitled to a priority of payment out of the assets; but that ground fails in this case, there being no priority to be enforced where there is no claim. It follows, as a necessary corollary from the principles above stated, that, admitting all the allegations in the bill to be true, the bill cannot be sustained; and, accordingly, the demurrer is sustained, and the bill dismissed.

[The case was taken on an appeal by the United States to the supreme court, where the decree of this court was affirmed, Mr. Justice Bradley dissenting. 99 U. S. 35.]

Case No. 14,441.

UNITED STATES v. AMES.

[1 Woodb. & M. 76;[1] 9 Law Rep. 295.]

Circuit Court, D. Massachusetts. Oct. Term, 1845.

UNITED STATES—OWNERSHIP OF LAND—CESSION—MILL DAMS—BACK-FLOWING WATER—AWARD—OFFICER.

1. Where the United States own land, situated within the limits of particular states, and over which they have no cession of jurisdiction, for objects either special or general, the rights and remedies in relation to it are usually such as apply to other land owners within the state, and the lex rei sitæ will govern; except where the

[1] [Reported by Charles L. Woodbury, Esq., and by George Minot, Esq.]

constitution, treaties or statutes of the United States, otherwise require and provide.

[Cited in Moan v. Wilmarth, Case No. 9,686; Passenger Cases, 7 How. (48 U. S.) 538.]

[Cited in Re O'Connor, 37 Wis. 384.]

2. The territory belonging to the United States, not situated within the limits of any state, and also that within such limits, but over which jurisdiction has been ceded to the United States, and which is used for exclusive and constitutional objects, are subject to the laws of congress, and not to those of the state, when conflicting in any degree with what has been required by the general government.

[Cited in Perry Manuf'g Co. v. Brown, Case No. 11,015; Ex parte Tatem, Id. 13,759; Van Brocklin v. Tennessee, 117 U. S. 176, 6 Sup. Ct. 684.]

3. The United States, in cases where congress has not provided any or adequate remedies for injuries to public property, may resort to those of common law origin, or those provided by the laws of the several states.

[Cited in Clark v. Sohier, Case No. 2,835; U. S. v. New Bedford Bridge, Id. 15,867; Perry Manuf'g Co. v. Brown, Id. 11,015.]

4. But in a place over which jurisdiction has been ceded to the United States, the state laws cannot be permitted to thwart or embarrass the object of the cession.

[Cited in U. S. v. Chicago, 7 How. (48 U. S.) 195.]

5. It seems, that the laws of Massachusetts respecting flowage, do not apply to the case of machinery used by the United States for public purposes, in a place over which jurisdiction has been ceded to the United States, so as to authorize a mill owner to flow back in a way to impair in any degree the use of the machinery.

[Cited in Harding v. Funk, 8 Kan. 221.]

6. It seems, also, that those statutes were not intended to authorize the flowage back upon public lands of the United States.

7. Whether an award, made under a parol agreement to refer, and not under a rule of court, nor by a submission under a statute provision, nor under bonds, with penal provisions to enforce its execution, can be pleaded in bar to any action, unless previously accepted, or carried into effect, —quære.

8. No officer of the United States has authority to enter into a submission in their behalf, which shall be binding on them, unless the power is given by a special act of congress.

9. The United States had machinery in operation, carried by water, on land which had been sold to them, and over which jurisdiction had been ceded to them, by the state of Massachusetts. A. owned mills above and below them, on the same stream; and the dams of each party flowed back so as to obstruct the other. A submission of the matters in dispute was entered into by A. on the one part, and by the district attorney, authorized by the solicitor of the treasury, or war department, on the other part, but without any authority from congress; and an award was made thereon, prescribing the height of the dam. The United States afterwards brought an action of trespass against A. for flowing their land. He pleaded a special bar of the award, alleging that he had complied with its terms. On general demurrer, it was *held*, that the special plea could not be sustained.

[Cited in Head v. Amoskeag Manuf'g Co., 113 U. S. 9, 5 Sup. Ct. 448.]

[Cited in Holyoke Water-Power Co. v. Connecticut River Co., 52 Conn. 575.]

This was an action of trespass on the case, brought by the United States against the defendant [David Ames] for flowing land of theirs, situated in Springfield, over which jurisdiction had been ceded to them by the state of Massachusetts. The writ was sued out, April 26, 1843. The general issue was pleaded, and a special bar of an award, which was averred to have been made under a submission between the United States and the defendants, September 24, 1841. The plea sets out the whole submission as entered into by Franklin Dexter, district attorney of Massachusetts, stated to be "authorized for that purpose," of the one part, and claiming that Ames had erected his dam so high as to flow back water on the plaintiffs, and injure them; and Ames, on the other part, claiming that the United States had done the same to him as owner of other works situated above them, and agreeing that the decision of the arbitrators be final. The plea then avers a hearing before them, and a decision June 27, 1842. The decision was set out in full; and among other things found that both parties, by recent dams, had flowed the water back on each other higher than before, and to each other's injury; and ordered that Ames' dam be reduced in height so as not to flow back enough to obstruct the wheels of the United States; but that he might continue, as he does now, to flow back on the land of the United States, paying damages as assessed, "agreeably to the provisions of the laws of Massachusetts." It is not necessary to repeat other particulars in the award as set out; but the plea proceeded to aver that the award covers the claim now sued for; and that Ames had offered and been ready to fulfil it on his part, and had done all in his power to perform it before the commencement of the present action. To this plea there was a general demurrer.

R. Rantoul, Jr., U. S. Dist. Atty., and Charles L. Woodbury, for the United States.

B. R. Curtis, for defendant.

Points, by the counsel of the United States: That the award was not made under a rule of the court, but was voluntary. That the award was bad, because made in pursuance of the laws of Massachusetts. Because the statutes under which it was made referred only to grist mills. That the award was in violation of the uses recited in the act of congress directing the purchase of the territory. That the title to the soil and the jurisdiction being both in the United States, the award was bad, because not authorized or confirmed by an act of congress. That the award was bad, because the executive of the United States had no authority to vest, by submission or otherwise, judicial powers, otherwise than according to article 3, § 1, of the constitution of the United States.

On the part of the defendant it was argued: That the award was correct in taking the law of Massachusetts as its rule. 1 Stat. 92, c. 20, § 34. That the rights, powers, and duties of ownership of land, were

derived from the lex rei sitæ. That the statutes were declarations of this rule, and had not been changed by the United States since the cession. The United States, as a general proposition, were subject to the same rules as citizens, as land owners. That if this action had been between citizens of Massachusetts, the award would be good. That the rights of the United States government in the premises were similar to the common law rights of prerogative in the king. That at common law, all rules of property which do not trench on some legal, fixed prerogative, bind the king. That the United States courts have gone far to sustain this doctrine.

WOODBURY, Circuit Justice. It was admitted in the argument of this case, that the referees intended to decide the claims of the parties according to law. In that event, the award can probably be examined, and its legality be considered by courts of law, when it is pleaded in bar to an action, as is done in the present instance. Power Co. v. Gray, 6 Metc. (Mass.) 131; Kyd, Awards, 351; Jones v. Frazier, 1 Hawks, 379; Greenough v. Rolfe, 4 N. H. 357.

The objections, relied on chiefly against the validity of the award, are; first, that the referees conform their decisions to the special laws of Massachusetts, rather than those of a general character, or those of the United States, applicable to their public domain; or to property they own for public purposes, such as arsenals or armories; and over which jurisdiction has been ceded to them. Secondly, that if their rights and remedies as to such property as this are to be regulated by the laws of Massachusetts, the special statutes as to damages for flowing by mill-owners are not designed for machinery or property used for such purposes as that at the Springfield armory. And lastly, that no authority exists by the laws of the United States, for any officer to enter into a submission, so as to bind the government to fulfil any award made thereon.

In relation to the first objection, it is material to notice, that not only the title to the soil where the injury has been done by the defendant, of which the United States complain, is in the latter, but the jurisdiction over it. Some of the deeds of the land were executed as early as September 19, 1798; and the cession of jurisdiction of a mile square, including the premises, was made by the state of Massachusetts in the same year. Sec St. Mass. 1798, c. 13, § 2. It is to be observed farther, that the purchase, cession and use of this land have been for a peculiar and exclusive public object, namely, the manufacture of arms. The acts of congress have authorized such establishments to make firearms; and the use of the latter for the public troops as well as for "arming" the militia of the states, is an important and constitutional object, and one that should be under the control ot the United States. See Const. U. S. art. 1, § 8. Congress, as early as April 20, 1794, authorized the erection of arsenals and magazines connected with this object. In 1796, the president was expressly empowered to purchase lands for armories; and all the purchases at Springfield, and the deeds of cession, with their dates, will be found enumerated in Com. v. Clary, 8 Mass. 72. Where the United States own land, situated within the limits of particular states, and over which they have no cession of jurisdiction, for objects either special or general, little doubt exists, that the rights and remedies in relation to it are usually such as apply to other land-owners within the state. It may be considered a general axiom in the title and transfers of real estates, that the lex rei sitæ governs as to non-residents, no less than residents and citizens. U. S. v. Crosby, 7 Cranch [11 U. S.] 115; Johnson v. M'Intosh, 8 Wheat. [21 U. S.] 543, 572; Kerr v. Moon, 9 Wheat. [22 U. S.] 565; 10 Wheat. [23 U. S.] 192. It governs also, as to remedies. Robinson v. Campbell, 3 Wheat. [16 U. S.] 212, 219. So the government, as a mere proprietor, must in most respects be treated like other proprietors, as to all servitudes, easements and other charges. Story, Confl. Laws, § 447. The laws of each state, too, so far as applicable, govern the decision, whoever may be the parties, in trials at common law, of questions in this court as well as in the several state courts, with an exception, which is pointed out in the judiciary act of 1789 [1 Stat. 73]. See section 34, c. 20. The exception is "where the constitution, treaties or statutes of the United States shall otherwise require or provide." And it is by force of these principles and analogies that the United States, if holder of a bill of exchange, must, in the absence of any law of congress on the subject, use the diligence and comply with the forms that are required of other parties. U. S. v. Barker [Case No. 14,520]; 12 Wheat. [25 U. S.] 561. So in its liability to damages on foreign bills of exchange. Bank of U. S. v. U. S., 2 How. [43 U. S.] 711. So in respect to its bonds (3 Story, Const. 200), and suits on the same (Dixon v. U. S. [Case No. 3,934]). And also its liability to a general average, when having property on board a vessel where a loss occurs, to save the cargo. U. S. v. Wilder [Id. 16,694]. So in respect to alluvion, or land deposits. New Orleans v. U. S., 10 Pet. [35 U. S.] 662, 717–719. So as to a set-off against and suit by the United States. U. S. v. Bank of Metropolis, 15 Pet. [40 U. S.] 377. So in suing on bills of exchange, without any special act of congress regulating the subject. Dugan v. U. S., 3 Wheat. [16 U. S.] 172.

By a careful discrimination, it will be seen that all these rest on a principle, not inconsistent with the idea that the territory belonging to the United States, not situated

within the limits of a state, and that which is within those limits, but over which jurisdiction has been ceded to the United States, and which is used for exclusive and constitutional objects, are subject to the laws of congress, and not to those of the state, when conflicting in any degree with what has been required or provided by the general government. The exception in the judiciary act seems introduced to meet such changes as congress might, from time to time, prescribe, either for others or the United States. It was a knowledge that new laws by congress, and that general rather than local principles must be made applicable to protect and govern such public property in many cases, that probably led to the express provision in the constitution, that "the congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States." Const. U. S. art. 4, § 3, c. 2. This of course means rules or regulations by legislation. Baldw. Const. 85, 86. The laws of the general government, therefore, punish offences, committed within such a jurisdiction ceded to the United States, and not the state laws; and state process cannot run there at all in civil or other cases, but by a special exception or reservation in the cession. The acts of congress also authorize, in certain cases, the removal of intruders on their lands by the marshal of the United States; and these acts have often been sanctioned by high law officers, as lawful on the part of congress. Op. Attys. Gen. p. 107, by Rodney; p. 123, by Rush; p. 1344, by Gilpin. Many will recollect the celebrated exercise of this power by Mr. Jefferson against Mr. Livingston, as to the batture in New Orleans. It is reported in Hall's Law Journal, and an action of trespass for it against Mr. Jefferson may be seen in 1 Brock. 211. The conveyance of lands by Indians, when under the jurisdiction of the United States, if made without their consent, is rendered void by the United States laws. See intercourse law of 1802, March 30 [2 Story's Laws, 83]; 2 Stat. 139. The removal of live oak and cedar from lands reserved for public use for the navy, is likewise prohibited and punished by extraordinary provisions in acts of congress, that have been long approved and their extension to other subjects is recommended by one of the ablest of our attorney-generals. Opinions, 367, by Mr. Wirt.

All these laws are to be vindicated, and are to control any state laws over the territory, though judisdiction of the particular lands in question has not always been ceded to the United States, by the states in which they lie. Op. Attys. Gen. 1397–1399. Because the public lands, held for sale, are held for that special purpose, and can be protected and regulated by congress, by removing intruders, so as to secure that purpose as a public and general one. It is the same in respect to those held for live oak, &c. They are held or are reserved for another specific public object, which might be defeated without particular and controlling legislation by the general government. And as to the Indians within particular states, and on lands the fee of which belongs to the general government, they and their title are under our protection rather than that of the states. All these rights exist in the United States for constitutional purposes, and without a special cession of jurisdiction; though it is admitted that other powers over the property and persons on such lands will of course remain in the states till such a cession is made. Nothing passes without such a cession, except what is an incident to the title and purpose of the general government; but that passes which is an incident, though a special jurisdiction may not have been transferred in so many words. Again, preëmption rights are not allowed on lands reserved for forts or as lead mines, or for cultivating the vine and olive; because they have been appropriated to specific public objects, and are thus taken out of the operation of other laws than those of congress as to such objects. The case of the Baubine claim at Chicago, recently, is well known over the country. See Wilcox v. Jackson, 13 Pet. [38 U. S.] 498; and U. S. v. Gear, 3 How. [44 U. S.] 120, 132.

Next, as to the general remedies for injuries to such property. Besides the statutory remedies given for injuries committed on some public property, the United States possess those common to other holders of property in the courts of the Union, whether of common law origin or otherwise. Opinion of Mr. Wirt, 366, 367. Their remedies in all these cases may be those specially provided by congress, or any others suitable to the case itself, and not conflicting with "the constitution, treaties, or statutes of the United States." And when these last are not full or exclusive in their design, as well as when their absence or inapplicability to the subject renders a resort to others expedient, the remedies to be pursued are those given by the laws of the several states. See the act before cited, and opinion of Wirt, 1388, 1150. Hence trespass, waste, and injunction, as well as the power to remove intruders, given by special acts of congress, exist for remedies.

In the case now under consideration, a cession of jurisdiction is superadded; and the state laws are to aid, and not defeat, the protection of the title of the United States; and to secure the object of the cession, rather than thwart or embarrass it; and whenever they do the latter, they are controlled by the acts of congress and the constitution, obtaining and setting apart this property for special public purposes, which the laws of the state, whether as to remedies or rights, must not be permitted to apply to, so as to destroy or injure. See the opinion of Mr. Butler, 1150, as to West Point. Such places

are under the exclusive legislation of congress, and that legislation controls so far as it goes. But remedies can be sustained under state laws, where congress has not acted so as to take them away; though state laws cannot be interposed to defeat the objects of the reservation. Id. 1151, 1152. If the United States could not enforce these objects in their own courts, and without being subject to defeat or restriction, by provisions made in particular states, either as to the damages or use, the whole object in the reservation, or the special use of such property, might be nullified. Thus, in this case, if the defendant can be protected, under the laws of Massachusetts, in overflowing the lands or machinery of the United States, and in paying damages therefor, only as those laws require, the design in the purchase and cession of jurisdiction for an armory is exposed to be entirely frustrated, and the whole establishment destroyed.

But, it has been held, even in the courts of Massachusetts, that the ordinary laws of the state do not prevail within the territory ceded to the general government. Com. v. Clary, 8 Mass. 72. And see People v. Godfrey, 17 Johns. 225; U. S. v. Bevans, 3 Wheat. [16 U. S.] 336, 388; Cohens v. Virginia, 6 Wheat. [19 U. S.] 264, 364. The states wherein such establishments exist, if jurisdiction over them has been ceded away, do not regard them or their occupants as subject to state control. They cannot vote, or be taxed; nor are they "bound by any of its laws." 8 Mass. 77. It is, in most respects, left to congress, and congress alone, to legislate for those territories, and districts, and places within its exclusive jurisdiction, and provide for its own rights, as well as the rights and duties of others within that jurisdiction, whether in territories, or forts, or public vessels, or any other public establishment. U. S. v. Cornell [Case No. 14,867]. So congress, being general in its powers over certain specified objects, can, through the courts of the United States, enforce all rights acquired for those objects, and can redress wrongs inflicted within its exclusive jurisdiction. Marshall, C. J., in Cohens v. Virginia, 6 Wheat. [19 U. S.] 264, 428. Indeed, it has been adjudged, that congress alone can punish crimes committed in such places. U. S. v. Cornell [supra] 8 Mass. 72. So it has been considered, that states cannot assess and collect taxes within the jurisdiction, or on property ceded to the United States. Wirt's opinion, Sept. 8, 1823, Op. Attys. Gen. p. 469. Nor can they tax the property (Id. p. 101) of the United States situated within their territory, according to another opinion (Id. p. 101, and semb.; Dobbins v. Commissioners of Erie Co., 16 Pet. [41 U. S.] 435), though that question is now before the supreme court of the United States, to be settled judicially, in a case from the state of Maine. Nor can the states pass statutes of limitation affecting the property of the United States held for special purposes. Jourdan v. Barrett, 4 How. [45 U. S.] 169.

In one class of cases, as to forms of process, writs, executions, &c. at common law, in the United States courts, it is true that the laws and forms of the states were expressly adopted in most respects, at first, in 1789, by the act to regulate processes. But they were left subject to change by congress afterwards, and when, in 1792 (1 Stat. 226, 1792, c. 36), they were made perpetual as then existing, it was with an exception of changes that might afterwards be made, from time to time, by said courts, or by the supreme court of the United States. Wayman v. Southard, 10 Wheat. [23 U. S.] 1, 31. And several changes have since been made by congress as to some writs, and imprisonment for debt, appraisers of property, &c. In all these cases, the state laws must yield to those made by congress, if any are so made, whether as to forms or remedies, when actions are brought in the courts of the United States. Livingston v. Jefferson [Case No. 8,411]. Nor is this conclusion at all inconsistent with the general axiom, that the lex rei sitæ, whether as to rights or remedies, governs as to real estate; for here the land is situated not within the jurisdiction and control, or government of Massachusetts, but within that of the United States. In another view, as an exception to the general principle, if necessary to establish an exception, it seems highly reasonable, and is sustained by various analogies, that no special law of a state shall be applied to property so situated, if at all endangering the use or object for which it is held by the United States. The inclination of my mind would, therefore, be strong against the legality of applying the special act of Massachusetts, for flowing land, to this case, if it had been allowed by the arbitrators to remain flowed, so as to impair at once and in any degree the use of the machinery on these premises for an armory. But as it does not remain so under the award, I do not feel justified in holding the award void on account of this reason; yet as it is supported under the next head by other reasons, which seem to exempt the whole cession from the operation of any peculiar local laws, and to protect any public privilege or right from the flowing acts, it is very questionable whether the arbitrators should have allowed any encroachment whatever in this case, even on the land, to have been continued by virtue of those acts. My impression is, they should not, and I have examined this point at more length than would otherwise have been done, as the case can be disposed of on the last point alone, because, if not settled now, it must be at the trial of this very cause on the general issue, where the flowing acts would be probably urged as furnishing the guide and rule in respect to damages.

Let us then proceed to the second objection, and in the course of it, see more as to the force of the other considerations in favor

of the first objection. The second is, that the laws of Massachusetts, as to flowing, do not in their spirit apply to cases like this. The origin of those laws, was doubtless to encourage and sustain grist and saw mills, and not other machinery, moved by water, for other purposes. But by chapter 116, § 1, Rev. St., the owner of any "water mill" is invested with those rights, and it may not be certain, that, with the greater demand and increase of machinery of all kinds, the words should not have a broader construction than the original subject-matter. I have been referred to no adjudged case other than grist or saw mills, except under a special law as to the Roxbury mill-dam, in 12 Pick. 467. There can be little doubt, however, that if the act extended to all flowing, and allowed it for the use of any machinery whatever, persons ought to be limited to flowing land alone, and not be permitted to flow so as to obstruct other machinery higher up. Hence the second section prohibits flowing on other machinery. And such would be the construction without that prohibition, or the law would prove suicidal. It would encourage and sustain one set of machinery, not so as to add more to the whole already in existence, but to overflow and drown out another set. The award in this case, therefore, avoids that consequence and absurdity, by requiring the dam to be lowered, so far as it floods the machinery of the United States. But it still allows it to flow back the water on the land of the United States, though reserved for a special public purpose. It treats this cession to the government as mere private property, not dedicated to any general use. By thus permitting the public cession to be flowed under the local statute, it subjects the property of the United States to local laws, and for local objects, contrary to the sound policy and safety of the general government, and the general objects for which the cession was procured.

A further objection, also, seems to apply to this case, so as to prevent any right in an individual to flow a public privilege, or public right of the United States, by virtue of a special statute in Massachusetts. That statute was intended to prevent multiplicity of actions between individuals, as well as to encourage the erection of mills, and justified so strong a measure as being very conducive to a public object, or one worthy of public aid and public favor. But it does not, in terms, allow this flowing, to the injury of, or encroachment on, other public privileges in the state, but merely on private lands. Nor is there any reason for allowing it to that extent, and thus aid one public object, to the danger or sacrifice of another. Hence in Com. v. Stevens, 10 Pick. 247, it was settled, that a mill-owner cannot be allowed to overflow a public highway; and the court say, "it seems manifest, that no encroachment on the public rights was intended to be sanctioned." The principle here described applies more strongly to public rights of the United States than of the state, on account of their paramount importance, and the clearer power of the state to subject its own public rights to being overflowed, rather than those of the general government.[2] And though the award does not allow the flowing to continue, so as to stop the machinery of the armory, and defeat at once its great objects, yet it allows the flowing to encroach on public property, and the grounds of a great public establishment; to pass the line of the jurisdiction of the state, and doing this, it seems to me to be with difficulty vindicated.

The last objection is in respect to the validity of the award on two grounds, connected with the mode and power of making the submission. First. It is not an award by a rule of court, and thus becoming, in some respect, a record, whether taken out in a suit pending, or by a submission made in court under a statute, like that in England of 9 & 10 Wm. III. Nor is it an award, made under bonds of submission, with penal provisions to ensure its execution. But it is a mere parol agreement, made out of court, to refer the difficulty. And the opinion seems to be plausible, that no such agreement or award under it can be pleaded in bar to any action, unless previously accepted or carried into effect; and that until then, the remedy on such an award is by action, or bill in equity, or a rule to punish for contempt (Banert v. Echert [Case No. 837]), if not fulfilled when made under a rule of court. See Kyd, Awards, 318; 1 Bac. Abr. "Arbitration," H; 2 Ld. Raym. 1039. But without expressing a positive opinion on this, the next objection to the validity of the award is, in my view, decisive; and that is, the want of authority in any officer of the United States to enter into a submission in their behalf, which shall be binding. All judicial power is by the constitution vested in the supreme court, and such inferior courts as congress may, from time to time, ordain and establish. Const. U. S. art. 3, § 1. No department nor officer has a right to vest any of it elsewhere; and it has been questioned even if congress can vest it in any tribunals not organized by itself. [Martin v. Hunter] 1 Wheat. [14 U. S.] 304, 330, 336, and authorities cited in the case of The Sheazle [Case No. 12,734].

It is our duty to take notice that no act of congress has granted any authority to any arbitrators in cases like this; and hence, though the former district attorney speaks in the award as if authorized to submit this case, he doubtless means that he was "authorized" by the solicitor of the treasury

[2] See more on the power of the state to take away one public right under itself, for another paramount public object, cases 2 N. H. 22; 10 N. H. 369; 7 N. H. 35; 8 N. H. 398; 11 N. H. 19.

or war department to do so, and not by any special law. As we are bound to know that neither he nor they were authorized by any law for that purpose, it follows, that any arrangement by the solicitor of the treasury, or by the war department, or by the district attorney, to refer such a claim, is not binding. U. S. v. Nicoll [Case No. 15,879]. Such submissions and awards are sometimes useful, as they may be afterwards accepted and voluntarily enforced by the proper authority, as a guide to what is supposed to be nearly right and safe; but I can see no legal ground on which their execution can be compelled by a court of law. The case of the disputed title to the pea-patch in the Delaware Bay, is familiar to many of us, where a most inconvenient delay has occurred in authorizing a reference of the dispute by a special act of congress, it being conceded on all hands that no authority already existed for making such a reference. The demurrer to this plea must therefore prevail, and the case go to trial on the general issue. Demurrer allowed.

Case No. 14,442.

UNITED STATES v. AMINHISOR.

[2 Wheeler, Cr. Cas. xliv.]

Circuit Court, D. Maryland. Dec., 1823.

ROBBERY OF MAIL—PUTTING LIFE IN JEOPARDY.

It appeared by the testimony in this case, that on the morning of the 8th July, 1823, between 3 and 4 o'clock in the morning, the Great Southern Mail was stopped and robbed by three men, [John] Aminhisor, Moore, and Ward.

Patrick Green, the guard of the mail, details the circumstances as follows: On the morning of the 8th of July, between the hours of 3 and 4, on the main road, between Rouse's tavern and Baltimore, he perceived a fence ahead of the stage, and suspecting an attack, cautioned the driver to be on his guard. As they approached the fence, he descried three men on the right of the stage, among the trees. He immediately fired his blunderbuss at them; the horses were much frightened, and ran up on a bank; two of the men then advanced, one on the right, and the other on the left; the one on the right armed with a pistol; the one on the left presented a musket to the breast of the driver, with the muzzle so near to the guard, that he caught hold of it and held it away from him, until he could draw his pistol. He presented his pistol—it snapped; the robber then presented his musket a second time, and the guard fired his second pistol, and wounded the robber in the breast. One of the robbers then sprang into the stage, and knocked the guard down; he was then dragged from the carriage, and placed under the care of one of the robbers, while the other two proceeded to plunder the mail; these frequently called to the one who was watching over him, "Damn him, shoot him, or he will shoot you." He asked the man who guarded him with a pistol to his breast, "Do you mean to take my life?" He replied, "How came you to shoot me?" He told him it was his duty. He asked the robber a second time, "Do you mean to take my life?" to which the robber replied by again asking how he came to shoot him; and the guard said, as before, "it is my duty." The robber then said, "Don't be afraid; you shall not be hurt; you are with a gentleman." The two men who were plundering the mail, called to the one who had the guard in safekeeping, "Hurrah! Larry, the packet is ready;" upon which the robber pushed the guard into the woods, and went towards his associates. The counsel for prisoner contended against such a construction of the act of congress [Act April 30, 1810] as would render the mere possession and exhibition of dangerous weapons, such a use of dangerous weapons as would of itself put the lives of the driver or the guard in jeopardy. They strengthened their case by many illustrations, to show the extreme degree of danger denoted by the word "jeopardy," and strenuously argued, that the intention of using the dangerous weapons must concur with the possession of them, before the life of the carrier or guard could be said to be in jeopardy. They denied that any such intention was manifested by Aminhisor or his associates; and they founded this denial upon this broad and immovable argument; that as the purpose which they went together to accomplish, was almost frustrated by the immediate and brave resistance of the guard; as the use of the dangerous weapons was necessary at the very commencement of the affray, if they ever intended to use them, as they had every opportunity of using them; and as the motive of revenge (for Moore and Ward were dreadfully wounded) conspired with the motive of apparent necessity, to dictate the use of those weapons; and as these dangerous weapons were never used, the inference of reason and of law would be, that the robbers did not intend to effect the robbery by the use of dangerous weapons, which would put the guard's life in jeopardy.

The jury found them not guilty of the capital charge.

Case No. 14,443.

UNITED STATES v. AMORY.

[5 Mason, 455.] [1]

Circuit Court, D. Massachusetts. May Term, 1830.

INSOLVENCY—PRIORITY OF UNITED STATES—SURETIES.

Where there is a general assignment of a debtor's property, for the benefit of creditors, and the priority of the United States attaches, they having various debts due by bonds, with different

[1] [Reported by William P. Mason, Esq.]

sureties, all payments made by the assignees are to be applied pro rata to all the debts of the United States; and the latter are not at liberty to apply the payments in any other manner, without the consent of all the parties in interest.

[Cited in brief in U. S. v. Lewis, Case No. 15,595.]

In equity.

Mr. Dunlap, U. S. Dist. Atty.

F. G. Loring, for Dexter and Holbrook & Dexter.

Mr. Merrill and Samuel Hubbard, for Daniel Appleton.

William Sullivan, for Jonathan Amory.

STORY, Circuit Justice. The present bill in equity is an amicable suit brought against Jonathan Amory, Jr., surviving assignee of the firm of Jonathan Amory & Jonathan Amory, Jr., as assignees of Messrs. Adams & Amory, for an account, and to compel satisfaction of certain debts due to the United States, for which the United States have a right of priority of payment, out of the funds in the hands of the assignees. Messrs. Adams & Amory became insolvent in May, 1826, and on the 25th of that month made an assignment of their property and effects to certain persons, for the payment of their creditors, and these persons having declined, the Messrs. Amory, the defendants in the bill, succeeded to the trust. There is no difficulty on the part of the assignees, in rendering an account of the monies received by them; and they have already paid into court the sum of $20,433.60, which is all that at present they can properly account for, there being still some outstanding claims in litigation. The real question is, in what manner the sum so paid in, shall be appropriated by the court towards satisfaction of the debts due to the United States, the same having arisen from various custom-house bonds, on which there are various sureties, who have an interest in the appropriation. The assignees alone are regularly before the court, as parties; but all the sureties having consented to be bound by such decree as the court may make, and having desired a final settlement of the question, and the district attorney having agreed to that course, I have thought it my duty to proceed to make such a decree, especially as the point is raised in the answer of the assignees. The assignment of Messrs. Adams & Amory, after reciting that it is made to secure certain creditors, indorsers, sureties, and guarantors, for their debts and liabilities, conveys all their estate and effects &c. to the assignees for sale, and after deducting charges and expenses, to apply the proceeds, first, to the payment of certain preferred debts and liabilities, mentioned in a schedule annexed to it, pari passu; and afterwards to all other creditors, &c. pari passu; and the surplus, if any, to hold in trust for the assignors. And the further usual powers are given to the assignees. It is observable that no notice whatsoever is taken in this instrument of debts due to the United States; but it being the intention of the parties that all custom-house bonds should be paid before any debts due to private creditors, a supplemental instrument to that effect was drawn up and executed on the 2d of June following, and was signed by all the parties who had previously signed the original assignment, except one, who is not understood to dissent from it. On the 6th of the same month, the defendants were in due form substituted as assignees.

At the time of their failure, Messrs. Adams & Amory were indebted to the United States upon custom-house bonds, upwards of $92,500, and upon these bonds there were various sureties. All of these bonds became due after the assignment; and upon the principal part of them, judgments have been obtained by the United States against the principals and sureties, as stated in the bill. Upon some of these bonds, Messrs. Holbrook & Dexter, and others, were sureties; upon others, Daniel Appleton was also surety; and upon others, some persons whom it is not now necessary to particularize. Judgments appear to have been obtained upon bonds, where Appleton was a surety to the amount of $16,576.50; and where Holbrook & Dexter and others, or Thomas A. Dexter and others, were sureties, to the amount of about $70,000. Appleton has petitioned the court to have so much of the money paid into court, as may be necessary for the purpose, applied in discharge of the bonds upon which he is surety. This was originally resisted by T. A. Dexter, on behalf of himself and others, and he prayed that the fund might be apportioned among all the bonds, pro rata. But it appearing that a balance of about $12,000 is now due from Messrs. Dexter & Co. to Messrs. Adams & Amory, Dexter now assents that Appleton may have a preference to that extent out of the fund, and that the residue only shall be applied pro rata to all the bonds. We are, then, to take the case as one in which all the sureties agree that, to the extent of $12,000, the court may, if it has authority for this purpose, appropriate the amount in discharge of Appleton's suretyship on the custom-house bonds. It is material also, to observe, that the United States do not oppose such an appropriation, with this reserve only, that it shall not compel them to allow the debentures upon any of the bonds, to which the fund shall be so appropriated.

In the first place, as to the authority of the court, I have no doubt, that, sitting in equity, it has a right to restrain the United States from exercising its power in cases of priority injuriously to the sureties upon the various bonds to which that priority applies. Whenever there is a general assignment of all the estate of a debtor, and the United States have various debts secured by various sureties, I conceive, that the aggregate constitutes but a single debt, and that the priority attaches to it as a whole. All payments,

therefore, that are received by the United States under such circumstances, are to be deemed payments upon the whole debt, and they must be applied pro rata to the extinguishment of all. It is not like the case of payment by a debtor, where, he failing to make an appropriation at the time of the payment, the creditor may then appropriate it as he pleases. In cases of assignments and other cases where the right of priority attaches, the provision is in effect, that the fund shall be first applied to the extinguishment of debts due to the United States. But the assignees are to apply the fund generally, not to one particular debt, but to all debts due to the United States. It would be a violation of their duty to apply it to one debt, to the fraud or injury of sureties. If they are to pay generally, without any specification in the assignment of any preference or priority of any particular debt of any creditor, the law deems each debt as equally entitled to be extinguished pro rata; for equality is in such cases equity. The assignor has not trusted the assignees with any authority to create a preference, and the creditor has no right to demand it. He must make payments as the debtor has provided, or as the law upon his omission has appropriated them.

The argument at the bar has gone somewhat farther, and assumed, that the court, in cases of this nature, will undertake to adjust mere equities between the principal and sureties on different bonds, and the creditor. Without saying that the court will never undertake such a duty, it is sufficient to say, that the case must be very special indeed, in which it will interfere against the creditor to adjust equities between different classes of sureties, with which the creditor has no privity or connexion. All that the court will generally do in cases of this nature is, to see that the creditor does not himself misapply the payments. The creditor has nothing to do with the state of the accounts between different sureties, or with cross claims, which they might assert against each other, if they were the principal parties to the suit. And sureties have no right to call upon the creditor to change the general rule of law as to appropriation of payments, merely because it may not work right in respect to their own private claims, with which the creditor has no concern. It is very clear to me, therefore, that in this case the whole fund ought, upon principle, to be applied pro rata in extinguishment of all the priority debts due to the United States. See Favenc v. Bennett, 11 East, 38, 42. But if the parties interested will consent to a different appropriation, there is nothing to prevent this court from carrying any such agreement into effect.

I shall therefore decree, that so far as respects the $12,000, admitted to be due from Dexter & Co. to Messrs. Adams & Amory, the fund now in court to that extent shall, with the consent of the United States, be appropriated to the extinguishment of the bonds and the judgments thereon, for which Appleton is surety, upon his delivering up the debentures, which have been given by the United States, for the draw-back of any of the duties on the goods, for which the same bonds were originally given, or his extinguishing in any other legal manner the same debentures. I wish to add, that it is not to be understood, that the court will exercise any authority, or interfere between different sureties, or adjust any equities between them in respect to the fund, except so far as to direct that the appropriation shall be pro rata in cases where the right of priority attaches. All other arrangements are matters of private consent between the parties and the United States.

Case No. 14,444.

UNITED STATES v. The AMPHITRITE. [See Case No. 10,585.]

Case No. 14,445.

UNITED STATES v. AMY.

[4 Quart. Law J. 163.]

Circuit Court, D. Virginia. May Term, 1859.

SLAVERY—CONSTITUTIONAL LAW—"PERSON"—LARCENY OF MAIL BY SLAVE—ACCOUNTABILITY THEREFOR.

1. Section 22 of the act of congress passed March 3, 1825 [4 Stat. 108], provides that, if "any person shall steal a letter from the mail, the offender shall, upon conviction, be imprisoned not less than two nor more than ten years." *Held*, that the word "person" is used in the constitution of the United States to describe slaves, as well as freemen, and that the constitution recognizes slaves both as persons and as property.

2. When the word "person" is used in an act of congress, the act may be construed as including slaves, unless there is something in the object and policy of the law, or in the provisions with which the word is associated, which manifestly indicates that it is used in a different sense, and was intended to apply to persons who are free

3. There is nothing of this character in this act, and therefore it includes slaves.

4. The act, thus construed, is constitutional.

5. The clause in the 5th amendment of the constitution, which declares that private property shall not be taken for public use without just compensation, cannot, upon any fair interpretation, apply to the case of a slave, who is punished in his own person for an offence committed by him, although the punishment may incidentally affect the property of another, to whom he belongs. The clause applies to cases where private property is taken to be used as property for the benefit of the government, and not to cases where crimes are punished by law.

6. From the nature of our government, the same act may be an offence against the laws of the United States, and also of a state, and be punishable in both; yet in all civilized countries it is recognized as a fundamental principle of justice that a man ought not to be punished twice for the same offence, and if the slave Amy had been punished for the larceny in the state tribunal, the court would have felt it to be its duty to suspend sentence, and to represent the facts to the president, to give him an opportunity of ordering a nolle prosequi, or granting a pardon.

The slave Amy, the property of Samuel W. Hairston, of Patrick county, Virginia, was indicted for stealing a letter from the mail at Union Furnace post-office in that county, under section 22 of the act of congress passed March 3, 1825, which provides that, "if any person shall steal a letter from the mail, the offender shall, upon conviction, be imprisoned not less than two nor more than ten years." At the trial before Judge Halyburton, on the point being suggested by the defendant's counsel that a slave is not a "person" amenable to the act, his honor said the point was one of great novelty and importance, and that, as the chief justice was shortly expected, it must be adjourned for argument and consideration until his arrival. The point was therefore overruled, and the case proceeded in with the understanding that the question would be argued and decided upon a motion for a new trial in the event of conviction. The slave was convicted upon the evidence, and accordingly, on the arrival of the chief justice, the motion for a new trial on the reserved point was argued before the two judges.

John Howard (of Howard & Sands), for the owner of the defendant, Amy, contended,

(1) That as there was nothing in the act specially pointing to slaves, it applied, prima facie, only to "persons" known and acknowledged in the law generally as persons having legal rights and responsibilities, who could be tried and legally punished in the manner provided by the act, and under the usual forms of the law as administered in the United States courts; that a slave is not such a legal "person," and is not within the meaning of the act, a slave not being, in ordinary legal contemplation, a person, but property; and he cited the constitution of the United States, construed by the supreme court of the United States in Dred Scott v. Sandford, 19 How. [60 U. S.] 407, 408, 411, 425, 426, as recognizing slaves only as property, and the supreme court of appeals of Virginia as deciding in Bailey v. Poindexter, 14 Grat. 132 (see authorities there collected), and other recent cases (Williamson v. Coalter's Ex'rs, 14 Grat. 394, and Fox v. Fox's Ex'r, not yet reported), that a slave has no legal right or capacity whatever; that he is not a legal person, but a thing; that it was a well settled principle of construction that all the parts of a statute must be taken together, and the whole construed as one law; and that, in accordance with these views, the different sections of this act of congress, in respect to offences against the post-office, clearly showed that slaves were never intended to be embraced therein, since sometimes the punishment is merely a pecuniary fine, varying from $10 to $2,000, and sometimes imprisonment, sometimes both; that it was impossible, in a legal sense, either to fine a slave, or to deprive him of liberty; that a slave has neither property nor liberty to be taken away; his legal character, so to speak, consisting in the absence of all the rights of property and liberty, so that a judgment against him, depriving him of either, to any extent, would be a mere legal nullity and absurdity. The act of congress should not be construed as contemplating so palpable a judicial solecism and impossibility. But if the act be construed as including slaves, a still more striking incongruity would follow. The constitution of the United States provides that "the trial of all crimes, except in cases of impeachment shall be by jury," which means a jury of one's peers. Such was the sense in which the terms was used in the constitution. In that sense it was immemorially understood at the common law, from which it was taken; for even in Magna Charta (in this respect the prototype of our constitution) it is expressly provided that no man shall be deprived of his life, liberty, etc., unless by the judgment of his peers, nisi per legale judicium parium suorum, etc., or, in the language of Judge Story, in his Commentaries on the Constitution, citing Coke's Institutes and Blackstone, "a trial by the country, which is a trial by a jury, who are the peers of the party accused, being of the like condition and equality in the state." 2 Story, Const. 425. If, therefore, slaves are included in this act of congress, and are to be tried according to the constitution of the United States, they must be tried by a jury of their peers, their equals, slaves like themselves; and thus would be presented the novel and anomalous spectacle of twelve negro slaves, subpœnaed from the field or the factory, presided over by the learned judges of the court, and addressed by the district attorney as "gentlemen of the jury,"—slaves solemnly determining the legal rights of their fellow-slaves, who, in contemplation of law, have no rights, and disposing of the lawful property of their masters, themselves but mere property like that of which they dispose. Such solecisms and absurdities as these plainly enough show that slaves never were intended to be included within the provisions of this act of congress.

(2) If, however, they were intended to be so included, then the act was unconstitutional, inoperative, and void, as to them. The principles recognized and established by the supreme court of the United States in Dred Scott v. Sandford clearly apply to this case. There, it is true, the only matter in issue was whether an emancipated negro, whose ancestors were brought from Africa, and sold into this country as slaves, is a citizen of a state, in the sense in which the word "citizen" is used in the constitution of the United States; and the court decided that he is not, and that therefore he cannot sue as a citizen in the United States courts. It is also true that the court expressly stated that they were by no means prepared to say that there are not many cases, civil, as well as criminal, in which a circuit court of the United States may exercise jurisdiction, although one of the

African race is a party. That broad question was not before the court. Nor is that broad question now before this court. The question is not whether the court may not exercise jurisdiction in any case in which a freed negro is a party; but whether it has jurisdiction in a case in which a negro slave is made a party. Aliens, citizens of the different states, not naturalized as citizens of the United States, and free negroes, all have their respective legal rights and obligations. They are sui juris, and may, or may not, be held suable or responsible in the civil and criminal courts of the United States. But with slaves it is different. They have no legal rights nor obligations. They can neither sue nor be sued. They are punishable, indeed, by the statute law of the state, and only by the positive statute law, since African slavery is unknown to the common law, as was decided by Lord Mansfield in Sommersett's Case, 20 How. State Tr. 1, and by the general court of Virginia in Turner's Case, 5 Rand. 678, and as has been decided by the supreme tribunals of other states of the Union. They are punishable by the statute law, yet in a mode, and to an extent, that recognizes no rights of any character in themselves, but, on the contrary, demonstrates the absolute legal dominion and supremacy of the master race, and the absolute subjection of the slave. Slaves certainly could not be sued in a civil action for damages in the circuit court of the United States. It is difficult to see how they can be made defendants to a criminal prosecution, the object of which is to enforce a fine, or the forfeiture of property, or freedom, to any extent, or in any manner. Congress has passed no positive act to that effect, and it has no authority to pass any such act. It would be to create rights and responsibilities for the slave which he cannot possess, and could not exercise and fulfil. It would be to invade the peculiar province and jurisdiction of the several states, in respect to a matter purely of domestic concern, at once of the greatest delicacy, and of the greatest magnitude and importance.

The reasoning of the supreme court in the case of Dred Scott v. Sanford [supra] abundantly supports these views. The court say that the only two provisions of the constitution of the United States which point directly and specifically to the negro race as a separate class of persons show clearly that they were not regarded as a portion of the people or citizens of the government then formed; the one clause authorizing their importation as slaves by the several states until the year 1808, and the other providing for the return of fugitive slaves to their masters; "that these provisions show conclusively that neither the description of persons therein referred to (African negroes), nor their descendants, were embraced in any of the other provisions of the constitution, for that certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen." "The only two provisions which point to them, and include them, treat them as property, and make it the duty of the government to protect it. No other power, in relation to this race, is to be found in the constitution; and as it is a government of special delegated powers, no authority beyond these two provisions can be constitutionally exercised. The government of the United States had no right to interfere for any purpose, but that of protecting the rights of the owner, leaving it altogether with the several states to deal with this race, whether emancipated or not, as each state may think justice, humanity, and the interests and the safety of society may require. The states evidently intended to reserve this power exclusively to themselves." [Dred Scott v. Sandford] 19 How. [60 U. S.] 425. Such is the language of the court, and therefore the law of the land, expounded by its highest constitutional tribunal. Of course, then, negro slaves are not entitled to any of the personal rights secured to the citizen, nor can they be subjected, by the federal government, to any of the civil or legal responsibilities of the citizen, since it has nothing to do with slaves, except to protect the rights and property of their owners in them as slaves. The state governments take care of their municipal discipline and control. Hence, any act of congress which contemplates and necessitates, in its administration by the courts of the United States, the exercise by the slave of any of the personal rights of the citizen, or which seeks to subject the slave to any of the civil or legal responsibilities of the citizen, or which attempts to treat or to punish him as a free man, who is liable as such to the process and coercion of the courts, is clearly unconstitutional, nugatory, and void, so far as he is concerned. A slave has no such rights to exercise or claim, and no such responsibilities can be thrust upon him. The creation of a civil or legal person out of a thing, the investure of a chattel with the toga civilis, may be an achievement of imperial power, but it is beyond the compass of an American congress. Congress must first emancipate the slave, before it can endow him with the rights of a citizen under the constitution, or impose upon him the responsibilities of a legal person, or compel him to pay money, or part with liberty. Now the act under which the slave Amy is prosecuted contemplates, implies, and necessitates in its administration by the courts the exercise by the party prosecuted of whatever right a citizen may claim under the constitution, and the 5th and 6th articles of the amendments thereto, prominent among which is the right of trial by jury, and the act cannot be enforced without compelling the party prosecuted to pay money, or part with liberty, or do both, neither of which things can be done by the slave, and neither of which has the federal government power to endow him with

the capacity to perform, or to compel him to perform. The act has no application to slaves; but if it is to be construed as including slaves, then it is, as to them, clearly unconstitutional, null, and void.

It is unconstitutional and void for the further reason that in condemning the slave to imprisonment, it deprives the master of the labor and services of his slave during the term of imprisonment, and thus takes "private property for public use without just compensation"; for the slave is punished for the public benefit, as a warning and example to offenders. On this account, in Virginia, a slave who is hung or transported is paid for by the state according to his value. The whole management and control of slaves, their discipline, government, and punishment, is, and ought to be, a matter purely of state, police, and municipal jurisdiction, the domestic concern of the several states, with which the federal government has no right or business to interfere. It is a subject too sacred for the touch of federal power. In the very language of the supreme court, the states "intended to reserve this power exclusively to themselves," and it will be an evil day for Virginia and the Southern states when the federal government shall assume the authority to seize and carry away our slaves to the District of Columbia, or the Northern states, for the alleged purposes of punishment, or otherwise. Nor is there any necessity in this case to institute so dangerous a precedent and innovation. This slave may well be tried, and, if guilty, properly punished under the state laws, for larceny of the letter and its contents; and that is the course with her which ought to be pursued, and to which her owner, Mr. Hairston, would interpose no objection. She ought to be whipped, and sent about her business, and not carried beyond the jurisdiction of Virginia, to Washington, there to sleep or sicken in imprisonment, from two to ten years, to the total loss of her services to her master during that time, and then to be turned loose among persons perhaps but too ready to facilitate her escape to the North. The master had no guaranty that she would ever be returned to him. It was not the duty of the marshal to return her; it was not the duty of the keeper of the Washington penitentiary; no provision was made for it in the act; and this fact, of itself, shows that the act was never intended to apply to slaves, and that, if it was, it is unconstitutional.

John M. Gregory, Dist. Atty., for the United States, resisted the motion for a new trial.

(1) Because the trial had been fair, the evidence clear to establish the guilt of the prisoner, beyond doubt and beyond cavil.

(2) The prosecution was under the 22d section of the act of congress approved March 3, 1825, entitled "An act to reduce into one the several acts establishing and regulating the post-office department." 4 Stat. 108. There are four counts in the indictment. In each the accused was charged with a violation of the provisions contained in this 22d section, and the jury found a general verdict of guilty against her. No person who heard the evidence can doubt that the prisoner committed the offence of which she stands charged. But the counsel for the prisoner insists that the court ought not to pass judgment upon the prisoner, because she is a slave, "and as such not a legal person in the contemplation of the act of congress, a slave not being in ordinary legal contemplation a person, but property." It is true that slaves are property; but it is equally true that they are recognised in all modern communities where slavery exists as persons also. The constitution of the United States recognizes slaves as persons, and they are also recognized as persons by several acts of congress. They are recognized as persons in every state in the Union, and punishable as persons for the commission of offences in violation of the penal laws. How then can it, with any correctness, be said that a slave is not such a legal person as is amenable to the act of congress under which the prisoner has been tried and found guilty by the jury? The facts stated are so plain and well known to the court that I deem it would be but a useless waste of time to refer more particularly to authorities to sustain them. I cannot prove more plainly that the prisoner is a person, a natural person, at least, than to ask your honors to look at her. There she is. She is beyond doubt a human being, and it is not pretended she is not of sound mind. It is submitted that, although the motion for a new trial has been sustained with much earnestness and ingenuity, it must be overruled, and the prisoner sentenced, under the law, to punishment by the court.

John Howard, in reply.

No question is made as to the guilt of the prisoner, upon the evidence, if a slave be amenable to this act of congress. The defence urged is purely a legal and technical defence, but it involves principles of statutory construction in respect to slaves, of vast practical importance, and questions of constitutional right in respect to federal juristion over slaves, of equal novelty, delicacy, and magnitude. (1) Are slaves within the act? (2) If so, is the act constitutional? These are the grave questions to be considered and decided.

(1) Upon the first point it is said that slaves are certainly within the act, because, although they are property, yet they are persons also; that they are recognized as persons in all modern communities in which slavery exists; that they are recognized as persons by the constitution of the United States, and by several acts of congress (of which, however, no instance was furnished), and by the laws of the several states of the Union, and are punishable as persons for the

commission of offenses in violation of penal laws. No references were deemed necessary, and none certainly were needed, to sustain these positions. And, as if in triumphant and conclusive proof that a slave is a person,—a natural person, at least, a human being,—and therefore within the act, profert is made of Amy in open court. This is the argument—the whole argument—for the United States. It is easy to see how far short it comes of proving the case of the government, that slaves are persons within this act; for it entirely overlooks a broad, radical, and most important distinction, which is the basis of all our civil and criminal jurisprudence in respect to slaves. It confounds the legal character and attributes of the African slaves in the United States, who are purely chattel slaves, with their character and attributes as natural persons. This great mistake into which, as it is humbly submitted, the learned counsel for the United States has fallen, is a mistake in which it would seem he has the company of men of high reputation. Even so philosophic a thinker as Prof. Bledsoe, who was bred to the law, and is distinguished for the accuracy of his intellectual perceptions, has, if his language be not misunderstood, fallen into the same error. Lib. and Slavery, pp. 94–102. And Mr. Cobb, the learned and intelligent author of the only respectable legal treatise upon Southern slavery, would seem, perhaps inadvertently, to have yielded his assent to the same misconception of the subject, although in other parts of his valuable work, as will presently be seen, he fully sustains the view upon which the defence of this case, on this point, is based. 1 Cobb, Slav. p. 83. It is natural, perhaps, or, at least, not a matter of surprise, that inaccurate and conflicting ideas should be current in regard to a subject of which the philosophy and the jurisprudence are alike in so inchoate and undeveloped a condition. But it is submitted, with great deference, that a few plain and simple general principles of universal assent would seem very clearly to point out the true legal character and attributes of our slaves, and to constitute the solid foundation of the only consistent and intelligent system of law in respect to the relations of the free and enslaved race. It is admitted that the African slaves among us have no voice in the government, federal or state; that they were not parties to the establishment of either; and that they have no agency in the making, administration, and execution of the laws thereunder. It is admitted that we must now take it as res adjudicata, however well it might be doubted, if an open question, that they were unknown to the common law; and therefore that all the law which is applicable to their condition is statute law. It is admitted that the parties to the state and federal governments hold and exercise the sovereign power of the political communities of the United States; and it is further admitted that, in respect to slavery within its own limits, each state government is supreme.

These facts demonstrate that the status of the slave is a matter exclusively of state jurisdiction and of positive statute law. And we have but to inquire what is the status of the slave by the statute law of each of the states in which he exists? The direct answer is that, by the statute law of every state in which he exists, he is made absolutely and purely a chattel, and that he has no legal or civil rights or capacities whatever, and therefore no corresponding responsibilities as a legal or civil person. From the very law of his condition, thus expounded, the inference is at once obvious and inevitable that he cannot be subjected to the pains and penalties which are exclusively applicable to legal or civil persons. Accordingly, we shall find that in each slave-holding state of the Union there is virtually a separate code of penal laws for slaves; that, as was well said by the court (per Gaston, J.), in State v. Manuel, 4 Dev. & B. 20, "slaves are not, in legal parlance, persons, but property"; that in the construction of general statutes by the state courts, slaves are held not to be included, unless specifically mentioned in the act, or embraced by necessary implication; and that when the penalties of the act are of such a character that civil persons—persons having civil rights and capacities—alone can suffer them, slaves are held by that circumstance to be necessarily excluded from its provisions, and not to have been within legislative contemplation. And in the absence of anything to the contrary,—nay, indeed, with the strongest considerations demanding their recognition,—no reason is perceived why the same rules should not hold in construing this act of congress, an application of which, in a case of the first impression, is sought to be made to the same subject-matter of legislation.

Such, briefly, is the view of the legal status of slaves, and of the canons of interpretation, upon which, on this point, the defence relies. Now, obviously, it is no answer to say that "slaves are not only property, but persons also;" that they are "recognized as persons in the constitution of the United States," and are "punished as persons by the penal laws of the several states," and must therefore be held to be included in this act. For it assumes that slaves are "persons" in some legal sense that is inconsistent with the fact of their being absolute property; that they are referred to in this act of congress as "persons," if at all, in the same sense in which that word is used in the constitution, and that they are indicated in the act, by the same or by equivalent words of description, as are used in the clauses of the constitution in which they are included; and that in the penal laws of the several states, slaves are generally embraced under the word "persons," without reference to the

character of the offence, or to the kind or degree of the punishment imposed. In other words, it takes for granted the points in dispute,—begs the whole question. When it is said that our slaves are not only property, but persons also, the proposition, rightly understood, is undoubtedly true. It is true that the negro did not cease to be a natural person—a human being—by becoming a slave, and he may be punished as such by fit penalties. The very idea of a slave is a human being in bondage. A slave is, and must, of necessity, continue to be, a natural person, although he may be a legal chattel, or whatever may be his relations to the law. And it is evidently in this sense that he is "recognized" as a "person" in the constitution of the United States. Thus in the clause respecting the return of fugitive slaves, he is called "a person held to service," —that is, a slave. So in the clause authorizing their importation, until the year 1808, slaves are designated as "such persons as any of the states now existing shall think proper to admit." And so in the only other clause in which allusion is made to them,—the clause regulating the ratio of federal representation and direct taxation,—slaves are spoken of as "three-fifths of all other persons" than "free persons." It is well known that these circumlocutory forms of expression were all adopted merely to avoid the use of the word "slave" in the constitution, which, it was thought, would be a blemish upon the face of that instrument, and "which had been declined," as Roger Sherman said, "by the old congress (of the confederation), and was not pleasing to some people." 3 Mad. Papers, p. 1427. They were each used as a euphemism, instead of the word "slave," and each means a slave, and nothing more. That was the sole office and import of the expression used in each instance. The first describes him as a person held to service; the second as a person, the subject of the slave-trade, a person imported for sale, as a chattel; the third as a person who is not a "free person,"—that is, who is a slave. Certainly nothing is expressed or implied by these descriptions, in respect to the legal character or relations of the slaves so described, except a recognition, direct and emphatic indeed, of slaves as property; and such was the construction put upon these forms of expression by the supreme court in Dred Scott v. Sandford, as will be seen. The court seem to have overlooked, or to have regarded as of no significance in this aspect, that clause of the constitution in which, in fixing the ratio of representation and taxation, slaves are described as "other persons" than "free persons;" and they say, in respect to the other two clauses above quoted: "These provisions show conclusively that neither the description of persons therein referred to (slaves), nor their descendants, were embraced in any of the other provisions of the constitution; for that certainly these two clauses were not intended to confer on them, or their posterity, the blessings of liberty, or any of the personal rights so carefully provided for the citizen. The only two provisions which point to them, and include them, treat them as property, and make it the duty of the government to protect it. No other power in relation to this race is to be found in the constitution; and as it is a government of special delegated powers, no authority beyond those two provisions can be constitutionally exercised." 19 How. [60 U. S.] 411, 425. It is perfectly clear, therefore, that the sense in which the slave is described in the constitution of the United States, as a "person," is merely as a natural person, and not as a legal or civil person,—a person having legal or civil rights and capacities, and obligations corresponding thereto. And this is obviously the sense in which the slave is recognized as a "person" in all the laws of the several states of the Union, in which he is included. It is in this sense in which he is spoken of in all the adjudications of the supreme tribunals of the states in respect to him or his legal condition. Thus in the case of Bailey v. Poindexter, before cited, he is described as "a person whose status or condition, in legal definition and intendment, exists in a denial to him of the attributes of any social or civil capacity whatever." 14 Grat. 198. Now, if this is all that is meant by saying that a slave is not only property, but a person also, no possible objection can be made to the statement. On the contrary, it is perfectly true. But it is fatal to the argument of the government in this case. For if slaves are recognized in the constitution of the United States only as natural persons, and in the laws and adjudications of the several states in the same sense, and we are therefore to recognize them in that sense in construing acts of congress, then this act of congress obviously cannot be construed as including slaves, in so far as its penalties apply only and exclusively to civil persons. And it would seem to be singularly unfortunate that recourse should have been had to the use of the word "person" in the constitution of the United States, in illustration of its meaning in this act of congress, so far as slaves are concerned. For the word "person," in that instrument, is held to include slaves only when words of description are added, such as "persons held to service," or "such persons as any of the states existing shall think proper to admit," etc.; and we have the conclusive authority of the supreme court for saying that they are not included in any other clauses of the constitution than in those in which they are thus specifically described. If, therefore, we are to hold slaves to be included in this act of congress, because the word "person" is used in the constitution as including them, analogy and common sense alike require that the act be construed to include them only in those

clauses in which they are specifically described or alluded to in like manner as in the constitution itself. And no such clauses are to be found in the act. Nay, not only so, but, on the contrary, as if to exclude the possibility of including slaves, penalties are provided in each clause, such that civil persons only can suffer, and from which slaves are exempt by the very law of their condition.

Now this view would appear thus to be conclusive of the case for the defendant, even upon the ground taken by the counsel for the United States. But it seems to be thought that slaves are something more, in legal contemplation, than chattels and "natural persons;" that they are endowed with some sort of vague, undefined civil rights and capacities, which authorizes the federal government to subject them to responsibilities as legal or civil persons. It is admitted that they are chattels,—property,—in its strictest sense; yet it is said they are "persons also." But if any thing more or other than this be meant, that slaves are natural persons, although chattels,—if it be meant that a slave is at the same time property, and, separate and apart from, and beyond, this, a legal or civil person, endowed with civil rights or capacities, and subject to correlative responsibilities, as a legal or civil person,—the proposition, so far from being true, is pregnant with its own refutation; it shows upon its face, indeed, an inherent, necessary, and self-evident absurdity and contradiction in terms. The simple and conclusive answer to every assertion of this legal solecism and impossibility is the question, if the chattel slave have legal or civil rights or capacities of any kind, or to any extent, where are his legal remedies to enforce them? or what his opportunities to illustrate their exercise? Is he known to the constitution, state or federal, except as a chattel? In what part of the law are those rights enumerated or defined? Under what forms of the law are they vindicated? Can he maintain any sort of action, or institute any sort of prosecution? Or can he be held responsible in any form of action or prosecution as a civil person,—a free man? If so, what is the case, and where is the precedent? None can be found. If it be said that the slave may bring a suit for his freedom, the reply it that this is provided for by statute, or proceeds upon the legal fiction that he is free, and is therefore entitled to be relieved from bondage; and it is easy to see that the necessity for the statute or the resort to a legal fiction demonstrates, in a more striking manner, the utter legal incapacity and impersonality of the slave. So absolute is this that, even in a suit between the executor and the distributees of the estate, the object of which is to ascertain whether or not he is emancipated by the will of his master, it is held error to make him a party. In a legal sense, he is as much "homo sed non persona" as ever was the slave of ancient Rome, although greater security to life and limb is afforded him by the more humane genius of our institutions, and the pure spirit of an enlightened Christianity. Very clearly, then, whatever privileges of personal enjoyment, or whatever actual protection, or whatever liability to punishment, humanity, or public opinion, or public policy and legislation, or a wise and kind domestic discipline may deem compatible with, or necessary to, the proper subordination of the slave, and may concede to, or provide for, him, yet when you come to speak of his legal or civil rights and capacities, you speak of that which has no existence. So completely is his condition an abnegation of all civil rights or capacity whatever, that even his own master cannot confer upon him, by deed or will, or in any other manner, any right or privilege, gift or bequest, short of absolute freedom; and emancipation is defined to be, not in strict legal sense, a gift or bequest of freedom, but a mere renunciation of property, on the taking effect of which the slave is born into civil life. Rucker v. Gilbert, 3 Leigh, 8; Wynn v. Carrell, 2 Grat. 227; Smith v. Betty, 11 Grat. 752; Wood v. Humphreys, 12 Grat. 333, 340; Crawford v. Moses, 10 Leigh, 277; Williamson v. Coalter's Ex'rs, 14 Grat. 398. Thus, whatever may be the case elsewhere, whatever legal privileges or capacities slaves in other countries, in ancient or modern times, may have had, among us of the Southern states there is no intermediary legal condition between absolute freedom and absolute slavery,—between the high civil status of the freeman and the civil nonentity of his chattel. In the eye of the law, so far as civil relations are concerned, the slave is property, and property only. He is a chattel, and the legal attributes of a chattel are his legal attributes. All the civil rights or capacities which, as other men, he would have, as a natural person in a state of freedom, are, by the law of his condition, absolutely transferred to his master. He is but the object of the civil rights of others, and law, as to him, is a matter between his rulers, with which he has nothing to do. If it be said that, although a chattel, he cannot be divested of his characteristics as a natural person,—a human being; a human body inspired with intellect, feeling, volition,—that is conceded. It is that which makes him so valuable a chattel, and the natural character of the chattel must determine the manner and kind of treatment it receives from its owner or others. Thus a horse, or a dog, a slave, or a pet lamb, would not be treated as a bale of goods; and the rights of the owner, and the responsibilities of third persons to the owner in respect to them, would not be the same.

So in Boyce v. Anderson, 2 Pet. [27 U. S.] 158, the question was whether a steamboat company were to be held to as high a degree of responsibility,—that of common car-

riers,—in transporting a slave, as in transporting a bale of goods; and Judge Marshall said, delivering the opinion of the supreme court, that they could not be, since a slave has volition and feelings which cannot be entirely disregarded, and he could not be treated and packed away as a bale of goods, and therefore could not be under the same absolute control; but undoubtedly the legal character of the chattel in both cases was the same, as was attested by the fact of the form of action in the case being the same as that for the loss of a bale of goods.

Other and varied illustrations might easily be given. And this fact—the fact that the natural characteristics of the corpus or subject of chattel property are not the same—cannot in any wise affect the legal character of the chattel itself. There are numerous laws against cruelty to animals, for instance, and there are laws prescribing death or other punishment for certain animals in case of dangerous or troublesome insubordination, roving, or ferocity. But these laws rather show the supreme authority of the law-making power, than recognize any legal or civil rights in the brute creation,—the animals protected, or punished. And so with the laws punishing offences committed upon, or committed by, slaves. The slave is still but a chattel, in which no legal or civil personal right inheres. The fact that he is protected by the law, or is punished by the law, is no concession to him of legal rights or responsibilities, any more than in the case of other chattels, the accidents of whose natural characteristics are animate existence, and some sort of intelligence, volition, and feeling. The high and sacred moral obligations of the master—which are so generally and conscientiously fulfilled—to protect, by law, the life and limbs of the slave from wanton violence, or the safeguards adopted by the master for his own protection and that of society, do not invest the slave with any legal or civil right whatever. In full and strict accordance with this view is the latest judicial decision upon the subject, that of a tribunal which, in point alike of ability and learning, stands as high as any in the country, and deservedly commands great respect,—the supreme court of North Carolina. "A slave," says Pearson, C. J., "a slave, being property, has not the capacity to make a contract, and is not entitled to the rights, or subjected to the liabilities, incident thereto. He is amenable to the criminal law, and his person (to a certain extent), and his life, are protected. This, however, is not a concession to him of civil rights, but is in vindication of public justice, and in prevention of public wrongs." The other judges (Battle and the venerable and distinguished Ruffin) concurred in the opinion, of which these are the opening sentences, embodying the fundamental principle of the judgment which follows,—a judgment which is but a striking illustration of the utter civil nonentity of the slave. Howard v. Howard (Dec. Term, 1858) 6 Jones (N. C.) 235. So, as we have seen in the late case of Bailey v. Poindexter, 14 Grat. 198, the supreme court of appeals of Virginia speak of a slave as a "person whose status or condition, in legal definition and intendment, exists in the denial to him of the attributes of any social or civil capacity whatever." That case was twice elaborately argued, and was decided after great consideration; and, whatever may be thought of the ruling of the court in respect to the authority of the cases of Pleasants v. Pleasants, 2 Call, 319, and Elder v. Elder, 4 Leigh, 252, upon the particular point presented for adjudication, to wit, the validity of an emancipation by will made dependent upon the election of the slave between freedom and slavery, yet no doubt has ever been intimated as to the truth and legal accuracy of the great fundamental principle on which confessedly was based the judgment of the court, namely, that a slave has no legal or civil rights or capacity whatever. That principle indeed was virtually conceded by the eminent counsel who argued the cause for the slaves, and was amply sustained by the long and uniform train of decisions of the supreme tribunals of the several states of the Union cited at the bar, and commented and relied upon by the court. The decision in that case has been emphatically affirmed in the case of Williamson v. Coalter's Ex'r, 14 Grat. 394, and reaffirmed in the still more recent case of Fox v. Fox's Ex'r (not yet reported), and the principle upon which these cases are founded is admitted to be sound law, even by the learned dissenting judges (Moncure and Samuels), who so strenuously contended against its applicability to the special point then under adjudication.

Hence, it may truly be said, in the language of Daniel, J., in Dred Scott v. Sandford, 19 How. [60 U. S.] 477, that a "slave is one devoid of rights, civil or political"; and (pages 475–485): "It may be assumed as a postulate that to a slave, as such, there appertains, and can appertain, no relation, civil or political, with the state or government. He is himself strictly property, to be used in subserviency to the interests, the convenience, or the will, of his owner; and to suppose, with respect to the former, the existence of any privilege or discretion, or of any obligation to others, incompatible with the magisterial rights just defined, would be by implication, if not directly, to deny the relation of master and slave, since none can possess and enjoy as his own that which another has a paramount right and power to withhold. Hence it follows, necessarily, that a slave, the peculium or property of his master, and possessing within himself no civil nor political rights or capacities, cannot be a citizen," nor in any wise a legal or civil person; and, a fortiori, he can have none of the rights, in a qualified or unqualified degree, which appertain exclusively to a civil

person. And that it never was in the contemplation of the framers of the constitution of the United States that the federal government should have or assume jurisdiction over the slaves in the several states as legal or civil persons, and subject them to the pains and penalties applicable exclusively to such persons, is abundantly shown by the lucid and candid statement of the intelligent historian of the instrument,—a Northern man,—who cannot be suspected of stating too strongly the truth of the case against slaves. "The social and political condition of the slave, so totally unlike that of the freeman, presented a problem hitherto unknown in the voluntary construction of representative government. It was certainly true that by the law of the community in which he was found, and by his normal condition, he could have no voice in legislation. It was equally true that he was no party to the establishment of any state constitution; that nobody proposed to make him a party to the constitution of the United States, to confer upon him any rights or privileges under it, or to give to the Union any power to affect or influence his status in a single particular." 2 Hist. Const. U. S. (by George Ticknor Curtis) p. 155.

From these views and authorities, which might be illustrated and multiplied ad libitum, it would seem to be demonstrated beyond controversy that slaves are recognized in the constitution of the United States, and in the laws and by the adjudications of the several states, merely as natural persons, as persons held as property, whose legal status or condition is that of property, and property only, and not as being in any sense, or to any extent, legal or civil persons, persons having legal or civil rights and capacities, and subject to corresponding obligations or responsibilities as legal or civil persons. And this is the great and fundamental distinction of which sight has been so completely lost in the argument for the United States in this case. It is a distinction so broad and generic as to have become the foundation of the whole system of laws in all of the slave-holding states in respect to slaves. So absolute and wide-pervading is the ethnological, civil, social, and political difference between the dominant and the subject races,—the white American sovereign and the black African slave,—that they are not, and cannot be, governed by the same system of penal laws. Both the character and the number of the offences, and the kind and the degree of the penalties attached to them, are, and must, of necessity, be, different. And one striking and all-important difference arises from the inherent legal characteristics, the difference in the legal status, of the two races. An American citizen or freeman may be punished, for instance, by a fine or imprisonment, the forfeiture of money, or a temporary forfeiture, or deprivation of liberty. But, ex necessitate rei, from the very nature and law of his condition, it is absolutely impossible to punish a slave in this manner, because he has neither property nor liberty of which to be deprived. And even if this were legally possible, yet, in respect to the deprivation of liberty and confinement to manual labor, the vast and varied difference between the social position, usual habits, and natural constitution of the white sovereign and the negro slave would render the same punishment, for the same offences by each, utterly and obviously unequal, inadequate, and unwise, if not futile or impracticable, and it is scarcely within the extremest range of legislative inconsistency, negligence, or improvidence that so enormous an incongruity and error should be contemplated or committed, in a whole system of jurisprudence; and yet that is what has been done by congress, if slaves are included within this act. Certainly no slave-holding state has a place in its penitentiary for slaves, or a provision for their punishment for crimes by confinement to manual labor. That, indeed, with some occasional relaxation of restraint, is the normal and habitual life of the negro slave, and it could never be adopted as a penalty in prevention of the peculiar peccadilloes of theft, for which he would seem to be endowed with an inborn genius and proclivity.

In ample confirmation and illustration of these views, we find the legislation of every state in the Union in regard to its slaves, and the uniform adjudications of the state courts in regard to the construction of statutes, so far as slaves are concerned. Thus Mr. Cobb well lays down the law: "The protection of the person of the slave depending so completely upon statute law, it becomes a question of importance what words in a statute would extend to this class of individuals? Generally, it would seem that an act of the legislature would operate upon every person within the limits of the state, both natural and artificial; yet, where the provisions of the statute evidently refer to natural persons, the court will not apply them to artificial. Nor will statutes ever be so construed as to lead to absurd and ridiculous conclusions. Experience has proved what theory would have demonstrated, that masters and slaves cannot be governed by the same laws. So different in position, in rights, in duties, they cannot be the subjects of a common system of laws. Hence the conclusion that statutory enactments never extend to or include the slave, neither to protect nor to render him responsible, unless specifically named, or included by necessary implication." 1 Cobb, Slav. p. 91. And so again on page 263 of the same volume it is said: "We have already seen that statutory enactments never extend to or include the slave, neither to protect nor to render him responsible, unless specifically named, or included by necessary implication. The result is that the ordinary penal code of a slave-holding state does not cover offences committed by

slaves, and the penalties thereby prescribed cannot be inflicted upon them. A moment's reflection would show the propriety of this principle. To deprive a freeman of his liberty is one of the severest punishments the law can inflict; and one of the most ordinary, especially when the penitentiary system is adopted. But to the slave this is no punishment, because he has no liberty of which to be deprived. Every slave-holding state has hence found it necessary to adopt a slave code, defining the offences of which a slave may be guilty, and affixing the appropriate penalties therefor." If, therefore, this act of congress were a state statute, or if in a state statute the same language, "any person," were used, and the same penalties attached to the offences specified, as are found in this act, and the supreme tribunal of any slave-holding state were called upon to construe it in respect to slaves, it would at once be held that there was nothing in the act specially pointing to slaves, and that the penalties attached,—the payment of pecuniary fines, or the deprivation of liberty, the forfeiture of money, or the forfeiture of freedom, or both, —conclusively showed that slaves were not in the eye of the legislature at the time of its passage, since the fulfilment of such penalties by the slave is obviously and absolutely inconsistent with the law of his condition. No reason has been assigned, and none can be shown, why the same construction should not be placed upon this act of congress. On the contrary, it is easy to see that the act must receive the same interpretation as similar statutes of the several slave-holding states; for in respect to the legal or civil status of slaves, it is conceded that the federal government has no constitutional authority or jurisdiction, and it must therefore legislate in respect to slaves, if at all, in obedience to, or in conformity with, their recognized status in the several states, who have exclusive and supreme jurisdiction upon the subject. Accordingly, from its very foundation to the present time, all the acts of the federal government touching slaves have recognized them as property, and not as persons, in any just legal sense, and in so doing have fully recognized the broad and complete contrast between the social, civil, and political condition of the dominant and the slave race, upon which is founded the separate code of penal laws for slaves which obtains in all of the slave-holding states. See article 7, Preliminary Treaty of Peace with Great Britain (8 Stat. 57); article 7, Definitive Treaty (8 Stat. 83); article 1, Treaty of Ghent (8 Stat. 218),—in all of which slaves are the subject of negotiation, "as negroes, or other property," or "slaves, or other private property"; 6 Stat. 600; Const. U. S. art. 1, §§ 3, 9; Id. art. 4, § 2; the three fugitive slave laws (2 Stat. 126, 3 Stat. 548, and 9 Stat. 462), in all of which, as in article 4, § 2, of the constitution, slaves are described as "persons held to service or labor," —expressions fully recognizing the right of property in them, by virtue of which their owners are entitled to demand the aid of the federal government in securing their return. And special attention is invited to the fact, so full of significence in this case, that in all the clauses of the constitution and in all the acts of congress in which slaves are spoken of as "persons" at all, they are so designated by words of particular description, and then only to indicate them as the property of their masters. In fact the whole structure of the federal government is based upon the recognition of slaves as property, while their existence as legal or civil persons is ignored, or, by a negative pregnant, denied and repudiated. Clause 3, § 2, art. 1, of the constitution, commonly cited to show that they are entitled to representation as being included among "three-fifths of all other persons," shows only that the "several states,"—that is, the political communities composing the several states; in other words, their masters,—are entitled to representation, and are subjected to taxation on their account as property. Hence, in the convention which formed the constitution, Roger Sherman said truly, with good reason, when this clause was under consideration, that "he did not regard the admission of the negroes into the ratio of representation as liable to such insuperable objections. It was the freemen of the Southern states who were, in fact, to be represented according to the taxes paid by them, and the negroes were only included in the taxes." 3 Mad. Papers, p. 1265. The slaves do not pay taxes, nor do they have any voice in the government. Their masters are taxed and are represented in the fixed ratio, on account of themselves, and of their property in slaves. So the circuit court of the United States for the Eastern district of Pennsylvania and New Jersey say: "Look at this article, and you will see that slaves are not only property as chattels, but political property, which confers the highest and most sacred political rights to the states, on the inviolability of which the very existence of this government depends: (1) The apportionment among the several states composing this Union of their representatives in congress. (2) The apportionment of direct taxes among the several states. (3) The number of electoral votes for president and vice-president, to which they shall respectively be entitled. * * * Thus you see that the foundations of the government are laid and rest on the rights of property in slaves. The whole structure must fall by disturbing the corner stones." Johnson v. Tompkins [Case No. 7,416]. Thus in all this legislation of the federal government, organic and ordinary, slaves are as fully treated as property as in the statutes of any of the slave-holding states, and their social, civil, and political inequality and degradation as completely recognized and established. There is every reason, therefore, why, in the administration by

the courts of the general acts of congress, the same rules of construction should be observed, so far as slaves are concerned, which have been established by the courts of supreme judicature in the several states in respect to the general statutes of the states. And, even in the absence of these facts, this should be true upon other considerations, which have been often and amply recognized by the supreme court of the United States. For it is well known that, although in matters of general federal jurisdiction the courts of the United States rightly adopt their own rules of construction, yet in subject-matters peculiarly of state and local concern and jurisdiction, if they do not always feel bound to adopt the rules of construction or the decisions of the state courts, great and profound respect is ever paid to them. And particularly ought this to be the case in regard to laws affecting slave property, and offences committed by or upon slaves.—subjects eminently of state and local interest and occurrence, with which, ordinarily, the federal courts have so little to do.

Now, in reference to the subject-matter of the punishment of slaves by the federal government, it is to be observed, in this connection, and especially in view of the constitutional question hereinafter to be noticed, that, so far as has been shown by the counsel for the United States in the argument of this cause, and so far as a careful examination of the acts of congress, with the view to ascertain the fact, may be entitled to confidence, congress has passed no act whatever, of a penal character, in which slaves are specifically included, either eo nomine, or by words of particular description, such as those in which they are specially designated in the constitution of the United States and the various acts of congress which have been above cited. In the vast majority of cases, in fact, the punishments are of such a character as necessarily to exclude slaves. The penal code of congress is unique, and, with the occasional exception of capital punishment for offences of great enormity, fine and imprisonment, singly or together, constitute the sole penalties imposed. Evidently this penal code was never designed to extend to slaves, for the great inadequacy and inequality of the punishments inflicted, as applied alike to citizens and to slaves, as well as the legal incongruity and impossibility of applying to slaves the penalties (applicable only to civil persons) denounced against at least nine-tenths of the offences, conclusively show that white men and freemen were alone in legislative contemplation. Even supposing that the federal government had criminal jurisdiction over slaves, nothing is easier or more natural than to account for this omission of congress to legislate upon the subject. The great mass of Southern slaves are constantly engaged in agricultural and other rural labor, under the immediate eye and control of their masters or superintendents, and far removed from contact with any of the agents or operations of the federal government. And the whole subject of the management, discipline, and punishment of slaves is so peculiarly a matter of state jurisdiction and municipal police, and so wise, effectual, and all-pervading have been the state legislation and the action of the state tribunals, and the still more general and successful administration of the patriarchal laws of the household and the plantation, that a more orderly, law-abiding, and quiet population never existed than the slave population of the South; and, what with the state tribunals, local police, and family government, congress has had no occasion to pass a separate code of laws for slaves, or to adapt the penalties of its acts to suit their legal and social condition. Certainly, under these circumstances, it is more reasonable to suppose that the case of slaves is casus omissus, than to suppose that, in relation to all offences alike, congress, composed until of late years of a majority of slave-holders, or representing a majority of slave-holding constituencies, should have designed to place the white citizen and the black slave upon an equal footing, and that, contrary to the spirit of all the other action of the federal government in regard to slaves, and in utter contempt of the established legal status of slaves in the several states, which the federal government was itself bound to respect and protect, slaves should have been treated as legal or civil persons, and subjected to penalties applicable only to such; and that, accordingly, penalties should have been provided for him, in the great mass and majority of cases, from which, unless the constitutions and laws of the several states in which he exists were to be crushed under foot, the slave, by the law of his condition, is necessarily and absolutely exempt. Yet such must be the case, if this act, which forms no exception to the general mass of penal acts, be construed to include slaves. And hence, in view of the whole penal legislation of congress (in which the phraseology is the same as that used in this act), it becomes a question of grave interest and magnitude to the slave-holding states what construction shall be placed upon its terms, so far as slaves are concerned. If for fines which they cannot possibly pay, and for all the multitude of federal offences within the range of penitentiary punishment, the slaves of Virginia, of Alabama, of Louisiana, or of Texas, are to be seized from their work by the federal arm, and whiffed away to Washington city, and there immured in prison for life, or until their fines are paid, or for any time from three months to twenty-one years, and their masters are to receive no compensation for their value or the loss of their services, and are to be put to the peril of losing them forever after their imprisonment is over, the sooner this startling new code is promulged, the better. It is impossible not to see that if slaves be included in this act, it can only be in violation of all the establish-

ed rules of statutory construction adopted in respect to them by the several states, and which, as has been shown, the federal courts are as much bound to recognize as the courts of the several states, in violation and disregard of the established legal status of slaves, and against the long and uniform course of dealing as to slave-property which has characterized the federal government in all its departments. There must, hence, be some very strong and paramount reason for including them, if all these considerations are to be overriden and trodden down. It may be said—it can only be said—that, though not included by name, nor by words of special description, as is usual in the federal state papers, and though it would seem that they were perforce excluded by the incompatibility of the penalties imposed with the fundamental law of their being, yet that they are included by necessary implication. But how can this be? So far as the mischiefs contemplated by the act are concerned, certainly no reason appears why they should not have been included. It is perfectly true that there is nothing in the object and policy of this act to exclude slaves from its provisions, or from punishment for the offences therein enumerated, since, obviously, the mail may be robbed by slaves, as well as by persons who are free; and it may be further said that, unless slaves are punishable under the act, they may be made the instruments of depredations upon the mail, guided or wielded by the hands of others, who may escape with impunity. All this, however, only shows the necessity of a law punishing slaves in an adequate and appropriate manner for such offences; and it may be a very strong and unanswerable argument to prove that they should have been included in some provision of the act, with effective and suitable penalties thereto attached. And the same remark applies with equal truth to a thousand other offences under other acts of congress, the penalties for which being merely pecuniary fines, for instance, clearly cannot include slaves. This kind of reasoning certainly shows what ought to have been done. It does not, and cannot, prove what has been done. As the exigencies of society are developed, the discovery of the necessity for a law can never be urged as proof of its existence. If so, felons would never escape, or innocent men either. So to construe an act is to make ex post facto laws. The act must be construed by its obvious intent and legal application, and not be stretched to cover all possible or supposable cases within its mischief, which might or ought to have been provided for, but were not. Looking to this act, it is seen that, so far from special reference being made to slaves, eo nomine, or by particular description, as in all state papers of the federal government in which they are confessedly included, here the penalties provided are such that slaves cannot legally suffer, or possibly be made to fulfil; from which the inference naturally and irresistibly arises that they were not in the contemplation of congress in framing and passing the act. If the penalty imposed in all cases were merely a pecuniary fine, this certainly would be demonstrably clear, for no one could have the hardihood to contend that it is in the power of a slave to pay a fine. It is not perceived that the logic is altered by adding imprisonment to the fine in some cases, or by providing imprisonment alone in others, as in the case at bar. The whole act must be scanned and construed together. It is one law. Its very title is "An act to reduce into one the several acts establishing and regulating the post-office department." And in scanning the whole act, we see that, of some several hundred different offences for which indictments could be framed, the penalties for about one-half are pecuniary fines alone, varying from $10 to $500; the penalty for scarcely one-fourth is imprisonment alone, varying from 3 months to 21 years, and, with the exception of death in a single instance, the penalties for the rest are fines and imprisonment, in the alternative or together, the fines varying from $50 to $2,000, and the imprisonment from 6 months to 21 years. Can it be imagined that slaves were in contemplation of congress when this act was passed? An act, of which all the offences were equally within the object, mischief, and policy to be provided for, yet of which, at the least, more than two-thirds of the penalties (being mere pecuniary fines, directly, or in the alternative or cumulative) are such that slaves confessedly cannot suffer; an act of which, in fact, except in the solitary exception of the punishment by death for a single offence, all the penalties are such that the slave, by the very law of his condition, cannot be compelled to fulfil, and which, therefore, for him, are no penalties at all. Would it be doing justice to the intelligence of congress to indulge so extravagant an hypothesis? No reason can be assigned why the slave should have been in contemplation of congress in one clause of the act, rather than in another. Why, if a slave steal a letter containing no article of value, should he be held not included within the act, because the penalty is a pecuniary fine and imprisonment, while if the letter contain an article of value, he is to be held included within the act, the penalty in such case being imprisonment alone? Is he more or less a "person" in the one case than the other? If included in one clause, why not in all? If not in all, why in any? Is the circumstance of the presence of an article of pecuniary value in the letter any special reason why punishment should be imposed upon slaves, while in other cases they are exempt? Does the most important and really valuable correspondence,—correspondence communicating commercial, social, political, or military intelligence, of the largest consequence and magnitude to the parties or to the government,—usually contain any article of pecuniary value at all? Is not the

great burden of the mail composed of letters or packages containing no money, mercantile security, or other evidence of debt? Why, then, should slaves be within the object and policy of the law in respect to the least important part of the mails, and yet be excluded from offences against all the rest, which constitute the great bulk and business of the postal system? If it be said that slaves are equally within the mischief and policy of all the offences of the act, but that, evidently, as to those offences of which the penalties are pecuniary fines, or pecuniary fines and imprisonment, they were not in contemplation of congress, because they cannot pay a fine, and to imprison them until the fine be paid would be but to inflict unjust punishment upon their innocent masters, it may be said, with equal force and truth, that neither in respect to the offences of which the penalty is imprisonment alone could slaves have been in legislative contemplation, since deprivation of liberty, in a legal sense, is, by the law of his condition, as much an impossible thing to the slave as the payment of a fine by him, while in either case the loss of his services, during imprisonment, falls identically as the same unjust punishment upon his innocent owner. If, indeed, a slave cannot be imprisoned for not paying a fine, how can he be imprisoned for any other delinquency? And is not an imprisonment of the slave for an offence against the law just as much an unjust punishment of his unoffending owner as if the slave be imprisoned for not paying a fine, which is a penalty imposed by law? What is the difference in principle or in fact? If it be said that the slave has the physical capacity to suffer punishment by imprisonment, so also has he physical capacity to suffer punishment by paying a fine, though he has no legal capacity to do either; and you may as well compel the master to pay the money of the fine, as to compel him to part with the time and labor of his slave, worth more to him, in many cases, than forty-fold the fine. Surely it behooves those who contend for a construction of the act of congress which is so much at variance with the ordinary and established rules of construction, and with all the other action of the federal government concerning slaves, to reconcile these numerous contradictions and incongruities. And yet no explanation has been offered. None can be given. It is therefore respectfully, but earnestly, submitted that upon no principle of rational or consistent interpretation can the slaves be included within this act.

If the foregoing views are not wholly erroneous, it has been conclusively shown—(1) That, in ordinary legal contemplation and parlance, slaves are not regarded as persons, but as property, and that, although as chattels, they must still be and remain natural persons; yet that they are not, and, from the law of their condition, necessarily cannot be, legal or civil persons. Hence, that, prima facie, in general statutes of the states, or general acts of congress, they are not included; such statutes or acts ordinarily having reference only to legal or civil persons, and that, in order to include slaves, they must be mentioned eo nomine, or by words of special description, or by necessary implication. (2) That in the penal code of the federal government, slaves are nowhere mentioned eo nomine, or by words of special description; and that, although from the object and policy of many of the penal acts, it would seem that slaves ought to have been included, and, in the absence of anything to the contrary, might possibly be construed to be included by necessary implication, yet that, in respect to those very acts, by the character of the penalties imposed, in the great mass and majority of cases, slaves are, by the law of their condition, necessarily and absolutely exempt. (3) That of this character is the particular act, and especially the particular provision of the act, under which this prosecution is instituted. To all of which, it might be added, if need be, that neither in the summoning of slave witnesses, the most common and important witnesses for or against their fellow-slaves; nor, pursuant to that humane clause of the federal constitution which stipulates that "excessive bail shall not be required," in allowing or providing for the taking of bail in the case of slaves, who cannot enter into bail-bonds for themselves, and who are therefore, under the general law, now incapable of being bailed at all, and the constitution thus made a dead letter in that respect, so far as they are concerned; nor in adapting the mode and incidents of trial to suit the civil and social status and character of the slave; nor in providing suitable and sufficient penalties for slaves, and avoiding the inequality, fatuity, and injustice of putting the white citizens and freemen of the whole country together with the negro slaves of the South, in the same offences, and the same punishments, side by side, in paying fines, or at hard labor in prison, or otherwise; nor in providing just compensation to their owners for the loss of the services, or of the total value of slaves, when they are thus taken for the public use; nor in providing for their safe and speedy return or delivery to their owners, after the period of punishment has expired,—in none of these important respects, most, or all, of which are deemed necessary or proper to be provided for in the penal codes of all the slaveholding states, and in no view whatever do slaves, in any instance, and certainly not in this act, seem to have been in the mind and contemplation of congress. If, therefore, congress has passed a penal code for slaves at all, it has designedly enforced it by penalties which necessarily exclude them from its provisions, and it has provided no machinery for its administration by the courts.

Such is the dilemma to which the government is driven in this case.

(2) In respect to the constitutionality of the act, if it be held to include slaves, no answer to the points raised in the opening argument for the defendant has been furnished or attempted by the counsel for the government. They appear to be unanswerable, however they may be overlooked or avoided. It may be pardoned to state them more fully.

1. Congress has no constitutional authority to treat a slave as a freeman or civil person; it cannot endow him with the right to be tried as such; it cannot subject him to the obligations or penalties which can be fulfilled or discharged only by freemen, or civil persons,—therefore it cannot give him the right of trial by a jury of his peers, and it can try him by jury in no other way. Nor can it compel him to pay a fine or part with liberty,—things impossible to be done by a person in his condition. To assume this power is to assume authority to change the civil status, the legal character and relations of slaves, a matter peculiarly and exclusively of state sovereignty and jurisdiction.

2. The federal government has no constitutional authority to punish slaves at all. "The judicial power of the federal government," says St. George Tucker, "extends to all cases in law and equity arising under the constitution. Now, the powers granted to the federal government, or prohibited to the states, being enumerated, the cases arising under the constitution can only be such as arise out of some enumerated power delegated to the federal government, or prohibited to those of the several states. These general words include what is comprehended in the next clause, viz. cases arising under the laws of the United States." 1 Tuck. Bl. Comm. 418. See, also, 2 Story, Const. pp. 420, 421. And the supreme court say in Dred Scott v. Sandford: "The power of congress over the person or property of the citizen can never be a mere discretionary power, under our constitution and form of government. The powers of the government and the rights and privileges of the citizen are regulated and plainly defined by the constitution itself, * * * and the federal government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which has been reserved." 19 How. [60 U. S.] 440–450. Now, in respect to slaves, the court say, as we have seen: "The only two provisions which point to them, and include them, treat them as property, and make it the duty of the government to protect it. No other power, in relation to this race, is to be found in the constitution; and, as it is a government of special delegated powers, no authority beyond these two provisions can be constitutionally exercised. The government of the United States had no right to interfere for any purpose but that of protecting the rights of the owner, leaving it altogether with the several states to deal with this race, whether emancipated or not, as each state may think justice, humanity, and the interests and safety of society require. The states evidently intended to reserve this power exclusively to themselves." Id., pp. 425, 426. If, then, it be true, as it is universally conceded to be true, that the federal government is a government of special delegated powers, and if it be true, as we are bound to accept it to be true, under the adjudication of the supreme court, that the only constitutional power delegated to the federal government, in respect to slaves, is the power to protect them as the property of their owners, it would seem to follow, not only as a natural, but as a necessary and irresistible, consequence, that the federal government has no criminal jurisdiction over them whatever. The case is different in regard to the states. The power and authority of the states over their slaves is sovereign, supreme, unlimited. The only power delegated by the several states to the federal government, in respect to slaves, was the "power," in the language of Chief Justice Taney, delivering the opinion of the supreme court, "the power to protect them as property." All other powers, therefore, in reference to them, were reserved to the several states, respectively. To punish slaves, therefore, and to keep them under due discipline, is thus a matter exclusively of state jurisdiction. The slave may be duly punished by the state laws for crimes of any character. He is under the absolute dominion of the state governments, but he is known to the federal government only as property, and to be protected as such,—the property of his masters, the depositaries of state sovereignty and power. And while the federal government, so far as is known, has never presumed to pass any penal law specifically embracing slaves, and has never before this prosecution asserted jurisdiction over them in criminal cases, each of the several slaveholding states, on the other hand, has enacted virtually a separate code of laws for the punishment and protection of slaves, in which, alike in the character and number of offences, and the kind and degree of punishment, due regard is had to the social, civil, and political differences between the dominant and the subject race, and in which, while proper subordination and goodly courses are carefully preserved, substantial safeguards are provided for the personal security of the slave. Nor does any inconvenience arise to the federal government from this want of criminal jurisdiction over slaves, since the state laws thus provide full and fit punishment for all offences of which a slave may be guilty. The case at bar is a case in which, as is well known, slaves have often been prosecuted and punished under the laws of the state of Virginia, in the hustings court of this city of Richmond. And the fact that this case, so

far as is known, is the first case in which, since the foundation of the government (a period of seventy odd years), this court has ever been asked to take jurisdiction over a slave, would seem very strongly to indicate the absence of any necessity for the assumption of jurisdiction, in such cases, by the federal courts.

Now it may be said, in answer to these views, that the constitution expressly gives congress the power "to establish post-offices and post roads," and therefore, by implication, power to protect them after they are established; and the splendid judgment of Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. [17 U. S.] 417, may be cited, in which this doctrine was incidentally discussed and established. But the answer to that view is furnished by the supreme court in Dred Scott v. Sandford, 19 How. [60 U. S.] 425. And, however true and irrefragable may be the logic of Chief Justice Marshall in M'Culloch v. Maryland [supra], yet it may be said that it applies only to such persons as those over whom the federal government has general jurisdiction, and not to slaves, in respect to whom the same supreme court have solemnly declared that "the only two provisions in the constitution which point to them, and include them, treat them as property, and make it the duty of the government to protect it. No other power, in relation to this race, is to be found in the constitution; and, as this is a government of special delegated powers, no authority beyond these two provisions can be constitutionally exercised."

But, whatever may be thought of this denial to the federal government of general jurisdiction over slaves, it must be conceded by all that it can exercise jurisdiction, if at all, only in accordance with the law of their condition,—their legal status in the several states,—a matter which the federal government cannot alter or affect. And, therefore, in any light, the penalties of this act, if applied to slaves, are unconstitutional.

3. This act is unconstitutional, if it includes slaves, because it makes no compensation to the owner for property taken for the public use. It is true that the origin of the 5th amendment to the constitution, which provides that "private property shall not be taken for public use without just compensation," was the apparent necessity of protecting private property from unjust seizure in times of war; but that circumstance can scarcely be judicially held to confine the application of the great constitutional right, thus secured, to the extraordinary cases of public invasion or hostilities. Indeed, nothing is more common than for the federal government, in time of profound peace, to pay for private property taken for public use, as in the case of sites for custom houses, of which an illustration is furnished in the site of the elegant structure in which this court is held, and the post-office establishment located. Nor will it do to say that these are all cases of fair purchase on the part of the government. That fact is but a recognition of the sacred rights of private property; and, if the government cannot, without just compensation, take the property of the citizen for one purpose, it is difficult to see how it can take it for any other purpose whatever, or, if for any one purpose, then not for all. Whenever taken at all, it is taken for some real or supposed public good, and the public, under the constitution, must pay for it. If the government cannot take a site on which to build a post-office, without paying for it, how can it seize property in the shape of slaves, whether for punishment or otherwise, in order to keep up the post-office or postal system, after it is established? Does it matter to the owner whether the slave is seized as "property," or as a "person," since, whether taken as the one or the other, the legal character of the slave as property remains the same, and the loss and injury to the owner identical? And, although it should be admitted to the fullest extent, for which it is contended, that slaves are to be viewed in the twofold character of property and persons, yet is it not perfectly apparent, even upon this hypothesis, that, whether dealt with as property or as persons, this twofold character cannot be disregarded; so that if the slave be punished as a person, he must still be paid for as property? It is quite in vain to say that it is an incident of property in slaves that it may be forfeited to the federal government, if the slave commit an offence against its laws. In the eye of the law, under the constitution of the United States, and the constitutions and laws of the several states, slave property is precisely like any other property, and to be protected as such, and has identically the same legal incidents; and if the rights of the owner of a slave in and to his labor and services can be forfeited to the federal government by reason of any action of the slave, then the anomolous absurdity would follow that the title of the owner is placed at the mercy of the property owned. It is the legal incident of no kind of property whatever to have the capacity to forfeit or affect the title of its owner by any action of its own, however true it may be that the value of a slave, or of other animate property, may be injured by negligent or vicious conduct on its own part. And this is the true, the clear, and broad distinction to be taken. If it be conceded that the federal government has the constitutional right, in self-defence, or in protection of its property or citizens, to punish slaves at all, yet, as we have seen, it must do so by penalties compatible with their legal condition, and in subordination to the vested rights of the owner. Property in slaves existed before, and exists independently of, the constitution, which did not create, but recognizes and protects, it. Johnson v. Tompkins [Case

No. 7,416]; Dred Scott v. Sandford, 19 How. [60 U. S.] 419. If the federal government punish slaves as persons, it must remember that they are property also, and, as such, must be protected and paid for when seized and used for the public good. The several states undoubtedly have the right to say that the owner shall lose his title to the services of his slave, if the slave commit an offence against the law; and some of the states have virtually done this, by prescribing the penalties of death or transportation for slaves, in certain cases, without providing compensation to the owner. This has been done as a part of their municipal polity and police in respect to slaves, upon the idea that, by tying the self-interest of the master the more closely to the common weal, greater diligence would be encouraged on his part, alike by coercion and kind treatment, to keep his slaves in due subordination and goodly courses. Therefore, in some states, the master gets only half or two-thirds of the value of the slave who is hung for crime, in others, nothing; of which the frequent consequence is that no sooner is a capital crime committed by the slave, than he is run off to another state, and sold, and public justice thwarted,—a condition of things avoided in Virginia, Maryland, and other states by paying the full value of the slave. Now the several states may do this, or they may take slave property, or property of any other kind, for public use, without just compensation. They may even annihilate all property in slaves by general emancipation, because they have absolute sovereignty and jurisdiction over the subject of slaves and slave property, and there is nothing in the constitution of the United States which forbids it, for the limitation in question applies not to the states, but to the federal government. Thus in Barron v. Mayor, etc., of Baltimore, 7 Pet. [32 U. S.] 243, Mr. (now Chief Justice) Taney, then at the bar, on rising to speak to that point, was stopped by the court, and Chief Justice Marshall, delivering its opinion, said: "The question presented is, we think, of great importance, but not of much difficulty"; and decided that "the provision in the 5th amendment of the constitution, declaring private property shall not be taken for public use without just compensation, is only a limitation of the power of the United States; it is not applicable to the legislation of the several states." While, therefore, the several states are at full liberty, in the exercise of sovereign power, to take private property for public use without compensation, no such power is vested in the federal government. The only power, say the supreme court,—certainly, the paramount duty,—of the federal government, in respect to slaves, is to protect the rights of property of their masters in and to them. To seize and carry them away, and keep them out of the service of the owner, and beyond the jurisdiction of his sovereign state, for the emolument or advantage of the federal government, without compensation to the owner, would certainly be a strange way of showing that protection. Whether the slave be seized and carried away to be employed directly on works of public utility for the federal government, or to be punished by being employed, in "imprisonment and confinement to hard labor," for the profit, advantage, or benefit of the federal government, matters but little to the owner, whose property is thus appropriated without compensation; and it amounts to but mockery to tell him that his property is used or destroyed by the government in self-defence. Private property is always taken by the government in self-defence, or for self-advantage. The manner in which, or the purpose for which, or the cause or necessity for which the government proposes to use or appropriate slave property, or any other property, without just compensation, cannot in any wise alter or affect the obligation to pay for it. Whether, for instance, in time of war, a slave, in a sudden emergency, be pressed into public service (as at the defence of New Orleans), either as a teamster, or as an artillery man, or as a soldier of the line, whether he be used in the capacity of "property" or a "person," to work or fight, cannot vary the constitutional obligation and duty of the government to pay the owner the full value of his services, during the time the slave is thus employed for the public good, or to pay for his whole value in case of his permanent detention or of his being killed. The public must be the judge of its own necessities, and of the manner and time of taking private property for public use, as well as of the uses and purposes for which it is to be employed; but this fact cannot abrogate its responsibility to pay for the property it thus appropriates to its real or supposed necessities. Least of all can it be urged that, in punishing slaves by fine and imprisonment, or by imprisonment until the fine be paid, where fine alone is imposed, the federal government would not take them as property, but as persons, responsible to penal laws, and that the loss to the owner of his property follows incidentally as a natural and unavoidable consequence of property in slaves; for this assumes, first, that slaves can be punished by penalties incompatible with the fundamental law of their condition; it assumes, secondly, that the loss or damage inflicted upon the owner is incidental, which is not the fact; it assumes, thirdly, that if such loss be incidental, that circumstances would affect the right and principle of compensation. Certainly the federal government can inflict no penalty upon the slave which is inconsistent with, or repugnant to, the law of his condition; for it must be conceded that the federal courts are bound to respect and to protect that law, the status of the slave being a matter exclusively of state jurisdiction. It must be

equally apparent that the loss resulting to the owner from the service and detention, or destruction, of his property, is direct and positive, and susceptible of clear and easy calculation; such as is made every day in actions of detinue or trover for slaves. Nor, if the fact were otherwise, would the conclusion be different. For, if the loss to the owner of the labor and services of the slave be the certain and inevitable consequence of its seizure and detention or annihilation, it matters nothing, in substance, whether that loss be direct or incidental. The fact of the loss to the owner by the appropriation of his private property by the public, for its own emolument or use, or in furtherance of its policy, is that which constitutes the gravamen and justice of the charge, and which must fix upon the public the responsibility of paying for it. And so are all the analogies of the law. Whether, for instance, a defendant is liable in trespass vi et armis for a direct injury, or in case for consequential damages, often presents a nice question in special pleading; but the fact of his liability, in law and in justice, is equally as certain and well settled in the one case as in the other, and the recovery as great, according to the evidence of the actual loss sustained. The truth is that the whole idea of the legal responsibility of the slave to the federal government for offences against its laws, and therefore of the liability of the owner, incidentally, to the loss of his property in consequence of the punishment of the slave by imprisonment or death, rests, it is respectfully submitted, upon a fallacy, which is the result of that radical misconception of the legal status and relations of slaves which has been pointed out and established in another part of this argument. The slave is a chattel in the eye of the law, and nothing more. He has no civil or political rights, and therefore no corresponding responsibilities or relations to the state. He is punishable by statute, when included by name, description, or necessary implication, as a natural person; but always, and only, in a manner compatible with the law of his condition as a chattel. The several states, having sovereign and absolute jurisdiction over the subject, may or may not, according to their views of municipal or domestic policy, compensate the owner for the value of the slave, in case of his transportation or capital punishment. But that circumstance in no wise affects the fact, which is the grand substratum of the only consistent and rational system of jurisprudence upon the subject, that slaves, as such, being mere property, have no civil or political rights, obligations, or relations, and are therefore incapable of being held to the same kind or degree, or to any kind or degree, of responsibility as persons having civil and political rights, obligations, and relations. Their punishment is always, and necessarily, a matter of positive statute, and, ex virtute magistri, based, not upon any recognized civil, social, or political obligation of the slave to obey the law, but upon the sovereign and supreme mandate of his master, embodied in the law, the observance of which is enforced by penalties inflicted for its violation. The slave is punishable, but upon a different principle, and in a different manner, and often in a different degree, from that in which a civil and political person is punished. He is punished as a matter of chastisement and discipline, according, indeed, to principles of natural justice and moral obligation; but certainly not upon any hypothesis of violated civil or political obligations, the sanctity of which is to be enforced or preserved by the surrender or forfeiture by him, in whole or in part, of civil or political rights and franchises, such, for instance, as the deprivation of property or of liberty, or of the capacity to hold or take offices of public emolument, honor, and trust. Obviously, this vast radical and all-pervading difference results necessarily from the established and conceded absence, on the part of the slave, of all civil or political rights and relations to the state; that organized sovereignty whose will is his law, of which he forms no constituent element, in which he has no voice or influence, and to which he stands as a chattel, the subject of property, and the object of the civil rights of others, the component parts of that supreme and sovereign power over and above him. This was the legal status of the slave at the time of the adoption of the federal constitution, and it so continues. That instrument recognizes and protects slavery as it then existed, and still exists, in the several slave-holding states; and, therefore, in the penal laws of the federal government, in regard to slaves, it must recognize and respect that great fundamental fact. This, therefore, being true, since, in a legal sense, —in the sense of obligation correlative to right, in the sense of the maxim jus et obligatio sunt correlata,—the slave is not bound to obey the laws, either state or federal, he cannot be punished upon that hypothesis. He cannot be punished by the forfeiture or deprivation of any civil or political right, possession, franchise, or immunity; he has none to forfeit or lose. Still less can he, by any act of his own, directly or incidentally, forfeit, transfer, or affect the legal rights of others,—the right of property, for instance, in his labor and services, the right of property in and to himself and his posterity, which, by the law of his condition, is vested in his owner. While, therefore, he is certainly punishable for crime, yet, so far as the federal government is concerned, beyond all question he cannot be punished as a civil or political person,—a person having civil or political rights, obligations, or responsibilities,—but he must be punished, if at all, in strict accordance with the law of his condition, in profound respect to his establish-

ed legal status, and only and always in perfect subordination to the vested rights of his master in and to him as property, guarantied and secured, as they are, in the most positive and emphatic manner, by the constitutions and laws of the several sovereign states in which he exists, and sanctioned and shielded by the constitution and laws of the United States. In so far, then, as this act of congress attempts to punish slaves by pecuniary fines and imprisonment, it is clearly unconstitutional; and, in so far as it attempts to do this, without providing just compensation to the owner for the detention and loss of his property, thus taken by the public for its own use and purposes, it is still more clearly and manifestly unconstitutional and void.

TANEY, Circuit Justice. The prisoner (Amy) in this case was indicted for stealing a letter from the post-office, containing articles of value, particularly described in the indictment. It appeared in evidence on the trial that she was at the time the offence was committed, and at the time of trial, a slave, and her counsel therefore prayed the direction of the court to the jury that the prisoner was not embraced in the description of persons to which the law in question applied, and upon whom it intends to inflict punishment. The motion was overruled by the court, and the prisoner, under its direction, was found guilty by the jury, as charged in the indictment; and a motion is now made to set aside the verdict, and grant a new trial, upon the ground that the instruction asked for ought to have been given, and that the court erred in refusing it. The act of March 3, 1825 (section 22), under which the prisoner is indicted, provides that, if any person shall steal or take a letter from the mail, or any post-office, the offender shall, upon conviction thereof, be imprisoned not less than two, nor more than ten, years.

It has been argued in support of the motion that a slave, in the eye of the law, is regarded as property; and, as the act of congress speaks only of persons, without any reference to the property of the master, and makes no provision to compensate him for its loss, it was not intended, and does not operate, upon slaves.

It is true that a slave is the property of the master, and his right of property is recognized and secured by the constitution and laws of the United States; and it is equally true that he is not a citizen, and would not be embraced in a law operating only upon that class of persons. Yet, he is a person, and is always spoken of and described as such in the state papers and public acts of the United States. Thus, the two clauses in the constitution which point particularly to property in slaves, and sanction its acquisition and provide for its protection, both speak of them as persons, without any other or further word of description. The clause which authorized their importation declared "that the migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by congress prior to the year one thousand eight hundred and eight." And the clause intended to protect the right of property in the master provides "that no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered upon claim of the party to whom such labor or service may be due." And the third clause of the second section of the first article, which apportions the representation in congress among the several states, describes them by the same word, and provides "that representation and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons"; and under this description slaves have always been enumerated in the census, and the slave-holding states represented in congress according to their numbers, in the proportion specified, and no one has ever questioned the right of the slave-holding states to this representation, or doubted the meaning of the words "all other persons." It is evident, therefore, that the word "person" is used in the constitution to describe slaves, as well as freemen, and a court of justice would not be justified in refusing to give the same word the same construction when it is used in an act of congress, unless there was something in the object and policy of the law, or in the provisions with which the word was associated, which manifestly indicated that it was used in a different and narrower sense, and intended to be confined to persons who are free.

There is certainly nothing in the object and policy of the law in question from which it can be inferred that slaves were not intended to be punished for the offences therein enumerated. The offences were as likely to be committed by slaves as by freemen, and the mischief is equally great whether committed by the one or the other; and, if a slave is not within the law, it would be in the power of the evil disposed to train and tutor him for these depredations on the mails and post-offices, and, as the slave could not be a witness, the culprit, who was the real instigator of the crime, would not be brought to punishment. And if the slave himself is not within the law, the crime might be committed daily, and with perfect impunity, and all of the safeguards which congress intended to provide for the protection of its mails and post-offices would be of no value. Such a construction would defeat the whole evident object and policy of the law, and would

rather tempt to the commission of these offences by the certainty of impunity, than to prevent them by the fear of punishment.

In expounding this law, we must not lose sight of the twofold character which belongs to the slave. He is a person, and also property. As property, the rights of the owner are entitled to the protection of the law. As a person, he is bound to obey the law, and may, like any other person, be punished if he offends against it; and he may be embraced in the provisions of the law, either by the description of property or as a person, according to the subject-matter upon which congress or a state is legislating.

It is true, that some of the offences created by this act of congress subject the party to both fine and imprisonment, and it is evident that the incapacity and disabilities of a slave were not in the mind and contemplation of congress when it inflicted a pecuniary punishment; for he can have no property, and is also incapable of making a contract, and consequently could not borrow the amount of the fine; and a small fine, which would be but a slight punishment to another, would, in effect, in his case, be imprisonment for life, if the court adopted the usual course of committing the party until the fine was paid. And we think it must be admitted that, in imposing these pecuniary penalties, congress could not have intended to embrace persons who were slaves, and we greatly doubt whether a court of justice could lawfully imprison a party for not doing an act, which, by the law of his condition, it was impossible for him to perform; and to imprison him, to compel the master to pay the fine, would be equally objectionable, as that would be punishing an innocent man for the crime of another.

The case before us, however, does not involve this question, and we must not be understood as expressing a decided opinion upon it. The offence of which the prisoner has been found guilty is punished by the law by imprisonment only, and that punishment is, without doubt, looked to with as much apprehension and fear, and felt as severely, by the slave as it is by the freeman. But, although the difficulty above mentioned will arise in passing the sentence of the law where both fine and imprisonment are imposed, yet that circumstance will not justify the court in departing from the sense and meaning in which the word "person" is used in the constitution; especially when it is obvious that the whole object and purpose of this act of congress would be defeated if the word "person," as used in it, was held not to embrace a person who was a slave. Nor do we doubt the authority of congress to pass this law. It is true that no compensation is provided for the master for the loss of service during the period of imprisonment. But the clause in the 5th amendment of the constitution which declares that private property shall not be taken for public use without just compensation cannot, upon any fair interpretation, apply to the case of a slave who is punished in his own person for an offense committed by him, although the punishment may incidentally affect the property of another to whom he belongs. The clause obviously applies to cases where private property is taken to be used as property for the benefit of the government, and not to cases where crimes are punished by law. And if, in one of those contingencies which sometimes arise in time of war, a slave is pressed by the proper authority into the public service, in order to be employed as a laborer or teamster, or in any other manner, this clause of the constitution undoubtedly makes it the duty of congress to compensate the master for the loss he sustains. In such cases, and in all other cases where the slave is taken and used as property for the benefit of the government, the government acts directly and exclusively upon the master's right of property, without any reference to the personal rights or personal duties of the slave towards the government. It deals with him as property only, and not as a person, and, as it takes property to be used for the public emolument, it must pay for it.

But punishment for crime stands upon very different principles. A person, whether free or slave, is not taken for public use when he is punished for an offence against the law. The public, in such cases, acts in self-defence, to preserve its own existence, and protect its members in their rights of person and rights of property; and the loss which the master sustains in his property is incidental, and necessarily arises from its twofold character, since the slave, as a person, may commit offences which society has a right to punish for its own safety, although the punishment may render the property of the master of little or no value. But this hazard is unavoidably and inseparably associated with this description of property, and it can furnish no reason why a slave, like any other person, should not be punished by the United States for offences against its laws, passed within the scope of its delegated authority.

It is not for the court to say whether the government is or is not bound, in justice, to compensate the master for the loss of service during the time the slave shall be imprisoned. The question does not depend upon any provision in the constitution, nor has it been provided for by any act of congress; and, as the matter now stands, it is a question for the decision of the political department of the government, and not for the judicial; and, consequently, is one upon which this court forbears to express an opinion. It would seem, from the statements in the argument at the bar, that in different slaveholding states different opinions upon the subject have been adopted and acted on by the constituted authorities.

In maintaining the power of the United States to pass this law, it is, however, prop-

er to say that, as these letters, with the money in them, were stolen in Virginia, the party might undoubtedly have been punished in the state tribunals, according to the laws of the state, without any reference to the post-office or the act of congress; because, from the nature of our government, the same act may be an offence against the laws of the United States and also of a state, and be punishable in both. This was considered and decided in the supreme court of the United States in the case of Fox v. Ohio, 3 How. [44 U. S.] 433, and in the case of U. S. v. Marigold, 9 How. [50 U. S.] 560; and the punishment in one sovereignty is no bar to his punishment in the other. Yet in all civilized countries it is recognized as a fundamental principle of justice that a man ought not to be punished twice for the same offence; and, if this party had been punished for the larceny in the state tribunal, the court would have felt it to be its duty to suspend sentence, and to represent the facts to the president, to give him an opportunity of ordering a nolle prosequi, or granting a pardon. But there does not appear to have been any proceeding in the state tribunals, or under the state laws, to punish the offence, and, as the prisoner has been proceeded against according to the laws of the United States, and found guilty by a jury selected and impaneled according to the act of congress, we see no ground for setting aside the verdict or suspending the sentence, and the motion is therefore overruled.

Case No. 14,446.

UNITED STATES v. ANDERSON.

[1 Blatchf. 330.] [1]

Circuit Court, S. D. New York. Oct. Term, 1848.

SURETIES—COLLECTOR'S BOND—ADDITIONAL SECURITY.

1. Where H. as principal and P. as surety gave a joint and several bond to the United States, which recited the appointment of H. as collector of customs, and also that two bonds had been previously given by him, with sureties, for the faithful discharge of his duties, and that it was deemed expedient that he should give additional security, and was then conditioned that if H. "has faithfully discharged and shall continue faithfully to discharge all the duties of the said office, according to law, then the above obligation to be void otherwise it shall remain in full force." *Held*, that P. became absolutely bound for any default of H.

[Cited in State v. Hill, 17 W. Va. 463.]

2. The recitals do not import conditional or contingent security, but were intended to show that P. had become surety in addition to the sureties in the prior bonds.

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

This was an action of debt, on a joint and several bond, executed by Jesse Hoyt and Thaddeus Phelps to the United States, in the penal sum of $200,000, dated December 14, 1839, which, after reciting that Hoyt had been appointed collector of the port of New-York, and had, on the 22d of March, 1838, given a bond to the United States, with six sureties, in the penalty of $150,000, conditioned for the faithful discharge of his duties, and also had, on the 30th of November, 1838, given another bond to the United States, with the same sureties, in the penalty of $200,000, and with the like condition, and, after further reciting that it was deemed expedient that said Hoyt should give additional security to the United States for the faithful performance of his trust as such collector, was conditioned, that if the said Hoyt "has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of the said office, according to law, then the above obligation to be void and of none effect, otherwise it shall abide and remain in full force and virtue." The declaration assigned several breaches. The defendant [Charles E. Anderson, executor of Thaddeus Phelps] interposed a general demurrer, in which the plaintiffs joined. The question raised upon the demurrer was, whether Phelps, the testator, by entering into the bond became absolutely bound for any default of Hoyt in the discharge of his duties as collector, or whether he became only contingently bound, in the event of the failure or inability of the sureties in the previous bonds to satisfy and discharge the same.

[See Cases Nos. 15,409 and 15,410.]

Benjamin F. Butler, U. S. Dist. Atty.

J. Prescott Hall, for defendant.

THE COURT held that the testator became absolutely bound; that the recital in the bond, that it was deemed expedient that Hoyt should give additional security, did not necessarily or by any fair inference import conditional or contingent security; that the condition of the bond was in the terms prescribed by the first section of the act of congress of March 2, 1799 (1 Stat. 705), and found in all the official bonds of collectors; that the recitals were intended to show that Phelps was not the sole surety for Hoyt, but had become such in addition to the sureties in the two prior bonds; that such additional security might be absolute or conditional, depending upon the terms of the obligation; and that, in this instance, it was as absolute as words could make it.

Judgment for plaintiffs.

Case No. 14,447.

UNITED STATES v. ANDERSON.

[10 Blatch. 226.] [1]

Circuit Court, S. D. New York. Nov. 30, 1872.

CRIMINAL LAW—BOARDING VESSEL WITHOUT PERMISSION—BOARDING-HOUSE RUNNER—FOREIGN VESSELS.

1. Section 62 of the act of June 7th, 1872 (17 Stat. 276), making it an indictable offence to go on board of a ship about to arrive at the place of her destination, before her actual arrival, and before she has been completely moored, without permission of the master, is a valid enactment.

2. The offence is indictable, under section 62, and is punishable, on conviction, by the imposition of a penalty not exceeding $200, and imprisonment until the payment thereof, not exceeding six months.

3. It is not necessary for the United States, in such a prosecution, to prove that the prisoner was not in the United States' service, or was not duly authorized by law to go on board of the vessel.

4. A runner for a licensed keeper of a sailors' boarding house is not exempt from the prohibition of section 62.

5. Climbing on the rail of the vessel, from a boat, in the act of entering on the vessel, without permission, is within the prohibition.

6. Proof that the master was not on board, and that the mate in command gave no permission, and caused the defendant to be arrested on the spot, is sufficient to support a conviction, in the absence of evidence showing a permission by the master.

7. When the offence can be committed by boarding an inward bound vessel, laden with cargo, at anchor, considered.

8. The section is intended to protect foreign vessels, as well as vessels of the United States.

[Cited in U. S. v. Sullivan, 43 Fed. 605. Disapproved in Grant v. U. S., 7 C. C. A. 436, 58 Fed. 696.]

[This was an action at law by the United States against Thomas Anderson.]

Henry E. Davies, Jr., Asst. U. S. Dist. Atty.

Robert W. Andrews, for defendant.

BENEDICT, District Judge. Upon the trial of the defendant upon an indictment for the offence of going on board of a vessel about to arrive at the place of her destination, before her actual arrival, and before she was completely moored, without permission of the master, in violation of section 62 of the shipping act of June 7th, 1872 (17 Stat. 276), it was ruled, under objection taken in behalf of the defendant, as follows:

(1) The enactment contained in the 62d section of the act under which the indictment was framed, is a valid enactment, within the scope of the powers granted by the constitution of the United States.

(2) The section in question creates a criminal offence against the United States, punishable by means of an indictment and conviction in a criminal proceeding, and, upon such conviction, by reason of the effect of the language of the 62d and 64th sections taken together, a penalty, not exceeding $200, is to be imposed by the court, and the offender may be imprisoned until the payment thereof, not exceeding six months.

(3) It is unnecessary for the government, in such a prosecution, to prove that the prisoner was not in the United States service, or was not duly authorized by law to go on board of the vessel.

(4) The proof that the prisoner was a runner employed by a person who held a license to keep a sailors' boarding house, under the statute of the state of New York, passed March 21st, 1866 (Laws 1866, c. 184), does not show the prisoner to be exempt from the prohibition of the section in question.

(5) The prisoner, by climbing from a boat upon the rail of the ship, in the act of entering upon the ship, without permission given, rendered himself liable to punishment, as provided in the 62d section.

(6) Proof that the master of the ship was not on board of the vessel, and that the mate then in command gave no permission to the defendant to board the vessel, and caused his arrest on the spot, is sufficient to support a conviction, in the absence of any evidence showing a permission by the master.

(7) The offence is committed by boarding, in the Bay of New York, without permission, an inward-bound vessel, laden with cargo to be landed at a pier in New York City, before the arrival of the vessel at such pier, although it appear that, at the time of the boarding, the vessel was temporarily at anchor in the bay.

(8) Considering the general language of section 62, and in view of the evil sought to be remedied thereby, and of the nature of the prohibition therein contained, the section is to be considered as intended to protect foreign vessels, as well as vessels of the United States; and the fact that the vessel boarded by the prisoner was a foreign vessel, is, therefore, of no avail, as a defence, in a prosecution under this section.

These several rulings I have re-examined, in the light of the argument which has been had in respect to them, and I am satisfied of their correctness. The statute in question being new, and its language, in many instances, inartistic and obscure, I have thought proper to submit the questions raised to the consideration of the circuit judge, and he concurs with me in the opinion that the rulings stated are correct. There must, therefore, be judgment upon the verdict.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

Case No. 14,448.

UNITED STATES v. ANDERSON.

[17 Blatchf. 238;[1] 8 Reporter, 677.]

Circuit Court, S. D. New York. Oct. 13, 1879.

INDICTMENT — PLACE OF COMMITTING OFFENCE — OUT OF JURISDICTION OF ANY STATE — ALLEGATIONS — ASSAULT.

An indictment purporting to be founded on section 5346 of the Revised Statutes, charging the commission of an assault with a dangerous weapon, on board a vessel belonging in whole or in part to a citizen of the United States, alleged the assault to have taken place "in the harbor of Guantanamo, in the island of Cuba," but did not allege that that place was out of the jurisdiction of any state of the United States. *Held*, upon the authority of U. S. v. Jackelow, 1 Black [66 U. S.] 484, that the indictment was bad, for want of such allegation.

[Cited in Com. v. Clancy, 154 Mass. 133, 27 N. E. 1001.]

Criminal assault in admiralty. On motion to quash the indictment [against Charles Anderson].

William P. Fiero, Asst. U. S. Dist. Atty.

Benjamin B. Foster, for defendant.

BENEDICT, District Judge. This case comes before the court upon a motion to quash the indictment. The offence intended to be charged in the indictment is that enacted by section 5346 of the Revised Statutes of the United States, where it is provided: "Every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, on board any vessel belonging in whole or in part to the United States, or any citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault on another, shall be punished by a fine of not more than three thousand dollars, and by imprisonment at hard labor not more than three years." The act charged is an assault with a dangerous weapon on board the brig Sarah and Emma, a vessel belonging in whole or in part to a citizen of the United States, in the harbor of Guantanamo, in the island of Cuba, on waters within the admiralty jurisdiction of the United States. The objection taken to this indictment is, that it contains no averment that the place where the offence is said to have been committed is out of the jurisdiction of any of the states of the Union. In the case of U. S. v. Jackelow, 1 Black [66 U. S.] 484, it was held by the supreme court of the United States, that the question whether a particular place be out of the jurisdiction of any state, when material in determining the extent of the jurisdiction of a court, is a question of fact, to be passed on by the jury; and, in that case, the supreme court set aside a special verdict which found the offence to have been committed in waters adjoining the state of Connecticut, between Norwalk Harbor and Westchester county in the state of New York, at a point five miles eastward of Lyons' Point (which is the boundary between the states of New York and Connecticut), and one mile and a half from the Connecticut shore at low water mark, upon the ground, that, in the absence of a finding by the jury that the place so described was out of the jurisdiction of any state, it was impossible for the court to determine such to be the fact. If it was not competent for the supreme court, from such a description of the place as was given in Jackelow's Case, to say that the court had jurisdiction to try the offender, certainly, it will not be competent for this court to say that it has jurisdiction to try the defendant for an offence committed "in the harbor of Guantanamo, in the island of Cuba." There may be an island called Cuba within the jurisdiction of some of the states of the Union, and, for all that is stated in this indictment, therefore, the place described may be within the jurisdiction of such state. If, as the supreme court held in the case referred to, the question whether a certain place is out of the jurisdiction of a state be a question of fact, to be determined by the jury, then the fact must be averred and proved. No such averment is contained in this indictment, and, upon the authority of the supreme court of the United States, the omission must be held to be fatal. The motion to quash the indictment is granted.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

Case No. 14,449.

UNITED STATES v. ANDERSON.

[1 Brunner, Col. Cas. 202;[1] 1 Cooke, 143.]

Circuit Court, D. Tennessee. 1812.

ARMY — ENLISTMENT OF MINOR — HABEAS CORPUS.

The enlistment in the army of a minor without the consent of his parent is a ground for discharge, on habeas corpus, at the instance of the parent.

This was a writ of habeas corpus, directed to Colonel Anderson, requiring him to bring up the body of Zebedee Bigby, alleged to be in his regiment and under his command. The application for the habeas corpus was made by George Bigby, the father, in a petition setting forth that the said Zebedee was under the age of twenty-one years, and had been enlisted without the consent of the father, master, or guardian The facts set forth in the petition were well supported by affidavits. Upon the investigation of this case two questions arose: First, whether this court had a right to discharge the soldier until an application had been fruitlessly made to the secretary of war? And secondly, whether he could be discharged, as the application was not made by him but by his father? The

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

son was about eighteen years of age, and there was no proof that he wished to leave the service of the United States.

Hayes & Montgomery, for applicant.
Whiteside & Cooke, for defendant.

McNAIRY, District Judge (TODD, Circuit Justice, absent). The first objection taken by the defendant's counsel in this case is that where a man of any age has signed the enlistment, taken the oath, and been mustered in, no judge has a right to interfere by habeas corpus to discharge him until the war department has improperly refused. The constitution of the United States (article 1, § 9) declares "that the privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it." Congress could not pass a law vesting the war department with a power which would in effect suspend the writ of habeas corpus. The judges, by law, are vested with the power to issue writs of habeas corpus in all cases where citizens are illegally confined. Men constrained to enlist by force, or enlisted under the age of twenty-one, without the consent of their parents, masters, or guardians, are illegally confined. They are not regularly soldiers, not having been properly and legally enlisted, and are therefore entitled to their discharge upon a writ of habeas corpus. In this case the proof is clear that the son is under the age of twenty-one years.

It is next insisted that the habeas corpus issued improperly, the application having been made by the father and not the son, and that, therefore, the writ should be quashed. To support this idea the defendant's counsel have cited 6 Term R. 497; 7 Term R. 745; Cowp. 672. In the first case cited the apprentice was twenty-two years of age. The court, in giving their opinion, founded it not only on the apprentice being of sufficient age to judge for himself, but also because he was over the age of eighteen, under which, by the statute of Anne, apprentices could not be impressed. The plain inference is that if he had been under the age of eighteen the impressment would have been illegal, and the apprentice would have been restored to his master upon a writ of habeas corpus. The case in 7 Term R. 745, is expressly decided on the authority of the first case. It is not stated what was the age of the apprentice, but as the court refer to the former case, it is fair to suppose he was over the age of eighteen. The case in Cowp. 672, is a writ of habeas corpus directed to the commanding officer of a man-of-war, on board of which the two persons intended to be brought up were acting in the capacity of common sailors, but not as prisoners. The court said that if the men were served with subpœnas they might have been willing to attend, and that they could not be brought up as prisoners without their consent. The court cannot conceive that the case has any analogy to the one now before it, except in the general words used by the court "that they can never be brought up as prisoners against their consent." The court surely never intended this expression to extend to the cases of idiots, femme coverts, minors under the age of discretion, or even to minors under the age of twenty-one who are confined expressly against law.

On the other side, the counsel in support of the habeas corpus have cited 1 Burrows, 339; 1 Strange, 579; 2 Strange, 982; 2 Burrows, 1334; 1 Strange, 641; 1 Burrows, 542, 606; 2 Burrows, 1115; 1 Burrows 687; 3 Burrows, 1434; 3 Bac. Abr. 5, 6, 15. Without referring particularly to those cases it may be remarked that they go to show a writ of habeas corpus may issue at the instance of persons other than the one confined. A husband is entitled to this writ in favor of his wife, a guardian in favor of his ward, and, of course, a father for his infant son. It seems to be granted that the writ may issue at the instance of the father in favor of an infant of tender years, viz., under the age of fourteen; but that, after that age, the child is deemed by law to have discretion enough to apply for a habeas corpus if one is necessary. This presents to the court the principal difficulty, if any exists. But in none of the cases produced does it appear that the person detained was enlisted against an express statute requiring the consent, in writing, of the parent, master, or guardian, previous to the enlistment; and from the strictest examination I have been able to give these cases I feel confident that, had the impressments been made directly against a positive law which required the cooperation of the parent, master, or guardian to make the impressment legal, the writ of habeas corpus might have issued at the instance of persons acting in either of those capacities as the case might happen to be.

In the case before me the illegality entirely consists in the want of consent of the parent in writing, and it is obvious that congress did not iutend the minor should have any discretion, either as to enlistment or discharge. The whole matter is entirely a concern of the father. Let him be discharged.

NOTE. Federal courts have jurisdiction on habeas corpus to inquire into a contract of enlistment, and to discharge minors enlisted in the army unlawfully or without consent of parents, without any application being first made to any other department of the government. In re McDonald [Case No. 8,752]; In re Keeler [Id. 7,637]; McConologue's Case, 107 Mass. 171, approving and following case in text.

Case No. 14,450.

UNITED STATES v. ANDERSON.

[2 Cranch, C. C. 157.] [1]

Circuit Court, District of Columbia. Nov. Term, 1818.

BAIL—PRISON BONDS—ACTION BY UNITED STATES.

A prisoner in execution for debt, at the suit of the United States, is entitled to the benefit of the prison bounds, upon giving sufficient security.

The defendant [James Anderson] was brought in by the marshal at the suit of the United States, upon a ca. sa. for debt; and applied for the benefit of the prison bounds, and tendered a bond with sufficient sureties.

THE COURT (THRUSTON, Circuit Judge, doubting) decided that he was entitled to the benefit of the bounds. See Acts Cong. Jan. 6, 1800, § 1 (2 Stat. 4), for the relief of persons imprisoned for debt, and March 3, 1803, §§ 16, 17 (2 Stat. 241), for the relief of insolvent debtors, within the District of Columbia.

[See Case No. 353.]

Case No. 14,451.

UNITED STATES v. ANDERSON.

[3 Cranch, C. C. 205.] [1]

Circuit Court, District of Columbia. Nov. Term, 1827.

HOMICIDE—MANSLAUGHTER—PUNISHMENT.

In 1827, manslaughter, in the District of Columbia, was punishable by fine and imprisonment.

The prisoner [Willis Anderson] was convicted of manslaughter, by killing Gerard Arnold.

Sentence, to pay a fine of $300, and to be imprisoned one year, and until the fine and costs should be paid.

Case No. 14,452.

UNITED STATES v. ANDERSON.

[4 Cranch, C. C. 476.] [1]

Circuit Court, District of Columbia.

WITNESS—TRIAL FOR FORGERY—INTEREST.

Upon an indictment for forgery, a person interested in setting aside the instrument forged, is not a competent witness to prove the forgery.

Indictment [against John Anderson] for forging an order in the name of Mr. Dorsey, who was called as a witness for the United States.

Mr. Brent, for defendant, objects, and contends that no person, interested in setting aside the instrument, is competent as a witness, to prove the forgery. 2 Russ. 374; 4 Starkie, 573, 582, 583. In those states where a contrary doctrine prevails, it is by statute; and in England there is a late statute (9 Geo. IV. c. 32) permitting such testimony; which statute would have been unnecessary if it could be permitted by the common law. Ross's Case, 2 Dall. [2 U. S.] 239; Keating's Case, 1 Dall. [1 U. S.] 110; 10 Petersd. Abr. 70.

THE COURT (hesitans) rejected the witness.

Mr. Key, for the United States, offered again to examine Mr. Dorsey, upon a collateral question, and contended that he was competent to prove any fact except that the signature is not his. Rex v. Boston, 4 East, 582.

THE COURT (nem. con.) still rejected the testimony of Mr. Dorsey, because he was offered to prove a fact tending to prove the forgery.

NOTE. See U. S. v. Porter [Case No. 16,072], in this court, in 1812, where Jenkins, the person cheated, was examined as a witness for the prosecution. 2 Hawk. P. C. 610; Rex v. Whiting, 1 Ld. Raym. 396; McNally, Ev. 105, 124; U. S. v. Maxwell [Case No. 15,749], in this court. Peake, Ev. 94; Abrahams v. Bunn, 4 Burrows, 2255; Smith v. Prager, 7 Term R. 60; Bent v. Baker, 3 Term R. 27; Respublica v. Ross, 2 Dall. [2 U. S.] 239. See Hardr. 331; 1 Salk. 283, 286; 2 Strange, 728, 1043; 1 Vent. 49; 2 Hawk. P. C. c. 46, §§ 24, 25; 2 Strange, 1229; McNally, Ev. 121; Peake, Ev. 96, 116; 4 Starkie, 770, 771; and the following cases in this court: U. S. v. Suter, Nov., 1807 [Case unreported]; Bayne's Case, Dec., 1830 [Case No. 1,146]; U. S. v. Brown, Dec., 1827 [Case No. 14,658]; U. S. v. Bates, April, 1823, and June, 1810 [Cases Nos. 14,542 and 14,543]; U. S. v. Moxley, Dec., 1812 [Id. 15,830].

UNITED STATES v. ANDERSON. See Case No. 14,672.

Case No. 14,453.

UNITED STATES v. ANDREWS.

[Cited in U. S. v. Abbott, Case No. 14,416. Nowhere reported; opinion not now accessible.]

Case No. 14,454.

UNITED STATES v. ANDREWS.

[1 Brunner, Col. Cas. 422; [1] 5 City H. Rec. 120.]

Circuit Court, S. D. New York. Sept. 15, 1820.

SLAVERY—ENGAGING IN SLAVE TRADE.

It is sufficient on an indictment for engaging in slave trade, to prove that the accused were engaged in procuring slaves, and sending them on by another vessel; it is not necessary that the vessel to which they belong should actually have had slaves on board.

The defendant [Alexander McKim Andrews] was indicted under the second section of an act of congress, passed the 10th of May, 1800 [2 Stat. 70], which is in these words: "It shall be unlawful for any citizen of the United States, or other person residing therein, to serve on board any ves-

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

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

sel of the United States, employed or made use of in the transportation or carrying of slaves from one foreign country or place to another; and any such citizen or other person, voluntarily serving as aforesaid, shall be liable to be indicted therefor; and on conviction thereof, shall be liable to a fine not exceeding two thousand dollars, and be imprisoned not exceeding two years." Gord. Dig. 421. The indictment, which contained several counts, alleged, that the prisoner, late of the city of Baltimore, mariner, and a citizen of the United States, on the 1st day of April, 1820, on the high seas, near a place called Cape Mount, on the coast of Africa, to wit, also at New York, and within the jurisdiction, etc., did, voluntarily, unlawfully, serve on board a vessel of the United States, being a schooner called the Endymion, belonging to a citizen of the United States, to the jurors unknown, employed in the transportation of slaves, from one foreign country to the jurors unknown, to some other foreign country also to the jurors unknown, against the peace and the form of the statute, etc.

Mr. Tillotson, Dist. Atty., and Mr. Bunner, for the prosecution.

Emmet & Scott, for the prisoner.

It appeared, from the testimony of Silas H. Stringham, that being attached to the Cyane sloop of war, a ship of the United States, in the capacity of lieutenant, on the 6th of April last, he boarded the Endymion, commanded by the defendant, at Cape Mount, on the coast of Africa. He found on board an American register and other papers, which he received from the mate of the vessel, in the absence of the defendant. The vessel had a berth deck, a large quantity of water, two large cabooses, and provisions, but no cargo; and the witness found in the hold a quantity of hand-cuffs. She had every appearance of a vessel engaged in the slave trade, with the equipment of which the witness was well acquainted.

Mr. Tillotson inquired of the witness, whether the defendant did not admit that he had sent slaves from the coast of Africa by another vessel.

The counsel for the defendant objected to the inquiry, and to the further prosecution of this indictment, under the evidence produced. They argued, in the first place, that the statute upon which the indictment was founded, was enacted to prohibit seamen from serving on board vessels employed in the transportation of slaves, and did not extend to the captain, inasmuch as he could not be said to serve on board any vessel, but to command others. In the second place it was insisted, that in order to constitute the offense against which the statute was enacted, it was necessary that the vessel should have been actually employed and made use of in the transportation of slaves; they should have been on board, and, to bring the defendant within the statute, the act should have been consummated previous to the capture.

The judge said that he had no doubt as to the first point raised by the counsel. The captain may as well be considered as serving on board as any of the crew. They all are serving on board under their owner or owners. With regard to the second, he thought it a grave objection, and worthy of consideration.

The counsel for the prosecution argued that the construction of the act contended for by the opposite counsel would render its provisions nugatory. By an act of 1819 [3 Stat. 532] our cruisers are authorized to seize vessels engaged in the slave trade on the coast of Africa. This act is declaratory of that upon which this prosecution is founded. If it was necessary that the slaves should be on board, that they should be transported, and that the act of transportation should be complete before the vessels could be seized, then these acts destroy themselves. The words of the act are "employed or made use of in the transportation of slaves." The word "employed" is of the same import as "engaged"; and if the vessel was engaged in any one act appertaining to the transportation of slaves, the defendant is brought within the act, and amenable to its penalties. The word "in," preceding the words "the transportation," etc., is synonymous with "for the purpose," and any inceptive act of transportation on the part of the captain or crew is sufficient.

It was insisted by the counsel for the defendant, in reply, that the word "employed" imported being actually engaged in the transportation, and the phrase "made use of" meant the completion of the act of transporting. To constitute the offense both must concur. The statute gave a locus penitentiæ, a time for repentance, before the offense of transportation was consummated.

The judge decided that if the crew of the Endymion, while she was on the coast of Africa, was engaged in procuring slaves and putting them on board any other vessel, for the purpose of transporting them to any other place, that, in his opinion, the captain and crew were amenable to the penalties of the statute, though no slaves were ever put on board the Endymion. In this point of view the testimony is admissible.

The witness proceeded to state that when he took possession of the Endymion, the defendant admitted that she was a lawful prize to the first officer of the Cyane; that he further admitted, on the passage, and after his arrival here, that he had sent home by another vessel one hundred and fifty; that he had made enough by those he had sent home to clear the owners from the loss of the vessel; and that had he not been taken, he would have cleared two hundred thousand dollars. His wages, he admitted, were two hundred dollars a month, and

those of the crew forty dollars; whereas, so the witness stated, the usual wages on board merchant vessels is but fifteen dollars a month.

It was testified to by Dr. Wiley, that after the arrival of the prisoner here, he admitted, that he had made about fifteen thousand dollars, was willing to give any lawyer two thousand dollars who would free him from his embarrassment; and that he had been inadvertently drawn into the affair at a dinner party at Baltimore.

The prosecution having rested, testimony was introduced on the part of the defendant for the purpose of showing that the Endymion was engaged in getting ivory and gold dust, and at no time had any slaves on board.

The judge said there was no proof in the case that any slaves were ever put on board; and he therefore deemed the inquiry a waste of time.

The case was summed up by respective counsel; and the several points of law, as above stated, were urged to the jury.

The judge, in his charge to the jury, instructed them that if this vessel had been fitted out for any other purpose than the transportation of slaves, it would have been in the power of the defendant to have shown it; that in the absence of all testimony on this point, the inference was strong against him; and that if they believed that the defendant and his crew had any agency, or were concerned in procuring slaves on the coast of Africa, and transporting them on board any other vessel, he came within the act, and it would be their duty to convict him.

It being late in the afternoon, the jury were directed by the judge to seal their verdict, and bring it into court in the morning. At this time eleven of the jurors returned into court, and it being proved to the court that one of them on his way to the court had fallen down in a fit, and that the state of his mind was such as to render him incapable of a discreet exercise of his duty on being polled, the court ordered the jury to be discharged, and the prisoner to be remanded for trial.

Case No. 14,455.

UNITED STATES v. ANDREWS.

[2 Paine, 451.] [1]

Circuit Court.[2]

INDICTMENT—CONCLUSION—STATUTE.

An indictment for an offence created by statute, charging the same to have been committed "in contempt of the laws of the United States of America," without referring to the statute, is bad.

The prisoner [John Andrews] was indicted for a perjury, under the thirteenth section of act of 3d March, 1825, c. 506 (7 Laws U. S. p. 397, c. 506 [4 Stat. 118]), committed while under examination as a witness, before the district judge, in the matter of an assault with a dangerous weapon charged against other parties. The indictment contained two counts, both concluding, "in contempt of the laws of the United States of America." It was moved "in limine," to quash the same, upon the ground that it did not adequately charge the offense to have been committed against any statute of the United States, and could not be sustained as at common law; and the following cases were cited in support of the motion: Com. v. Stockbridge, 11 Mass. 280; U. S. v. Davis [Case No. 14,930]; Starkie, Cr. Law, 253; 4 Bl. Comm. 119, 123.[1]

J. A. Hamilton, for the United States.

W. Q. Morton, for the prisoner.

After advisement, THE COURT, per THOMPSON, Circuit Justice, ordered that the indictment be quashed.

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [District and date not given. 2 Paine includes cases decided between 1827 and 1840.]

[1] Whether the statute be public or private, the indictment must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it: and must with certainty and precision charge him with having committed or omitted the acts constituting the offence, under the circumstances and with the intent mentioned in the statute. 1 Hale, P. C. 517, 526, 535. The defect will not be aided by verdict (2 East, 333), nor by a conclusion contra formam statuti (2 Hale, P. C. 170; Fost. Crown Law, 423, 424). See 8 Term R. 536. Nor will the fullest description and legal definition of the offence be sufficient without keeping close to the expressions of the statute (Fost. Crown Law, 424), which should be pursued in the precise and technical language used in the statute (Id.; 2 Hawk. P. C. c. 25, § 110). Thus, for rape, no expressions of force and carnal knowledge will excuse the omission of the word "ravished." 2 Hawk. P. C. c. 23, § 77. So if a statute make it criminal to do an act "unlawfully and maliciously," it must be stated to have been done "unlawfully," "Feloniously, voluntarily and maliciously," is not enough. Ryan & M. Cr. Cas. 239, 247. But where a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment will be sufficient. As if the word "knowingly" be in the statute, and the word "advisedly" substituted for it in the indictment (1 Bos. & P. 181); or the word "wilfully" in the statute, and "maliciously" in the indictment, (the words "advisedly" and "maliciously" not being also therein,) the indictment would be sufficient. Yet it is better to pursue strictly the words of the statute; as the court, in favorem vitæ, are sometimes inclined to listen to and countenance very nice distinctions upon the subject. Where the subject of the indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence, it is necessary, besides charging the offence in the words of the statute, to aver such facts and circumstances as may be necessary to bring the matter within the meaning of it. Matt. Dig. 200, 275; 2 Leach, Crown Cas. 664; 2 East, P. C. 928.

And if there be any exception contained in the same clause of the act which creates the offence, the indictment must show, negatively, that the defendant, or the subject of the indictment, does not come within the exception. Id. 275; 1 Term R. 141; 15 East, 456; 1 East, 643; 2 Leach, Crown Cas. 580, Russ. & R. 174, 321: But

UNITED STATES (ANDREWS v.). See Case No. 381

Case No. 14,456.

UNITED STATES v. The ANN.

[Cited in U. S. v. Arnold, Case No. 14,469. Nowhere reported; opinion not now accessible.]

Case No. 14,457.

UNITED STATES v. The ANNA.

[2 Am. Law Reg. 421.]

District Court, D. Maryland. Feb., 1854.[1]

SHIPPING — PUBLIC REGULATIONS — FORFEITURE — ILLEGAL NUMBER OF PASSENGERS—INTENTION—PERSONAL LUGGAGE.

1. The limitation of two passengers for every five tons of a vessel's measurement, by the 1st and 2d sections of the passenger act of 1819 [3 Stat. 488], has been repealed by the 10th section of the act of 1848 [9 Stat. 220].

2. No conviction can be had under the passenger act of 1847 [9 Stat. 127], except where an illegal number of passengers has been taken on board at a foreign port, with the intention to bring them into the United States, and where such illegal number has been actually brought in; or where an illegal number has been taken on board at a port in the United States, with the intention to transport them to a foreign port. The mere intention to violate the law, formed in a foreign country, and not completed by the illegal importation, is insufficient.

3. In the determination of the liability of a vessel, under the passenger act of 1847, the court will be guided by her custom house measurement, which has been delivered by the surveyor of the port to the master or owner of the vessel, in preference to any subsequent measurement on the part of the government.

4. The term "personal luggage," in the act of 1847, only includes wearing apparel, bed and bedding of the passengers, required for their comfort and convenience of the voyage, and does not extend to furniture, stores, or other articles not necessary for their personal convenience.

5. The principles by which the court will be guided in the determination of the cases under the passenger act of 1847.

This was a libel filed by the district attorney of the United States, to enforce a forfeiture, under the acts of congress passed in relation to passenger vessels.

William Meade Addison, U. S. Dist. Atty.

Brown & Bume, for claimants.

GILES, District Judge. The case of U. S. v. The Anna, belonging to Bremen, has received the careful consideration of the court, since its adjournment. Its trial occupied the attention of the court for twelve days, and I do but justice to the learned counsel engaged in it, when I say, that the investigation has been conducted throughout, with a learning and ability, and an industry fully commensurate to the large amount depending on its issue, and the important interests connected with it. The barque Anna was seized by the collector of this port, on the 24th of December last, for an alleged violation of the acts of congress passed in reference to passenger vessels. She was claimed to be forfeited by the 2d section of the act passed 22d February, 1847. That section reads as follows: "That if the passengers so taken on board of such vessel, and brought into, or transported from the United States aforesaid, shall exceed the number limited by the last section to the number of twenty in the whole, such vessel shall be forfeited to the United States aforesaid, &c." The said barque was also claimed to be forfeited under the 2d section of the act of 1819, entitled "An act relating to passenger ships and vessels," and which act limited the number of passengers to be carried in any vessel to two for every five tons of the custom house measurement of such vessel. The seizure was regular, and no question has been raised in reference to it. The libel in this case was filed by the attorney for the United States, to enforce the forfeiture. And I understood him to contend, 1st. That the limitation of two passengers for every five tons of the vessel's measurement has never been repealed. 2dly. That the offence consists in taking on board, at a foreign port, more than the legal number of passengers, although the vessel may not bring more into this country than the legal number. 3dly. That the court must be guided in the investigation and determination of this case by the actual measurement of the barque, made since her last arrival here, by witnesses who

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if an exception or proviso be in a subsequent clause or statute (1 Term R. 320), or although in the same section yet if it be not incorporated with the enacting clause by any words of reference (1 Barn. & Ald. 94), it is in that case matter of defence for the other party, and need not be negatived in the pleading (Matt. Dig. 275; Archb. Cr. Pl. 48. 3 Chit. Burn, Just. 456).

It is generally, but not always, sufficient, in an indictment for a misdemeanor created by statute, to describe the offence in the words of the statute. People v. Taylor, 3 Denio, 91. In an indictment for setting on foot a lottery, contrary to the statute, it is essential to specify the purpose for which the lottery was made; that being a part of the statute description of the offence. But a general statement of the purpose for which the lottery was made, is not enough. Some further description must be given where it is practicable to do so. Id.

There is no necessity to recite any public statute on which the indictment is founded; for the judges, ex officio, take notice of all public statutes. Dyer 155a; 2 Hawk. P. C. c. 25, § 100; 1 Saund. 153, note 3. But if it be recited with a material variance, and the indictment conclude "contrary to the form of the said statute," it will be fatal, though if it conclude generally, as, "contrary to the form of the statute in such case made and provided," without referring to the recited statute, the recital may be rejected as surplusage. 2 Hawk. P. C. c. 25, § 101; 6 Term R. 776. But the parts of a private act on which an indictment is framed, must be set out specially, as other facts, and a variance properly shown to the court will be fatal. 2 Hawk. P. C. c. 25, § 105. Neither the day on which a private statute was enacted, nor the title or preamble, need in any case be stated. But if set forth, it must be done with correctness, or, if the indictment conclude contrary to the statute aforesaid, the variance will be fatal. 1 Chit. Cr. Law, 277; Holt, 662; 2 Hawk. P. C. c. 25, § 106.

[1] [Affirmed in Case No. 14,458.]

have testified on the trial; and that the government is not bound by the custom house measurement of said barque, a certificate of which had been given by the surveyor of the port to the captain of said barque. 4thly. That the term "personal luggage," in the act of 1847, must be confined to such articles as are ordinarily used and required by emigrant passengers on voyages of this kind, and cannot be construed to include furniture, stores, or other articles not requisite for their personal convenience on the voyage.

During the trial, the captain of the barque was offered as a witness by the claimants, but he was objected to by the attorney for the United States on the ground of incompetency. His testimony was, however, taken, subject to the exception that the court might have time to look into the question. I have done so, and am clearly of the opinion that he is not a competent witness in a case of this kind. Whatever might be the rule of law on this subject in a proceeding in rem, instituted by a private suitor, and of which I say nothing, I think that in a case of seizure for a violation of any of our revenue or other acts of congress, where the offence consists in the wrongful act of the master of the vessel, and where the judicial sentence or decree is conclusive, not only with respect to the thing seized, but also with respect to the incidental rights and responsibilities of the parties concerned, the master is not a competent witness. And in my investigation of this case, I have not referred in any manner to the testimony of the captain.

The first law in relation to passenger vessels was passed on the 2d of March, 1819 [3 Stat. 488]. It provided, as I have stated, that no vessel should bring from any foreign port into the United States, or transport from the United States to any foreign port a greater number of passengers than two for every five tons of any ship or vessel, according to custom-house measurement. The trade of the importation of passengers was then in its infancy, and the legislators of that day never dreamed of the manner by which their good intentions would be frustrated, and the objects they sought by the enactment of that law wholly defeated. As the law contained no limit to the amount of freight to be brought in passenger vessels, and as the freight was always first taken in, it became the practice to get all the freight you could, and then crowd in the passengers afterwards. Ship fever and death was the consequence to hundreds of the victims of this imposition, until the humanity of the nation was aroused, and it appealed loudly to congress in 1847 for further legislation. That appeal was answered by the passage of the act of that year, to which I have already referred. That act came from the judiciary committee of the house, and was reported by Mr. Rathbun, of New York, no doubt after a careful review of the many facts of imposition which the history of this trade into the port of New York for several years preceding, afforded. It protected the passenger by requiring the ship owner or master to afford him a certain space of superficial feet, varying in extent, according to the deck he occupied, for the accommodation of himself and his personal luggage. But it still retained the limitation of two passengers to every five tons of the vessel's measurement. It was found in the course of that year, that in many cases where passengers were taken on board a vessel, and the space required by the act of 1847 fully given to them, their number would exceed the proportion of two to every five tons. And as congress thought that the protection given to emigrants by the act of 1847 was full and ample, if faithfully enforced, by the 10th section of the act of 1848 they repealed the limitation of the act of 1819. The attorney for the United States contends that this section only repeals "the first section of the act of 1819," and not the second section; but the first is the section that virtually contains and prescribes the limitation, and the second merely forfeits the vessel if this limitation be exceeded by the number of twenty passengers. This barque cannot, therefore, be forfeited under that act.

Now, in reference to the second point made by the learned prosecutor in behalf of the government, what are the provisions of the law of 1847? The first section of said act, leaving out for the present all that part which speaks of stores, luggage, &c., reads thus: "That if the master of any vessel, &c., shall take on board such vessel at any foreign port or place, a greater number of passengers than in the following proportion to the space occupied by them and appropriated for their use, on the lower deck or platform, one passenger for every fourteen clear superficial feet, &c., with intent to bring such passengers to the United States, and shall leave such port or place with the same, and bring the same or any number thereof, within the jurisdiction of the United States aforesaid." And the second section provides "that if the passengers so taken on board of such vessel, and brought into or transported from the United States, &c." The court thinks that under this law, no conviction can take place, except where an illegal number of passengers has been taken on board at a foreign port, with the intention to bring them into the United States, and such illegal number has been brought in, or where an illegal number has been taken on board at a port in the United States, with the intention to transport them to a foreign port. In the former case the court would have no right to convict for the mere intention formed beyond the jurisdiction of the United States. The intention must be carried out by the illegal importation into this country. Even if the law were doubtful, we should not so construe it, as to make congress vio-

late the law of nations, and attempt to punish offences committed beyond the jurisdiction of the country. But the court deems the language of the law clear, beyond all question upon this subject. The word "so" in the second section upon which the learned counsel for the United States relied to support his view, obviously refers to the "intention to bring into or transport from the United States" as mentioned and specified in the first section. In reference to the third point, to wit: By what measurement is the court to be guided in ascertaining the capacity of the vessel for passengers? it appears clear to the court, that whenever the officers of the government have measured the vessel, ascertained her capacity, and given that result to the captain upon which he has acted, the government would be bound by it. It appears by Captain Barnes' testimony, page 30, and also by the testimony of Captain McDonald, that it is the usage and practice of the officers of the government at this port, to measure all passenger vessels, where they have not been previously measured at some other port of the United States, and to give to their masters a certificate of said measurement. Now, this practice would bind the government, except where it would come in conflict with the provisions of the law on the subject. For this principle, I refer to the case of U. S. v. Fillebrow, to be found in 7 Pet. [32 U. S.] 28. But if no usage had been proved, I should still hold that the proper measurement was the one made by the surveyor of the port, and under his direction, and on which the master and owners of the vessel had acted. For, as no one is designated by the law of 1847 to make the measurement, if we do not take the custom house measurement, by what measurement shall we be guided? By the measurement in a foreign port, or by the measurement of any ship carpenter employed by the master here? We have seen enough in this case to show us that this rule would lead to great confusion. In the regulation of vessels coming into our ports, to be examined and inspected by our officers, to ascertain whether they have complied with our laws, congress must have intended that the capacity of these passenger vessels should be ascertained and declared by the same officers whose duty it may be to enforce the penalties for their violation. We must take the custom house measurement, therefore, where no part of the space usually allowed to passengers is occupied by cargo, stores, &c., but where the whole space formerly measured is not appropriated to and used by the passengers. Barnes proves that it is the practice of the boarding officer to measure the space actually occupied by them. The master must, at his peril, see that in the space actually allotted to the passengers in the particular voyage, he attempts to carry no more than that space would contain by the custom house measurement, after deducting for the spaces he may have thought proper to occupy with cargo, stores, &c. To enable him to make this calculation, it is usual for the boarding officer, when he makes his first measurement, to furnish the master with a diagram of his vessel, showing her capacity for passengers in sections. The captain of the Anna was furnished with such a diagram. By that diagram, which the captain had with him since 1851, and which was made for him by Captain Barnes, then the official measurer of vessels at this port, it appears that the two spaces forward and aft, enclosed by the supposed bulkheads, would contain 534 superficial feet, equal to 38 passengers, leaving 154 passengers for the middle space. By Captain Barnes' diagram, marked "R. C. B.," and made by request of the counsel of the claimants in this case, the middle space between the bulkheads contained 2083 superficial feet, equal to 149 passengers, and the spaces within the bulkhead contained 608 superficial feet, equal to 43 passengers. This was made from the data furnished by the custom house measurement. By Mr. Abrahams' calculation, the capacity of the vessel between the bulkheads was 2122 superficial feet, equal to 151 passengers, and the spaces behind or enclosed by the bulkhead contained 479 superficial feet, equal to 34 passengers, and making the whole number 185. By the measurement made by Messrs. McDonald, Barnes and Abrahams, it appears that the middle space contains 2074 superficial feet, equal to 148 passengers, and the spaces back and forward of the bulkheads contain 527 superficial feet, equal to 37 passengers. So that it appears by any and all of these diagrams and calculations, the middle part could not be made to contain legal space for more than 154 passengers at the outside. She then carried and brought into this country 20 over the number; and is forfeited by the act of 1847, if the court is satisfied from the testimony, that the space forward of the supposed bulkhead was not appropriated to and used by the passengers; or, at least, that space was not left there for at least one or more passengers. And here, before I discuss the testimony in reference to this part of the case, it is necessary to settle what is included in the term "personal luggage," used in the act of 1847.

The term "luggage" is used in England, as I am informed, in the same sense in which we use the word "baggage" in this country. Now, it has never been ascertained with certainty what things may or may not be included in the term "baggage"; but I should suppose it would be limited to such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and would not include merchandise or other effects. For this construction, see Story, Bailm. § 499; 9 Humph. 622; 11 Humph. 419; 5 Cush. 69; 25 Wend. 459. And more particularly is this construction required for this act, in which the word "per-

sonal" is placed before the word "luggage." Congress was aware that these emigrants frequently brought with them articles of furniture, agricultural and mechanical instruments, and determined, by the passage of this act, that none of these things should occupy a part of, or interfere with the space of the vessel which was required to be appropriated for the use of each passenger on the voyage. I shall therefore always hold, in the construction of this passenger act, that the term "personal luggage" only includes wearing apparel and bed and bedding of the passengers required for their comfort and convenience on the passage. Any other construction, it appears to me, would defeat the wise and humane views of the legislature in the enactment of the law. The learned counsel of the claimants, by the course of their examination, sought to enlarge the construction of these words, so as to include all articles which the passengers were permitted to bring in duty free. But it will be found, on an examination of the tariff act of 1846 [9 Stat. 42], that many articles are admitted with the passengers free of duty that could not come under the classification of "personal luggage" in the most liberal construction of that term.

Now, having settled the construction to be given to these words in the act of 1847, let us look at the testimony in the case. And here I approach the only part of the cause which has given me any embarrassment. The testimony is apparently contradictory—and I have felt, during my examination of this testimony, more disposed than ever, to sympathize with juries who are called upon so frequently to reconcile or draw their deductions from conflicting evidence. But in the review of this testimony, I have been guided by what I consider to be two leading rules of evidence. 1st. That in all cases of conflicting evidence, the first step in the process of inquiry should be, to ascertain whether the apparent inconsistencies which it presents, may not, without violence, be reconciled; and if not, to what extent and in what particulars, the adverse evidence is irreconcilable. And 2dly. That in case of conflict of testimony, the greater weight should be given to the testimony of those witnesses whose position gave them the best opportunity for observation.

Now, by the testimony in the case, what was the condition of the forward part of this vessel between decks on her last voyage? The government has produced ten witnesses in all, only one of whom, Dr. Pahmeyer, undertakes to speak of its condition when they left Bremer Haven and on the passage. Eight of these witnesses, Messrs. McDonald, Pickering, Williams, Winter, Bosley, Barrier, Collier and Pitts, are custom-house officers at this port, and only saw the vessel after her arrival here. And of all these, Captain McDonald is the only one who speaks of what was contained in the forward space at the quarantine. He boarded the barque on the 19th, at quarantine, but did not measure her until the 21st of December, after her arrival at the wharf. Mr. Pickering did not see her until the 23d December. Williams does not speak of the condition of the forward space until he held the line to measure the vessel on the 21st, and then he says "he did not look over the casks to see what was behind them." Bosley took no particular notice of what was forward. Collier saw nothing forward. Barrier never went below until the vessel arrived at the wharf; and then he cannot say what was behind the casks. Pitts did not examine what was behind the forward bulkhead, and Winter only saw a few casks forward. Mrs. Pahmeyer never went below until the morning of the vessel's arrival at the wharf. And Dr. Pahmeyer's testimony presents this contradiction: that when the vessel left Bremer Haven, the space forward was pretty full of tierces, chests and casks—and yet he says, that after the storm he saw a great many more there. Besides, I could not rely upon the testimony of a professional man whose memory is so treacherous that he could not recollect the names of the patients whom he had attended, or the name of the lawyer whom he had employed in what he considered an important cause. Now the claimants have proved by twelve witnesses who were in the vessel for nearly two months, and who were passengers between decks, and, therefore, must have seen this part of the barque daily, that when she left Bremer Haven, there was nothing forward but one or two passengers' chests, and that subsequently when they had left England they encountered a storm by which water got into the lower hold and wet the passengers' chests and casks that were there. They were brought up, their clothes and bedding dried, and then put forward with two casks of potatoes; but that the space was at no time full or anything near full. That they could at all times go round the casks and forward of them, and march about there for exercise. And that there was no rope or cargo there. They are confirmed in this statement by the mate and cook of the barque.

Now, may not all this testimony be reconciled without imputing perjury to any one? I think so; and I think the mate's testimony gives the key to unlock this apparent difficulty. He says, that there were a few passengers' chests forward when they left England, that more were placed there after the storm, together with the two casks of potatoes, and that after they arrived at quarantine and a part of the passengers were gone, they began to clean up between decks, and he placed in the forward space some ropes and several barrels. Albert Christopher also testifies to the placing the rope there after the arrival of the vessel. Ernest Schultze testifies that there was no rope in

that space forward on the voyage; that he left the Anna the day she came to the wharf; that he went down to the vessel the next day to get his things; that he went between decks and he took notice that the state of things about the foremast was not the same as before, different articles were taken away and other things put there that were not there before. Another witness speaks of their taking down the berths, and one of the witnesses for the government speaks of seeing boards forward between decks. They were no doubt the boards of the berths which had been taken down. Now from this testimony can the court say that this forward space was entirely occupied, and the passengers had no use of the same? It contained 262 superficial feet, equal to 18 passengers. Now, place there all the boxes of which any of the witnesses have spoken, say 30, and you would not fill but a little more than one-third of the space. Add to them the three casks, and you will still have more than half of the space vacant, or legal capacity for nine passengers. Now, can a conviction be justified upon such testimony? The burden of proof is upon the government in a case like this, and if the mind of the court is in doubt, it should not enforce the forfeiture. If this forward space had been filled up with cargo, the government could have shown it by Mr. Cole, the inspector, who discharged the vessel. They have failed to do so, and have not proved a case entitling them to a decree of forfeiture. I will therefore sign a decree dismissing the libel filed in this case.

[Affirmed by the circuit court on appeal. Case No. 14,458.]

Case No. 14,458.

UNITED STATES v. The ANNA.

[1 Taney, 549.] [1]

Circuit Court, D Maryland. Nov. Term, 1854.[2]

SHIPPING—FORFEITURE—ILLEGAL NUMBER OF PASSENGERS—FROM FOREIGN PORT—MEASUREMENT OF VESSEL—STATUTES—APPEAL.

1. The second section of the passenger act of 1819 [3 Stat. 488] is repealed by the tenth section of the act of 17th May, 1848 [9 Stat. 223].

2. The tenth section of the act of 1848, in repealing the first section of the act of 1819, regulating the number of passengers, repealed all other parts of the law which inflicted penalties and forfeitures for breaches of the rule thereby established.

3. The act of 1848 designed to repeal altogether the rule of apportionment of passengers, by tonnage, and to establish that provided by the act of 22d February, 1847, as the only one by which the ship-owner was to be governed.

4. The act of February 22d, 1847, § 1 [9 Stat. 127], provides that, if the master of a vessel shall take on board, at a foreign port or place, a greater number of passengers, in proportion to the space appropriated for their use, than is therein specified, with intent to bring such passengers to the United States, and shall leave such port or place with the same, and bring the same, or any number thereof, within the jurisdiction of the United States, the master shall be deemed guilty of a misdemeanor, and fined fifty dollars, and may be imprisoned for a term not exceeding one year. The proportion prescribed by this section is, one passenger for every fourteen clear, superficial feet on the lower deck or platform; this space to be unoccupied by stores or other goods not being the personal luggage of such passengers; if the vessel is to pass through the tropics, the proportion is required to be twenty superficial feet, instead of fourteen. The second section subjects the vessel to forfeiture, in case the passengers "so taken on board and brought into the United States," shall exceed, by twenty, the number limited in the first section: *Held*, that the words "so taken on board and brought into the United States," refer to the whole provisions of the preceding section; they refer to the entire transaction there described, to the taking on board the forbidden number, as well as to the bringing them, or any number of them, into the United States.

[Cited in U. S. v. Nicholson, 12 Fed. 524.]

5. The taking on board, the intent at the time, and the bringing into the United States, are all constituent parts of the offence; it is consummated by the entry of the vessel into one of our ports, with any portion of the passengers on board, who have been exposed to the maladies and diseases incident to an overcrowded ship on such a voyage. If congress had intended to make the offence depend upon the number brought in, and that the number taken on board should not constitute a part of it, then the words "so taken on board" ought to have been omitted.

6. The vessel is forfeited, if, when she left her European port for the United States, with one hundred and eighty-five passengers, the space occupied by them was not in the proportion of fourteen superficial feet to each passenger; and she is equally liable to forfeiture, if that proportion of the space was diminished at any time during the voyage, unless it was necessary, for a time, by the dangers of the sea.

7. The eighth section of the act of May 17th, 1848, does not repeal or modify any of the regulations of the act of 1847.

8. The two acts (1847 and 1848) relate to the same subject-matter, are intended to accomplish the same object, and must be construed together; the eighth section of the act of 1848, when it speaks of the number of passengers to be taken on board and brought into the United States, refers to the numbers provided for in the act of 1847, and makes no new provision on that subject.

9. A measurement of the vessel, and a statement placed on the files of the custom-house, specifying the number of passengers she is entitled to transport, is not conclusive upon the government, as evidence of the capacity of the vessel.

10. It is the duty of the ship-owners to know how many they can legally transport; and if the fact is disputed, it is for the judiciary to decide upon the whole testimony.

11. The question of forfeiture or not must be determined by the actual capacity of the surface appropriated to the use of the passengers.

12. Where the space occupied by certain boxes on the berth-deck of a passenger vessel, was lawfully so occupied, if the boxes contained luggage belonging to the passengers, and was unlawfully so occupied, if they did not, it is incumbent on the United States, in a proceeding for the forfeiture of the vessel, to show what was the contents of such boxes, in order that it may be

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

[2] [Affirming Case No. 14,457.]

known whether the offence operating the forfeiture has been committed.

13. The act of congress regulating the mode of transportation, is intended, not only for the protection or convenience of the passengers, but also to guard our own cities from disease, and from the burden of supporting a multitude of persons brought to our shores with their health broken on the voyage, by overcrowding them in the ship, or feeding them with unwholesome food; and when the law has regulated the manner of transportation, and prescribed the proportion which the number of passengers shall bear to the space appropriated to their use, neither their assent nor request, nor their supposed convenience, will justify the master in violating the provisions of the statute

14. In a proceeding for the forfeiture of a vessel under the passenger acts, a cause of forfeiture, not made a charge against the master and ship-owners, which is not one of the grounds upon which the forfeiture is claimed, and which was not noticed in the district court, is not properly before the circuit court, on appeal.

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

The libel in this case was filed in the district court, on the 27th of December 1853, against the barque Anna, a foreign vessel, belonging to the port of Bremen. It claimed a forefeiture of the vessel, for a violation of the acts of congress relating to the transportation of passengers to the United States from foreign countries. The forfeiture was claimed on the ground that, on the 20th day of October 1853, Heinrick Raschen, then, and up to the time of the seizure, being master of the said barque, (she being of 275 tons burden) took on board, at the port of Bremen, 235 passengers, who were above the age of one year, 231 of whom were passengers other than cabin passengers, with the intent to bring them to the United States; and did leave said port with said passengers, all of whom, with the exception of twelve who died on the voyage, were brought by the said barque into the port of Baltimore, where she arrived about the 18th of December 1853; which number of passengers, thus brought into the port of Baltimore, was an excess of more than twenty passengers over two passengers for every five tons of said barque, contrary to the provisions of the second section of the act of congress, approved the 2d of March, 1819, entitled "An act regulating passenger ships and vessels." That the space on said barque, appropriated to the said 219 passengers, other than cabin passengers, who were so brought into the port of Baltimore, and occupied by them, and unoccupied by stores and other goods, not being the personal luggage of said passengers, was only 2684 superficial feet of the lower deck or platform on which said passengers were accommodated; which number of passengers was an excess of more than twenty over one passenger for every fourteen clear superficial feet of deck so appropriated and occupied; contrary to the provisions of the second section of the act of congress approved the 22d day of February, 1847, entitled "An act to regulate the carriage of passengers in merchant vessels." That the portion of said barque appropriated, during said voyage, to 174 of the above-described passengers, other than cabin passengers, who were brought into the port of Baltimore, was between decks, and the space appropriated to them and occupied by them, and unoccupied by stores or other goods, not being the personal luggage of said passengers, was only 2054 superficial feet of the lower deck or platform on which said passengers were accommodated, and carried during said voyage; which was an excess of passengers of more than twenty over one passenger for every fourteen clear superficial feet of deck so appropriated and occupied; contrary to the provisions of the second section of the said act of congress approved the 22d day of February, 1847. That the portion of the said barque Anna, appropriated to 186 of said passengers, other than cabin passengers, received on board said barque at Bremen as aforesaid, with intent to bring the same to Baltimore as aforesaid, was between decks, and the space appropriated to them and occupied by them, and unoccupied by stores or other goods, not being the personal luggage of said passengers, was only 2054 superficial feet of the lower deck or platform on which said passengers were accommodated and carried; that twelve of said passengers died after leaving Bremen, and before her arrival in the United States; that said passengers so received at Bremen, with intent to be brought to Baltimore, were an excess of more than twenty, to wit, an excess of forty passengers over one passenger for every fourteen clear superficial feet of deck so appropriated to and occupied by said one hundred and eighty-six passengers so received at Bremen as aforesaid; contrary to the provisions of the second section of said act of congress, approved the 22d of February, 1847. The answer of Hermann von Kapff, claimant of said barque, in behalf of her owners, after stating the ownership of the barque and the illegality of her seizure, alleged that said barque belonged to the port of Bremen in Germany and was of the capacity of 383 tons. That on the 3d day of November 1853, Henry Raschen, being then and ever since, the master of said barque, she sailed from Bremer Haven, the port of Bremen, bound for Baltimore, with 234 passengers on board, of whom four were cabin passengers, forty-nine were second cabin or steerage passengers on deck, and one hundred and eighty-five were between-deck passengers; that the whole number of passengers was, as above stated, 234 and not 235, as alleged in the libel; that 230 were passengers other than cabin passengers, and not 231, as stated in the libel; and that eleven died on the passage and not twelve as stated in the libel. That all of said passengers, except those who died as above stated, were brought by said barque into the port of Bal-

timore, where she arrived about the 20th of December 1853. He admitted that said number was more than an excess of twenty passengers over two passengers for every five tons burden of said barque, but he denied that such excess was any ground of forfeiture, or in any wise contrary to law; on the contrary, he alleged and believed it to be true, that said barque was by law authorized to take and carry between-decks alone 192 passengers, as would appear by a draft of the between-decks of said barque and measurement thereof, prepared and certified to by Robert C. Barnes, measurer of the United States for the port of Baltimore, and furnished by said Barnes to Captain Raschen, and filed with the answer, and which measurement he had a right to suppose to be correct. He denied that there were 219 passengers brought in said barque into the port of Baltimore, on the lower deck or platform called the between-decks of said barque, and alleged that the number actually brought into said port of Baltimore on said lower deck was 174; but he did not believe it to be true, and therefore denied, that the space appropriated to them and occupied by them and unoccupied by stores or other goods, not being the personal luggage of said passengers, was only 2054 superficial feet of the lower deck or platform on which said passengers were accommodated and carried, during said voyage, as is charged in said libel. A voluminous mass of testimony was taken in the case, the substance of which is fully stated in the opinion of the court. The libel was dismissed by the district court [Case No. 14,457], and appeal taken to this court.

Wm. Meade Addison, for appellants.
Brown & Brune, for appellee.

TANEY, Circuit Justice. I shall affirm the decree of the district court in this case. But as it is the first that has come before this court under the acts of congress regulating the transporting of passengers, and involves several questions which have been strongly contested in the argument, it is proper that I should state fully the grounds upon which my opinion is founded.

The barque Anna sailed from Bremer Haven, in November 1853, and arrived in the port of Baltimore in the December following; she took on board at Bremer Haven, on the lower deck or platform, one hundred and eighty passengers, with intent to bring them to the United States, and left the port with that number on board; the cholera made its appearance among them on the day she sailed, and eleven passengers died on the voyage; she brought into the United States one hundred and seventy-four. Upon her arrival at the port of Baltimore, she was seized as forfeited to the United States, for a violation of the passenger laws; and it is contended on the part of the United States that she is liable to forfeiture under the acts of congress of 1819 and 1847, on account of the number of her passengers beyond those authorized by those laws.

The testimony in the case is exceedingly voluminous, and before I examine it, it is necessary to dispose of some questions of law which have been raised on the construction of these acts of congress. In relation to the act of 1819, I think it quite clear, that the libel cannot be maintained under the law. The first section prohibited any vessel from taking on board or bringing to the United States, more than two passengers for every five tons of such vessel, and inflicted certain penalties on the master and owners who should be guilty of violating this provision; and by the second section, if the number of passengers should exceed the proportion of two to every five tons, by twenty, the vessel was forfeited. But this regulation is repealed by the tenth section of the act of May 17th, 1848. It is true, the repealing clause speaks only of the first section; but it is that section which regulates the number of passengers by the tonnage of the vessel; and in repealing that regulation altogether, they certainly repealed all other parts of the law which inflicted penalties and forfeitures for breaches of the rule thereby established. It cannot be supposed that congress intended, by the repealing clause, to exempt the master and owners from the pecuniary penalty inflicted on them by the first section, for a breach of this law, and retain the heavier penalty of forfeiting the ship; such a construction would be unreasonable. It is evident that the act of 1848 designed to repeal altogether the rule of apportionment, by tonnage, and to establish the one provided by the act of February 22d, 1847, as the only one by which the ship-owner was to be governed.

The act of 1847 is supposed to present a question of more difficulty; but, after a careful examination, I think it will be found free from doubt. The first section provides that, if the master of a vessel shall take on board, at a foreign port or place, a greater number of passengers, in proportion to the space appropriated for their use, than is therein specified, with intent to bring such passengers to the United States, and shall leave such port or place with the same, and bring the same, or any number thereof, within the jurisdiction of the United States, the master shall be deemed guilty of a misdemeanor, and fined fifty dollars, and may be imprisoned for a term not exceeding one year. The proportion prescribed by this section, is one passenger only for every fourteen clear superficial feet, on the lower deck or platform, this space to be unoccupied by stores or other goods, not being the personal luggage of such passengers. If the vessel is to pass through the tropics, the proportion is required to be twenty superficial feet instead of fourteen. The second section subjects the vessel to forfeiture, in case the passengers "so taken on board and brought into the United

States," shall exceed, by twenty, the number limited in the first section.

The claimants contend that the barque cannot be condemned, although there may have been an excess of twenty passengers in proportion to the space, when she sailed, unless there was a like excess when she entered the United States, that is, that although the 185 which she took on board at Bremer Haven, may have exceeded, by twenty, the proportion to the space prescribed by the act of congress, yet she is not forfeited, unless the 174 which she brought into the United States, also exceeded, by twenty, the number which could lawfully be accommodated in the space appropriated to the use of the passengers.

But this construction cannot be maintained, either upon the grammatical or fair construction of the act of congress, or upon its evident object and policy. The words "so taken on board and brought into the United States," refer to the whole provisions of the preceding section, they refer to the entire transaction therein described, to the taking on board the forbidden number, as well as to the bringing them, or any number of them, into the United States. The taking on board, the intent at the time, and the bringing into the United States, are all constituent parts of the offence; and it is consummated, by the entry of the vessel into one of our ports, with any portion of the passengers on board, who have been exposed to the maladies and diseases incident to an overcrowded ship on such a voyage. If congress had intended to make the offence depend upon the number brought in, and that the number taken on board should not constitute a part of it, then the words "so taken on board," ought to have been omitted.

There is certainly nothing in the object and policy of the law to induce the court to restrain the operation of this clause of the statute, within narrower limits than its language naturally and justly imports. Before congress legislated upon the subject, the transportation of passengers to this country, was, in many instances, conducted in a manner that shocked the moral sense of the community; the ships were crowded to excess; the places allotted to the passengers not ventilated; and they were often, during the voyage, fed upon unwholesome food, or restricted to a very scanty allowance. The natural result was, that ships were continually arriving with contagious and infectious diseases on board; and after having lost, on the voyage, a great portion of the passengers, brought the survivors into the country, so emaciated with disease, as to become a public burden, and often introducing contagious and infectious maladies contracted on shipboard, endangering thereby the health and the lives of our own citizens

It was to prevent these evils, that congress passed the act of which we are speaking, as well as the other statutes upon the same subject. It is the duty of the court to interpret them, and execute them in the spirit in which they were enacted by the legislature; to give to the words of the law a fair and just interpretation with reference to the object intended to be accomplished; and to inflict the penalty prescribed by the act, whenever its provisions have been disregarded. The construction contended for by the claimant, would make the act perfectly nugatory; for, if the ship-owner crammed his vessel, like an African slave-trader, and fed his passengers upon food injurious to health, he would be perfectly sure, that all of those taken on board would not live to be brought within the jurisdiction of the United States; and that they would be sufficiently thinned before the voyage was over, to have, upon their arrival, the proportion of fourteen superficial feet for the number who survived. It is impossible to suppose that congress contemplated such an object, nor have they, in my judgment, used words which lead to such a conclusion; but have required that the space allotted to the passengers should be in the proportion specified in the law, when the vessel leaves the foreign port, and should be preserved throughout the voyage, in proportion to the numbers thus taken on board.

This vessel, therefore, is forfeited, if, when she took her departure from Bremer Haven, with one hundred and eighty-five passengers, the space occupied by them was not in the proportion of fourteen superficial feet to each passenger; and she is equally liable to forfeiture, if that proportion of the space was diminished, at any time during the voyage, unless it was made necessary, for a time, by the dangers of the sea.

Nor does the eighth section of the act of May 17th, 1848, repeal or modify this provision of the act of 1847. The section referred to in that act, relates entirely to the size and height of the berths; and if the construction given to it by the claimant was the true one, and it was necessary to show that the whole number of passengers taken on board, were brought in, before the vessel could be condemned under the section referred to, yet the provision extends only to the regulation of the berths, and is confined to forfeitures on that account. It does not repeal any of the regulations in the act of 1847; nor is it, in any respect, inconsistent with them. If the construction of the claimant was admitted to be the true one, the regulations of both acts would still stand, and be in force; the forfeiture under the act of 1848 being confined to the defect of the berths, and not affecting in any degree the provisions of 1847, which forfeits for the want of space for the passengers and their luggage. The act of 1848 was passed to provide additional security for the health of the passengers, and not to impair or lessen the security provided by the previous law.

But the construction given to the last-men-

tioned law by the claimant, cannot be maintained, even where the forfeiture is demanded on account of a defect in the berths. The two acts relate to the same subject-matter, are intended to accomplish the same object, and must be construed together; the eighth section of the last act, when it speaks of the numbers to be taken on board and brought into the United States, refers to the numbers provided for in the act of 1847, and makes no new provision on that subject.

These being the regulations of law upon this subject, I proceed to examine the testimony, as far as it is material to the decision of the case. There is a good deal of controversy, as to the number of superficial feet on the deck occupied by the passengers; but it is unnecessary to incumber this opinion with the multitude of figures and calculations brought forward in the testimony. It is sufficient to say, that the evidence proves to the satisfaction of the court, that the deck was large enough to accommodate one hundred and eighty-five passengers, and no more, according to the space prescribed by the act of congress. In ascertaining the superficial contents of a ship's deck, some difference will occasionally take place, where it is measured, at different times, by different persons; the width of the ship from stem to stern not being the same, the average width by which the contents are to be calculated, when ascertained by different lines in different sections of the vessel, will necessarily vary in some degree from each other. But the difference between the witnesses in this case is greater than ought to exist, if all of the measurements had been made with ordinary care and skill, and the wide difference between them shows that some must have been loosely or unskillfully made. Upon weighing the whole testimony, I think she was capable of accommodating the number of passengers above mentioned, and no more.

It appears, that some years ago a measurement was made of this vessel, and a statement placed on the files of the custom-house in Baltimore, by which she was entitled to transport one hundred and ninety-two passengers on this deck; a copy of this statement was given to the master of the barque, and on several voyages preceding the one in question, he has brought to this port the number of passengers specified in that statement, without objection. And the respondent now contends, that this certificate, thus placed in the hands of the master, and acted upon by him in former voyages, is conclusive upon the government; and that in determining whether the number taken on board in this instance exceeded, by twenty, the legal number, the capacity of the vessel ought to be rated at one hundred and ninety-two. But this point is altogether untenable. The act of congress does not authorize any particular officer to make the measurement, or to give a certificate to the master; it is the duty of the shipowners to know how many they can legally transport; and if the fact is disputed, it is for the judicial power to decide upon the whole testimony.

Indeed, if such a principle should be sanctioned by the court, it might lead to flagrant abuses. This case itself shows its evil tendency; for here is a vessel proved, upon careful measurement, to be able to accommodate legally only one hundred and eighty-five passengers, and yet the master is in possession of a certificate from an officer of the customs, founded upon some measurement made loosely, or under improper influences, which rates the capacity of the vessel at one hundred and ninety-two. And under the protection of this certificate, it appears, has been illegally crowding passengers in former voyages, and carrying on the trade, in direct contravention of the act of congress.

The question of forfeiture or not must be determined by the actual capacity of the surface appropriated to the use of the passengers. As I have already said, the whole deck of the barque Anna afforded space for one hundred and eighty-five; but a bulkhead was put up abaft the mizen mast, very soon after the vessel left Bremer Haven, and the space between this bulkhead and the stern, was filled with cargo or stores, and the passengers excluded from it. There is some controversy about the exact extent of the space thus cut off; but from the whole evidence, I think it is shown, that it contained superficial feet enough for the accommodation of fifteen passengers, according to the proportion prescribed by law. This left room for only one hundred and seventy, while one hundred and eighty-five were on board; here, then, is clearly an excess of fifteen above the legal number. But this excess does not forfeit the vessel; it must amount to five more, that is, to twenty, before a forfeiture can be claimed.

In order to show that the space was still further curtailed, it is insisted on the part of the United States, that another bulkhead was made, from one to three feet forward of the foremast, by placing hogsheads on their ends, across the ship, from side to side, so as to prevent the passengers from passing beyond it, and that the space between this bulkhead and the apron of the ship, was filled with boxes and chests, and that those boxes and chests, for the most part, if not altogether, contained cargo, and was not appropriated to the use of the passengers or their personal luggage; and if this allegation can be maintained, the vessel is undoubtedly forfeited, for this bulkhead would cut off far more than space for five passengers, and make the illegal excess placed between these bulkheads much greater than twenty.

But this allegation is denied by the respondents, and they insist, that the hogsheads spoken of were only two bread-casks, which had (after being emptied) been brought up from the hold and filled with potatoes;

that the potatoes were a part of the provisions for the voyage, and were originally placed in the hold of the vessel; but that from storms experienced during the voyage, the hold had become damp, and the potatoes were spoiling, and that they had been brought up to be picked and dried, and suffered afterwards to remain there because they were more accessible to the passengers; and that there was room on each side of them to pass forward. That the boxes and chests placed there contained the personal luggage of the passengers, with the exception of two or three boxes which contained beds or bedding, or some trifling articles of household furniture, upon which he had charged no freight; that, like the potatoes, they had become wet from the effect of severe storms, and were, at the request of the owners, brought up to dry, and suffered afterwards to remain. This is the main point in the dispute, and it has appeared to the court from the first statement of the case, that it must turn upon the decision of this part of the controversy; and many witnesses have been examined upon it by the parties, to support their respective allegations.

It is proper to observe, that there were no berths forward of the foremast; they were all between the after-bulkhead and the foremast, and there were on each side of the deck, a line of chests and boxes, in front of the berths, containing personal luggage of the passengers. But it does not, by any means, follow that these rows of chests and boxes along the berths contained all the personal luggage which passengers brought with them, and which might lawfully be placed within the space allotted to their use. Every passenger whose means would afford it, undoubtedly, brought with him apparel of a different quality, from that which he used in a rough exposure of a sea-voyage in a crowded ship; and this apparel was a part of his personal luggage which, to a reasonable amount, might legally be placed in the space appropriated to the passengers. And as the boxes and chests containing it, would not probably be opened until they arrived in port, it would be more convenient to the passengers. to place them in the forward part of the barque, than to pile them up in front of the berths. If, therefore, the hogsheads did not block up the passage to this part of the vessel, and these chests and boxes were of this description, the space in question must be regarded as actually appropriated to the use of the passengers and their personal luggage.

Now, as the United States claim the forfeiture, it is incumbent on them to prove that the offence was committed; they must prove that the articles in question, were not such as could legally be placed in the portion of the barque allotted to the use of the passengers. But I see nothing in the testimony of the witnesses, adduced on the part of the prosecution, that can be regarded as proof of this fact. The custom-house officers saw chests and boxes there, filling up the space, and a coil of rope on one of the boxes; but they did not require them to be opened; they do not know what they contained, and they appear to have looked at them in a cursory and hasty manner, merely for the purpose of ascertaining whether any passengers were concealed among them. Some of these witnesses, indeed, suppose they contained cargo, because, as they say, they remained there after the passengers had left the ship; but from the slight examination given by them to these articles, it is perfectly impossible they could, with certainty, determine whether the chests and boxes seen there afterwards, were the same that they found there when they boarded the vessel. Indeed, so slight was the examination, that it is not very clear whether there were two or three casks blocking up the way, or whether there were or were not boxes at their sides.

It would be contrary to the first principles of justice, to convict an individual of an offence upon testimony like this. It was in the power of the officers of the government, to have these boxes and chests opened; to examine their contents, and to prove positively, directly and plainly, that they did not contain the personal luggage of the passengers, if such was the fact. And with such proof within their reach, and omitting to obtain and produce it, the seizure cannot be maintained, upon testimony so vague and inconclusive as that now offered; which does not speak from the actual knowledge of the witnesses, but consists of remote and doubtful inferences, which may or may not be correct. The coil of rope of which they speak, is proved to have been placed there after the vessel came into port.

In these remarks upon the testimony in support of the seizure, I have not intended to embrace the testimony of Doctor Palmoyer, who was one of the passengers in the barque. In relation to him, it is evident, from his own testimony, that he is a man of very excitable temperament, was engaged in very violent quarrels with the master and mate of the vessel, during the passage, and gives his testimony under the influence of strong feelings of resentment. Besides, he was a passenger on the upper or spar-deck, and his knowledge of the situation of things between decks was obtained, for the most part, in occasional visits to patients to whom he was called. With his attention necessarily drawn to the sick, and without any particular motive for an attentive examination of the luggage or cargo, his recollections, at the time he gave his testimony, could not be very accurate or distinct, and would unavoidably be discolored, in his own mind, by the strong feelings under

which he was acting; without intending to impeach his integrity, or to impute to him a wilful departure from the truth, yet, it would be unsafe and unjust to act upon it; for he is in conflict with the evidence given by all the other passengers who were examined, and who had betters means of knowledge, as they were passengers between decks. Therefore, I put his testimony aside; but I doubt whether, if uncontradicted by others, and above all suspicion, it ought to be deemed, in a court of justice, sufficient to support the seizure, when, as in this case, the officers of the custom-house had it in their power to obtain positive and indisputable proof, by actual inspection, and yet have omitted to do so.

It appears, indeed, by the respondent's own showing, that some part of the space forward of the foremast was illegally occupied. Undoubtedly, he might lawfully bring up the potatoes and the household furniture of the passengers, for the purpose of drying them, after they had become damaged or wet by the storm, and he might temporarily keep them there for that purpose, but it was his duty to remove them as soon as this object was accomplished; for the ship-owners were bound to see that the ship was seaworthy, and capable of transporting her cargo and provisions without encroaching on the space appropriate to the use of the passengers. The hogsheads with potatoes, and the chests or boxes, with bed and bedding, or bureaus, or other household furniture, were certainly not the personal luggage of the passengers. Nor would their consent or supposed convenience justify this encroachment. The act of congress regulating the mode of transportation, is intended not only for the protection or convenience of the passengers, but also to guard our own cities from disease, and from the burden of supporting a multitude of persons brought to our shores with their health broken on the voyage, by overcrowding them in the ship, or feeding them with unwholesome food. And when the law has regulated the manner of transportation, and prescribed the proportion which the number of passengers shall bear to the space appropriated to their use, neither their assent nor request, nor their supposed convenience will justify the master in violating the provisions of the act of congress.

If the articles, thus illegally placed on the deck, occupied the space which the law requires for five passengers, the vessel would, undoubtedly, be subject to forfeiture; for, as the whole deck was sufficient for only the one hundred and eighty-five passengers with which she sailed, and the space for fifteen had been cut off at the stern, if the space for five more was unlawfully occupied in the forward part of the vessel, it would make the passengers exceed, by twenty, the number which could be legally taken on board, in the space occupied by them and their personal luggage.

But the space occupied by these unlawful obstructions was not measured; even the number of hogsheads, and of boxes or chests containing household furniture, is not very clearly established, and the evidence of their dimensions are loose estimates, very little better than conjecture. When the burden of proof is on the prosecution, testimony of this character is entirely insufficient to convict the party. It is very true, that the master and owners, in this case, are not entitled to any favorable construction of their acts and motives; for it is proved beyond doubt, that almost immediately after leaving Bremer Haven, he put up the bulkhead at the mizen mast, with one hundred and eighty-five passengers on board, thus wilfully and deliberately violating the act of congress, by overcrowding the space remaining for the passengers he had taken, even if his vessel had been authorized to transport one hundred and ninety-two, according to the certificate he had obtained. This curtailment of the space was not sufficiently great to forfeit the vessel, but it is quite sufficient to make it the duty of the court to scrutinize carefully his defences, and to listen with caution to the excuses he may offer, when he is professing to act by the request of the passengers, or for their convenience. Yet, however indefensible his conduct may have been, there is no evidence to justify a decree of condemnation.

It has been suggested, that the passengers brought on the spar-deck, in what was called the second cabin and the steerage, were unlawfully placed there, and that under the true construction of the acts of congress, that deck ought to be free, for exercise and fresh air, for the passengers on the deck below; and if this be the construction of the law, there was clearly an excess of more than twenty beyond the number which could be lawfully transported. But, although the libel and answer, and testimony show the number of passengers in the cabin, second cabin and steerage, on the upper or spar-deck, still this circumstance is not made a charge against the master and ship-owners; nor is the forfeiture of the ship claimed on this ground; nor was that point made in the district court. The point suggested is therefore not properly before me on this record, and I abstain from expressing any opinion upon it. Testimony as to the purposes to which the spar-deck was usually applied, when the act of 1847 was passed, may perhaps be necessary to enable the court to decide this question.

For the reasons hereinbefore stated, the decree of the district court must be affirmed.

Case No. 14,459.

UNITED STATES v. ANTHONY.

[11 Blatchf. 200; 5 Chi. Leg. News, 462, 493; 17 Int. Rev. Rec. 197; 30 Leg. Int. 266; 5 Leg. Op. 63; 20 Pittsb. Leg. J. 199.] [1]

Circuit Court, N. D. New York. June 18, 1873.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—RIGHT TO VOTE—WOMEN—QUALIFICATIONS OF VOTERS IN NEW YORK.

1. A female voted, at an election in the state of New York for a representative in the congress of the United States. Under the constitution and laws of the state of New York, none but males were authorized to vote for members of the most numerous branch of the state legislature. She possessed all the qualifications entitling a person to vote at such election, except that she was not a male. She was indicted, under section 19 of the act of May 31st, 1870 (16 Stat. 144), for knowingly voting at such election without having a lawful right to vote. On the trial it was contended, in defence, that, as she had all the qualifications required for electors of representatives in congress, by article 1, § 2, subd. 1, of the constitution of the United States (namely the qualifications requisite for electors of the most numerous branch of the state legislature), except that of being a male, the restriction of voting to males, by the constitution and laws of New York, was void, as a violation of the 14th amendment of the constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *Held*, that such restriction was not void.

[Cited in State v. Howard Co. Ct., 90 Mo. 598, 2 S. W. 790.]

2. The 13th, 14th and 15th amendments of the constitution of the United States, considered.

3. The 14th amendment defines and declares who shall be citizens of the United States, and protects only such rights as are rights belonging to persons as citizens of the United States, and not rights belonging to persons as citizens of a state.

4. The rights of citizens of a state defined.

5. The right or privilege of voting is one arising under the constitution of the state, and not under the constitution of the United States.

[Cited in Kinneen v. Wells, 144 Mass. 498, 11 N. E. 919.]

6. It is no defence to such indictment, that the defendant believed she had a right to vote, and voted in reliance on that belief.

[Cited in U. S. v. Watkinds, 6 Fed. 154; The Ambrose Light, 25 Fed. 426.]

7. The defendant, knowing that she was a female, and that the constitution of New York prohibited her from voting, and having voted, the court refused to submit to the jury the question whether she intended, by voting, to violate the statute, or any other question, and directed the jury to find a verdict of guilty, and denied a request, by the defendant's counsel, that the jury be polled. *Held*, on a motion for a new trial, that such direction was proper, and not a violation of the right of trial by jury.

8. On the trial of an indictment, the court has the power, and it is its duty, to direct a verdict of guilty, whenever the facts constituting guilt are undisputed.

[Cited in U. S. v. Babcock, Case No. 14,486. Disapproved in U. S. v. Taylor, 11 Fed. 471.]

[Cited in State v. Burpee, 65 Vt. 3, 25 Atl. 964. Disapproved in Territory v. Kee (N. M.) 25 Pac. 926.]

The defendant [Susan B. Anthony], a female, was indicted for a violation of the 19th section of the act of May 31st, 1870 (16 Stat. 144), which provides, "that if, at any election for representative * * in the congress of the United States, any person shall knowingly * * vote without having a lawful right to vote, * * every such person shall be deemed guilty of a crime, and shall, for such crime, be liable to prosecution in any court of the United States of competent jurisdiction, and, on conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or both, in the discretion of the court, and shall pay the costs of prosecution." The trial took place before HUNT, Circuit Justice, and a jury. There was no dispute that the defendant had voted for a representative in the congress of the United States at an election therefor, in Rochester, Monroe county, New York, and that, under the constitution and laws of the state of New York, none but males were authorized to vote at an election for members of the most numerous branch of the state legislature, and that the defendant possessed all the qualifications entitling a person to vote at such election, except that she was not a male.

Richard Crowley, Dist. Atty., for the United States.

Henry R. Selden, for defendant.

HUNT, Circuit Justice, after argument had been heard on the legal questions involved, ruled as follows:

The defendant is indicted under the act of congress of May 31st, 1870, for having voted for a representative in congress, in November, 1872. Among other things, that act makes it an offence for any person knowingly to vote for such representative without having a lawful right to vote. It is charged that the defendant thus voted, she not having a right to vote, because she is a woman. The defendant insists that she has a right to vote; and that the provision of the constitution of this state, limiting the right to vote to persons of the male sex, is in violation of the fourteenth amendment of the constitution of the United States, and is void.

The thirteenth, fourteenth and fifteenth amendments were designed mainly for the protection of the newly emancipated negroes, but full effect must, nevertheless, be given to the language employed. The thirteenth amendment provides, that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 17 Int. Rev. Rec. 197, 5 Chi. Leg. News, 462, 30 Leg. Int. 266, and 20 Pittsb. Leg. J. 199, contain only partial reports.]

the United States or any place subject to their jurisdiction." If honestly received and fairly applied, this provision would have been enough to guard the rights of the colored race. In some states it was attempted to be evaded by enactments cruel and oppressive in their nature—as, that colored persons were forbidden to appear in the towns, except in a menial capacity; that they should reside on and cultivate the soil without being allowed to own it; that they were not permitted to give testimony in cases where a white man was a party. They were excluded from performing particular kinds of business, profitable and reputable, and they were denied the right of suffrage. To meet the difficulties arising from this state of things, the fourteenth and fifteenth amendments were enacted.

The fourteenth amendment creates and defines citizenship of the United States. It had long been contended, and had been held by many learned authorities, and had never been judicially decided to the contrary, that there was no such thing as a citizen of the United States, except as that condition arose from citizenship of some state. No mode existed, it was said, of obtaining a citizenship of the United States, except by first becoming a citizen of some state. This question is now at rest. The fourteenth amendment defines and declares who shall be citizens of the United States, to wit, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." The latter qualification was intended to exclude the children of foreign representatives and the like. With this qualification, every person born in the United States or naturalized is declared to be a citizen of the United States and of the state wherein he resides.

After creating and defining citizenship of the United States, the fourteenth amendment provides, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." This clause is intended to be a protection, not to all our rights, but to our rights as citizens of the United States only; that is, to rights existing or belonging to that condition or capacity. The expression, citizen of a state, used in the previous paragraph, is carefully omitted here. In article 4, § 2, subd. 1, of the constitution of the United States, it had been already provided, that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The rights of citizens of the states and of citizens of the United States are each guarded by these different provisions. That these rights are separate and distinct, was held in the Slaughterhouse Cases, 16 Wall. [83 U. S.] 36, recently decided by the supreme court. The rights of citizens of the state, as such, are not under consideration in the fourteenth amendment. They stand as they did before the adoption of the fourteenth amendment, and are fully guaranteed by other provisions. The rights of citizens of the states have been the subject of judicial decision on more than one occasion. Corfield v. Coryell [Case No. 3,230]; Ward v. Maryland, 12 Wall. [79 U. S.] 418, 430; Paul v. Virginia, 8 Wall. [75 U. S.] 168. These are the fundamental privileges and immunities belonging of right to the citizens of all free governments, such as the right of life and liberty, the right to acquire and possess property, to transact business, to pursue happiness in his own manner, subject to such restraint as the government may adjudge to be necessary for the general good. In Crandall v. Nevada, 6 Wall. [73 U. S.] 35, 44, is found a statement of some of the rights of a citizen of the United States, viz., to come to the seat of government to assert any claim he may have upon the government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions, and to have free access to its seaports, through which all the operations of foreign commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several states. "Another privilege of a citizen of the United States," says Mr. Justice Miller, in the Slaughterhouse Cases [supra], "is to demand the care and protection of the federal government over his life, liberty, and property, when on the high seas or within the jurisdiction of a foreign government." "The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus," he says, "are rights of the citizen guaranteed by the federal constitution."

The right of voting, or the privilege of voting, is a right or privilege arising under the constitution of the state, and not under the constitution of the United States. The qualifications are different in the different states. Citizenship, age, sex, residence, are variously required in the different states, or may be so. If the right belongs to any particular person, it is because such person is entitled to it by the laws of the state where he offers to exercise it, and not because of citizenship of the United States. If the state of New York should provide that no person should vote until he had reached the age of thirty years, or after he had reached the age of fifty, or that no person having gray hair, or who had not the use of all his limbs, should be entitled to vote, I do not see how it could be held to be a violation of any right derived or held under the constitution of the United States. We might say that such regulations were unjust, tyrannical, unfit for the regulation of an intelligent state; but, if rights of a citizen are thereby violated, they are of that fundamental class, derived from his position as a citizen of the state, and not those limited rights belonging to him as a citizen of the United States; and such was the decision in Corfield v. Coryell [supra].

The United States rights appertaining to this subject are those, first, under article 1, § 2, subd. 1, of the United States constitution, which provides, that electors of representatives in congress shall have the qualifications requisite for electors of the most numerous branch of the state legislature; and second, under the fifteenth amendment, which provides, that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude." If the legislature of the state of New York should require a higher qualification in a voter for a representative in congress than is required for a voter for a member of the house of assembly of the state, this would, I conceive, be a violation of a right belonging to a person as a citizen of the United States. That right is in relation to a federal subject or interest, and is guaranteed by the federal constitution. The inability of a state to abridge the right of voting on account of race, color, or previous condition of servitude, arises from a federal guaranty. Its violation would be the denial of a federal right—that is, a right belonging to the claimant as a citizen of the United States. This right, however, exists by virtue of the fifteenth amendment. If the fifteenth amendment had contained the word "sex," the argument of the defendant would have been potent. She would have said, that an attempt by a state to deny the right to vote because one is of a particular sex is expressly prohibited by that amendment. The amendment, however, does not contain that word. It is limited to race, color, or previous condition of servitude. The legislature of the state of New York has seen fit to say, that the franchise of voting shall be limited to the male sex. In saying this, there is, in my judgment, no violation of the letter, or of the spirit, of the fourteenth or of the fifteenth amendment.

This view is assumed in the second section of the fourteenth amendment, which enacts, that, if the right to vote for federal officers is denied by any state to any of the male inhabitants of such state, except for crime, the basis of representation of such state shall be reduced in a proportion specified. Not only does this section assume that the right of male inhabitants to vote was the especial object of its protection, but it assumes and admits the right of a state, notwithstanding the existence of that clause under which the defendant claims to the contrary, to deny to classes or portions of the male inhabitants the right to vote which is allowed to other male inhabitants. The regulation of the suffrage is thereby conceded to the states as a state's right.

The case of Bradwell v. State, 16 Wall. [83 U. S.] 130, decided at the recent term of the supreme court, sustains both of the positions above put forth, viz., first, that the rights referred to in the fourteenth amendment are those belonging to a person as a citizen of the United States and not as a citizen of a state; and second, that a right of the character here involved is not one connected with citizenship of the United States. Mrs. Bradwell made application to be admitted to practice as an attorney and counsellor at law in the courts of Illinois. Her application was denied, and, upon a writ of error, it was held by the supreme court, that, to give jurisdiction under the fourteenth amendment, the claim must be of a right pertaining to citizenship of the United States, and that the claim made by her did not come within that class of cases. Justices Bradley, Swayne, and Field held that a woman was not entitled to a license to practice law. It does not appear that the other judges passed upon that question. The fourteenth amendment gives no right to a woman to vote, and the voting by Miss Anthony was in violation of law.

If she believed she had a right to vote, and voted in reliance upon that belief, does that relieve her from the penalty? It is argued, that the knowledge referred to in the act relates to her knowledge of the illegality of the act, and not to the act of voting; for, it is said, that she must know that she voted. Two principles apply here: First, ignorance of the law excuses no one; second, every person is presumed to understand and to intend the necessary effects of his own acts. Miss Anthony knew that she was a woman, and that the constitution of this state prohibits her from voting. She intended to violate that provision—intended to test it, perhaps, but, certainly, intended to violate it. The necessary effect of her act was to violate it, and this she is presumed to have intended. There was no ignorance of any fact, but, all the facts being known, she undertook to settle a principle in her own person. She takes the risk, and she can not escape the consequences. It is said, and authorities are cited to sustain the position, that there can be no crime unless there is a culpable intent, and that, to render one criminally responsible a vicious will must be present. A. commits a trespass on the land of B., and B., thinking and believing that he has a right to shoot an intruder upon his premises, kills A. on the spot. Does B.'s misapprehension of his rights justify his act? Would a judge be justified in charging the jury, that, if satisfied that B. supposed he had a right to shoot A., he was justified, and they should find a verdict of not guilty? No judge would make such a charge. To constitute a crime, it is true that there must be a criminal intent, but it is equally true that knowledge of the facts of the case is always held to supply this intent. An intentional killing bears with it evidence of malice in law [and a desire to promote the welfare of the deceased by his translation to a better world would be no justification of the act, were it committed by a

sane man].[2] Whoever, without justifiable cause, intentionally kills his neighbor, is guilty of a crime. The principle is the same in the case before us, and in all criminal cases. The precise question now before me has been several times decided, viz., that one illegally voting was bound and was assumed to know the law, and that a belief that he had a right to vote gave no defence, if there was no mistake of fact. Hamilton v. People, 57 Barb. 625; State v. Boyett, 10 Ired. 336; State v. Hart, 6 Jones, 389; McGuire v. State, 7 Humph. 54; State v. Sheeley, 15 Iowa, 404. No system of criminal jurisprudence can be sustained upon any other principle. Assuming that Miss Anthony believed she had a right to vote, that fact constitutes no defence, if, in truth, she had not the right. She voluntarily gave a vote which was illegal, and thus is subject to the penalty of the law.

Upon the foregoing ruling, the counsel for the defendant requested the court to submit the case to the jury on the question of intent, and with the following instructions: (1) If the defendant, at the time of voting, believed that she had a right to vote, and voted in good faith in that belief, she is not guilty of the offence charged. (2) In determining the question whether the defendant did or did not believe that she had a right to vote, the jury may take into consideration, as bearing upon that question, the advice which she received from the counsel to whom she applied, and, also, the fact, that the inspectors of the election considered the question and came to the conclusion that she had a right to vote. (3) The jury have a right to find a general verdict of guilty or not guilty, as they shall believe that the defendant has or has not committed the offence described in the statute.

THE COURT declined to submit the case to the jury, on any question, and directed the jury to find a verdict of guilty. A request, by the defendant's counsel, that the jury be polled, was denied by THE COURT, and a verdict of guilty was recorded. On a subsequent day, a motion for a new trial was made, on the part of the defendant, before HUNT, Circuit Justice.

HUNT, Circuit Justice, in denying the motion, said, in substance:

The whole law of the case has been reargued, and I have given the best consideration in my power to the arguments presented. But for the evident earnestness of the learned counsel for the defendant, for whose ability and integrity I have the highest respect, I should have no hesitation. Still I can entertain no doubt upon any point in the case. I do not doubt the correctness of my decision, that the defendant had no right to vote, and that her belief that she had a right to vote, she knowing all the facts and being presumed and bound to know the law, did not relieve her from the penalty for voting, when in truth she had no right to vote.

The learned counsel insists, however, that an error was committed in directing the jury to render a verdict of guilty. This direction, he argues, makes the verdict that of the court and not of the jury, and it is contended that the provisions of the constitution looking to and securing a trial by jury in criminal cases have been violated.

The right of trial by jury in civil as well as in criminal cases is a constitutional right. The second section of the first article of the constitution of the state of New York provides, that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever." Articles six and seven of the amendments to the constitution of the United States contain a similar provision. Yet, in cases where the facts are all conceded, or where they are proved and uncontradicted by evidence, it has always been the practice of the courts to take the case from the jury and decide it as a question of law. No counsel has ever disputed the right of the court to do so. No respectable counsel will venture to doubt the correctness of such practice, and this in cases of the character which are usually submitted to a jury. People v. Cook, 4 Seld. [8 N. Y.] 67; Godin v. Bank of Commonwealth, 6 Duer, 76. The right of a trial by jury in a criminal case is not more distinctly secured than it is in a civil case. In each class of cases this right exists only in respect of a disputed fact. To questions of fact the jury respond. Upon questions of law, the decision of the court is conclusive, and the jury are bound to receive the law as declared by the court. People v. Bennett, 49 N. Y. 137, 141. Such is the established practice in criminal as well as in civil cases, and this practice is recognized by the highest authorities. It has been so held by the former supreme court of this state, and by the present court of appeals of this state.

At a circuit court of the United States, held by Judges Woodruff and Blatchford, upon deliberation and consultation, it was decided, that, in a criminal case, the court was not bound to submit the case to the jury, there being no sufficient evidence to justify a conviction, and the court accordingly instructed the jury to find a verdict of not guilty. U. S. v. Fullerton [Case No. 15,176]. The district attorney now states, that, on several occasions, since he has been in office, Judge Hall, being of opinion that the evidence did not warrant a conviction, has directed the jury to find a verdict of not guilty.

In the case of People v. Bennett, 49 N. Y. 137, 141, the court of appeals of the state of New York, through its chief justice, uses the following language: "Contrary to an opinion formerly prevailing, it has been settled that the juries are not judges of the law, as well

[2] [From 17 Int. Rev. Rec. 197.]

as the facts, in criminal cases, but that they must take the law from the court. All questions of law during the trial are to be determined by the court, and it is the duty of the jury to regard and abide by such determination. * * * I can see no reason, therefore, why the court may not, in a case presenting a question of law only, instruct the jury to acquit the prisoner, or to direct an acquittal, and enforce the direction, nor why it is not the duty of the court to do so. This results from the rule, that the jury must take the law as adjudged by the court, and I think it is a necessary result."

In these cases the question, in each instance, was, whether the court had power to direct a verdict of not guilty to be rendered. But the counsel for defendant expressly admits that the authority which justifies a direction to acquit will, in a proper case, justify a direction to convict; that it is a question of power; and that, if the power may be exercised in favor of the defendant, it may be exercised against him. As I now state this proposition, the counsel again signifies his assent. The reason given by Chief Justice Church in the case just cited, shows that there is no distinction between the cases in this respect. He says the rule results from the principle, that the jury must take the law from the court The duty of the jury to take the law from the court is the same, whether it is favorable to the defendant, or unfavorable to him.

It is laid down in Colby, Cr. Law, c. 12, § 125, that no jury shall in any case be compelled to give a general verdict, so that they find the facts and require the court to give judgment thereon. 2 Rev. St. c. 421, § 68. "A special verdict is given when the jury find certain facts to exist, and leave the court to determine whether, according to law, the prisoner is guilty." "It is not necessary that the jury should, after stating the facts, draw any legal conclusion. If they do so, the court will reject the conclusion as superfluous, and pronounce such judgment as they think warranted by the facts." Colby, Cr. Law, c. 12, § 125.

All the authorities tend to the same result. It is the duty of the jury to act upon the facts. It is the duty of the court to decide the law. The facts being specially found by the jury, it is the duty of the court, and not of the jury, to pronounce the judgment of guilty or not guilty. The facts being fully conceded, it is the duty of the court to announce and direct what the verdict shall be, whether guilty or not guilty. Therefore, I cannot doubt the power and the duty of the court to direct a verdict of guilty, whenever the facts constituting guilt are undisputed.

In the present case, the court had decided, as matter of law, that Miss Anthony was not a legal voter. It had also decided, as matter of law, that, knowing every fact in the case, and intending to do just what she did, she had knowingly voted, not having a right to vote, and that her belief did not affect the question. Every fact in the case was undisputed. There was no inference to be drawn or point made on the facts, that could, by possibility, alter the result. It was, therefore, not only the right, but it seems to me, upon the authorities, the plain duty of the judge to direct a verdict of guilty. The motion for a new trial is denied.

The defendant was thereupon sentenced to pay a fine of $100 and the costs of the prosecution.

Case No. 14,460.

UNITED STATES v. ANTHONY.

[14 Blatchf. 92.] [1]

Circuit Court, S. D. New York. Jan. 15, 1877.

INTERNAL REVENUE—ILLEGAL REMOVAL OF SPIRITS.

An indictment, under section 3296 of the Revised Statutes, which charges a removal of a certain quantity of "distilled spirits" on which the tax had not been paid, to a place other than the distillery warehouse, is good.

This was an indictment, under section 3296 of the Revised Statutes, and charged a removal of a certain quantity of "distilled spirits," on which the tax had not been paid, to a place other than the distillery warehouse. The defendant [James Anthony] demurred to the indictment, on the ground that it did not charge any offence.

Roger M. Sherman, Asst. Dist. Atty.

Thomas Harland, for defendant.

BENEDICT, District Judge. While, in a strictly chemical sense, the terms "ethyl alcohol" and "spirits of wine" are generic terms, and the term "distilled spirits," as defined by [Rev. St. U. S.] § 3248, when used in that sense, would be generic, and not necessarily confined to the product of distillation, still, the term "distilled spirits" has also an ordinary and literal meaning, which implies distillation, and, when it is used in the latter sense, it is confined to the product of distillation. It is so used in section 3296 and in this indictment. Consequently, the indictment shows the subject-matter to be subject to tax, under section 3254, and is good.

Case No. 14,461.

UNITED STATES v. The ANTHONY MANGIN.

[2 Pet. Adm. 452.] [2]

District Court, D. Pennsylvania. 1802.

FORFEITURE—SHIPPING—ILLEGAL REGISTRY—INNOCENT PURCHASER.

The ship Anthony Mangin had been registered as an American vessel, when she belonged in part to a foreigner. She was afterwards sold for a valuable consideration to a person ignorant

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

[2] [Reported by Richard Peters, Jr., Esq.]

of the fraud which had been committed, and was afterwards libelled as forfeited to the United States.

[Cited in U. S v. The Laurel, Case No. 15,569.]

PETERS, District Judge. The proceeding being in rem, all the world become parties to the sentence, as far as the right of property is involved; and of course all persons in any wise interested in the property in question, are admissible to claim and defend their interests. The libel states the cause of action with all the averments necessary to support the affirmative allegation that a forfeiture has accrued.[2] The only claimant intervening in this cause is T. W. Norman, who alleges himself to be a bona fide purchaser for a valuable consideration, ignorant of any cause of forfeiture existing at the time of the purchase; and under such purchase, i. e. bona fide and for a valuable consideration claiming the property as exonerated from the cause of forfeiture alleged, even if the facts stated to sustain the same be true, which he in no wise admits. On these proceedings several questions of law have been raised and argued by the counsel; and as the great point does not appear to have ever received either in this country or in Great Britain any direct judicial determination, I have with great diligence examined into the question, which from the breaking of the cause, I saw must necessarily be involved in the determination.

The opinion which I am now to give as the result of more than usual investigation, is delivered with the diffidence which will ever attend the determination of an inferior court upon a new, great and important legal question, and which will probably receive, as it ought, the ultimate judgment of the supreme court. It is necessary to keep in different views the questions of fact in issue, the questions of law arising from these facts, and the parties between whom they arise. It is to be distinctly remembered, that A. Brown whose wilful perjury is alleged to sustain the forfeiture sued for, is no party to the suit; neither are his assignees in any shape parties to this suit to be directly affected by the judgment. Every consideration, therefore, which would be in support of a prosecution against the actual offender, to recover the penalty of his wilful crime, or which might be alleged against those who stand in his situation as privies in law quoad the forfeiture must be laid out of the case.

The only parties to this suit are the United States and the informant as libellants, and T. W. Norman as claimant of the ship. And I think it peculiarly necessary to confine my opinion to the state of facts, and questions of law, applying to the parties in court, because it is not necessary for me to decide whether the assignees of A. Brown are clothed with any of the essential characters of a fair purchaser, or have, so far as relates to the property, any privilege or exemption which Brown himself would not have had, and the question de bona fide emptoris, does arise directly upon Captain Norman's claim. To that I shall, therefore, immediately proceed. No seizure was made or libel filed against the ship until after Brown's bankruptcy, and a sale by his assignees to the claimant, who is admitted to be an innocent purchaser for a valuable consideration. Nor until after he had obtained a new register in his own name upon that purchase.

It is argued by the libellants' counsel that Brown was not competent to pass any property to his assignees, nor they to any purchaser under them, as the forfeiture relates back to vest the property from the time of the false oath; and that the libellants' claim is therefore paramount to that of the claimant. The defendant's counsel argue in support of his claim, that the relation back to the time of the offence is never admitted to overreach rights intermediately acquired by third persons.

In commenting on the case from 1 Durn. & E. [Term R.] 252, when the argument was first opened, Mr. Martin pressed very strongly the dictum of Lord Kenyon, that if the relation back to the time of an offence, was admitted as to the property, it would in every case equally relate as to the profits intermediately acquired. If the reason assigned was true, it certainly furnished one of the strongest cases for applying the argument, ab inconvenienti, and as such I was forcibly struck with it when mentioned. The manner in which Lord Kenyon is reported to have made this observation, plainly shews it to have been the declaration of a sudden impression; and which, though correct as applied to some special cases, is not so in the latitude reported, either at common law, the civil law, or in equity, supported by policy. 3 Bac. Abr. 272; Co. Litt. 390b, 118a. First. At common law, even as to the guilty party, no attainder whatsoever has relation as to the mesne profits of lands, but only from the time of the attainder. Second. By the civil law, and the rules of equity adopted from that code, a subsequent possessor is not only in a worse situation than those from whom he derives his possession, but even in cases where the original possessor might be bound to restore profits, a bona fide possessor is exempt from any obligation to restore such profits, as in the case of a bona fide purchaser. "Bona fide emptor, non dubie percipiendo fructus etiam ex re aliena, interim suos faciat, non tantum eos qui ex diligentia, et opera ejus proveniunt sed omnes, quia quod ad fructum attinet loco domini est." Third. It would not be equitable or just, in the abstract, to permit a legal owner to lay by to avail himself of the ignorance of an innocent holder; and the same considerations of policy, which in England permits the offender and his family to enjoy the profits of

[2] See note at end of case.

lands forfeited for treason, which is a strong and acknowledged case of relation to the offence, lest land should be uncultivated, and the public interest thereby suffer, applies conclusively to every case where it may be doubtful whether the relation is to the offence, or only to the time of the conviction. 2 Inst. 48; Hardr. 87; 4 Com. Dig. "Forfeiture," B. 4.

As this reason against relation does not appear to have the force it carried at first view, we must have recourse, first, to the principles of decisions in analogous cases, in their application always having regard, as was justly argued by Mr. Harper (on the motion to produce Brown's examination before the commissioners) that a relation back shall never be permitted to injure the rights of third persons, nor to protect or favor wrong: and secondly, to the statute under which the forfeiture is claimed in this case. The adjudged cases on this subject are six classes of offences, which incur a forfeiture of real estate (2 Brown, Ch. 267), and seventeen which produce a forfeiture of personal property (Id. 421). In this numerous classification the principle which governs each description of cases does not materially differ. I have, therefore, only selected the cases of, and attainder of crimes, as illustrative of these cases; second, waived goods; third, relation of executions at common law (5 Coke, 170a; 2 Bac. Abr. p. 318), and since the statute of Charles; and, fourth, as involving the general doctrine of this case, and to explain the case cited by Mr. Harper (Roberts v. Wetherall, 5 Mod. 193, Salk. 223; 2 Bac. Abr. 318), from a case of villenage which governed that decision.

First. Attainder or conviction of crimes and outlawry. Of this description there are two classes, which are adjudged to have relation to the time of the offence committed, and over-reach all intermediate alienations, treason and felo de se. The case of treason in which the forfeiture relates, as to land, to the time of the offence committed, depend upon feudal principles; as the land could not be alienated by the tenant voluntarily, it would be preposterous to admit that to be done through the medium of a crime, which could not be done by a lawful act; and the power to sell introduced by subsequent statutes, is considered as applying only to lawful alienations. 5 Bac. Abr. 228; Hale, P. C. 261, 262. The reason assigned in some books, that it shall relate to the offence, because "the indictment contains the year and day when it was done," is by no means true or satisfactory, since that would apply equally to personal property, which the same books admit is only affected from the time of the conviction (3 Bac. Abr. 271; Plowd. 488; 5 Coke, 170); and the time charged is traversable even in the case of land by the third persons claiming an interest therein (Hale, P. C. 264, 270; 3 Inst. 230). It is a proposition universally true, that the forfeiture upon an attainder for treason, relates but to the conviction, as to chattels: unless the case of the offender killed in resisting, or flight, form an exception, which may well be doubted. 3 Bac. Abr. 271; Perk. § 29. Indeed, says Lord Coke (5 Coke, 171), it hath always been holden that any one indicted or appealed of treason or felony, may bona fide, sell any of his chattels, real or personal. Jones v. Ashurt, Skin. 357; 4 Com. Dig. "Forfeiture," B, 4; 2 Inst. 48. In the case of a felo de se, it is stated, that the forfeiture has relation to the time of the mortal wound given, so that all intermediate alienations are avoided. 3 Bac. Abr. 272. This is the only case I have ever discovered in which the doctrine of relation has been so far extended. If the principle of that determination is sound, and it is applicable to other cases, it is a drag-net indeed. It may perhaps, most correctly be considered as a cause sui generis, and neither for the reasons which are assigned to maintain it, nor the doctrine it supports, applicable to other cases. Those who are curious on this subject will be amused with the argument of Chief Justice Dyer on the drowning of Sir J. Hales, and will probably be as much convinced by the reasoning of the chief justice (Plowd. 262), as by the logic of the gravedigger in Hamlet, to prove that the drowning of Ophelia was se defendendo. Outlawry subjects the party to forfeitures which, as are well known, depend upon the nature of the suit upon which they are prosecuted. Without enquiring when an office is necessary or may be dispensed with by the crown, I shall mention one case (5 Bac. Abr. 564), where even after an outlawry (of which purchasers might always have notice as it is a matter of record) a fair purchaser was protected even against the crown. It is Attorney General v. Freeman, Hardr. 101, Salk. 395, Carth. 442. A. was outlawed, and afterwards made a lease of his lands, and afterwards these lands were found amongst others by inquisition, and this lease was pleaded in bar to bind the king, being before the inquisition: the court held that a lease or other estate, made by the party after outlawry and before an inquisition taken, will prevent the king's title, if it be made bona fide upon good consideration: but if it be made in trust for the party only, it will not be a bar; but that no conveyance whatsoever, made after the inquisition, will take away or discharge the king's title.

These cases are strong to shew the general protection afforded by law to fair purchasers, even where the forfeiture is in rem, and the offender is not actually divested of his possession; the necessity of which is directly affirmed in the second description of cases to which I have alluded, to wit: Second. Waived goods. As to waived goods, these belong to the king, and are in him without any office, for the property is in nobody. They may belong in like manner to

the lord of a manor by grant, but not by prescription. The general principle of these cases is conformable to that quoted by Mr. Harper (5 Bac. Abr. 517; 5 Coke, 109) to shew that an offence like that charged against Brown, divested the property out of him, and left it, as it were, in abeyance until suit, which vested the property by relation, from the act of forfeiture. A position of greater comprehension, or which, as a general rule, should embrace the libellant's case, could scarcely be imagined. Waived goods are in the king without office, that is, even without seizure, the purpose of which is answered as to legal title to the king, by the office. 12 Mod. 92. The property is as it were in abeyance, yet this case, so completely applicable in its general principles contains "the strongest possible illustration of the doctrine that a title by forfeiture in the case of a personal chattel, begins from suit, seizure or conviction, and has no relation back (5 Bac. Abr. 517, cites, 21, 2, 4; Ed. 4, 16; 16 Kitchen, 82); for the owner may at any time retake the goods waived, if they are not seized by the king, or the lord of the manor; for the lord's property begins from the seizure." This case is conclusive against Mr. Hollinsworth's argument, that the question is a question of property only, since it proves that property only begins from the seizure, which cannot be lawfully made, to affect an intermediately vested right of a third person.

Third. The relation of executions, at common law, and since the statute, considering this case as one between the government and the claimant, from analogy to cases of the king's precedency in execution. By the statute of 33 Hen. VIII. c. 39, it is enacted, that if any suit be commenced or taken, or any process awarded, for the recovery of any of the king's debts, then the same suit or process shall be preferred before any person or persons. 2 Bac. Abr. 73, 4, etc. And as the king's execution of goods, the same relates to the time of awarding thereof, which is the test of the writ, as it was in the case of a common person at common law. Now to apply the doctrine to the case before the court, and even admitting to this libel the same extent of relation, as is admitted at common law upon the king's execution against personal chattels, and as to real and personal, by the above recited statutes—will it overreach the sale to Capt. Norman? 2 Bac. Abr. 735. It is generally agreed that an execution executed though posterior to the time to which the king's extent relates, bars the king's priority; and in the case of Letchmere v. Thorowgood, 3 Mod. 236 (Com. Dig. C, 12 Z), it was holden, that if the king's extent be sued out posterior to a judgment recovered by a subject, and a writ of execution thereon delivered to the sheriff, though not executed, the king shall be postponed, for the property of the goods is changed by the subject's execution. Here then we advance one step further in restricting the doctrine of relation, as it applies to individual interests. It is presumed that the principle of relation upon executions since the statute, is too familiar to require any reference to adjudged cases.

Fourth. The case of Roberts v. Wetherall, as reported by Salkeld and copied by Bacon, is in these words. "By the act of navigation (12 Car. II. c. 18), certain goods are prohibited to be imported here, under pain of forfeiting them, one part to the king, another to him or them that will inform, seize, or sue for the same." 2 Bac. Abr. 318; Salk. 223. It was adjudged that in this case, that the subject may bring detinue for such goods as the lord may have replevin, for the goods of his villein distrained, for the bringing of the action vests a property in the plaintiff. When this cause was first referred to by Mr. Harper, I considered, as I believe he and the other counsel did, that it came nearer to the case before the court than any which occurred in their researches. On a careful examination of that case, I now think it will be found not to bear on the point now to be decided. In the first place it may be observed, that the case as reported, does not afford any ground to presume, that any other person than he who had unlawfully imported the goods, was interested in the suit; but on the contrary, it is presumable that it was a suit against the original importer. In that case, the question of relation could not have arisen, since it was utterly unimportant to the plaintiff and to the defendant, whether the plaintiff recovered by a title which related to his writ, or to the time of the importation: and further, it is to be remarked, that the question in that case seems to have been only upon the form of action. It was detinue which was founded upon property, and all that that case decides is, that in a case of specific forfeiture, the bringing of the suit vests a property in the plaintiff sufficient to sustain the form of action; for the case to which it is likened and on which the decision rests, is express to shew it does not relate to the interests of others; for, says the book, "in this case the subject may bring detinue for such goods, as the lord may have replevin for the goods of his villein." Which case, as I will shew, goes not only to the form of action, but to the full length of the case. See, at full length, Litt. § 177, with Lord Coke's comment thereon.

So in this case, this ship was liable to forfeiture, and might have been specifically recovered from Brown by the government, or any prosecutor under its laws, before a bona fide alienation by him; but if they have waited until such alienation by him, and a third person has honestly bought and paid for the property sued for, they may be answered in the language of Littleton, "that it shall be adjudged their folly that they did not enter when the offender was in possession." For according to Coke, before such seizure, they had neither jus in re, nor jus

ad rem, but only a right to sue, which I understand to be the meaning of Lord Coke's possibility above referred to. From all these cases and principles, I infer that the relation of the forfeiture to the time of the offence in cases of treason and felony, especially by self-murder, is peculiar to those cases; that in case of forfeiture of chattels, the relation is only to the time of the conviction.

That the forfeiture to which a party is subjected by statute of a personal chattel, must be construed with relation to the continuance of his ownership in that chattel at the time of conviction, and cannot be prosecuted in rem, to affect a bona fide purchaser for a valuable consideration; and this construction I think not only warranted by the statute on which it is founded, and which speaks of a recovery of the value of the ship, but also by sound legal principles. The value can only be recovered against the actual offender, and never from a bona fide holder: for against the offender, it is the value at the time of the offence, even against a mala fide holder it is only of the thing, be the value of that thing greater or less. If any holder, bona fide, was liable because of his possession, he would not be the less so after he had parted with his possession, but he might be made answerable for the value of the thing in the same manner as if the possession had continued with him; but even where he was not, strictly, a bona fide holder, the remedy in rem is lost if his possession is gone. And it is but just when two remedies are given, to punish an offence, one of which shews a plain intent of the legislature that it shall follow the offender personally or in his personal interests, so to construe the other remedies, as not to permit them to be extended to involve others, who are wholly innocent, in the same degree of punishment as would attach to the responsible offender.

The argument, that Brown by his false swearing subjected the ship to forfeiture de facto, and that no alienation by him could vest a better title in the vendee than the vendor possessed; and that as he held the ship subject to forfeiture, so any holder under or through him must take it subject to that forfeiture, is certainly a strong one. The general principle is undoubtedly true, that a derivative title cannot be better than the original from which it is derived; but it is only true as a general principle, and the exceptions to its operation are those on which I rely, to warrant my construction of the statute in providing for a recovery of the value of the ship, as well as to shew that in some instances, he who hath no title at all may yet transfer a valid one to personal chattels. Robbery can give no title to goods, and upon conviction there is a judgment of restitution, according to the statute which fixes the remedy against any person in possession at the time of conviction; and this is by the express provision of positive law. Yet the owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from a person who has purchased and sold them again, even with notice of the theft before conviction. 2 Term R. 750. And if the owner of goods loses them by a fraud and not a felony, and afterwards convicts the offender, he is not entitled to restitution or to retain them against a third person, e. g. a pawn-broker, who has fairly acquired a new right of property in them. 5 Term R. 175. If, therefore, he who has no title at all may nevertheless, in some cases, give a legal right, a fortiori, he who holds by a title defeasible only within a limited time (for by the statute of limitations the prosecution, in cases like the present, must be within two years) may transfer a good title to a fair purchaser for a valuable consideration. The language of Blackstone is very emphatic: "The right of proprietors of personal chattels is preserved from being divested, only so far as is consistent with that other necessary policy, that purchasers bona fide, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller." 2 Bl. Comm. 449, 450.

The statute provides that in case of a wilfully false oath, in any of the matters required previous to the obtaining the registry, "there shall be a forfeiture of the ship or vessel, together with her tackle, apparel and furniture, in respect to which the same shall have been made, or the value thereof to be recovered," &c. It seems to me the plain and just construction of this statute that the wilful false swearing does not ex directo produce a forfeiture of the ship. The forfeiture is alternative either of the ship, or of the value of the ship; of either at the election of the government, or person suing, but not of both the ship and the value. If the government had recovered the value from Brown, there would have been an end of proceedings against the ship. And if the offence charged against Brown, only produces a specific forfeiture by a subsequent election, the argument is cogent that the relation consequent upon that election, should be restricted by the general rule, that it shall not overreach an antecedent equity, and conclusive that Brown's title was not forfeited de facto, but forfeitable only, and, therefore, within the principles of the cases of waived goods, and villenage before relied on by me, and expressly by Blackstone. 2 Bl. Comm. 421.

Further, the forfeiture is of the ship or the value I have construed this clause somewhat differently from all the counsel: and though this circumstance produces doubts of its correctness, yet as it has weight with me, and minds of less comprehension may sometimes embrace truths which escape superior understanding, I think it my duty to mention it. It is this: That the ship is not liable to forfeiture in the hands of any holder, other than the person false swearing in any case but where such holder would be liable to a suit for the value. The words "that there

shall be a forfeiture of the ship," &c. or of the value thereof, "to be recovered with costs of suit of the person by whom such oath or affirmation shall have been made," plainly shew the intent of the legislature, that the penalty and punishment should attach to the offender only. "To be recovered of the person," both grammatically and legally relate to the object to be recovered, to wit, the ship or the value thereof; and the person from whom, and whom only, the one or the other is to be recovered. The guilt of false swearing forfeits only such interests as the offender possessed; for by the express provision of the sixteenth section of this statute, the rights of an innocent and unoffending owner are exempt from forfeiture. And the words of the statute which connect the recovery with the forfeiture in this case, exclude the idea of any recovery from an innocent holder. Expressio unius est exclusio alterius. If the ship is forfeited by the sole act of the false swearing, then she is equally forfeited, notwithstanding there may have been fifty fair transfers in public market. Every particular sale would be a particular conversion: and any one, or every one, through whose hands she may have passed might be sued for the value of the price; but the statute says that value shall only be recovered of the offender himself. A party having fairly obtained, and fairly lost or departed with his possession, would not in such case be liable for the thing or its value. 3 Com. Dig. 359; 2 Term R. 750. If not liable when his possession has honestly ceased neither can he be made so when it honestly continues since his own act cannot vary his legal responsibility.

Does reason or policy require a different construction? The government prohibits an act under a penalty against the party offending. They say we for this forfeit the thing in respect to which you have sworn falsely, if it continues in existence and is yours; but if lost or destroyed, or other persons innocently acquire new rights in that thing, your guilt shall still be punished; if annihilated—if sold—pay the value; if you have fraudulently impaired the thing, still pay the value; the one or the other shall be recovered of you, the guilty party. But this prohibition contains no threat of punishment against an innocent holder. No inconvenience arises from this construction. A purchaser can only look to the face of the documents, to the records of title which the law requires for this species of property. The knowledge of the cause of forfeiture rests generally in the bosom of the offender; and the law can never require of a purchaser to examine into the secrets of the heart.

It is more the interest and policy of government to increase its wealth and strength by the employment of ships in trade and commerce, than to augment its revenue by forfeitures. It therefore wisely protects the interests of fair ship-holders, while it carefully provides for the punishment of fraudulent contravention of its laws. Protection is not by this construction afforded to guilt or fraud, it is only a shield for innocence. The remedy remains, as it ought, against him who committed the offence. Government cannot be deprived of its forfeiture by any fraudulent alienation. Such a sale would be void. Jones v. Ashurt, Skin. 357. The possession is legally, and to effectuate the statutory provision still in the vender. Twyne's Case, 3 Coke, 80b; 2 Bl. Comm. 421. Indeed all the reasoning on this subject is contained in two axioms of the civil law, to which this court may be allowed to refer. "In rem actione tenetur qui dolo desiit possidere." Zouch, Elem. 197. "Et aliquando quod fieri non debet factum valet—primum et bonum quod sit bona fide, improbatur autem quod sit mala fide vel dolo." Id. 41.

If a contrary construction prevails, government may have greater security for a few specific penalties; but it is at the expense of the interest of commerce, and the security of all ship-holders. Libel dismissed.

NOTE.

The United States of America, Maryland District,—ss.: To the Honourable James Winchester, Judge of the District Court of the United States of America for Maryland District: In the name and on the behalf of the United States of America, Zebulon Hollingsworth, attorney of the United States for Maryland district, cometh here into court in his proper person, and giveth the court here to understand and be informed, that heretofore, to wit, on the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and one, at the port of Baltimore, in Maryland district, a certain Aquila Brown, a citizen of the United States of America, and of the city of Baltimore, being a part owner of a certain ship, called the Anthony Mangin, appeared before Robert Purviance, collector of the customs for the United States of America at the port of Baltimore, in Maryland district, he the said Robert Purviance being then and there the officer authorized by law to make registry of the said ship; and the said Aquila Brown then and there, to wit, on the day and year aforesaid, at the district aforesaid, made oath before the said Robert Purviance, on the Holy Evangelists of Almighty God, that he the said Aquila Brown was the sole owner of the said ship called the Anthony Mangin; the said oath being then and there made by the said Aquila Brown, and so as aforesaid administered by the said Robert Purviance collector as aforesaid, in order to the registry of the said ship; and with the intent to obtain, and for the purpose of obtaining, a register for the said ship, pursuant to the statute of the United States in such case made and provided. And the said attorney in the name and on behalf of the said United States, doth aver, and in fact say, that the said fact in the said oath alleged, that the said Aquila Brown was the sole owner of the said ship, called the Anthony Mangin, within the knowledge of the said Aquila Brown so swearing as aforesaid was not true, to wit, on the day and year aforesaid at the district aforesaid; but the said attorney in the name and on the behalf of the said United States, doth in fact aver and say, that the said fact so alleged in the said oath was false and untrue; and that within the knowledge of the said Aquila Brown, a certain Harman Henry Hackeman, an alien and not a citizen of the United States of America, was part owner of the said ship called the Anthony Mangin, at the time of making the said oath by the said Aquila Brown as aforesaid, with the

intent and for the purpose aforesaid, and in order to the registry of the said ship to wit, on the day and year aforesaid, at the district aforesaid; for which causes the said Robert Purviance collector as aforesaid, hath caused the said ship, her tackle, apparel and furniture to be seized as by law forfeited. Wherefore the said attorney prayeth the advice of the court here in the premises, and that due process of law may issue against the said ship, her tackle, apparel and furniture, and that due proclamation with monition may issue in this behalf to cite and admonish all persons to be and appear at a day and place by your honor to be named, to shew cause if any they have, why the said ship called the Anthony Mangin, her tackle, apparel and furniture should not be condemned and sold, and the money arising from said sale to be distributed according to law. And that she be so condemned and sold, and the said money so distributed prayeth Zeb. Hollingsworth, Attorney of the United States for the Maryland District.

Case No. 14,462.

UNITED STATES v. APPEL.

[22 Int. Rev. Rec. 169.]

District Court, D Louisiana. April 18, 1876.

INTERNAL REVENUE—INSUFFICIENT RETURNS—EXTRA ASSESSMENTS.

[Rev. St. § 3887, provides for returns by cigar manufacturers. Id. §§ 3371, 3396, authorize the commissioner of internal revenue, on information that cigars have been made without payment of the tax due thereon, to make an assessment for the tax omitted to be paid. A cigar manufacturer reported the amount of cigars made, showing the use of 38 pounds of leaf tobacco for every 1,000 cigars manufactured. The reports of other manufacturers showed an average use of about 24 pounds of leaf tobacco for every 1,000 cigars made. *Held*, in an action to recover an extra assessment made under such circumstances, that where the manufacturer offered evidence that his cigars were of a larger size than usual, and required a greater number of pounds of leaf tobacco to the 1,000 cigars, it was for the jury to determine whether such evidence rebutted the presumption which the returns of other manufacturers raised against defendant.]

At law.

NIXON, District Judge (charging jury). The case which you are called upon to decide, is important only because it involves the legality of the methods adopted by the commissioner of internal revenue, in estimating the amount of taxes which has been omitted to be paid by cigar manufacturers. The 3387th section of the Revised Statutes enacts, "That every person before commencing, or, if he has already commenced, before continuing the manufacture of cigars, shall furnish, without previous demand therefor, to the collector of the district, a statement in duplicate under oath, setting forth the place, and, if in a city, the street and number of the street where the manufacture is to be carried on, * * * and shall give a bond in conformity with the provisions of this title, in such penal sum as the collector may require, not less than $500, with an addition of $100 for each person proposed to be employed by him in making cigars; * * * said bond shall be conditioned that he shall not employ any person to manufacture cigars who has not been duly registered as a cigar maker; that he shall not engage in any attempt by himself or by collusion with others, to defraud the government of any tax on his manufactures; that he shall render correctly all the returns, statements, and inventories prescribed; that whenever he shall add to the number of cigar makers employed by him he shall immediately give notice thereof to the collector of the district; that he shall stamp, in accordance with law, all cigars manufactured by him, before he offers the same for sale and before he removes any part thereof from the place of manufacture; that he shall not knowingly sell, purchase, expose, or receive for sale any cigars which have not been stamped as required by law; and that he shall comply with all the requirements of law relating to the manufacture of cigars."

Under the provision of this section, the defendant, Adolph Appel, on the 22d day of July, 1872, executed to the government a bond in the penalty of nine hundred dollars, with Henry T. Katencamp as his surety, that he would comply with all the requirements of said law relating to the manufacture of cigars, and this action is brought upon said bond for breach of its condition, in not paying the amount of taxes due for his manufacture, during the year 1873. The execution of the bond is admitted, and it was shown by the deputy collector and not disputed by the defendant, that on the 1st of January, 1873, he filed a sworn statement, exhibiting the amount of leaf tobacco then on hand to be 1,450 pounds. He made monthly statements, during the year under oath, and these show the whole amount purchased by him was 4,135 pounds. He claimed, for allowance, in his different statements 703 pounds, for tobacco clippings, etc., sold or damaged, before manufacture, and also for 700, which he acknowledged to have on hand at the close of the year. Making these deductions, it appears from his statements, that he manufactured into cigars, during the year, 4,182 pounds of leaf tobacco. The whole number of cigars, which he reports to have manufactured, was 110,575. An abstract of the monthly statements of Appel during the year 1873 being made, it was sent to the office of the commissioner of internal revenue for examination, and upon comparing the amount of leaf tobacco manufactured, with the number of cigars reported, it was found that the defendant had used about 38 pounds of leaf tobacco for every 1,000 cigars made. The commissioner, carefully comparing the reports of the manufacturers of cigars, from all parts of the United States, and ascertaining from the comparison that, averaging the same, 1,000 cigars of the ordinary size ought to be reported for about every 23 or 24 pounds of leaf tobacco used, he assumed, in the absence of explanation, that there was a failure on the part of the defendant to report the whole manufacture in the present case, and ordered an assessment to be made for

the apparent deficiency; and this suit is brought to recover such deficiency.

The commissioner claims the right to make the said assessment under the provisions of sections 3396 and 3371 of the Revised Statutes. The former authorizes him to prescribe such regulations for the inspection of cigars and the collection of the tax thereon, as he may deem the most effective for the prevention of frauds in the payment of such tax; and the latter charges him with the duty, upon such information as he can obtain, in cases where cigars have been made and sold, or removed from the place of manufacture without the payment of the tax due thereon, to estimate the amount of the tax which has been omitted to be paid, and to make an assessment therefor, authorizing it to be made at any time within two years after the sale or removal. These provisions confer ample authority upon the commissioner, and vest him with a large discretion in the use and choice of methods for preventing frauds in the payment of taxes by cigar manufacturers. Under them he claims the authority to hold: (1) That prima facie evidence of sale or removal of cigars without the payment of the tax is furnished from the abstract reports of cigar manufacturers' accounts, made up by collectors from the manufacturers' yearly inventories and monthly reports of material on hand and purchased, and of cigars made and sold, together with the collector's own account of stamps sold, and which abstracts are rendered to him; and from the abstracts of sales made to cigar manufacturers of leaf tobacco, taken from the books required to be kept of all such transactions by leaf dealers. (2) That the failure of cigar manufacturers to make return of products corresponding to the amount of material had and used and corresponding to what is well known to be the average production of cigars from a given quantity of material, is made prima facie evidence of sale and removal of cigars without the payment of the tax, the presumption being that the cigars were actually made, but the tax not paid. (3) That upon such evidence and presumption the commissioner may proceed, upon receiving from collectors such abstract reports, to estimate the amount of tax apparently omitted to be paid, and to assess the same, subject, however, to such explanations and rebutting evidence as the manufacturer may be able to offer before collection of such assessment is made.

Now, it is true, gentlemen, as was insisted by the counsel of the defendant, that the instructions issued by the commissioner of internal revenue to his assistants are not binding, unless they are issued in pursuance of law; that there is nothing contained in the internal revenue laws, which authorizes the commissioner to designate any arbitrary number of pounds of tobacco, to be used in the manufacture of 1,000 cigars, which absolutely binds the manufacturer, in the sense that the distiller is bound in estimating the capacity of his still; and that although experience may teach the commissioner that on the average 30 pounds of tobacco will produce 1,000 cigars, it does not follow, as a conclusion of law, that manufacturers may be assessed and must pay taxes for all cigars, which ought to be made from the leaf tobacco used, on the basis and calculation of 1,000 cigars for every 30 pounds of tobacco. All this is conceded, and I do not understand that the commissioner claims any such authority. What he claims is, a right to examine the returns of the manufacturer; to institute a comparison between the product of the manufactured article and the quantity of leaf tobacco used, and where any considerable deficiency exists, in the produce based on the return of 1,000 cigars for every 25 pounds of tobacco used, to call upon the manufacturer for an explanation and where no reasonable explanation is given, to treat such deficiency as prima facie evidence of the non-payment of the full tax required on his production.

I am clear that the commissioner has not gone beyond the provisions of the law, or the discretion vested in him, in prescribing and establishing such regulations for the prevention of fraud, and that in the present case, where the returns show the use of about 38 pounds of leaf tobacco in the manufacture of 1,000 cigars, he was justifiable in assessing for a deficiency of tax, and in calling upon the defendant, Appel, for an explanation. You have heard the testimony of the defendants, in explaining the consumption of so much leaf tobacco for the manufacture of the product rendered. and it is for you to consider it, and to decide whether it is satisfactory. They offer proof, tending to show that of the 110,575 cigars manufactured by Appel during the year, 75,000 were of a large size, and that the general average of his manufacture were larger in size than are ordinarily made. This would, of course, require a greater number of pounds of leaf tobacco in the manufacture of every 1,000 cigars; and if you believe the evidence, and think it fairly accounts for the use of 38 pounds for a thousand, it will be your duty to find a verdict for the defendants. If, on the other hand, you are not satisfied that the testimony offered rebuts the presumption which the returns raise against the defendant, Appel, you should render a verdict for the government for such sum as will cover the deficiency of which, after a fair consideration of all the evidence, you believe exists.

Case No. 14,463.

UNITED STATES v. APPLETON.

[1 Sumn. 492.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1833.

EASEMENTS—BUILDING WITH WINGS—PASSAGES—CONVEYANCE.

1. A block of buildings, consisting of a central building and two wings, was erected in 1808, with a piazza in front of the central building, and side-doors in the wings, which opened on and swung over the piazza, the upper parts of which were used as windows. The centre building was occupied by the United States as a custom-house, under a lease from 1808, to July, 1816, when they purchased the same in fee, and have ever since been in possession thereof. The wings were sold in 1811 to other parties. *Held*, that these parties are entitled under the conveyance, independent of the lapse of time, to the use of the side-doors and windows therein, and passage therefrom, as they used them at the time of the conveyance.

[Cited in brief in Dexter v. Tree, 117 Ill. 533, 6 N. E. 506; Frederick v. Devol, 15 Ind. 359. Cited in Janes v. Jenkins, 34 Md. 7. Cited in brief in Jordan v. Woodward, 40 Me. 318. Distinguished in Keats v. Hugo, 115 Mass. 209. Keiper v. Klein, 51 Ind. 320. Cited in Lampman v. Milks, 21 N. Y. 509; Morrison v. Marquardt, 24 Iowa, 61; Winchester v. Hees, 35 N. H. 48.]

2. Where a house or store is conveyed by the owner thereof, every thing passes which belongs to, and is in use for, the house or store, as an incident or appurtenance.

[Cited in Steinbach v. Stewart, 11 Wall. (78 U. S.) 576; State v. Stark, Case No. 13,318; Bank of British North America v. Miller, 6 Fed. 551.]

[Cited in Atkins v. Bordman, 2 Metc. (Mass.) 464. Cited in brief in Comstock v. Johnson, 46 N. Y. 619; Coolidge v. Hager, 43 Vt. 12. Cited in Doyle v. Lord, 64 N. Y. 437; Farmers' Loan & Trust Co. v. Commercial Bank, 11 Wis. 210; Hadden v. Shoutz, 15 Ill. 582; Hardy v. McCullough, 23 Grat. (Va.) 261. Distinguished in Hilliard v. New York & C. Gas Coal Co., 41 Ohio St. 667. Cited in Holloway v. Southmayd, 139 N. Y. 407, 34 N. E. 1047, 1052; John Hancock Mut. Life Ins. Co. v. Patterson, 103 Ind. 587, 2 N. E. 191; Leonard v. Leonard, 7 Allen, 283; Meek v. Breckenridge, 29 Ohio St. 648; Morgan v. Mason, 20 Ohio, 411; Morrison v. King, 62 Ill. 36. Distinguished in Parsons v. Johnson, 68 N. Y. 62. Cited in Ray v. Sweeney, 14 Bush, 15; Riddle v. Littlefield, 53 N. H. 509; Scott v. Michael, 129 Ind. 255, 28 N. E. 546; Seymour v. Lewis, 13 N. J. Eq. 444. Cited in brief in Stevens v. Pillsbury, 57 Vt. 207. Cited in Thomas v. Wiggers, 41 Ill. 478.]

Trespass quare clausum fregit. The parties agreed to a statement of facts, the substance of which is as follows: A certain block of brick buildings, situate on Custom-House street, in Boston, was erected by the owners of the land on which it stands, in April, 1808, in the form, size, and manner, and with the doors and windows of each tenement, and the piazza in front of the central building, precisely as they now exist. The central building was designed for, and has since been used as, a custom-house. The stores constituting the wings project several feet beyond the front of the custom-house; and each of these stores has a side-door opening on, and swinging over, a part of the piazza, in front of the custom-house; and by means of these doors and a flight of steps of the piazza, persons can pass to and from those stores into Custom-House street. The doors are so built as to have the upper parts thereof used as windows to furnish light, looking from the stores into and upon the piazza. From the time of the erection of the stores until the trespass complained of, the side-doors have been constantly used by the owners and occupants thereof for the purpose of passing to and from Custom-House street, and of having light as above stated without obstruction, although each store has also a door fronting on Custom-House street. The United States occupied the central building, as a custom-house, under a lease from 1808 to July, 1816, when they purchased the same in fee, and have ever since been in possession thereof, using the same as a custom-house. The owners of the block (E. Francis & Co.) sold one of the wings in April, 1811, to one John Osborne; and the other, in the same month and year, to the defendant [Samuel] Appleton.

Mr. Dunlap, U. S. Dist. Atty.

The owners of these wings claim a right to swing doors, and a right of way from these doors, over land without their own boundaries, and within the boundaries of the United States. This is the exact nature of their claim. There are but three ways in which such an easement can be obtained. First, in a case of necessity. Secondly, in a case of prescription, founded on an adverse use of more than twenty years. Thirdly, by grant. 3 Cruise, Dig. 109, tit. "Ways." The present claim does not rest upon the ground of merit, nor of prescription. It is not a way of necessity, for the front doors of each of the wings are upon the street. It does not rest upon prescription, for the twenty years did not elapse before the commencement of the suit. And the prerogative principle nullum tempus applies; further, the use was merely a matter of indulgence, and not adverse. See 7 Mass. 385; 14 Mass. 33; 2 Pick. 466; Inhabitants of First Parish in Medford v. Pratt, 4 Pick. 228. The claim must rest for support on a grant. No express grant in terms of a right to swing the doors, &c., and pass from the wings over the piazza, is pretended. But these rights, it is contended, were appurtenances, and pass with the estates, whether the deed contains the word "appurtenances" or not, as part and parcel of the estates granted. This is the very question, whether there ever existed any such easements as those now claimed, as appurtenances to these wings. It is denied, that there ever were any such appurtenances to the wing estates. The original owners built the whole centre build-

[1] [Reported by Charles Sumner, Esq.]

ing and wings. Did they own the wings with the appurtenances of these easements in the centre lot? Certainly not. The whole was one lot, one estate, and one ownership A man with a house and an adjoining field, does not own a right of way in that field; he owns the whole field. To test this more strongly: suppose there had been a right of way expressly granted and annexed to these wings, over the centre lot; suppose E. Francis & Co. to have become the owners of the wings, with the appurtenances; suppose further, that Francis & Co. had afterwards bought the centre lot Now, what could have become of the appurtenances to the wings? They would have vanished by the union of the right of property in the fee, with the right to the easement; a merger would have taken place. Co. Litt. 114b; Cooper v. Barber, 3 Taunt. 99; 2 Bl. Comm. c. 11. The foundation of the claim, on the part of the proprietors of the wings, is, that the grantor once had the right; they claim, that they may have his estates with the appurtenances. The answer is, the grantor of the wings had the right, not as appurtenances to the wings, but because he owned the centre and the whole. The United States now have all his rights in the centre lot.

What is an appurtenance? It is something annexed to "another thing more worthy"; that is, an easement estate less than the estate to which it is appendant or appurtenant. How were Francis & Co., when owners of the whole and standing on the piazza, owning and enjoying a less estate, or a less worthy estate, than when standing inside the doors of the wings? Their estates were equal and the same, the fee in all the lots, wings and centre. There were, then, no such things legally existing, as the appurtenances claimed, and could not have been, when the whole was under one owner. Consequently, when the estates in the wings were leased out, there could have been no rights in the grantees to swing doors, and rights of way, unless expressly created and granted. A few familiar examples are offered to illustrate the argument. A owns black acre and white acre; he makes a gate or a stile to pass from one field to another. He conveys black acre, with all the privileges and appurtenances. The grantee surely cannot say to the grantor, I have all the rights and privileges, and enjoyments which you had; and one of your enjoyments was, to pass through the gate, or over the stile, into white acre. Again; suppose in the case last put, the owner of black and white acre, with the gate or stile, conveys at the same time, and by one deed, black acre to A, and white acre to B; let A and B the next day, the several grantees, meet on the stile; which of them shall yield or give back? Again; a man has a house and yard, and behind them a garden, which he is in the habit of entering by a gate from his yard. He conveys the house and yard by boundary lines; the right to open that gate into the garden and pass there, is not conveyed under the word "appurtenances." Yet the owner built the gate, as the doors to the wings were built, and used the garden as freely as the owners did or could have used the piazza, when they were the owners of the whole estate. Barker v. Clark, 4 N. H. 380; Grant v. Chase, 17 Mass. 442. The cases, Story v. Odin, 12 Mass. 160; Nicholas v. Chamberlain, Cro. Jac. 121; Staple v. Heydon, 6 Mod. 4, 2 Ld. Raym. 922,—are clearly distinguishable from the present.

Great stress is laid upon the continued use of this indulgence, as furnishing an exposition of the construction of the deeds. It is supposed, that but little advantage can reasonably be made on that account. Had the piazza been the ornamental entrance to a private mansion, those doors would not have been permitted a moment. But the building being in a great measure public, though not, like the street, public property, the doors in the wings produced no inconvenience; nor did the ingress to, or the egress from, the wings produce any. Hence the indulgence has been permitted, which is now contended for as a right, and which as a right is resisted. If there is any question whether the possession be adverse or not, that should go to a jury. No adverse possession is admitted.

Mr. Cooke, for defendant.

(1) The defendant acquired the legal right to use the door and way in question, by the express terms of his grant in 1811, April 5th, under the words, "the store with all the privileges and appurtenances." "Appendant or appurtenant is a thing used with, and related to, or dependent upon, another thing, more worthy in its nature and quality than the thing whereunto it is appendant." Co. Litt. 121b, 122. If, then, a door, and privilege of passing out of a door, may be considered a thing used with, and related to, a store, then the door in question passed by the express words of the grant. But it is not even necessary the words "privileges and appurtenances" should be used to pass the right of way, if it was in existence, and used as such, at the time of the grant. "In the construction of a grant, the court will take into consideration the circumstances attending the transaction and the particular situation of the parties, and state of the country, and the thing granted, for the purpose of ascertaining the probable intent of the parties." Bigelow, Dig. Com. § 5. In Fowle v. Bigelow, 10 Mass. 379, the supreme court actually admitted parol testimony to show the existence of a gate at the time of the grant, in order to give such a construction of the grant, as would give a right of way. See Leland v. Stone, Id. 459; Kent v. Waite, 10 Pick. 141; Nicholas v. Chamberlain, Cro. Jac. 121; Whitney v. Olmstead, Id. 284; Staple v. Heydon, 6 Mod. 4, 2 Ld. Raym.

922; 3 Kent, Comm. 338; Grant v. Chase, 17 Mass. 447. I have, heretofore, endeavoured to maintain the defendant's right to the use of the door and way, upon the legal effect and operation of the express terms of his grant.

(2) The defendant has acquired the right to the use of said door, both as a door and a window, under what is legally called an implied grant, or an implied covenant of the grantor, resulting from the nature and character of the thing granted, that the grantor would not derogate from his own grant. See Compton v. Richards, 1 Price, 36–38; Swansborough v. Coventry, 9 Bing. 305; Woolr. Window Lights, 60, 61, 39; Story v. Odin, 12 Mass. 160; Parker v. Smith, 17 Mass. 415.

(3) The defendant has acquired a right to the use of the door and way by more than twenty years' exclusive enjoyment. This court, in Tyler v. Wilkinson [Case No. 14,312], states, that "by our law, upon the principles of public convenience, the term of twenty years of exclusive enjoyment has been held a conclusive presumption of a grant or right." The defendant's case comes precisely within this principle. The facts find the erection of the block in 1808, and at that time a lease of the custom-house to the United States, and an uninterrupted enjoyment since. And here I admit the enjoyment must be adverse, and not by consent or permission; but the facts in the case show a clear adverse possession. The United States first entered under their lease, as the case finds, in 1808, and here then was the commencement of a clear adverse possession under an adverse title; and the case shows that the nature of this possession has not been changed or altered; and, if so, the twenty years elapsed so long ago as the year 1828. If the use was by consent, the burden is on the plaintiff. But supposing the adverse possession must be considered as commencing on the 12th of April, 1811, when our grant commenced; we are still within the limited time, the first writ being served on the 8th of April, 1831, four days before the twenty years would have elapsed. In order to afford a presumption of grant, as the law now is, a use for twenty full years is not now necessary. Indeed, if it was, the four days necessary to complete the time in the present case would hardly be considered. Bealey v. Shaw, 6 East, 215, is the leading case, and the opinion of Lord Ellenborough is as follows: "I take it that twenty years' exclusive enjoyment of the water in any particular manner, affords a conclusive presumption of a grant; but less than twenty years may, or may not, afford such presumption, according as it is attended with other circumstances, to support or rebut the right." What, then, are the circumstances calculated to support this right? See Haight v. Morris Aqueduct Co. [Case No. 5,902], Ang. Water-Courses (2d Ed.) p. 84; Ricard v. Williams, 7 Wheat. [20 U. S.] 59; 2 Selw. (Wheat. Ed.) 506.

(4) Here was such a dedication of the "locus in quo." as forms a complete defence to this action of trespass. I say, such a dedication, because it is now settled there may be a partial or limited dedication (Woolr. Ways, pp. 13, 33), which is a complete defence to an action of trespass; and it is sufficient for my purpose to show there has been a partial or limited dedication or license. What are the facts? The building was erected for a custom-house; hired and purchased for the express purpose of being dedicated to that use. It has been dedicated by a use of near thirty years. It has become, as its name purports, the custom-house of the United States, for all the citizens of the United States. Indeed, on this state of facts, it would be easy to maintain the ground of a complete and unlimited dedication to the public. In Rex v. Lloyd, 1 Camp. 260, the court say: "If the owner of soil throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing over it by positive prohibition, he shall be presumed to have dedicated it to the public." Same principle in Roberts v. Karr, 1 Camp. 262, note. Here we meet with no embarrassment, as to the time of dedication; it has now been used for near thirty years, and it has even been held, that a use for six years was sufficient to found the presumption of dedication. Trustees of Rughby Charity v. Merryweather, 11 East, 376, note; Jarvis v. Dean, 3 Bing. 447; Rex v. Barr, 4 Camp. 16.

STORY, Circuit Justice. The question is, whether the defendant, Appleton, in virtue of the conveyance to him, is entitled to swing the side-door of his store over the piazza of the custom-house, and to pass in and out of his store through that side-door into Custom-House street. In other words, is he entitled to the use of that door and the piazza, as a passage from and to Custom-House street? It appears to me, that upon principle and authority he is so entitled. The general rule of law is that when a house or store is conveyed by the owner thereof, every thing then belonging to, and in use for, the house or store, as an incident or appurtenance, passes by the grant. It is implied from the nature of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner, and with the same beneficial rights, as were then in use and belonged to it. The question does not turn upon any point as to the extinguishment of any pre-existing rights by unity of possession. But it is strictly a question, what passes by the grant. Thus, if a man sells a mill, which at the time has a particular stream of water flowing to it, the right to the water passes as an appurtenance, although the grantor was, at the time of the grant, the owner of all the

stream above and below the mill. And it will make no difference, that the mill was once another person's; and that the adverse right to use the stream had been acquired by the former owner, and might have been afterwards extinguished by unity of possession in the grantor. The law gives a reasonable intendment in all such cases to the grant; and passes with the property all those easements and privileges, which at the time belong to it, and are in use as appurtenances. Mr. Justice Doddridge, in Sury v. Pigot, Poph. 166, put the very case "A man," (said he,) "owns a mill, and afterwards purchases the land, upon which the stream goes, which runs to the mill, and afterwards aliens the mill; the water-course remains." Let us take another case. A man sells a dwelling-house with windows then looking into his own adjacent lands There can be no doubt, that the grant carries with it the right to the enjoyment of the light of those windows; and that the grantor cannot, by building on his adjacent land, entitle himself to obstruct the light, or close up the windows. Mr. Justice Bayley, in a very late case, put the very illustration. "If," (said he,) "I have a house surrounded by my land, and sell the house, I sell the right to light from the windows. The sale of the house, as it stands, gives a right to the light coming in at the windows, without necessity for twenty years' possession of the easement." Canham v. Fisk, 2 Tyrw. 155, 157. He also put another case: "Suppose," (said he,) "the owner of two fields sells one, having a stream of water flowing through it; can the vendee stop that water-course? Prima facie no exception in the conveyance could be presumed." Id. This is the converse case; for here the law gives a common-sense construction to the grant, and supposes, that each field has the appurtenances thereof in statu quo, notwithstanding the grant.

It has been very correctly stated at the bar, that in the construction of grants the court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties. Bigelow, Dig. "Conveyance," S, p. 211. In truth, every grant of a thing naturally and necessarily imports a grant of it, as it actually exists, unless the contrary is provided for. Here, the side-door in question was in actual use, as an appurtenance de facto, at the time of the grant. Could the owners of the central building on the next day after have shut it? Could they have shut out all the light of the window in the upper part of it? Could they have built down to Custom-House street, and filled up the piazza? In my opinion it is most clear, that they could not. Their grant carried by necessary implication a right to the door and window, and the passage, as it had been, and as it then was, used. The case of Nicholas v. Chamberlain, Cro. Jac. 121, is in point. So is the case of Staple v. Heydon, 6 Mod. 1, 4, notwithstanding the criticism which has been passed upon it at the bar. There, the third point decided by the court was, that "If one be seised of black acre and white acre, and use a way over white acre from black acre to a mill, river, &c., and he grant black acre to B. with all the ways, easements, &c., the grantee shall have the same conveniency that the grantor had, while he had black acre." The report of the same case, in 2 Ld. Raym. 922, is quite imperfect, and far less satisfactory. And Mr. Chancellor Kent, in his learned Commentaries, fully sustains the doctrine in 6 Mod. 4. 3 Kent, Comm. (2d Ed.) Lect. 51, p. 420.

It is observable, that in this case reliance is placed on the language of the grant, "with all the ways," &c. But this is wholly unnecessary; for whatever are properly incidents and appurtenances of the grant will pass without the word "appurtenances," by mere operation of law. So, it is laid down by Lord Coke in Co. Litt. 307. The same doctrine is affirmed by Lord Chief Baron Comyns (Com. Dig. "Grant," E, 11); and it has been fully supported by the supreme court of Massachusetts in a very recent case (Kent v. Waite, 10 Pick. 138). The doctrine of the same court also in the cases of Grant v. Chase, 17 Mass. 443, 447, 448, and Story v. Odin, 12 Mass. 157, especially the latter, appears to me fully to support my present opinion. The question is not indeed new to me; for I had occasion in the case of Hazard v. Robinson [Case No. 6,281], to examine the subject at large. I adhere to the doctrine stated in that opinion, which covers the whole ground of the present question. If there had been any doubt upon the conveyance, which I think there is not, the subsequent usage would, in my judgment, be conclusive, as to the construction put upon the conveyance by all the parties in interest. My opinion, therefore, is, that judgment upon the statement of facts ought to be for the defendant.

Case No. 14,464.

UNITED STATES v. ARCHER.

[1 Wall. Jr. 173.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1847.[2]

EQUITY—DISCHARGE AT LAW—SURETY.

Where a party whose obligation to pay arises from his contract only—as a surety—is discharged at law, equity will not extend his liability in a case where there has been neither fraud nor accident.

(This decision is in conflict with U. S. v. Cushman [Case No. 14,908], which is denied in the Third circuit to be law.)

Archer in his life time became bound as "surety" to the United States for the payment by Mifflin and another, as "principals"

[1] [Reported by John William Wallace, Esq.]

[2] [Affirmed in 9 How. (50 U. S.) 83.]

of certain joint and several bonds. Suits were brought jointly against all the obligors and judgment so obtained on them; but before satisfaction was procured the principals became insolvent and the surety died. The present suits, bills in equity, were brought after the surety's death to recover the amount of the judgments out of his estate. And whether the United States could so recover was the question. The act of congress under which the bonds were given, enacts (March 2, 1799, § 65 [1 Stat. 676]) that when due, the collector, shall prosecute them "by action or suit at law:" and the same section gives any surety who shall pay the debt of his principal a right to proceed on the bond "in law or equity," &c.

Mr. Pettit, Dist. Atty., for the United States, relied principally on a case decided in 1836, by Judge Story (U. S. v. Cushman [Case No. 14,908]), the essential facts of which were the same as those of the present case. The argument of that judge is, in its outline, as follows: He admits that generally speaking, equity will not make a surety liable when discharged at law, but seems to confine the doctrine to cases "where the plaintiff seeks to have a bond joint in its form, reformed so as to make it joint and several." U. S. v. Cushman [supra] No reform was needed here. And though as between the obligors, one might be surety only, and another principal, yet as towards the United States, "they were all principal debtors, jointly and severally liable as such by the general principles of law as well as in equity," a position for which he refers to Berg v. Radcliff, 6 Johns. Ch. 302. The defendants' argument supposed, that if a bond joint and several in form is sued against all the obligors, and a joint judgment is obtained thereon (U. S. v. Cushman), the joint judgment though unsatisfied, ipso facto, extinguished the several as well as the joint obligation ex contractu;" a doctrine for which "even at law" no authority had been cited, and which it would be difficult to maintain on principle. His honour says on the contrary, that "when a party enters into a joint and several obligation, he, in effect, agrees that he will be liable to a joint action and to a several action for the debt; and, if so, then a joint judgment can be no bar to a several suit, if that judgment remains unsatisfied. The defect of the opposing argument," he continues, is, "that it supposes that the obligee has an election only of the one remedy or of the other; and that by electing a joint suit he waives his right to maintain a several suit;" which he takes "not to be a sound legal interpretation of the contract." The remedies, he says, are concurrent, and he knew "of no principle of law, which would have prevented the plaintiffs from bringing a joint suit and a several suit on the bond at the same time, and proceeding therein pari passu." His honour cites for authority, five cases: Higgens' Case, 6 Coke, 44, saying however that it is "not directly in point to the present"; Dyke v. Mercer, 2 Show. 394, where "again the party sued was not a party to the former judgment"; Sheehy v. Mandeville, 6 Cranch [10 U. S.] 253, "also distinguishable from the case at the bar," though a "remark of the court seems to apply in principle"; Ward v. Johnson, 13 Mass. 148, "also distinguishable"; and finally Lechmere v. Fletcher, 1 Cromp. & M. 623, where "again the facts did not call for any decision of the precise point now before this court." "But it was immaterial," he concludes, "whether a suit could be maintained at law or not. The joint contracts of debtors having a common interest are in equity treated as joint and several, wherever the joint remedy at law fails to enable the plaintiff to obtain satisfaction" (as in the case of a deceased partner). "A fortiori the same principle will be applied, &c. in the case of a contract in form joint and several where the survivors are insolvent..... It is against conscience that a party who has severally agreed to pay the whole debt, should by the mere accident of his own death, deprive the creditor of all remedy against his assets. So courts of equity have always treated the matter, and the present case is but a new application of a very old and well established doctrine." Story, Eq. Jur. § 676, and note; Id. § 164, and notes. His honour refers to two cases decided by Sir William Grant (Devaynes v. Noble, 1 Mer. 564; Sumner v. Powell, 2 Mer. 30) as giving a very clear exposition of the doctrine and of the grounds of equitable interference, and cites also Rawstone v. Parr, 3 Russ. 424, "though the case was finally disposed of on another ground."

Mr. Meredith and Mr. Miles, for the defendant.

The bonds being joint and several, the U. S. could sue them either jointly or severally, but cannot sue them in two ways. "It is at the election of the obligee," says Sergeant Williams (Cabell v. Vaughan, 1 Saund. 291, note 4), in speaking "of actions upon joint or several bonds," "to consider such a bond a joint or several one. If he sues one or each of the obligors, he acts upon it as a several bond: if he sues all of them he proceeds upon it as a joint bond." . . . . "If two are jointly and severally bound," says Bacon (Bac. Abr. tit. "Obligation," D, 4), "and there is judgment on a joint action against both, the execution must be joint against both; for though the plaintiff might have sued them severally, yet by suing them jointly he has made his election." . . . . "If the contract is joint as well as several," says a recent writer (Pitm. Sur. 84, quoting Lord Talbot as post), "the creditor may sue the parties jointly: but if he elects to sue them jointly, he cannot sue them severally, for the pendency of one suit may be pleaded in abatement of the other." Adjudged cases are to the same effect. "The cause of action,

said the court of K. B. in 1607 (Brown v. Wootton, Cro. Jac. 73, 74), when the principle is clearly found, "being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before, is reduced in rem judicatam and to certainty, which takes away the action against the others." The precise doctrine was assumed true, as of course, by Lord Talbot in 1735 (Ex parte Rowlandson, 3 P. Wms. 406), and was conceded by opposing counsel as of course: "At law," says the chancellor, "when A. and B. are bound jointly and severally to J. S., if J. S. sue A. and B. severally, he cannot sue them jointly; and on the contrary, if he sues them jointly, he cannot sue them severally, but one action may be pleaded in abatement of the other." The counsel against whom the decree was, admit the doctrine, and apply it to the very case where "at law two men are bound jointly and severally in a bond." In 1812, Lord Eldon illustrates (Ex parte Brown, 1 Ves. & B. 65) an argument in bankruptcy by saying, "under a joint and several bond, the obligee, though he might have several executions, could not bring a joint and also two several actions. The point was adjudged, precisely, in Pennsylvania, A. D. 1825 (Downey v. Farmers' & Mechanics' Bank, 13 Serg. & R. 289), on general principles, in a case, too, "where the court felt a strong inclination to assist the plaintiff," but could not, "because upon looking well into it the law was too strong against them." After bringing a joint action, said C. J. Tilghman in that case, "the bond is to be taken as joint only, and can never after be proceeded on as a several obligation." This case has been twice affirmed in the same state. Walter v. Ginrich (1834) 2 Watts, 204; Stoner v. Stroman (1845) 9 Watts & S. 85. In Minor v. Mechanicks' Bank (1828) 1 Pet. [26 U. S.] 37, in the supreme court of the United States, Judge Story says, on "a joint and several bond, the plaintiff might have commenced suit against each of the obligors severally, or a joint suit against them all." He has no right to commence a suit against any intermediate number. "He must sue one or all." Certainly then, the remedies are not concurrent as supposed (U. S. v. Cushman [supra]) by Mr. Justice Story, and there is a settled principle of law, distinctly enunciated by Talbot and Eldon—asserted from the bench of the supreme court by Judge Story—and solemnly decided in Pennsylvania, which does prevent a plaintiff "from bringing a joint and several suit at the same time, and proceeding thereon pari passu." U. S. v. Cushman. Of the five authorities in U. S. v. Sumner, every one is admitted to be not in point: their language, only, or supposed principle is relied on. The first (Higgens' Case, 6 Coke, 44) decides "that where two are bound jointly and severally, and the obligee has judgment against one of them, he may yet sue the other." U. S. v. Cushman. Of course he may. In the second (Dyke v. Mercer, 2 Show. 394), "two men were bound in a bond to J. S.; one was sued, who pleaded that his co-obligor had been sued to judgment, and thereupon a fi. fa. issued and the sheriff levied the money. Upon demurrer it was held that the plea was bad, it not averring any satisfaction." U. S. v. Cushman. What application has this? the case not showing at all, that the bond was joint merely, and it having been no doubt joint and several. In the third (Sheehy v. Mandeville, 6 Cranch [10 U. S.] 253), judgment had been obtained against J. who was afterwards discharged as an insolvent; under a local law of course, the terms of which are not stated in the report. The plaintiff then discovering that M. was originally liable with him (as a secret partner), brought a joint suit against J. and M. J. was discharged from liability under this suit, either by nolle prosequi or something equivalent to it, and judgment given against M. alone. See the case in 7 Cranch [11 U. S.] 208, where it came again, on judgment against Mandeville, alone. The case is a peculiar one, turning on the effect of a discharge of one of the defendants under a local law whose provisions are not stated, and is cited by Judge Story for no more than that the several judgment was no bar to a joint action, "at least as to the partner not sued before." See the case well explained by Mr. H. B. Wallace, 1 Smith, Lead. Cas. (Phila. Ed 1847) 337, note. Even if the case decided, that after a several judgment against one partner, a joint judgment could be had against both, it would be but the converse of the proposition for which it is cited, and would be at variance with the highest decisions made in full view of it, both in this country and England.[2] The fourth case (Ward v. Johnson, 13 Mass. 148) is more than distinguishable. It is in principle at variance. "Suit was brought against one partner upon a partnership contract, and afterwards a joint suit against both. . . . The court held that . . . the joint suit was not maintainable." U. S. v. Cushman. The last case is Lechmere v. Fletcher, 1 Cromp. & M. 623. In that case there was an original partnership debt

[2] To Willings v. Consequa, in this circuit [Case No. 17,767], A. D. 1816, by Judge Washington, who assisted in the determination, and does not refer to it as deciding differently from him. To Ward v. Johnson (A. D. 1816), in Massachusetts (13 Mass. 151), in which the case is explained, and a decision made in conflict with it if held generally. In New York to Penny v. Martin (A. D. 1820) 4 Johns. Ch. 566, by the chancellor (Kent;) and at law to Robertson v. Smith (A. D. 1821) 18 Johns. 459. And see Peters v. Sanford (A. D. 1845) same court, 1 Denio, 224. In Pennsylvania to Smith v. Black (A. D. 1822) 9 Serg. & R. 142, and to Anderson v. Levan (A. D. 1841) 1 Watts & S. 339. And, finally, in England to King v. Hoare (A. D. 1844) 13 Mees. & W. 494, in which case, as in Robertson v. Smith, it is particularly adverted to, and its reasoning pronounced not satisfactory.

on which a joint suit was brought: . . . one of the defendants had a verdict in his favour, and the other a verdict and judgment against him. Afterwards the plaintiff brought a sole suit against the defendant, who had the verdict in his favour upon a distinct promise made to him before the former suit was brought (U. S v. Cushman) and had a judgment. That was right enough, but it has no application either to the case of U. S. v. Cushman, or to this. All the authorities cited by Judge Story are thus disposed of: not one of them applies.

The question then is simply: Will equity make a surety liable, who is discharged at law? It being conceded that the surety has received no personal benefit from his bond, and that there has been neither fraud, ignorance, mistake or inadvertence in the case. That it will relieve, where through fraud or accident even a surety is discharged, is true: and though there have been neither fraud nor accident, it also will against any co-obligor, who, though discharged at law, has yet, himself had the benefit of the contract which he seeks to evade. Simpson v. Vaughan, 2 Atk. 31; Bishop v. Church, 2 Ves. Sr. 100; Thomas v. Frazer, 3 Ves. 399; Hunt v. Rousmanier, 1 Pet. [26 U. S.] 16. But as early as 1683, the lord keeper declared (Ratcliffe v. Graves, 1 Vern. 196, 1 Eq. Cas. Abr. 93, c. 13, K, pl. 3) that as a general rule, "he would not charge the sureties further than they were answerable at law," and dismissed a bill seeking so to charge them. In 1735, Lord Talbot refused (Heard v. Stanford, Forrester, 173, 3 P. Wms. 409) to hold a husband liable in equity for his wife's debts, he being discharged at law; this "though he had a large fortune with her." In 1795, the liability of a surety was carefully considered in the court of appeals of Virginia (Minge's Ex'r v. Field, 2 Wash. [Va.] 136), where the accurate reporter's syllabus is: "If a bond be made joint without fraud or mistake, equity will not charge the executor of the surety, who was discharged at law by his death in the lifetime of the principal. Aliter, if the lending had been to both." "The surety," says the president of the court (Id. 140), "received no benefit from the loan: he was bound by no contract, express or implied, antecedent to the bond: he was under no moral obligation to pay, and of course equity would not bind him further than he was bound at law." Sumner v. Powell, 2 Mer. 30, A. D. 1816, to which U. S. v. Cushman refers, as giving "a very clear exposition" of the doctrine of equity, was in effect this: A. and B. were partners. The name of C. afterwards appeared as a partner, but he never took any share of the profits, nor received any thing beyond a fixed salary. B. embezzled certain funds and applied them to the partnership purposes, both A. and C. being ignorant of his act. A. afterwards retired from the firm, taking a joint covenant of indemnity from B. and C. against claims upon him as a partner. C. died, B. surviving insolvent. A. having been made to account as a partner for B.'s embezzlement, filed a bill against C.'s executors to have indemnity under the covenant which he sought to have treated as joint and several. But Sir William Grant refused to give it, because C. had received no benefit from the embezzlement, and his obligation to indemnify existing—not in virtue of any "antecedent liability"—but only as matter of "arbitrary convention," its extent could be measured only by the words in which it is conceived. Chief Justice Tilghman of Pennsylvania, applies (Weaver v. Shryock, 6 Serg. & R. 264, A. D. 1820, confirmed in Kennedy v. Carpenter, 2 Whart. 344) the doctrine in favour of a surety. He declares "that going as far as equity has done to follow the assets of a joint debtor, is carrying the matter far enough," and that "no case can be shewn where equity has charged the estate of a surety which has been discharged at law." He examines the older authorities, especially a case mentioned by Lord Hardwicke in Primrose v. Bromley, 1 Atk. 90, which has been misunderstood, and shews that it was the case of a joint beneficiary: and his general positions about sureties are exactly confirmed in the court of appeals in Maryland. Waters v. Riley, 2 Har. & G. 305, A. D. 1828. And see Story, Eq. Jur. § 164. Where a creditor had obtained judgment against certain known partners, being ignorant of three dormant ones, Chancellor Kent refused (Penny v. Martin, 4 Johns. Ch. 566) to lend equitable aid to reach them.

Admit that these cases were of joint bonds or joint debts not of joint and several ones, how is that important here? The several virtue of the bond, having been merged, destroyed and surrendered by the obligor himself, who had them all in his own hands—for the preferred and higher security of a joint judgment. The bond has no existence at all as a security, after the judgment. To use the language of Ventris (volume 2, p. 43), "it is drowned in the judgment," and the surety is bound in this case by a joint judgment only, just as in the cases cited he was by a joint bond: and in both he has been discharged. The errour of Judge Story's conclusion, springs from a fact assumed by him in his outset as true, but which in fact, is wholly untrue, "that where an obligation is joint and several the remedies are concurrent." They are "elective." One of his positions stated as an argument, takes the whole matter for granted: "When a party," he says (U. S. v. Cushman) "enters into a joint and several obligation, he in effect agrees that he will be liable to a joint action and to a several one." But this is not "so." He agrees to be bound just so far and in just such a manner as, in law or equity, he is

bound, neither further nor otherwise: and to say that in either law or equity he is bound severally after the joint judgment—what is that but to assume the question in controversy? In Berg v. Radcliff, 6 Johns. Ch. 302, relied on by Judge Story, a testator devised his real estate to pay debts, some of which arose from suretyship. He had never been discharged from them in law or equity, and in directing his executors to pay them Chancellor Kent only enforced a trust which the testator had himself created.

Mr. Pettit, in reply.

Every one of the cases cited on the other side was of joint debts merely. Those in Virginia (Minge's Ex'r v. Field, 2 Wash. [Va.] 136), Maryland (Waters v. Riley, 2 Har. & G. 305), and Pennsylvania (Weaver v. Shryock, 6 Serg. & R. 264) of joint bonds; and those before Sir William Grant (Sumner v. Powell, 2 Mer. 30; and Chancellor Kent (Penny v. Martin, 4 Johns. Ch. 566) of partnership or joint debts. In the Maryland case, the chief justice notes the circumstance that the bond was intentionally required to be "joint" and not "joint and several." Now the whole point of Judge Story's decision turns on the distinction between bonds merely joint and those that are joint and several: Of course none of the cases apply, and the doctrine of them all is elsewhere admitted by Judge Story himself. Story, Eq. Jur. §§ 162–164. When in making a bond, the debtor super-adds a "several" to his joint liability, who can say that nothing is meant by the addition? It undoubtedly "is against conscience," as Judge Story says (U. S. v. Cushman) that a party who has severally agreed to pay the whole debt, should by the mere accident of his own death deprive the creditor of all remedy against his assets. For the creditor looked to him severally, and as a surety trusted him principally, perhaps altogether. Admit that at law the remedies are but elective. This present suit is an application for equitable aid: and we ask the court to look behind the judgment at that "antecedent liability" so much spoken of on the other side, which the bond originally gave, and of which through an accident of the law the party has been deprived.

GRIER, Circuit Justice. That the case of U. S. v. Cushman, decided by the late Justice Story, and pressed upon us in behalf of the United States, is, in all material facts, similar to the present cannot be denied; and such is the reverence entertained by this court for the learned judge who decided it, that the weight of his single name would have been amply sufficient to draw assent from our minds in a case otherwise susceptible of a doubt. But as all other authority is, in our opinion, to be placed in the opposite scale, we have ventured, though with diffidence, to dissent from his conclusions.

1st. The allegation that an obligee who has obtained a joint judgment against all the obligors may afterwards sue them or their representatives severally, assumes too much for the plaintiff's case. If such be the law, the plaintiff has ample remedy at law, without invoking the aid of a court of equity.

But the law appears to be well settled, that if two or more are bound jointly and severally, the obligee may elect to sue them jointly or severally. But having once made his election and obtained a joint judgment, his bond is merged in the judgment "quia transit in rem judicatam." Indeed it is essential to the idea of election that the obligee cannot have both a joint and several action: and no case can be found to countenance the doctrine (Brown v. Wootton, Cro. Jac. 73; Bac. Abr. "Obligation," D, 4; Streatfield v. Halliday, 3 Durn. & E. [3 Term R.] 782; Hurl. Bonds, 97; Minor v. Mechanicks' Bank, 1 Pet. [26 U. S.] 73; Ex parte Brown, 1 Ves. & B. 65; Pitm. Sur. 85; Downey v. Farmers' & Mechanics' Bank, 13 Serg. & R. 288; Walter v. Ginrich, 2 Watts, 204; Stoner v. Stroman, 9 Watts & S. 88; Poll. 641; 2 Vent. 348) that he can.

2d. That the death of the defendant's testator after judgment discharged his assets, and that no action at law lay against him, the bill impliedly admits, and it has not and cannot be denied. U. S. v. Cushman [Case No. 14,907]; Reed v. Garvin's Ex'rs, 7 Serg. & R. 354; Stiles v. Brock, 1 Pa. St. 215; Erwin's Lessee v. Dundass, 4 How. [45 U. S.] 77.

3d. It cannot be disputed that equity will reform an instrument even as against a surety, where there has been fraud or mistake; and give a remedy against the estate of a deceased joint debtor, where he has been personally benefited by the consideration of the contract. Story, Eq. Jur. §§ 162–164, 676; Primrose v. Bromley, 1 Atk. 90; Simpson v. Vaughan, 2 Atk. 31; Bishop v. Church, 2 Ves. Sr. 101, 371; Devaynes v. Noble, 1 Mer. 568; Sumner v. Powell, 2 Mer. 36; Thomas v. Frazer, 3 Ves. 399. But that it will give assistance as against a mere surety, who has received no personal benefit, when his liability is discharged at law, is a proposition not only unsupported by precedent, but denied by many authoritative decisions. To some of these it will be proper more particularly to refer.

In Hunt v. Rousmanier, 1 Pet. [26 U. S.] 16, the court (referring to the cases last above quoted,) say, "the cases alluded to are those in which equity has afforded relief against the representatives of a deceased obligor in a joint bond given for money lent to both the obligors, although such representatives were discharged at law. The principle upon which these cases manifestly proceed, is, that the money being lent to both, the law raises a promise in both to pay, and equity considers the security of

the bond as being intended by the parties to be co-extensive with this implied contract by both to pay the debt."

The court of appeals of Maryland (Waters v. Riley, 2 Har. & G. 305), in reference to this subject, declare the general rule to be, "that where the remedy at law is gone, chancery will not revive it, in the absence of any accident, fraud or mistake; to which the case of a bond where all are principals, has been held to be an exception, each being equally benefited, and under an equal moral obligation to pay the debt, independent of the bond, to which equity relates back, when the remedy on the bond at law is gone. But in case of a surety who is bound only by the bond itself, and is not under the same moral obligation to pay, equity will not interfere to charge him beyond his legal liability."

The same doctrine is fully recognized by the supreme court of Pennsylvania in several cases, and by the court of appeals in Virginia. Weaver v. Shryock, 6 Serg. & R. 264; Kennedy v. Carpenter, 2 Whart. 361; Minge's Ex'r v. Field, 2 Wash. [Va.] 136.

This case cannot be distinguished from those I have quoted, on the ground of the United States being party plaintiff: for the same rules of contract are applicable where the sovereign is a party as between individuals. Hunter v. U. S., 5 Pet. [30 U. S.] 174. On the contrary, the act of congress of March 2, 1799, § 65, in pursuance of which the bonds in this case were given, while it gives a surety who has paid the bond a remedy both at law and equity against his principal, requires on behalf of the government, that prosecutions for the recovery of the money "shall be by action or suit at law." Now while I doubt not but that the assistance of a court of equity, as ancillary to a court of law, may be invoked to obtain a remedy where there is a legal obligation to pay the bond; it is plain that the statute does not provide for the enforcement of a mere equitable right in favour of the United States, where their obligations are discharged at law, or claim for them any privilege or prerogative beyond any other corporation or individual.

A surety in a bond to the United States, is under no higher legal or moral obligation to pay the money than if an individual were the obligee. And the extent of that obligation in common cases, both at law and equity is well established by decisions of tribunals of the highest authority. I do not think the court is bound to depart arbitrarily from all precedent, or to establish new and anomalous principles, to suit the necessities of the government. Congress may alter the law, if they see fit, but it does not become the court to legislate when they have omitted it. Bills dismissed.

[Upon appeals by the plaintiff to the supreme court, the decrees dismissing the bills were affirmed. U. S. v. Price, 9 How. (50 U. S.) 83.]

Case No. 14,464a.

UNITED STATES v. The ARCOLA.[1]

District Court, D. Maryland. Oct. Term, 1861.

PRIZE—RESIDENCE OF OWNER—SHIP'S PAPERS—AT WHAT TIME BELLIGERENT RIGHTS COMMENCE—ACTUAL HOSTILITIES—RIGHTS OF LOYAL MORTGAGEE—RECORDING OF MORTGAGE.

[1. The uncontradicted testimony of the owner of a captured vessel that he lives in Virginia, together with a showing that he had, in a mortgage of the vesse., stated that he was of that state, is sufficient to show that he was a citizen thereof at the time of the capture of the vessel.]

[2. The existence of a state of war such as would justify the capture of a vessel belonging to a resident of Virginia, dated from the beginning of hostilities, the closing of the federal courts, and the opposition to the execution of the laws of the Union by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, such as justified the exercise of belligerent rights by the government, and not from the passage or adoption of the ordinance of secession of Virginia.]

[3. The interest of a loyal citizen in a vessel, based on a mortgage made to him by the owner before the outbreak of hostilities, and regularly recorded under the act of congress, and indorsed on the certificate of enrollment, should not be condemned because the interest of the mortgagor, a citizen of Virginia, is subject to condemnation.]

In admiralty.

Mr. Addison, for the United States.

A. Sterrett Ridgely, for claimants.

GILES, District Judge. The facts of this case as shown by the schooner papers and answers to the interrogatories in preparatorio are: That she was captured on the 23d of May last, in Hampton Roads, as a prize of war, and sent into this port for adjudication. That she was owned by John Lewis, who had purchased her in the city of New York on the 28th of March last for $2,500, from Messrs. Johnson & Higgins, of that city. That no part of the purchase money was paid by said Lewis, who, on the day of his purchase, executed a mortgage of the schooner to the said Johnson & Higgins to secure the payment of the said purchase money. The said mortgage was duly recorded in the New York customhouse, and a memorandum of it likewise indorsed on the certificate of the enrollment of the said schooner. That said Lewis, after said purchase, proceeded with the said schooner to Norfolk, where he enrolled her on the 4th of April last, and in which enrollment he states himself to be of Norfolk, Virginia. On the back of this enrollment there was also indorsed the memorandum of the mortgage which had been inscribed on the enrollment made in New York. Said Lewis was also the captain of said schooner, and as such proceeded in her on a voyage to Charleston, and from thence to this port, where she took in a cargo for New York, and was proceeding to that port when she was captured. Of all the witnesses examined, Lewis is the

[1] [Not previously reported.]

only one that speaks of his (Lewis') residence, and he swears that he lives in Norfolk, Virginia, and has lived there four or five years, and that the said schooner belonged to Norfolk. It is true, and in the test affidavits to the claim and answer the claimants swear, that John Lewis had no residence in Norfolk; that he was only there for a temporary purpose; that his family resided in Brooklyn, which they considered the place of his residence. But this case, like all prize cases, is first heard on the vessel's papers and answers to the interrogatories, and, unless from these the character of the property is doubtful, the court looks to no other further proof. For this rule of practice, see the case of The Dos Hernanos, 2 Wheat. [15 U. S.] 76; 1 Wheat. [14 U. S.] 499, Append.; 1 C. Rob. Adm. 390, Append.; The Anna, 1 C. Rob. Adm. 331; The Haabet, 6 C. Rob. Adm. 55; and The Amiable Isabella, 6 Wheat. [19 U. S.] 1. I can have no doubt as to the residence of John Lewis at the time of the capture. He swears that he lives in Norfolk, and no witness contradicts him. Even if there had been any doubt upon the subject, and the court had looked out of the ship's papers and answers to interrogatories, then there is enough to prove the same fact in the bill of sale of said schooner and mortgage executed in New York in March last. In both these papers Lewis is stated to be of "Norfolk, in Virginia." Now a decree of condemnation is resisted in this case on three grounds: (1) That Lewis was not a citizen of Virginia at the time of the capture; (2) that as, at the date of the capture, Virginia had not adopted the ordinances of secession by a vote of her people, there was no such state of war as justified the capture; and (3) that the interest of the mortgagees, Johnson & Higgins, who are residents of the city of New York, cannot be condemned.

I have disposed of the first ground by what I have said in reference to the evidence. I consider the second ground covered by my opinion in the case of The F. W. Johnson [Case No. 15,179]. It was the existence of hostilities, the closing of the federal courts, and the opposition to the execution of the laws of the Union by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, which justified the exercise of belligerent rights by the government, and not the passage or adoption of the ordinance of secession of Virginia. Now, as to the third ground, can the interest of these mortgages be condemned? The district attorney contends that no such interest can be regarded by a prize court, but, if the mortgagor be hostile, the property must be condemned. To sustain this position he has referred the court to the cases of The Tobago, 5 C. Rob. Adm. 223; The Marianna, 6 C. Rob Adm. 25; The Francis, 8 Cranch [12 U. S.] 418; and Bolchos v. Darrel [Case No. 1,607]. Now, the case of Bolchos v. Darrel [supra], last referred to, was decided on the ground that by the 14th article of the treaty with France the property of friends found on board the vessels of an enemy should be forfeited. It was the case of certain slaves mortgaged by a Spanish subject, and found on board the vessel of the mortgagor when she was captured. The learned admiralty judge who decided this case said: "It is certain that the law of nations would adjudge neutral property thus circumstanced to be restored to its neutral owner." The case of The Tobago was the case of a bottomry bond; The Marianna was the case of a lien asserted to be retained by an American proprietor on a vessel sold by him to a Spanisn merchant, but which did not appear by any written paper of any kind; and The Francis was the case of a lien claimed for advances made in consideration of the shipment of the goods sought to be condemned. Now, these were all secret liens, of which the captor could learn nothing when they made the capture, and depending for their existence upon the different laws of different countries. The difficulties which the examination of such claims would impose upon the prize court in deciding upon them have excluded such claims from the consideration of those courts. But do these considerations apply to the case of a mortgage, regularly recorded, under an act of congress of 29th of July, 1850, and indorsed on the certificate of enrollment? Our act of congress does not require the mortgage or memorandum thereof to be indorsed on the vessel's register or enrollment, as the statute of 6 Geo. IV., c. 110, and the subsequent British statutes, do. But it was done in this case, and it is a practice that should be followed in similar cases. It notifies the captors immediately on inspection of the ship's papers that there is an interest in the vessel vested in parties friendly to their government, and puts them to their election whether, under such circumstances, they will proceed in the capture. Now, by the mortgage of a chattel, something more than a mere lien passes to the mortgagee It is (as the superior court say in Conrad v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 441) "a transfer of the property itself, as security for the debt." The legal title to the property has passed to the mortgagee. As further authorities to sustain this position, I refer to Thelussion v. Smith, 2 Wheat. [15 U. S.] 396, and U. S. v. Hooe, 3 Cranch [7 U. S.] 73; and also to the case of Jamieson v. Bruce, 6 Gill & J. 74, in which Archer, J., delivering the opinion of the court of appeals of Maryland, says: "Upon the execution of the mortgage, the legal estate becomes immediately vested in the mortgagee, and the right of possession follows as a consequence." And again he remarks: "This right of possession is always subject to any agreements which may be made in relation thereto, and mortgages do generally contain clauses giving the right of possession as against the mortgagee until

forfeiture; but where the parties are entirely silent as it regards the possession, the right thereto follows the legal estate, and rests in the mortgagee." And this was a case of a mortgage of personal property. In the mortgage exhibited in this case there is no express covenant that Lewis is to retain possession of the schooner, yet such may be inferred to have been the agreement, from the provision that when thirty days shall have elapsed after a demand for the payment of the mortgage debt the mortgagees may take possession and sell said schooner for satisfaction of the debt. But this does not change the character of the conveyance, as passing the title to the property, but only postpones the possession to a future day. Now, is there any principle in the law of nations which requires a prize court to condemn such an interest, because the party who created it may subsequently become an enemy? When the conveyance was made both parties were citizens acknowledging their allegiance to the United States, and the conveyance was duly recorded in pursuance of the law to which I have referred. Is there any principle of justice which requires the courts of the captors to condemn the interest of loyal citizens because it may be connected with the property of those who are hostile to the government? I know of none. It would be a very harsh one if it existed. I will therefore sign a decree that the said vessel be sold by the marshal, and that the proceeds of sale, after deducting the costs of sale and the costs of the case, be paid over by the marshal to the mortgagees or their proctor, in satisfaction of their said mortgage claim or on account of the same, if there be not sufficient to pay the whole debt; and, if there be more than sufficient to pay said claim, the marshal will deposit the balance in the registry of this court to await its further order, or, if the proctors prefer it. I will decree a restitution of the vessel to the claimants, the mortgagees, upon their paying the costs of this case, as I am satisfied that the vessel will not sell for enough to pay the costs and the mortgage claim.

Case No. 14,465.

UNITED STATES v. The ARIADNE.

[Fish. Pr. Cas. 32.]

District Court, D. Pennsylvania. Feb. 14, 1812.[1]

PRIZE—DUTY OF CAPTORS TO SEND IN WITNESSES—SAILING UNDER ENEMY'S LICENSE—BILLS OF EXCHANGE—PROBABLE CAUSE.

[1. It is reprehensible negligence and misconduct in a captor to neither send in with the vessel nor produce for examination upon the standing interrogatories any witnesses found on board her, and the court will not permit claimants to be delayed on this account.]

[2. A trading voyage by an American vessel is not made unlawful by directing that the proceeds shall be remitted to American citizens detained in the enemy's country, in bills of exchange drawn upon that country.]

[3. Sailing by an American vessel on a voyage to a neutral country under a license or passport issued by one of the enemy's admirals and certified by an ex-consul, resident in the United States, under his seal, does not make the voyage illegal even if it should appear that money was paid to such ex-consul for the same.]

[4. "Probable or reasonable cause" of capture must be shown to rest on strong facts apparent at the time of capture; such as double papers for purposes of deceit being false and colorable, want of proper ship's papers, prevarication by the master or other officers and crew examined in preparatorio.]

The libel is in the common technical form. The vessel and cargo are proceeded against as "belonging to the government of the United Kingdom of Great Britain and Ireland, or to persons being subjects thereof, and as such, or otherwise, liable to confiscation and condemnation," &c. It is conceded, and if it were not, it appears by the papers found on board, and exhibited by the captors, that both vessel and cargo are bona fide the property of citizens of the United States; and the cargo, consisting of flour, belonging, in certain designated portions, to the owner of the ship, Nathaniel Goddard, and other citizens of the United States, was laden on board, at the ports of Baltimore and Alexandria, from which latter port she sailed on a voyage to Cadiz in Spain; and in the prosecution of her voyage, she was captured by the Argus [Arthur St. Clair, commander] and sent as prize into the port of Philadelphia. No circumstances of improper conduct in the captured inducing suspicion, are either shown or alleged. On the contrary, by a most unwarrantable misconduct in the captor, no witness or witnesses, is or are sent in with the vessel, or produced for examination upon the standing interrogatories. After the hearing had commenced, the master who had been detained on board the Argus, was sent from New York; but much too late for legal examination, according to the established course of proceeding. The court, whose duty it is to examine as well into the circumstances occurring at the time of capture, as they relate to the capture, as into the conduct of cruisers; is bound to pronounce its marked disapprobation of negligence so gross. In such cases the court has established a rule, that claimants shall not be delayed on this account. In cases where no claimants appear, all proceedings for the purposes of condemnation will be stayed. Instances of such negligence have been multiplied; and have forced on the court a determination, so far as its powers extend, to reform a mal-practice, which may be attended with consequences highly mischievous.

The hearing in this cause having been delayed; the court, conceiving itself warranted by the state of the season, the situation of the ship, and the circumstances of the case,

[1] [Reversed by the circuit court (case unreported). The decree of circuit court was affirmed by supreme court. 2 Wheat. (15 U. S.) 143.]

directed both vessel and cargo to be delivered to the claimants, on giving security, in the appraised value, to abide the final sentence and decree of this court, and the court or courts of appeal. That the situation of the vessel and cargo might be known, as it was at the time of its being placed in the custody of the marshal, and of its delivery over to the claimants; the court directed an inventory to be taken, and filed, and ordered a survey of the ship, her tackle, apparel and furniture. It is superfluous to state more of the documents and papers exhibited than such as are relied on by the captors, either for condemnation, or justification, or what are otherwise materially necessary in the case. The cargo, by all the shippers, was consigned to Captain William Farris, who went as supercargo in the vessel. He was instructed to sell the cargo, consisting wholly of flour, at Cadiz, and to remit the proceeds, in good bills on London; the greatest proportion to Samuel Williams, Esq. merchant, No. 13, Finsbury Square, for account of the shippers. There are instructions to Farris, from all the shippers, to the same purpose; except those from Samuel May, owner of 500 barrels of the flour, which are in these words: "The nett proceeds of five hundred barrels of flour, which you have of mine in your consignment, you will please, when realized remit to Henry Bromfield, Esq. merchant, London, for my account; in such mode as you may judge most for my interest." In the instructions from Nathaniel Goddard, the owner of the vessel and part of the cargo to William Farris, dated Boston, September 9th, 1812, he mentions (after directing his share of the proceeds sold at Cadiz to be invested in bills and remitted to Samuel Williams, Esq. in London): "From recent interruptions of regular supplies of flour at Cadiz, we are led to believe, that the demand for this article will be such as to insure you a valuable market, in the event of safe arrival; nor can we entertain a doubt, that the policy of Great Britain will lead her cruisers to abstain from offering any impediment to the free passage of vessels destined for Spain and Portugal; under this impression we have been induced to make the shipment now under your care, firmly believing that the same indulgences which have occasionally been extended to Sweden and other enemies, by Great Britain, will be shown to ships of the United States, carrying supplies absolutely necessary for the suffering inhabitants of Spain." "You will also please to remit the sum of nineteen hundred and ten dollars, to Samuel Williams, Esq. London, for account of Samuel F. Coolidge, Esq. of this place, to be assessed on the whole cargo." "As it is possible some unforeseen event may turn up, in the course of the voyage, you will act, in such case, as you may think prudent, and most conducive to the interest of the concerned; being careful not to violate any laws or regulations of the United States, or the municipal, or other regulations, of the place you may visit." The instructions from Nathaniel Goddard, dated 14th September, 1812, at Boston, to Bartlet Holmes the master, direct him to invest and remit the amount of freight (paid by Farris for account of other shippers) "in good bills on London (except what may be wanted to purchase salt, and for other disbursements) at the best possible rate, to Williams in London, for my account, and subject to my orders." He enjoins against detention of the ship, even if it were to ballast with salt, but orders him to proceed directly back to Alexandria for another cargo. He repeats, in epitome, his ideas as to the policy of Great Britain; and adds, "I trust the same will be shown to us, her declared enemies, carrying supplies for her suffering allies, the patriotic inhabitants of Spain; and on returning with salt to the United States, for the continuation of the same business. But as there are other cruisers on the ocean, it will be prudent to avoid if possible speaking with any vessel, of any description, on either of your passages. You will, on entering Cadiz bay, avoid the French side with great care, that you may not meet with cruising boats. You will take no cargo or adventures, but flour, and nothing home but salt, and be careful that no adventures are clandestinely stowed away, to expose the safety of the ship; and in no case, violate any laws of Spain, or the United States."

At the time of capture, there was found on board the Ariadne, and exhibited among the papers delivered into the custody of the clerk of this court, the passport, or by whatever name it is called, whereof the following is a copy:

"(Stamp. Arms of the British king.) Office of his Britannic Majesty's Consul. I, Andrew Allen, Jr. his Britannic majesty's consul, for the states of Massachusetts, New-Hampshire, Rhode Island, and Connecticut, hereby certify that the annexed paper is a true copy of a letter addressed to me by Herbert Sawyer, Esq. vice admiral and commander in chief on the Halifax station. Given under my hand and seal of office, at Boston in the state of Massachusetts, this ninth day of September, in the year of our Lord, one thousand eight hundred and twelve. (Signed) Andrew Allen, Jr. (Consular Seal.)

"To the commanders of any of his majesty's ships of war, or of private armed ships belonging to subjects of his majesty: Whereas from a consideration of the great importance of continuing a regular supply of flour and other dry provisions to the ports of Spain and Portugal, it has been deemed expedient by his majesty's government, that notwithstanding the hostilities now existing between Great Britain and the United States of America, every protection and encouragement should be given to American vessels so laden with flour and other dry provisions, and bound to the ports of Spain and Portugal.

And whereas in furtherance of these views of his majesty's government, and for other purposes, Herbert Sawyer, Esq., vice admiral and commander in chief of his majesty's squadron on the Halifax station, has directed to me a letter under date of the fifth of August, 1812, a copy whereof is hereunto annexed, and wherein I am instructed to furnish a copy of his letter certified under my consular seal, to every vessel so laden and bound either to any Portuguese or Spanish ports, and which is designed as a safe guard and protection to any such vessel in the prosecution of such voyage. Now therefore in pursuance of these instructions I have granted unto the American ship Ariadne, Bartlet Holmes master, burthen three hundred and eigthy two $^{2}/_{85}$th tons, now lying in the harbour of Alexandria, laden with flour and bound to Cadiz or Lisbon, the annexed documents to avail only for a direct voyage to Cadiz or Lisbon, and back to the United States of America. Requesting all officers commanding his majesty's ships of war or private armed vessels belonging to subjects of his majesty, not only to suffer the said ship Ariadne to pass without any molestation, but also to extend to her all due assistance and protection in the prosecution of her voyage to Cadiz or Lisbon; and then return thence laden with salt or other merchandise to the nett amount of her outward cargo, or in ballast only. Given under my hand and seal of office at Boston, this fifth day of September, A. D. 1812. (Consular Seal.) Andrew Allen, Jr. His Majesty's Consul."

"(Copy.) His Majesty's Ship Centurion at Halifax, the 5th August, 1812. Sirs: I have fully considered that part of your letter of the 18th ult. which relates to the means of insuring a constant supply of flour and other dry provisions to Spain and Portugal, and to the West Indies, and being aware of the importance of the subject, concur in the propositions you have made. I shall therefore give directions to the commanders of his majesty's squadron under my command, not to molest American vessels so laden and unarmed, bona fide bound to Portuguese or Spanish ports, whose papers shall be accompanied with a certified copy of this letter under the consular seal. I have the honour to be, sir, your most obedient humble servant, (Signed) H. Sawyer, Vice Admiral.

"Andrew Allen, British Consul, Boston."

PETERS, District Judge. I have given to this case as much of my attention as I could bestow; and confess myself at a loss to find the relevancy of many of the authorities, and of a great portion of the arguments, used by the captor's counsel. Whether they are seriously insisted on, for the purpose of condemnation, or to repel the claim of damages, I cannot accurately determine. The case will not rest with me, and I shall therefore leave the ultimate decision to superior tribunals; contenting myself with such observations as occur to me, in the progress of my march to the consummation of my duty; which is to place the case in a situation for an appeal.

I have changed accidentally, the order of the points, and shall make some observations on them, in the method in which I have stated them. Here is an American vessel, clearly documented as such—with an American cargo, indisputably belonging to citizens of the United States—sailing on a lawful voyage—cleared out for the port to which she was destined—and, on that voyage, captured as prize, by one of our own public ships; under none of the circumstances generally justifying suspicion of fraud, or concealment, either of destination, or enemy interests—acknowledged to be engaged in a fair and lawful trade—without the most distant imputation of ulterior commerce with the enemy, save that as much of the proceeds of her outward cargo, as remained (after paying contingencies and finishing a cargo or ballast, of salt, with which she was to return to the United States, and again pursue the course of trade into which she had now entered) was to be remitted, to London in bills of exchange, not specified to be English, but goods bills, and in one part, good bills on England, the remittance to be made to American citizens, permitted to remain there. Were these proceeds at any time to be lodged for enemy account? The direct contrary appears. In every instruction from the shippers, the declaration, that the funds were to remain for their use, and at their order; is made and reiterated. Nor do the counsel for the captors allege, that the declaration was fallacious. They could not allege this without violating all candid and plain evidence of the fact; and of this they are incapable. But, it seems, they discover what I must doubt whether the captor ever thought of, that remitting the proceeds in bills or exchange, though it had been the course of trade before the war; is now the same as if merchandise, or money, had been sent. And thus an ulterior destination, or trade with the enemy, is endeavoured to be shown from the papers found in the ship; and the ulterior destination being alleged to be unlawful, the vessel and cargo are said to be forfeited as prize; though the commencement of the voyage be legal. If their premises were sound, their conclusion would inevitably follow. For no trade can be lawfully carried on indirectly with an enemy, by going first to a neutral port, and investing there the proceeds, in a cargo, sent, in continuity of an original or otherwise unlawful plan, to an enemy's country. I shall omit taking notice of cases on this point. If applicable here, they would prove the position taken by the counsel.

I do not dispute the general doctrine, but its application depends on the identifying bills of exchange, with bullion, or merchandise. Now, although a definition of a bill of exchange, according to the phraseology of Blackstone, and a dictum of a Pennsylvania

court, from 2d Dallas, is introduced, to show the sense of the elementary writer, and the opinion of that court, on the nature of a bill of exchange; and it is defined by the one, and held by the other, to be "a mode of remitting money;" and equivalent thereto, in legal contemplation; I am not convinced that the definition, or the opinion, is as a general position, practically sound or correct. For, though true it is, that it is "a mode of remitting money;" mercantilely speaking, it is the mode of establishing a credit, which serves the purposes of money; often effected without the intervention of bullion, or actual money; and not adding to or deducting from, the aggregate of bullion or money, of the country in which the credit is placed. Technically the deposits may be called funds. But this means, any stock or capital, on which credit is founded. It does not necessarily imply money. It would, indeed, be a severe application of definitions, or dicta, to found on them the ruin of our own citizens, engaged in a commerce, undeniably lawful, so far as it had proceeded. With all the industry of the captor's counsel, they have not produced a single decision, directly to their point. In Chitty's Practical Treatise on the Law of Nations, &c. in 1812 (Boston Ed.) 25, it appears, that no decision had taken place in England, to prove the illegality of bills of exchange, drawn in one enemy country, on another. Nor can I find one, so far as my opportunities enable me to search, in any book of legal authority, of any other country. Chitty's words are, "An attempt was made by the counsel, in the case of De Tastet v. Baring, 11 East, 268, 2 Camp. 65, to establish, that no bill drawn from an hostile country upon this, could legally be passed here; but upon this point the court do not appear to have given any opinion. In several recent instances, of bills drawn by British prisoners in France, upon this country, holders, with full notice of the circumstances, have been permitted, at nisi prius, to recover; on this ground, that otherwise prisoners of war might be deprived of the means of comfortable subsistance." It seems, then, that even common law courts, consider the convenience and necessity of a case, a sufficient ground for its legality. On the like convenience and necessity, Sir W. Scott has restored goods, withdrawn from an enemy's country, without a license for so doing; which, in ordinary cases, is essential. 4 C. Rob. Adm. (Eng. Ed.) 195. I do not believe, that any one acquainted with the trade to Cadiz, will assert that it could be carried on, to any great extent, without the purchase of bills on England, or those ultimately resulting in British funds. It was inextricably interwoven in the trade, before the war between this country and England; and is now quite as much required. True, you can get bills on other countries; but these, by a circuitous operation, generally result in British funds. Cargoes, equal to the proceeds of those we send, cannot be obtained. Specie may sometimes be exported by permission. It is sometimes, secretly and at risk, brought off; but the general current of dealing is, to vest the proceeds in bills of exchange; and British bills are the most common; and most beneficial for us to buy, or receive in payments. True also, the British agents make purchases in the Cadiz market, in one way or other, of some of our cargoes, in common with or through the intervention of the Spanish government, or subjects. But, if we do not carry our commodities directly on British account; sales to British agents at Cadiz, without any preconcert, are as lawful, as are those to any others. Sell them to whom we may, British bills are common in payment. Of what advantage, then, would be our lawful commerce to Spain and Portugal, if it were settled by our courts, that remittances of those bills, or intention to remit them, forfeited our vessels and cargoes, if intercepted, by our cruisers on their passage? Shall not therefore, our courts, and especially our prize courts, to whom great latitude is given by the laws of nations, consider convenience and necessity? Particularly in a case wherein no law of our own country, or of nations, can be found, forbidding, in any definite terms, these paper operations: for I consider them, in practical effect, nothing more, and in fact, leaving a balance favourable to us, and against England; at the close of the whole transactions. I am not convinced to the contrary, by the ingenious constructions and deductions and consequences from, what the counsel for the captors deem principles. Their mode of cutting up this trade by the roots, would be accomplishing, through the judiciary, the destruction of one of the few branches of commerce remaining to us. However well or ill founded, objections to remittances of proceeds to the country of the enemy, or sailing under its passports, may be; the trade will be short lived, unless both are permitted. The aid of our own cruisers will not be required for its complete extinction. If it be deemed right, that this trade should be abolished, let it be done by the legislature, if they shall think proper, and not in an indirect way.

In the course of the hearing, I threw out for inquiry, my belief that since our declaration of war, bills of exchange on London, to a large amount, had been purchased, and remitted by the treasury department of the United States; and probably, to be sent into a country hostile to Great Britain. I have it in my power to prove, by indisputable evidence, that my belief was well founded. I mentioned the fact (for so it is) not with the view of thereby alone establishing its lawfulness—for if it were illegal, that could only be done by an act of the legislature—but to show the sense of a department so extensively influential and exemplary, as to the innocence and policy of the practice. Can it be contended, with any candid or forcible argument, that a citizen shall be liable to forfeiture of his prop-

erty, for an operation essentially necessary in the course of his trade, which has been sanctioned and practised on, by an authority so high? Let it not be said that "this was a governmental act, and a government can do what an individual cannot." A fiscal officer is not the government, nor would he do any act contrary to our laws, or to those of nations. The legislature have refrained, with a full knowledge of the mode in which purchases and payments are made, and every other circumstance concerning it, from passing any prohibitory law, either against the trade or the passports, used for the safety of our ships. They have not only refrained, but refused in effect, to pass inhibitions. But all this would operate as a trap to our citizens; simply presuming themselves pursuing lawful voyages, while they are subject to capture by our cruisers, and condemnation by our courts.

I can see a strongly marked distinction between a solitary case of a voyage, begun with a view to lodge permanently, and mix with the mass of enemy property, the proceeds in an enemy country; and voyages lawfully made, wherein the interest of trade indispensably require payments in bills, to be remitted to a hostile country, to be drawn out again for the use of the trader. I agree that while in transitu, as I conceive it, though temporarily commorant in the enemy state, they may by an act of power be seized, taxed, or used. But the interests of states at war, in the times now existing, and particularly of England, forbid such exercises of power. The spell of confidence in her good faith, would be at once dissolved by any violence committed by her government, in regard to funds placed within her control. I depend for results on the interests of nations, more than on mere refined or laudable motives. I am not exactly informed, but I believe that intercourse of exchange is common between hostile countries generally, though it may be subject to more or fewer interruptions in some than in others. No period of history ever exhibited so extensive a scene of warfare and desolation, as the time in which we live. Relaxations of old principles, better settled than the one now contended for, necessarily take place, in the present state of the world among nations at war. Shall we then, to whom such relaxations are as necessary as they can be to any other nation, insist on their severities, and visit them on the heads of our own citizens? The old routine of a kind of barter, by sending cargo for cargo, has long ceased. Credits, called "funds," or the paper representations of them, are lodged in one part of the globe, for enterprizes of trade in any or every part of it. They are placed in the country, either directly or circuitously, from whence they can be most conveniently drawn, or in which with most safety, they may temporarily remain. With the country, now our enemy, we have long had, and since the war, have innocently continued extensive commerce. We have large amounts of funds lodged there, and owe considerable debts. Intercourse by exchange is more particularly required with them than with any or most other countries, for obvious reasons. I believe funds are withdrawn and debts paid, in and by bills of exchange every day. I am told that government ought to consent, even to payments of "debts." I think justice and good faith require, that we should continue paying; and though an act of the British parliament makes the intervention of the secretary of state necessary, there is no prohibition till government prohibits. Vide 8 Term R. 71. The machinery of exchange, when even solid funds are its moving powers and principle, is in fact, buying a debt, and innocently and justly accomplishing its payment. I am referred to a transaction in England in the time of Mr. Pitt, when an act of parliament was passed, originating in the intention (whatever were the terms in which it was conceived) to prevent French citizens from withdrawing their funds. This was done to save the property of a class favoured by Great Britain, and on a special emergency, and not on a general principle. It proves, however nothing more strongly, than that it required an act of parliament to prohibit, what was before lawful.

Having in the best way I am capable of, disposed of the most important parts of the points in discussion, I might leave without multiplying remarks, the objections made on the subject of the 1910 dollars, to be assessed on all the cargo, and remitted to Williams for account of Coolidge, who is also an American citizen; and the instruction given by Samuel May to Farris, as to the ultimate investment of the proceeds of his adventure. The circumstance of Williams, Coolidge, and for aught I know to the contrary, Bromfield, being American citizens, and Coolidge resident in the United States, I only mention to show the improbability of British interests. For one of our citizens resident in a foreign country, in a permanent situation as a trader, is identified with a subject of that country, to certain intents. Nevertheless, at the breaking out of an unexpected war, though a citizen may have been commorant in a house of trade before hostilities, reasonable time for his return to his country ought to be given, before either he or his property be treated on a hostile footing by us. It does not appear for what purpose the 1910 dollars are to be assessed, and used by Coolidge. It is all conjecture; but let it be granted, that it is as compensation or bonus for A. Allen's certificate of the safe conduct or passport, hereafter mentioned. I see not that this, either in its principle or amount, should work either condemnation or justification of the capture. Coolidge may have obtained the document, and sold it at what price he could obtain—and yet no illegal effect be produced. I believe it is notorious in all countries, that passes or licenses, from even sovereigns, are ob-

jects of purchase and sale in the market; and who receives the benefit of them is not an essential inquiry On a presumption so vague, and with no other ground for certainty or conjecture, I cannot conceive the capture can be justified. If the whole of the shippers receive whatever advantages it can afford, they ought proportionately to pay the expense of obtaining it. I say nothing in approbation of the practice; but I know of no law inflicting confiscation on those who engage in it.

The last ground taken by the counsel for the captor, on this part of the subject, is, that of the instruction by Samuel May to Farris. In whatever mode the proceeds of his adventure were to be remitted, it must so be for May's account. Let it be remembered, that Farris in his general instructions, is inhibited from violating the laws of the United States (the laws of nations being included in them) or those of the places he may visit. This was an abundant caution;—he was bound to observe those laws, without specific instructions. But with all this monitory caution and his general obligation, should I be warranted in presuming, that he will take an illegal mode of remittance? He is not compelled by any duty to his principal, to remit cargo, or any article in breach of the laws of nations, or those of his country; however apparently advantageous, such remittance might be.

The remaining point insisted on by the counsel for the captor, is the illegality of the safeguard, contract, or passport, called, in my opinion, improperly, a license. The paper which has been the theme of so much observation, I do not classify among those acts of sovereignty, styled licences, which in modern times have increased in number, beyond all former example. It would be a most toilsome, and in this case, an unnecessary task, to go into a history of their nature or objects. I have read many discussions on the subject of them, and have reaped very little substantial benefit by the perusal. British writers disagree, as to their principles and utility; even to the nation from whose government they issue. Some, reprobate them as stimulants and incitements to perjury, and immorality of various kinds. They declare them injurious to England; and even that they have rendered their whole system of maritime law, as it regards commercial rights and regulations nugatory; and have torpified their navigation act, into a dead letter. They have thrown advantages, at the expense of their own ship-owners, into the hands of enemies and neutrals. But my reading on this subject is not very extensive. I have however, never before met with any complaints by neutrals, or enemies to England, while their subjects or citizens possessed advantages and freedom from capture, under these partial exemptions from the rigors of war. I agree with the counsel for the captors, that when a licensed trade is opened generally, or by special license, which is only tolerated by such license, and was not before free or lawful, as between ports of enemies; the consent of both sovereigns is necessary. It could not be effected without such mutual agreement. But I deny, that where a protection is given by one sovereign to the ships of his enemy, employed in a trade not depending on a license, but lawful to the vessel protected, any consent of both governments is necessary. Suppose a case, that Great Britain were to order generally, all her cruisers to abstain from captures of our ships bound to Cadiz or Lisbon, with certain cargoes. Would any one contend that our government should consent before our ships could enjoy the benefit? and that we should condemn our vessels, for sailing in safety, under such general orders to British cruisers? Where, then is the difference between all, and one vessel so sailing, always taking it for granted that there is no fraud in the case agreed, that British interests not immediate, but in some way, ultimately implicated, prompt such exemptions and indulgences? But this renders not the exemption illegal, or less beneficial. Quixotism among nations, is not to be looked for. Some consideration of benefit is always at the bottom of concessions of this nature.

The class of cases whereof The Hoop, in 1 C. Rob. Adm. 196, is the leader, may be dismissed from our notice; as not applying to a lawful trade, not one of course, depending on licenses. Our trade with Lisbon or Cadiz cannot be affected by the principles laid down in the case of The Hoop. It is a lawful trade to us; and all the advantage we enjoy from British passports, more commonly than correctly, called licenses, is freedom from capture by their cruisers; while we are prosecuting our lawful voyages. When a trade is deemed by one enemy, only beneficial to its adversary; it may, and does, refuse to consent to its subjects, or citizens, receiving licenses, or privileges, to engage in the traffic. Trading to enemy ports is unlawful in itself; and is often forbidden, and punished, by municipal laws. Such is our case as to trading to British ports. But although passports, called licenses, have long been in use, to exempt from British capture, vessels going from one lawful port to another; no instance can be shown, in which the consent of our government was ever asked, or deemed necessary. Our government may inhibit the practice, but until they do, I must act according to the suggestions of my own judgment.

Having, to preclude repetition, made these general observations, calculated to meet objections made in this cause, I proceed to consider the paper, to which the law respecting licenses has, in my view of it, been improperly applied. Although common parlance and common acceptation, do not amount to legal definition; they often lead to a good classification and understanding of subjects. Our merchants have habitually fallen into a nomenclature of the various British exemptions from capture, current among us, which is de-

scriptive of more than the mere names. Some are called Fosters, some Sidmouths, and those whereof that under consideration is one, are called (not Allens but) Sawyers. Now, according to the drawing exhibited in the objections made on behalf of the captor, Admiral Sawyer is thrown in the back ground, and Mr. Allen is brought prominently forward; I cannot see that the fact, or law of the case, warrants this mode of grouping and placing the figures. It is said, "that Mr. Allen has presumed to exercise a portion of sovereignty, within our territory, and that the captured have assisted him, in this invasion of our national rights and dominion." I have read the paper over and over again, and confess I can see nothing in it, to justify so serious a charge. I see more official form used, possibly from a lingering habit, and not intentional offence to us, than was necessary; and which might have been omitted. But, strip the paper of such redundancies, and it is nothing more than a certificate (calculated to operate on the British commanders, and with no apparent view to interfere with our sovereignty, or to assume any right to exercise the power of his own sovereign, in a way substantially offensive to us) purporting that Admiral Sawyer had written to him, a letter, whereof he attests a copy; by which it appears, that our vessels laden with dry provisions, unarmed, and bona fide bound to Portuguese, or Spanish ports, are not to be molested by the squadron under his command." It appears, that this was done by Admiral Sawyer; in furtherance of the views of his majesty's government; and therefore if any act of sovereignty exists in the case, it was exercised out of our territory. And it is as much exterritorial, as are the Sidmouths; which are acts of sovereign authority, inchoate in England, but consummated here. For they are sent in blank, sold in our market, and filled up, within our territory, with the name of the vessel, description of the voyage, &c. by those to whom the distribution is committed. And yet the counsel allow, there is no invasion of territorial rights, or sovereignty, or any illegality, in such passports. Now I cannot see that Mr. Allen's conduct is more offensive, or illegal, than is that of those who perfect a Sidmouth, and apply it to the vessel and voyage requiring it, by filling up the blanks, and thus consummate the validity of the document, within our territory. What are called Foster's are permissions or passports from the ex-minister Mr. Foster, many, if not all, composed or perfected and delivered, within our territory; and given by one who had no more authority, as it regarded us, than has an ex-consul. In the case of The Tulip [Case No. 14,234] I laid it down, that Mr. Foster's passport would not have been illegal, had it not been accompanied with the engagement of the vessel in enemy service. This opinion was confirmed, or not objected to, by the superior court. The council do not dispute, on the contrary they allow, the innocence and legality of such passports. But I am told, that the Sawyer safe conduct or passport—for so I consider it,—includes a contract, that the vessel shall go to the place designated, and no other; and it is therefore an engagement with the enemy. I see no such engagement. Every one knows, that passports, or even licenses are forfeited, and are no longer protections, if used for other voyages, or purposes than these designated. If those possessing the limited indulgence, choose to deviate, and forfeit its advantages, they have their election.

A Sawyer (for brevity sake, I use the current nomenclature) contains a permission to return safe, with lawful cargo; for so Mr. Allen certifies was Admiral Sawyer's intention. A Sidmouth, I believe, does not thus continue the permission. It is only material to the party concerned; and the return privilege is no more offensive to our laws, than that for the out passage. But it is said Admiral Sawyer had only a limited command, over a squadron. This and many other objections, would have been more in place, in a British prize court. But the more limited his authority, the less proof is there, that either his act, or that of Mr. Allen, was one of sovereignty. The English government have not viewed either Mr. Foster's or Admiral Sawyer's permissions, or safe conducts, as sovereign or national acts; for they have thought it necessary to confirm and validate them. If this be so, why we should consider the paper in question as an exercise of sovereign authority, for the purpose of implicating our citizens in the consequences, and thereby forfeiting their property, I cannot account, or reconcile with my opinions, either of law, or the principles of justice. This would be inflicting on our citizens, under pretext of participation, the penalty incurred, as it is alleged by Mr. Allen, for his supposed offence. But, "the consular seal was directed, by Admiral Sawyer, to be affixed to any copy of his letter, accompanying the papers of the vessel using it," as a safe-guard, or warrant to pass. With regard to us, this is of no consequence. The whole paper, and all other such, are not to operate within our territory. To us, and our laws, they are of no more validity, than are the forgeries of other passports, which have been plenteously spread through our country. But to British cruisers, on whom alone they are to operate, it is important that the documents should be genuine. The impression of the consular seal was therefore, a symbol, essential to show that the paper was not counterfeit. This emblem might have been any thing else, but the seal had been known, and respected. Mr. Foster may have innocently sealed his passports, with armorial bearings; a pageant of British heraldry, of which I do not mean to speak with disrespect. But they are as obsolete, and of as little authority among us republicans, as is the impression, or are the emblems, of a vacated seal of an ex-consul. The one

however, is as harmless as the other. We are not to judge for those whom such impressions are to affect; nor are we to mulct our citizens in forfeitures, on account of them; or because a late consul had raised up the shades of his departed formularies, after his office was defunct.

Mr. Onis's passports are agreed to be harmless and lawful. Yet they are given within our territory; by one, however worthy and respectable, yet not as I believe, formally acknowledged. I have merely noticed these and others, by way of illustration; and I think it useless to add more, though it might be done.

The embers of Mr. Genet's transactions are disturbed, for the purpose of comparison between this case and them. Trouble enough had I, in the unpleasant period of their existence; and when the subject was now brought up, the "jubes renovare dolorem" suggested itself to my mind. I shall speedily dismiss it. I do not see any resemblance. The one was an egregious violation of our territorial rights, and of the laws of neutrality. Courts, attempted to be erected in our country; cruisers, fitted out to annoy our then friend; foreign commissions, issued for warlike purposes, in the country of a nation at peace; our citizens seduced from their duty; and the whole tending to involve us in war. The present, so far as it reaches, has a direct contrary tendency. I have said enough, whether correct or not, to show my sense of the subject now under my consideration; and from my preceding remarks it will be seen, how little analogy there is in my opinion between the cases.

I shall also dismiss as concisely, the remarks made on the instructions given to Farris; for I have really extended my observations, led on by the general importance of the subject, to a length I had not myself contemplated. No mention is made of the Sawyer in these instructions: only general observations on the probability of British indulgence. I see nothing reprehensible in this. If Admiral Sawyer's command extended only to limits short of Cadiz, there was a part of the track unprotected; to which those general observations applied. The caution to avoid French boats, &c. was not unwise or unlawful. Our vessels have been captured by them, under pretexts less solid, than having an enemy pass on board. The injunction to avoid all vessels, was not reprehensible; even if it included our own. I must say, with most sincere regret, and not with the most distant idea of asperity, that I think the present claimants, have sufficient proof of the prudence of that precaution.

The only remaining point is, in what manner, or on what terms, the restitution of this vessel, and cargo, are to be made? For it may be perceived, that it is my intention to restore them to the claimants. I hold it to be my duty, as it is my inclination, to render every assistance within the scope of my judicial authority, to our cruisers conducting themselves with propriety. But I am also bound to protect the captured, from unnecessary seizures, delays, and losses, when I think the capture unlawful. The bias in foreign courts (complained of by us, when neutrals) to throw every thing, in any way possible, into the scale favourable to captors, must not be imitated among us. How to define with precision—"probable, or reasonable cause," is a difficult task. I shall leave it to the superior courts. For myself, I think, it should rest on strong facts, apparent at the time of capture. Such as double papers by way of deceit, but false and colourable; want of proper ship's papers; prevarication by the master, or other officers and crew, examined in preparatorio, which, in this case has not been brought to the test, by the conduct of the captor; false destination; papers thrown overboard, &c. &c. But these are all facts. I cannot conceive that a cruiser is excusable, for sending in a vessel of a friend, or of our own citizens for adjudication, on mere points of law. If they are against him, he takes the consequences. And I think this is the situation of the captor in this case.

It remains now, that I close a discussion, protracted by the novelty of the subject, the variety of matter suggested in the course of the hearing, and the considerations rising out of the circumstances of the case. That the vessel and cargo should be restored, appears to my mind, clearly shown. As to damages, there are some which inevitably follow restitution; however open to objection, others may be deemed to be. The vessel must be restored in the condition in which she was, in every respect, at the time of capture. Abstracting the officers and crew was unjustifiable; and every expense consequential on that, as well as other circumstances, entirely out of any questions of probable cause, ought to be retributed. I decree, however, generally; that the vessel and cargo be restored to the claimants, with damages and costs.

[NOTE. Reversed by the circuit court. Case unreported. On appeal to the supreme court the decree of the circuit court was affirmed. 2 Wheat. (15 U. S.) 143.]

Case No. 14,466.

UNITED STATES v. ARMIJO.

[1 Cal. Law J. 229.]

District Court N. D. California. Feb. 25, 1863.[1]

MEXICAN LAND GRANT—CONFLICTING CLAIMS—SURVEY—OBJECTIONS TO FORM OF PLAT.

Survey of rancho known as "Tolenas," in Solano county, approved February, 1863, so far as the controversy between it and the Suisun rancho is concerned, leaving to the United States the right hereafter to bring to the notice of the court more particularly the precise objections to

[1] [Affirmed in 5 Wall. (72 U. S.) 444.]

the survey, as to compactness of form, and encroachment upon the rights of neighbors.

[This was a claim by Dolores Risego Armijo and others, heirs of José Francisco Armijo, for the rancho Las Tolenas, three square leagues in Solano county, granted March 10, 1840, by Juan B. Alvarado to José Francisco Armijo. Claim filed February 9, 1852. Rejected by the commission August 8, 1854. Confirmed by the district court on appeal at the June term, 1857. Case No. 536. Confirmation affirmed by the supreme court on appeal by the United States. Case unreported. (See 5 Wall. [72 U. S.] 444.) It is now heard upon objections to the confirmation of the survey.]

HOFFMAN, District Judge. The principal controversy in this case relates to the location of the southwestern line of the approved survey. It is contended that that line should be located at the Arroyo Seco, a small affluent of Suisun creek, and so as to include a considerable tract of land to the south of the line fixed by the official survey. The land thus sought to be included is confessedly within the limits of the official survey of the Suisun rancho, and of the patent issued in pursuance thereof to the owners of the latter. It is not pretended that the land in question is not within the limits of the Suisun rancho as described in the grant and on the diseño, nor on the other hand, that the survey of the Armijo rancho, which is now objected to, is not in like manner within its exterior boundaries. On referring to the diseños, it is seen that they represent, to a great extent, the same tract of land—that indicated on the Armijo diseño being from twelve to twenty leagues, and that represented on the Suisun diseño being from eight to ten leagues in extent. The grant to Armijo was for three leagues, and he is entitled to that quantity, to be taken within the exterior limits. The grant to Solano of the Suisun rancho was for four leagues, which quantity has been surveyed to him, as has been stated, within his exterior boundaries, and a patent issued.

It is claimed on the part of certain parties intervening in this proceeding, that the grant to Armijo is entitled to priority of location, even though the location desired should embrace land already included in the patent of the Suisun rancho. This claim is founded, first on the alleged priority of the grant to Armijo; and, secondly, on the alleged fact that Armijo not long after he obtained his grant, occupied and built a house upon a portion of his land, thus effecting, it is contended, a segregation of his three leagues, and attaching his title to a specific tract of land by acts which were conclusive upon him, the Mexican government, and the United States, who succeeded it. The land claimed to have been thus appropriated by Armijo as the three leagues to which he was entitled, is in part included, as before stated, in the Suisun patent.

First, as to the alleged priority of the Armijo grant: The grant to Armijo by the governor was issued on the 4th of March, 1840—that to Solano on the 21st of January, 1842; but it by no means follows that under Mexican laws and usages the priority of title would be determined by this circumstance alone. It appears that on the 16th of January, 1837, Solano presented his petition to M. G. Vallejo, the commandant general of the Southern frontier, and director of colonization, praying for the land of Suisun, with its appurtenances. "Said land," he states, "belongs to him by hereditary right from his ancestors, and he is actually in possession of it, but he wishes to revalidate his rights in accordance with the existing laws of the republic and of colonization recently decreed by the supreme government." On the 18th of January, 1837, the commandant general granted "temporarily and provisionally to Francisco Solano, chief of the tribes of this frontier, and captain of the Suisun, the lands of that name, as belonging to him by natural right and by actual possession." On the 15th of January, 1842, Solano presented a petition to the governor, in which he refers to the provisional grant and solicits "the corresponding title of concession, perpetual and hereditary, of the aforesaid land, in order that at no time may the petitioner or his heirs be molested in the pacific enjoyment of his property." On the 20th of January, 1842, the governor made his usual decree of concession, and on the succeeding day the grant issued. On the 3d of October, 1845, the grant was approved by the departmental assembly. The title papers of Francisco Armijo, in like manner, commence with a petition to the señor commandant general, but this petition was dated November 22, 1839, more than two years and a half later than that of Solano. The three leagues solicited in this petition are described as joining with the Suisun rancho. On the same day Vallejo gives permission to Armijo to occupy "the place of Las Tolenas, which joins with the rancho of Suisun, on account of its being vacant and not being private property." This marginal order further directs the petitioner to apply, with this decree, to the political authority, that it may serve him as a legal step, and "that the grant be made to him, unless there should be some other obstacle." It seems that, subsequently, Armijo presented a petition to the prefect of the First district, asking for a grant of the same land. This petition, with a favorable report, was referred by the prefect to the governor, and on the 4th of March, 1840, the title issued. The grant to Armijo was not approved or made "definitively valid" by the departmental assembly. From the foregoing it will be seen that, in every respect, except the date of the formal title, the title to Solano had pri-

ority over that of Armijo. The rights of Solano are distinctly recognized by Armijo in his own petition, and by Vallejo in his provisional concession, and apparently referred to in the first condition of the grant to Armijo, which prohibits him from "molesting the Indians who are located on the land, and the immediate neighbors with whom he joins." It is clear, therefore, that no conflict between the two titles was apprehended, for the land of Tolenas is described as bounded by Suisun, and is declared vacant and not private property by the very officer who, two years and a half before, had granted to Solano the lands of Suisun as belonging to him by natural right and actual possession.

Under these circumstances it appears to me plain that, according to Mexican usages, the rights of Solano would have been recognized as prior had any contest arisen, notwithstanding that the formal title issued first to Armijo. The archives abound in instances where, not only the equity created by a first occupation and cultivation under a provisional license to occupy, but even that created by a prior solicitation, has been recognized and enforced. In the Case of Estrada [Case No. 14,750], for the rancho Pastoria las Borregas, there was granted to Yñigo a piece of land, to which he alleged some equitable right by reason of an ancient permissive occupation, and this notwithstanding that a grant had already issued to Estrada for a tract embracing the same land. So in the Case of Alvisu [Id. 14,435], whose boundaries were found to include land whereof his neighbor, Higuera, had long been in occupation by permission of the ayuntamiento of San José. On application to the governor the boundaries of Alvisu were reformed so as to exclude the lands of Higuera, notwithstanding that Alvisu had obtained a formal title, while none had been issued to Higuera. In the cases of the rancho of Santa Teresa [Id. 14,583] and Laguna Seca [case unreported], the decrees of concession were issued to Bernal and Alvirez, respectively, for the two ranchos named. Alvirez, however, presented to the departmental assembly his petition, in which he alleged that, beyond the limits of the rancho conceded to him and within those of the rancho conceded to Bernal, he had cultivated a field, dug a ditch, etc. The assembly recognized the right growing out of this occupation and cultivation so far as to assign to Alvirez his cultivated field, notwithstanding it formed a wedge-shaped piece of land extending within the limits of Bernal's rancho. The grant to Prado Mesa, and the subsequent grant of a portion of the same land to the Indian, Gorgonio, affords another illustration—and many more might be added—of the respect paid to the inchoate rights or equities acquired by an ancient occupation, or by provisional licenses to occupy. In view of these facts it cannot, I think, be affirmed that a prior right of location, as against Solano, would have been recognized as existing in favor of Armijo—and more especially as Solano's grant had been approved by the departmental assembly, and he was in a condition to ask judicial possession, while the grant to Armijo, being unapproved, remained not "definitively valid," and no judicial possession could legally be given.

With regard to the occupation by Armijo, the evidence is doubtful and unsatisfactory. It is plain that, in 1847, after the change of sovereignty, he built an adobe near the arroyo Seco, and claimed that his three leagues were there to be located; but his first settlement, in 1841, seems to have been further to the north, and beyond the limits of the Suisun patent. It is contended that this settlement by Armijo operated to effect the segregation of the quantity granted. The same ground was taken with respect to this title, when presented to the supreme court of this state in Waterman v. Smith, 13 Cal. 373, and after elaborate argument and mature consideration was overruled. It was there held that occupation and cultivation could have no greater effect than a private survey; and that the latter has no force or validity in support of the claim, had been repeatedly decided by the supreme court. It was further held that, where a grant was for a certain quantity of land to be taken within a larger tract, that the right to designate the particular tract granted could only be exercised under the former government by the proper officer, and that this right passed, with other public rights, to the United States, to be exercised in pursuance of its laws and policy. That the location of a confirmed grant, where the quantity granted lies within a larger tract, rests exclusively with the executive department, and that its action cannot be reviewed or corrected by the ordinary tribunals, except so far as the rights of third persons, having a proprietary right attached to a particular tract paramount to that of the United States, as well as to that of the patentee, might require. But it was considered that the grantee of a certain quantity of land to be taken within a larger tract had no such right attached to any specific piece of land as would enable him to contest the conclusiveness of a patent issued to his neighbor, notwithstanding such patent might include lands within his exterior limits, provided that sufficient land was left within his exterior limits to give him the quantity granted. That the supreme court could have come to no other conclusion, without assuming the right to review and correct locations made by the proper officers of the United States, may, perhaps, be admitted; but it does not follow that this court, charged by the act of June 14, 1860 [12 Stat. 33], with that precise duty, is confined within limits so narrow. Notwithstanding that the right to

segregate and measure off the quantity granted, technically passed to the executive officers of the United States with other sovereign rights, yet this court has constantly held, in the exercise of its supervisory and directory power over the executive officers, both as against the United States, and the claimants, that the election of the particular tract was fixed by the occupation and cultivation of the grantee. The surveys, therefore, have, in all instances, been made to include such settlements and occupation, and the segregation effected in the same manner as would have been by the Mexican officer in giving juridical possession. If, then, both of these ranchos had been before the court for location, and their diseños found to embrace the greater part of the same land, their respective locations would probably have been determined by the occupation and settlement of the parties. But it happens that, in this case, the rancho of Suisun has been finally located and a patent issued by the United States. If the location of the Armijo rancho, claimed by the intervenors, be allowed, the only course would be to direct a patent for that rancho to be issued, overlapping and embracing lands covered by the patent to Suisun. In the conflict which would thus arise between the two patents, it may well be doubted whether, by reason of the alleged priority of Armijo, his title would be adjudged superior. In the case of U. S. v. Fossatt [20 How. (61 U. S.) 413] it was held that the jurisdiction of this court over cases of this description continued until patent issued. Though this decision was wholly unanticipated, yet it must be taken as authority for the position that the claimants under Armijo might have filed their objections to the Suisun survey, and brought their equities, if any they have, arising from the occupation and settlement within their exterior limits, to the notice of the court. The location of both ranchos could then have been determined in conformity to the equitable principles applicable to the subject. But the patent for Suisun has been issued—the executive department, in whom the right was vested, at least preliminarily, to effect the segregation of the quantity granted Solano, have done so, and their action has become final. It is not pretended that the land thus segregated is without the exterior limits of his grant. If, then, a portion of the land embraced within the patent be also surveyed under the Armijo grant, and included in the patent of the latter, the effect would be, if the latter patent should be adjudged to convey the superior title, to diminish, without compensation or equivalent, by the amount thus included within the second patent, the area of the Suisun grant. Without affirming, therefore, as seems to be the opinion of the supreme court of this state, that a survey and patent is a final and conclusive establishment of the location and boundaries of the tract confirmed, notwithstanding that such location may be plainly without the exterior limits of the grant, and embrace a large—and perhaps the most valuable—portion of the land within the exterior limits of any colindante, provided that enough remains within those exterior limits—it may be a barren sierra or worthless lands,—to satisfy the quantity confirmed, it will be sufficient to say, in this case, that, where the segregation has been effected by competent authority and in the manner provided by law, it will be final and conclusive when clearly within the exterior boundaries of the grant, as against a neighbor whose diseño embraces a portion of the same lands, but whose location within his exterior limits has not been previously fixed by competent authority, under this or the former government. Whatever equities, therefore, Armijo might have urged, if the location of both ranchos were an open question, I think he is concluded by the patent already issued to his neighbor, who, as before observed, must be considered as having, under the Mexican system, the prior right.

In the foregoing observations I have treated the case as if Armijo had clearly shown a prior location and settlement on lands within the Suisun patent. But the proof on this point, as before remarked, is unsatisfactory. As early as 1847, and at the time of building the adobe house at the arroyo Seco, a contest arose as to the respective limits of the ranchos—Vallejo, to whom Solano's title had been assigned, and who had granted the provisional license to occupy in both cases, contending that the adobe house which Armijo was building was within the limits of the Suisun rancho. A suit at law was instituted before the alcalde, and the dispute was determined by arbitration. In the award of the arbitration it is declared that the limits of each rancho are clearly determined in the respective titles; and it seems that, by a correct construction of the award, which proceeds to specify the common boundary between them, the Sierra Madre, running in an east-northeast direction from the Suisun creek, was established as that boundary. These mountains are laid down on the Suisun diseño, and, though some question has been made as to what mountains were intended, I think it plain that the patent for Suisun has not passed beyond them. If this construction of the award and the identification of the Sierra Madre be correct, it is plain that Armijo cannot now attempt to unsettle the boundary formally established between him and Vallejo by judicial determination.

It is also objected on the part of various owners under the Armijo title, that the intervenors, who own but a small fraction of Armijo's interest, should not be allowed, contrary to their wishes, as well as to the interest of the owners of Suisun, to elect a location; but this right of election has con-

stantly been held by this court to be determined not by the comparative magnitude of the interests of the assignees of the original grantee, but by inquiring whether the grantee by his location and settlement, or by his deeds of specific parcels, had not himself made an election which he and his subsequent assigns were estopped to deny. The locations were therefore made by this court so as to include the settlement and cultivation of the grantee, and the parcels of land conveyed by him in the order of date until the whole quantity was obtained. If, therefore, the intervenors' titles for the lands they occupy were prior in date to that of persons holding the larger part of the rancho, or if they embraced lands already elected by the grantee by his occupation and settlement, the objection that their interests were small as compared with those of other assignees of the grantee would not avail.

But the question in this case is not between the various assignees of the grantee inter sese, but between them and the owners of the Suisun rancho; and as against the latter, I am of opinion that neither Armijo himself nor any nor all of the assignees under him have a right to cause their surveys to be made so as to include any portion of the land embraced within the patent to Suisun. This I understand to be the principal question in this case, and it was the one to which the attention of the counsel was chiefly directed. Exceptions, however, have been filed in the name of the United States, partly founded on the allegation that the ancient occupation of Armijo is not included in the survey, which has already been considered; and in part that the survey is not in a compact form. There would seem to be some force in the latter objection, but whether the survey could assume any other form without encroaching upon the limits of neighboring ranchos, as established by their patents, does not appear. It seems probable that any modification of the survey, while it might exclude settlers included within the present survey, would include others now excluded. No particular modification is suggested, except that by which the northern portion of the Suisun rancho would be included, and this location we have seen to be inadmissible. I shall therefore approve the official survey, leaving to the United States the right hereafter to bring to my notice more particularly the precise objections they make to the present survey, and to suggest in what manner the location may be made more compact without encroaching upon the rights of neighbors, and with due regard to the interests of the claimants.

[Upon an appeal to the supreme court, the decree of this court was affirmed. 5 Wall. (72 U. S.) 444.]

UNITED STATES (ARMIJO v.). See Case No. 536.

Case No. 14,466a.

UNITED STATES v. ARMS AND AMMUNITIONS.

UNITED STATES v. ONE THOUSAND SEVEN HUNDRED AND THIRTY-FIVE BOXES AND SEVENTY-SIX KEGS.[1]

District Court, S. D. New York. Sept. Term, 1856.

ADMIRALTY JURISDICTION—FEDERAL COURTS—LIBEL OF FORFEITURE.

[1. The jurisdiction of the federal courts in admiralty includes cases of seizure and forfeiture on tide waters without as well as within the United States nor is that jurisdiction intercepted by the existence of a foreign territorial authority over the place where the seizure was made. No legal exception can be taken by an American citizen to this fact, even if it might be a subject of reclamation by such foreign government.]

[2. In libels of forfeiture in rem, it is sufficient to describe the offense and the method of its commission in the words of the statute creating it. It is not essential to aver the manner or agency by which the property was arrested, unless it be in prize cases.]

BETTS, District Judge. Two libels of information were filed in this court,—the one on the 9th of April, 1856, and the other on the 27th of June, 1856,—against the above articles seized on board the bark Amelia at Port au Prince, on the 25th of September, 1855, and charging that they are forfeited to the United States for having been previously laden and received on board the bark at the port of New York, with intent that the said vessel should be employed in the service of some foreign state to cruise or commit hostilities against the citizens, subjects, or property of some foreign prince or state with which the United States were at peace, contrary to the third section of the act of congress of April 20, 1818. The section is as follows: "Sec. 3. And be it further enacted, that if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming, of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with

[1] [Not previously reported.]

all materials, arms, ammunitions and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States." The claimants entered and filed exceptive allegations, amounting in effect to demurrers to the libels. Pleadings attached (Schedules A and B). The specific objections stated in the exceptions are embraced in two propositions: First, that the informations set forth no lawful ground of action or jurisdiction in the case; and, second, that no legal seizure or arrest of the property proceeded against is stated which authorizes its detention and prosecution, and that upon the face of the pleadings the libellants are mere tort feasors and trespassers.

1. The claimants insist that the arms and equipments laden on the vessel are not subject to forfeiture except in connection with the condemnation and forfeiture of the vessel, if she was employed illicitly and in violation of the act of congress. I do not accede to that construction of the statute. It appoints specific punishment for three distinct agencies concerned in committing the offense prohibited: Fine and imprisonment, and also the forfeiture of all materials, arms, ammunition, and stores. This language does not import the necessity of a conjoint condemnation at the same time of all the guilty instruments of the offense. Palpably, the ship's company or the promoters of the culpable enterprise would be subject to fine and imprisonment, without regard to the situation or disposal of the ship herself and her lading. Should the vessel be destroyed in the act of capture, or escape, or is lost after seizure, so as never to become the subject of condemnation to forfeiture, her furniture or lading when arrested would no less be liable to the penalty of the law. The phrase "together with all materials, arms, ammunition and stores" cannot be regarded, in any reasonable construction of the language, to render the forfeiture of those culpable instruments of the offense dependent upon the condemnation of the vessel, which in the act is made no more than a coagent in the commission of the offence. I entertain, therefore, no doubt that the libellants are authorized by the act to demand the confiscation of the munitions of war seized on the vessel, if they were employed in the prohibited service, without showing a previous condemnation of the vessel. This ground of exception is accordingly overruled.

Neither, in my opinion, is the exception to the jurisdiction of this court tenable. The allegation in both libels is that the munitions of war, when seized, were on board the vessel at Port au Prince, on waters navigable from the seas, for vessels of the burthen of ten tons and upwards within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States. The libels further aver that the vessel had been previously illegally fitted out and loaded with the munitions of war at New York, within the jurisdiction of the United States and of this court, with intent to be employed in violation of the act of congress. I cannot regard it an open question at this day, in this court, whether it has cognizance of civil actions of admiralty and maritime jurisdiction, including cases of seizure and forfeiture, on tide waters within and without the territorial limits of the United States. That jurisdiction may be peaceably exercised anywhere upon the high seas, and, for most purposes, the ebb and flow of the tide determine the extent of that locality. 3 Story, Const. Law, par. 1663, and the cases cited. This jurisdiction is applied to cases of forfeiture under revenue laws and other prohibitory or penal statutes of the United States. U. S. v. La Vengeance, 3 Dall. [3 U. S.] 297; U. S. v. The Betsy & Charlotte, 4 Cranch [8 U. S.] 443; U. S. v. Whalen, 7 Cranch [11 U. S.] 112. Criminal offenses committed on the high seas are equally within that jurisdiction (U. S. v. Bevan, 3 Wheat. [16 U. S.] 336; 1 Kent, Comm. 6 to end, 360); and the description includes entrances, road-stands, bays, harbors, ports (3 Story, Const. Law, par. 1167; 1 Curt. Comm. 45, 50). The jurisdiction of the United States courts is not intercepted by the existence of a foreign territorial authority over the place where a seizure or arrest is made. It is explicitly declared by the supreme court that an American vessel may be seized within the territory of a foreign power for a violation of the laws of the United States. The jurisdiction of the national court over her when she is brought within its cognizance is perfect, although the arrest is certainly an offense against that foreign power. U. S. v. The Richardson, 9 Cranch [13 U. S.] 102–104. No legal exception to the act can be taken by the American citizen, and, if it be a wrong or even a subject of reclamation, it is so only between the government of the United States and the one whose territorial sovereignty has been violated. The averment in the libels makes in this vessel a legal and proper case of jurisdiction in the court over the cause of action, and the exceptive allegation is disallowed.

2. The informations, in my judgment, are sufficiently exact and specific in point of form. In the federal courts, in an indictment even, it is enough to describe the offense and the method of its commission in the words of the statute creating it. U. S. v. O'Sullivan [Case No. 15,974], where the cases are collected and considered. This is especially so in respect to libels in rem for forfeitures. The Mary Ann, 8 Wheat. [21 U. S.] 380; The Samuel, 1 Wheat. [14 U. S.] 9; The Palmyra, 12 Wheat. [25 U. S.] 1. It is not the usage in pleading, nor is it any way an essential part of the libel, to aver the manner or agency by which property pro-

ceeded against for forfeiture is arrested, unless it be in cases of prize. The fact does not ordinarily enter into the question of jurisdiction over the subject matter or that part of the court; and, when it does, a general allegation of seizure or arrest is all that need be stated in the pleading, the mere name in which it was made being matter of proof. The averment in this instance that the property was seized within the maritime jurisdiction of the United States is broad enough to admit all necessary proof of the competency of the officer or agent who performed the act to make the arrest, and that it is made in due form of law. The court will rule instead that the seizure was made by violence, and against the resistance or objection of the foreign power within whose waters the vessel and her lading were found; and the mere fact that they were within the territorial limits of another government, if on the high seas, does not abrogate and render void the proceeding, so as to constitute the act a trespass and tort by this government in respect to its own citizens, whose property was so arrested.

The decisions, therefore, in my judgment, are untenable on all points set up by them, and a decree must be entered in favor of the libellants for the forfeiture of the property so seized, with leave, however, to the claimants to answer and plead over to the merits on payment of costs.

Case No. 14,467.

UNITED STATES v. ARMSTRONG.

[2 Curt. 446; 19 Law Rep. 90.] [1]

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

HOMICIDE—EXTENUATING CIRCUMSTANCES—MALICE—DEADLY WEAPON—KILLING AT SEA—DEATH ON SHORE—JURISDICTION.

1. Though malice is not presumed merely from the fact of killing, yet the circumstances attending the homicide may be such that the law deems it malicious.

2. When the extenuating circumstance can be apprehended by the court, it is their duty to declare, as matter of law, whether it is sufficient to mitigate the offence; but when the case is such that the court cannot foresee what the jury may find the provocation was, only a general and hypothetical instruction can be given.

[Cited in Re Greene, 52 Fed. 111; U. S. v. Trans-Missouri Freight Ass'n, 7 C. C. A. 15, 58 Fed 67.]

[Cited in brief in State v. Nugent, 71 Mo. 137.]

3. That general instruction, in this case, was, that if the prisoner struck a fatal blow with a deadly weapon, it was not every actual assault which would extenuate the offence. The provocation must be such as to account for the act by reason of the infirmity of human passions in men in general, and without attributing to the prisoner a cruel and relentless disposition.

4. If the prisoner relies on an assault by the deceased, as extenuating his crime, he must show such assault by some satisfactory evidence; the jury have no right to conjecture, without evidence, that it may have been made.

5. There is no act of congress which makes punishable an unlawful stroke on the sea, without malice, followed by death on shore. But the guilty person may be convicted of an assault with a dangerous weapon.

[Cited in Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 767.]

[Cited in Com. v. Macloon, 101 Mass. 15; People v. Tyler, 7 Mich. 180; U. S. v. Guiteau, 1 Mackey, 575, Append.]

The prisoner [James H. Armstrong] was indicted for the murder of William Thompson, by wilfully and maliciously striking him on the head with a hatchet, while on the high seas, on board a vessel of the United States called the bark Kelly, of which wound Thompson afterwards died on shore within the United States. It appeared in evidence, that Thompson was mate, and the prisoner cook of the bark; and that early in the morning of the 22d day of July, 1855, some words passed between the mate and the cook in consequence of the failure of the latter to get up and come to the galley promptly when called by the mate, and ordered to get coffee ready for the watch on deck. This was about four o'clock, a. m. About an hour after, the mate inquired if the coffee was ready, and learning it was not, told the cook if he failed to have it ready another morning by five o'clock, he would give him cause to complain to the captain. (At this time the cook was in the galley, and the mate outside.) The cook replied, "You had better not commence with me, sir, if you do, it will be the worse for you." The mate put one foot and his head into the galley, the other foot remaining on the deck outside, and a moment after, backed out, his head being on the cook's breast, his arm round the cook's waist, the cook's left arm around his neck, a hatchet in his right hand, with which he struck the mate on the head, and was in the act of repeating the blow, when he was seized and disarmed by some of the crew. The wound inflicted by the hatchet, penetrated the skull, and the vessel having put into the port of Boston, and landed the mate, he died from the effect of the wound in a few days. Immediately after the cook was seized and disarmed, one of the men said to him, "You have killed that man." He replied, "Let him die, he had no business to kick me."

J. A. Loring and W. S. Dexter, for the prisoner, contended that the burden was on the government to show a malicious killing; that the presumption was against malice; that unless the government had satisfied the jury beyond a reasonable doubt, that the mate did not kick the cook in the galley, and there offer such violence as would provoke the conduct of the cook through heat of blood and without malice, the jury were bound to presume such violence was offered, and so that this was not a malicious killing.

Mr. Hallett, U. S. Dist. Atty., argued contra.

[1] [Reported by Hon. B. R. Curtis, Circuit Justice. 19 Law Rep. 90, contains only a partial report.]

In summing up the following instructions were given:

CURTIS, Circuit Justice (charging jury). In the case of U. S. v. Mingo [Case No. 15,781], tried here at the May term, 1855, this court, after careful consideration, laid down the rule, that whether the crime be murder or manslaughter, is not to be decided upon any presumption arising from the mere fact of killing; but that the government, besides proving the homicide, must offer sufficient legal evidence that the killing was malicious. And if, upon the whole evidence, the jury have reasonable doubt whether the killing was from malice, they cannot find the accused guilty of the crime of murder. To those principles we now adhere. But you will observe that they go no further than this; that the burden of proof is on the government to prove a malicious killing, and that proof of the mere fact of killing does not change this burden nor support it by raising a presumption of malice. But this is entirely consistent with such a presumption being raised by the circumstances under which the killing was effected. Mere homicide does not imply malice. But circumstances may attend a homicide, which, in point of law stamps it as malicious, without other evidence of malice. For malice may be, and is, implied by law, as well as expressly proved by direct evidence. And one ground for the implication of malice, is the nature of the act of the accused. If the prisoner, without such provocation or excuse as the law deems sufficient, intentionally struck a hatchet into the head of the deceased, and thereby killed him, the law deems this a malicious killing, and the offence is murder. In such a case, no other evidence of malice is required, than that furnished by the act itself. That being wicked, cruel, and barbarous, the law considers that it proceeded from a wicked and depraved heart, fatally bent on mischief. If, therefore, you find the prisoner intentionally struck the mate on the head with a hatchet, the blow being calculated to produce, and actually producing death, you should find him guilty of murder, unless there be some other circumstance in the case, which should control this implication of malice, and account for the act without its existence. The prisoner's counsel insist that there is. They urge that there is evidence tending to prove, that the mate assaulted the cook in the galley, and that moreover, as no one saw what passed there, you ought to presume, that the assault by the mate was of such a character as to excuse, if not to justify the homicide. But we do not think you can make any such presumption, in the absence of proof showing what was done by the mate. It is true the prisoner is entitled to the presumption that he is innocent, till his guilt is proved. But the same presumption exists in favor of the mate. The law will not presume without proof, that he wrongfuly assaulted the cook, any more than it will presume without proof, that the cook assaulted him. It presumes no misconduct by either; misconduct must be proved. But when it has been proved, he who apparently was a wrongdoer, cannot escape, upon a suggestion not supported by any evidence, that another, and not himself was guilty, and therefore you cannot consistently with the rules of law, allow the prisoner the benefit of any mere conjectures of what might probably have happened in the galley. If the evidence points to any thing as having there happened, you are to consider it, but you are not to assume without evidence, that the mate's misconduct excused or extenuated the act of the prisoner. Rex v. Oneby, 2 Ld. Raym. 1500.

It is urged that the evidence shows the mate kicked the cook. It is true the cook so declared immediately after the affray, and his declaration is before you to be weighed in connection with the other evidence. You will consider the position in which the mate stood, leaning forward, the upper part of his body and one foot in the galley and the other on deck; the time which elapsed, the positions of the parties when they came out of the galley, and then you will say, if you are satisfied, the mate kicked the cook. If he did not, this ground wholly fails. If he did, still it does not necessarily follow that the killing was not malicious. Because there must be some reasonable proportion between the provocation given and the act of resentment. It is not every blow given which will account for the use of a deadly weapon. If the evidence in this case had described the provocation, it would be the duty of the court to declare, as matter of law, whether it would or would not be sufficient to remove the presumption of malice arising from the fatal use of a deadly weapon. But it is not practicable to do so in this instance, because we do not know what you may consider to have been done by the mate to the prisoner. We can, therefore, only say, that if a blow of considerable violence, excites the passions of the one assailed, and so causes him, in the heat of blood, to kill his assailant, the killing is not, in general, malicious; but that if a deadly weapon is used, the provocation should be very great to be sufficient to extenuate the offence. If, from the evidence, you can find that the mate inflicted such a blow on the prisoner, as would account for his returning it with a blow on the head with a hatchet, without imputing to the prisoner any more than that infirmity of passion which belongs to men in general, then the act is not in law, malicious. But the law allows for the infirmity of our common nature, not for those violent and wicked passions which exist in some men; and if the act of the mate was such as to produce retaliation by a fatal blow with a deadly weapon, not by reason of the common passions of humanity, but from a cruel and relentless disposition, then the defendant is

guilty of a malicious killing, notwithstanding you may find the mate assaulted him.

Verdict, guilty of manslaughter only.

The prisoner's counsel moved an arrest of judgment, assigning for cause, that there was no act of congress which defined and punished the offence of giving a mortal blow on the high seas without malice, when the death therefrom occurred on shore.

This motion was argued by J. A. Loring and W. S. Dexter, in support thereof, and Mr. Hallett, Dist. Atty., in opposition thereto.

CURTIS, Circuit Justice. The twelfth section of the act of April 30, 1790 (1 Stat. 115), makes the crime of manslaughter on the high seas punishable by fine and imprisonment. It does not define the offence, otherwise than by the use of the term manslaughter. It thus remits us to the common law for its definition. Manslaughter is the unlawful killing of a human being without malice; and there is not such a killing on the high seas, if the death takes place on land. In accordance with this, Judge Washington, in U. S. v. Magill [Case No. 15,706], decided in 1806, held that a killing with malice from a stroke on the sea which produced death on shore, was not murder on the high seas. No doubt the fourth section of the act of March 3, 1825 (4 Stat. 115), under which this prisoner was indicted, was passed to remedy this defect of jurisdiction. But it applies only to a malicious killing on shore by a stroke at sea. The verdict of the jury negatives malice, which is an essential ingredient in this statutory offence. It is true, the offence described in the statute is not strictly murder; for it punishes the malicious stroke, given at sea, when the death occurs on land. But it is an offence of which one necessary ingredient is malice, and that is shown by the verdict not to have existed in this case. The district judge concurs in this opinion. Judgment arrested.

The prisoner was afterwards indicted in the district court, for an assault with a dangerous weapon, convicted, and sentenced to three years' imprisonment, with hard labor in the state prison at Charlestown.

Case No. 14,468.

UNITED STATES v. ARMSTRONG.

[20 Leg. Int. 212;[1] 5 Phila. 273.]

District Court, E. D. Pennsylvania. Aug. 22, 1862.

FRAUDS AGAINST THE UNITED STATES — FORGED PENSION PAPERS—INDICTMENT.

[1. Under the act of March 3, 1823 (3 Stat. 771), to punish frauds against the United States, an indictment may properly charge, in one count, that defendant caused to be transmitted to, and presented at, the pension office, forged papers, etc. The two acts of transmitting and presenting are not separate offenses under the statute.]

[2. The common-law refinements in criminal pleading are not applicable to statutory offenses under the laws of the United States. It is sufficient, usually, to allege the offense in the very terms of the statute.]

The defendant [Christopher Armstrong] was tried upon several indictments framed under the two last clauses of the first section of the act of congress of 3d March, 1823 (3 Stat. 771), entitled "An act for the punishment of frauds committed on the government of the United States." Each indictment contained two counts. The first charged the defendant with uttering and publishing as true a certain false, forged, and counterfeit writing, purporting to be in support of a claim by a surviving soldier, for the bounty land to which he might be entitled under the act of congress granting bounty land to certain officers and soldiers who have been engaged in the military service of the United States, passed March 3, A. D. 1855 [10 Stat. 701]. The second count charged him with transmitting to and presenting at the office of the commissioner of pensions, with intent to defraud the United States, the counterfeit writing described in the first count of the indictment, in support of the said claim for bounty land. The second count, as it appears in one of the indictments, was, with the omission of mere words of description, as follows: "That Christopher Armstrong did feloniously, falsely, fraudulently, and unlawfully, with intent to defraud the United States, transmit to and present at, and cause and procure to be transmitted to and presented at, a certain office of the government of the United States, to wit, the office of the commissioner of pensions, a certain false, forged, and counterfeit writing, purporting to be a declaration made by a surviving soldier, for the purpose of obtaining the bounty land to which such surviving soldier might be entitled under the act of congress granting bounty land to certain officers and soldiers who have been engaged in the military service of the United States, passed the third day of March, A. D. 1855."

The evidence on the part of the prosecution showed that certain papers, consisting of a declaration, in the form usual in cases of application for bounty land, and certain affidavits and writings in its support, relative to an alleged claim by a person purporting to be entitled to the benefit of the act of congress of March 3, 1855, were transmitted through the mail from Philadelphia to the office of the commissioner of pensions at Washington. The documents purported to come from one Jacob Helmer, and were sent to Washington in a letter, addressed to the commissioner of pensions, signed by Helmer. This letter made the request that communications, in relation to the inclosed claim, from the pension office, be directed to the writer and applicant, at 1317 South Philadelphia. Pending the action of the commissioner of pensions upon this applica-

[1] [Reprinted from 20 Leg. Int. 212, by permission.]

tion, a declaration, with the accompanying papers relative to another claim for bounty land under the same act of congress, was transmitted to the pension office from Philadelphia. They purported to have been executed by one George B. Anderson, and named George W. Moneypenny as the attorney of the applicant for the prosecution of the claim. The commissioner of pensions, having reason to doubt the genuineness of both of the claims referred to, and to believe that they were both the work of the same hand, in order to discover the person who had transmitted them, directed a letter to be prepared at the pension office, and sent to "George W. Moneypenny," the attorney named in the Anderson claim, at Philadelphia. This letter was mailed to Philadelphia, and at the same time the postmaster there was requested by the commissioner to observe particularly the person who made application for the letter at the window of the post office, and to discover, if possible, who he was, and where he resided. A few days after this decoy letter reached the post office at Philadelphia, a person, who was recognized as the defendant in this case, inquired at the delivery window for a letter to George W. Moneypenny. The clerk asked him to call at the chief clerk's desk, within the post-office building, for the letter, and told him that the letter would be handed to him there; but when the defendant left the delivery window, instead of proceeding to the desk of the chief clerk, he turned into the street and walked away. He was followed, however, by the postmaster, who had heard the defendant from within the office inquire for the Moneypenny letter, and subsequently by a police officer, to whom he was pointed out by the postmaster. The defendant pursued a devious route from the post office to the neighborhood of Thirteenth and Spruce streets, where he entered the dwelling of a well-known citizen of Philadelphia, when the police officer lost sight of him.

Subsequently another letter was written by the commissioner of pensions and directed to Jacob Helmer, No. 1317 South Philadelphia. It was mailed to Philadelphia, and the postmaster there was requested to take steps for the arrest of the person who called for it. A young man who said that he had been sent to the post office for the letter by Jacob Helmer, made application for it. He was told by the postmaster that he would require a written order from Helmer before the letter could be delivered. The boy left the office, and soon returned with the required order, signed "Jacob Helmer." Upon further questioning, however, in the presence of a detective police officer, the lad confessed that his father, who lived at 1317 South street, Philadelphia, had sent him for the letter, and had written the order. A police officer was then sent to take the defendant into custody. He was found at the house indicated in South street. The father and son being confronted at the mayor's office, the latter repeated substantially the statement that he had made at the post office; but the defendant strenuously denied having written the order signed "Jacob Helmer," which the son had produced when he applied for the letter. Upon the trial, the prosecution called this lad to the witness stand; but he refused to testify, on the ground that he would not "give evidence against his father." The defendant was arraigned and tried upon the indictments, which charged the uttering and transmission of the papers in the Helmer application.

After the United States had proved the counterfeit character of the papers, the forgery of the alderman's signature to the jurat attached to the declaration, the circumstances attending the application at the post office for the decoy letter to Jacob Helmer, the arrest of the defendant at 1317 South street, and had given some evidence to show that the body of the counterfeit papers was in the handwriting of the defendant, the law officers of the United States offered to prove the transactions already described, in connection with the other application, which we may call the Anderson or Moneypenny application, for bounty land. The defendant's counsel objected to the introduction of this evidence, but the learned district judge overruled the objection, upon the general ground that the question was one of fraudulent intent, and that, upon questions of that sort, where the intent of the party is in issue, it has always been deemed allowable to introduce evidence of other acts and doings of the party of a kindred character, in order to establish his intent or motive in the particular act directly in judgment.

Upon the argument of the case before the court and jury, the counsel for the defence asked the learned district judge to charge the jury that the evidence submitted on behalf of the prosecution did not sustain the first counts of the indictments, inasmuch as the clause of that section of the act of 1823 under which the indictments were preferred described the offence of uttering and publishing any false, forged, and counterfeit paper for the purpose of obtaining or receiving from the United States, or an agent or officer thereof, any sum or sums of money, and that the papers given in evidence by the prosecution, if they were false, and were uttered by the defendant, were uttered and published to obtain bounty land, and not money. The counsel, therefore, asked the court to charge the jury that they ought to render a verdict of not guilty under the first counts of the indictment. The counsel for the defence also argued to the court and jury that the second (or transmission) counts of the indictments were bad, in that they described what are substantially, and within the words of the statute, two separate and distinct offences, viz. transmitting to and presenting at the

office of the commissioner of pensions the writings in the indictments described.

CADWALADER, District Judge, charged the jury, in reference to the first counts, conformably to the request of the defendant's counsel, but sustained the second counts of the indictment as good in law. The jury found the defendant not guilty under the first counts, but guilty under the second counts of the indictments. The defendant then moved in arrest of judgment, and assigned the following reason: "All counts, and every count, describing the offence as that of transmitting to and presenting at an office of the government a false and forged application for bounty land, allege two distinct and incompatible offences, which demand for trial two distinct venues."

In view of the practical importance of the question raised by this motion, the district judge requested Judge GRIER, the circuit justice, to sit during the argument and to decide the point, intimating that, as a writ of error would remove the record to the circuit court, he would arrest the judgment, if Judge GRIER thought the indictments bad.

On the 12th day of September, 1862, the cause was accordingly argued before GRIER, Circuit Justice, and CADWALADER, District Judge.

Henry M. Phillips (John M'Intire, of counsel), for defendant, contended:

(1) That each of the offences charged in these indictments is a felony, expressly so described and declared in the act of congress.

(2) That the offence of transmitting a false and forged paper to a public office or officers of the United States was separate and distinct from that of presenting to such office or officers a paper of that description. The one might be committed within this district. The other could not be committed save in Washington, if the office in question were that of commissioner of pensions, as in this case, which is located at the seat of government. Congress manifestly intended to provide for the two distinct cases of transmission to and presentation at a public office of forged documents. The phraseology of the clause of the section of the act of 1823 in question was dealt upon as confirmatory of this view; the use of the words "to" and "at," and especially of the word "or," connecting the phrases "transmit to" and "present at."

(3) That if the offences are felonies, and are separate and distinct, they cannot be joined in one count. And they cited Whart. Cr. Law, § 381, and the cases therein referred to.

George A. Coffey, U. S. Dist. Atty., and J. Hubley Ashton, Asst. U. S. Atty., for the prosecution, argued:

(1) That the counts in question are substantially like the count in the indictment which was before the supreme court of the United States in the case of United States v. Staats, 8 How. [49 U. S.] 41.

(2) That this indictment must be sustained upon the principle which governed this court in sustaining the precedent of the indictment now used in this district in cases of counterfeiting, where the offences of making and causing to be made counterfeit money are always joined in the same count. This court has, therefore, expressly adjudicated the present question.

(3) That the indictments being in the very words of the statute, the rule of criminal pleading pertaining in the United States courts is fully satisfied. U. S. v. Goding, 12 Wheat. [25 U. S.] 474.

GRIER, Circuit Justice. I am of opinion that the indictments are well drawn, and that the counts to which the reason in arrest of judgment applies are sustainable in law. The common law refinements in criminal pleading are not applicable to statutory offences under the laws of the United States. It is sufficient, usually, to allege the offence in the very terms of the statute. It will be observed that the framers of this act of 3d March, 1823, have, in the first section, the section in question, divided the offences therein created and defined into three general classes. The first class includes the offences of making and aiding the making of false writings; the second, those of uttering and causing to be uttered such writings, with intent to defraud the United States; and the third class embraces the crimes to which the third counts of these indictments apply,—those of transmitting to and presenting at any office of the government of the United States counterfeit papers in support of or in relation to claims against the United States. The law-maker have divided and classified the offences described for the pleader. These indictments have been drawn with reference and in conformity to this arrangement of the statutes; and I think that the reason assigned for the motion in arrest of judgment is not valid, and that the motion should be overruled.

CADWALADER, District Judge, accordingly overruled the motion, and pronounced judgment upon the verdict. On the question of "district venues," he referred to State Tr. 727–729, 740.

UNITED STATES (ARMISTRONG v.). See Cases Nos. 548 and 549.

Case No. 14,469.

UNITED STATES v. ARNOLD et al.

[1 Gall. 348.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1812.

STATUTES — TIME OF TAKING EFFECT — CUSTOMS DUTIES—ARRIVAL AND ENTRY—BONDS.

1. The act of 1st of July, 1812, c. 112 [2 Stat. 768], laying double duties, took effect on that

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

day; and all vessels arriving at their port of entry and discharge on that day, were liable to pay the duties, although they had actually arrived before within the jurisdictional limits of the United States.

[Cited in U. S. v. Lyman, Case No. 15,647; The Gertrude, Id. 5,370; Smith v. Draper, Id. 13,037; Waring v. Mobile, 8 Wall. (75 U. S.) 120.]

2. Judgment on a bond cannot exceed the penalty thereof and interest from the breach, although the sum actually be larger.

[Cited in Lawrence v. U. S., Case No. 8,145.]

[Cited in Clark v. Wilkinson, 59 Wis. 553, 18 N. W. 485 Distinguished in Fraser v. Little, 13 Mich. 202. Cited in Hood v. Hayward, 124 N. Y. 24, 26 N. E. 338; Judge of Probate v. Heydock, 8 N. H. 494; Lyon v. Clark, 8 N. Y. 156; Mower v. Kip, 6 Paige, 93; Murray v. Porter, 26 Neb. 295, 41 N. W. 1113; New Holland Turnpike Co. v. Lancaster Co., 71 Pa. St. 445; Perry v. Horn, 22 W. Va. 385; Williams v. President, etc., of American Bank, 4 Metc. (Mass.) 322; Wyman v. Robinson, 73 Me. 389.]

This was an action of debt on a bond for the payment of duties. The defendants pleaded as follows:

"Rhode Island District ss.—Circuit Court, November Term, 1812. Case—United States v. Samuel G. Arnold et al.

"And the defendants come into court and defend the wrong and injury, when, &c. and crave oyer of the bond or writing obligatory set forth in the plaintiff's declaration, reserving to themselves the liberty of all further pleadings, in abatement or in bar, or otherwise, on oyer thereof.

"By Their Attorney—Nathaniel Searle, Jun.

"Which is granted; and having oyer of said bond, they crave oyer of the condition thereof.

"By Their Attorney—Nathaniel Searle, Jun.

"And having oyer of said bond, and of the condition thereof, which are read to them in the words and figures following, viz.:

" 'Know all men by these presents, that we, Samuel G. Arnold, Joseph S. Martin, merchants, and Richard Fenner, mariner, all of the town and county of Providence, in the state of Rhode Island, &c. are held and firmly bound unto the United States of America, in the sum of three thousand four hundred dollars, to be paid to the United States: for payment whereof, we bind ourselves, our heirs, executors and administrators firmly by these presents. Sealed with our seals, dated this 2d day of July, in the thirty-sixth year of the independence of the United States, and in the year of our Lord one thousand eight hundred and twelve.—The condition of this obligation is such, that if the above bounden S. G. Arnold, J. S. Martin, and R. Fenner, or either of them, or either of their heirs, executors or administrators shall and do, on or before the 2d day of October next, well and truly pay, or cause to be paid unto the collector of the customs for the district of Providence, for the time being, the sum of seventeen hundred dollars, or the amount of duties to be ascertained as due, and arising on certain goods, wares and merchandize, entered by the above bounden S. G. Arnold, as imported in the brig Dover, R. Fenner master, from Havana, as per entry dated this day, then the above obligation to be void, otherwise to remain in full force and virtue. Samuel G. Arnold. (L. S.) Joseph S. Martin. (L. S.) Richard Fenner. (L. S.) Sealed and delivered in presence of Thomas Peckham, Jun.

" 'Amount of duties ascertained as due, seventeen hundred and eight dollars and thirty-eight cents. Thomas Peckham, Jun. Deputy Collector.'

"The defendants further defend and say, that as to seventeen hundred and eight dollars and thirty-eight cents, part and parcel of said sum of three thousand four hundred dollars, demanded by the plaintiffs in their declaration, together with the interest thereon, from the day whereon the same was payable up to the present day, being thirteen dollars and thirty-eight cents, the defendants say, that true it is, they owe to the plaintiffs the said sum of seventeen hundred and eight dollars and thirty-eight cents, and also said sum of $13.38 cents, thirteen dollars and thirty-eight cents being the interest thereof, and in the whole amounting to the sum of seventeen hundred and twenty-one dollars and seventy-six cents; and that as to the whole residue of the sum demanded by the plaintiffs, in their said declaration as aforesaid, the defendants say, that therefor the plaintiffs their said action ought not to have and maintain; because they say, that the said brig Dover, in the condition of said bond mentioned, sailed from Havana in the said condition mentioned, on the 16th day of June, A. D. 1812, having on board the said goods, wares and merchandize mentioned in the condition aforesaid of said bond: which said goods, wares and merchandize were imported into the said United States, on the said 30th day of June, 1812, and into the said district of Providence, on the said 1st day of July, 1812, in the said brig Dover, as aforesaid, on her voyage aforesaid. That Providence is the only port of entry in the said district of Providence, and that on the 2d day of July, A. D. 1812, the said goods, wares and merchandize were duly entered at the custom-house in said district of Providence, as imported in said brig Dover as aforesaid, and as stated in said condition of said bond. And the defendants further aver, that the bond aforesaid was made, executed, and given by them to the plaintiffs, as aforesaid, for securing the duties due on the said goods, wares and merchandize, imported as aforesaid, in conformity with, and by virtue and in pursuance of the act of the congress of the United States, passed on the 10th day of August, A. D. 1790 [1 Stat. 180], entitled, 'An act making further provision for the payment of the debts of the United States,' and also of a certain other act of congress, passed on the 7th day of June, 1794 [1 Stat. 390], entitled, 'An act laying additional duties on goods, wares and merchandize imported into the United States.' And

the defendants further aver, that the duties due by the acts aforesaid, on the importation of said goods, wares and merchandize, in manner as aforesaid, amounted at the time of the importation of the same, as aforesaid, to the aforesaid sum of seventeen hundred and eight dollars and thirty-eight cents, and no more, and were then and there ascertained by the said deputy collector to amount to that sum and no more, according to the condition of said bond, and in pursuance of the provisions of said statute. And the defendants further aver, that at the time of the entering of said goods, wares and merchandize, at the custom-house as aforesaid, on said 2d day of July, 1812, neither they, the defendants, nor either of them, nor the collector of the customs for said district of Providence, had any knowledge of the passing of the act 'for imposing additional duties upon all goods, wares and merchandize imported from any foreign port or place, and for other purposes,' passed on the 1st day of July, 1812; nor was the said last mentioned act promulgated, published, and made known at the district of Providence, as aforesaid, at the time of making said entry as aforesaid. And this the defendants are ready to verify. Wherefore they pray judgment, if the plaintiffs their said action shall have and maintain, for any greater sum than the said sum of seventeen hundred and twenty-one dollars and seventy-six cents, and their cost.

"By Their Attorney—Nathaniel Searle, Jun."

To this plea there was a demurrer and joinder.

The real question raised at the argument was, whether the single duties or double duties, under the act of the 1st of July, 1812, c. 112, were recoverable on the bond.

Mr. Howell, U. S. Dist. Atty.

I contend that the act of the 1st July, 1812, c. 112, took effect at the time of its passage, according to the terms of the act, and was binding upon all parties without promulgation. This was a mere fiscal regulation, and differs from cases of penalties or offences, which perhaps may receive a different consideration. If the act took effect on the 1st of July, as in law there are no fractions of a day, it took effect during the whole of that day. The importation however was not complete until the 2d of July, when the vessel was entered at the custom-house. Until that time, the duties did not accrue, and therefore the double duties are payable. The revenue laws allow a credit from the time of the entry, and so is the custom-house practice. But even admitting that the importation took place on the 1st of July, on the arrival at Providence, yet the double duties are payable on all importations on that day.

Tristram Burgess and Mr. Searle, for defendants.

This is a contract made between the United States and the defendants, as to the payment of duties. The plea alleges that the duties to be secured were duties payable under the statutes of 1790 and 1794, not under the statute of 1st of July, 1812, c. 112. The demurrer admits the allegations of the plea, and it is not competent for the United States to deny the fact. If this be true, then the United States can recover no more under their contract, than what it was designed to secure. A statute cannot take effect until it has been promulgated. It must be known before it can have operation. It would be highly unjust, and against the prohibition of the constitution of the United States as to ex post facto laws, to allow the retrospective operation now contended for. At any event, the act did not take effect until the 2d of July. "From and after the date" excludes the day of the date; and "from and after the passage" excludes the day of the passage of a law. The importation took place immediately on the arrival of the vessel within the limits of the United States. The words of the act are, "imported into the United States;" not "imported into any port of the United States." The word "imported" is equivalent to "brought into"

(STORY, Circuit Justice. The decision in U. S. v. Vowell, 5 Cranch [9 U. S.] 368, is against this construction. There must be an arrival at the port of entry, to make the right to duties attach. An importation has, in many cases, been held to mean, "a voluntary bringing into port of goods, with an intent to land or discharge them there." So is the construction of the revenue statutes of Great Britain.)

If an arrival into the United States be not of itself an importation, it is an inchoate act of importation; and after the arrival of the vessel at the port of entry, it has a retroactive effect, so as to make the importation complete from the first arrival. But the importation, at all events, was complete on the 1st of July. An entry at the custom-house is not necessary to an importation; on the contrary, it presupposes a previous importation. The whole revenue laws show that the importation is considered as complete, independent of the entry. There are three stages in the transaction: First, an importation; secondly, a report at the custom-house; and thirdly, an entry of the goods. Duties accrue upon the importation, not on the entry. Act 1799, § 36 [1 Stat. 655].

(STORY, Circuit Justice. You need not labor this point; I have no doubt that an importation may be complete, without an entry.)

The case [U. S. v. Vowell] 5 Cranch [9 U. S.] 368, is distinguishable. In that case the act was repealed at the time when the bond was given. The bond was therefore illegal and void. The decision was right, but the

reasons of the court were not, in our judgment, correct. The plea expressly avers that the goods were imported on the 30th of June, 1812, and the demurrer admits the facts. The United States cannot now say that the importation was at a subsequent period.

Mr. Howell, in reply.

The demurrer admits no facts, which are not well pleaded. The whole facts must be taken together; and if so, then the importation was not complete until the 1st of July. The case in 5 Cranch [9 U. S.] is decisive. No parol averments can be admitted to narrow the terms of the condition of the bond. All duties which were payable were secured by it.

STORY, Circuit Justice. This is an action of debt, brought by the United States, on a custom-house bond given by the defendants, on the 2d day of July, 1812, to secure the amount of the duties to be ascertained as due and arising on certain goods, wares, and merchandizes, entered at Providence on the same day, as imported in the brig Dover from Havana. After oyer of the bond and the condition thereof (which are in the usual form), the defendants pleaded a special plea, which I need not literally state. It admits in substance, that single duties are due, to wit, $1708.38 cts. with interest from the day of payment to the day of the plea, to wit $13.38 cts. and unpaid on the bond aforesaid: and as to the residue of the penalty of the bond, alleges, that the brig sailed from the Havana, with said goods, &c. on board, on the 16th day of June, 1812, bound for the district of Providence; that she arrived with said goods, &c. within the United States, on the 30th day of June, 1812, and within the district of Providence, on the 1st day of July, 1812; that the same goods were imported into the United States on the said 30th day of June, and into the said district of Providence, on the said 1st day of July; that Providence is the only port of entry in said district, and that at that port the goods, &c. were duly entered, on the said 2d day of July. The plea then avers, that the duties intended to be secured by said bond were the duties imposed by the act of 10th of August, 1790, c. 39; and the act of 7th of June, 1794, c. 54; which amounted to a sum stated in the plea. That at the time of the entry, as aforesaid, neither the defendants nor the collector of the customs at Providence had any knowledge of the passing of the act of 1st of July, 1812, c. 112, laying double duties; and that at the same time the same act had not been promulgated or published at Providence. The United States have demurred to the plea, and its sufficiency is now in issue before the court.

I have no difficulty in deciding that the plea is bad in substance. It admits the cause of action, and does not avoid it: and it is quite impossible to contend, that it can be a good bar, when from the defendants' own showing, the bond has not been satisfied or discharged. If a single dollar only were due and unpaid to the United States, the bar would be insufficient. But as the questions, which were raised on the argument, must meet the court in another shape before the final decision of the cause, and have been very fully argued, I am willing to pronounce the opinion, which I have formed after much deliberation.

In the first place, it is contended, that the act of the 1st of July, 1812, which declares, "that an additional duty of 100 per cent. upon the permanent duties now imposed by law, &c. shall be levied and collected upon all goods, wares and merchandize, which shall, from and after the passing of this act, be imported into the United States, from any foreign port or place," did not take effect on the day of its passage, nor indeed until it was formally promulgated and published. From the language of the act it is clear, that the legislature did intend that it should operate from its passage; and when the legislature has so declared its will, unless it be unconstitutional, I know of no authority in judicial courts to set aside its solemn mandates. It is a general rule, that where any period or term of time is to begin to run from and after the doing of any act, it includes the day on which such act is done. The passing of this statute was on the 1st of July, and it begins to have operation, therefore, on that day; and for purposes of this nature the law does not allow any fractions of a day. Nor can such a legislative provision be considered as an ex post facto act, within the prohibitions of the constitution. Admitting that clause to apply to civil actions and rights, and to fiscal regulations, which has been doubted; still it can never be construed to prevent the legislature from giving effect to its acts immediately after their passage. It being then competent for the legislature to enact such a provision, the arguments as to the inconvenience or hardship of the case are not properly addressed to a judicial tribunal; they belong to another forum, which is the exclusive depository of legislative power. There is therefore an end of this question upon the manifest declaration of the legislature. In cases where a statute contains within itself no declaration as to the time when it shall begin to operate, it has been contended that it takes effect only from the time of its promulgation; and consequently, that it cannot affect a citizen until he has had actual or constructive knowledge thereof: actual knowledge by reading, hearing, or personal examination; constructive knowledge by the lapse of such a reasonable time from promulgation, as affords a presumption of knowledge. But it is very clear, that at common law no such promulgation is necessary; and the consequence would oth-

erwise be, that a law would exist and operate upon one part of the community, which as to other parts would be a dead letter. In the case of U. S. v. The Ann [Case No. 14,456]. Isaac Tenny, claimant, in Massachusetts, this question came successively before the district and circuit courts; and both courts, on very full consideration, held, that where no other time is mentioned in a statute, it takes effect from its passage, and binds all the citizens, without promulgation; and that the consequences (which, to be sure, might in many instances prove highly unjust) were very proper for legislative, but, ought not to affect judicial tribunals. The rule was considered as an inveterate rule of the common law. See Latless v. Holmes, 4 Term R. 660; 4 Inst. 25; Attorney General v. Panter, 6 Brown, Parl. Cas. 486. Nay, the common law extended the principle still further, by referring the passage to the first day of the session of parliament, on the fiction that the whole session was but a single day.

It is further argued that here there was an actual importation into the United States before the 1st of July. That the importation was either complete by arrival within the jurisdictional limits of the United States, or if inchoate only, upon the subsequent arrival at the port of discharge, there was a retro-active operation, which made the importation consummate from the first arrival. I know of no such retro-active effect as is here contended for. The duties were payable on importation, and not before; and the importation must therefore be complete before the right to the duties would attach. It might as well be contended, that from the moment that the goods were put on board at the Havana, there was an inchoate act of importation. The question, therefore, resolves itself into this: Did a mere arrival within the jurisdictional limits of the United States, and without the limits of the district or port of destination, constitute an importation into the United States, within the words of the statute? I am well satisfied, that an importation, within the meaning of the statute, must be an importation into some port or district of the United States, with intent there to discharge or land the cargo. It is not a bare arrival, even within a port, which would constitute an importation; it must be a voluntary arrival. If driven in by necessity or stress of weather, or unavoidable accident, it has been frequently held, that the goods were not to be considered as imported. On the other hand; if there be a voluntary entry into port, with an intent to land the goods, it has been held that the importation was complete, although, within forty-eight hours, a new destination was given to the property.

The whole provisions in the collection act evidently proceed upon the position, which I have assumed; and if it needed support, I think it is completely corroborated in the decision of the supreme court of the United States, in U. S. v. Vowell, 5 Cranch [9 U. S.] 368. The court there in effect held, that in order to fix a cargo with duties, it should not only be brought into the collection district, but within the port of entry; and that the duties did not accrue until the vessel arrived at the port of entry. And the court, in the same case, adopted the construction of the treasury department as sound law, that additional duties, imposed by the legislature, are payable on a cargo, although it may have arrived within the collection district before the passing of the act, if it do not arrive at a port of entry until after that time. That is precisely the present question. I am satisfied, therefore, that the argument of the defendants, on this second question, ought not to prevail.

After my decision as to the unsoundness of the plea, it may not be necessary to notice some objections, which have been started, on the ground that the demurrer admits all the facts in that plea; and the court are bound by that admission. I would observe however, that a demurrer admits only such facts as are well pleaded, and never admits the law arising on those facts. The court is bound to take notice of all public laws. The condition of the bond is for the payment of all duties due by law; and if double duties are payable by law, the mere allegation that single duties only are payable under the statutes of 1790, and 1794, cannot be admitted by the court to destroy the proper conclusion of law. Such an averment is properly matter of law, and not of fact; and a demurrer may well be for a false allegation of the law. As little will the allegation avail, that the parties meant to secure the duties accruing only under the statutes previous to the 1st of July. The condition of the bond is broad enough to cover all duties payable, and no parol averment is admissible to control or narrow the legal construction of the words of the condition. If it were otherwise, a mere mistake of the parties would not prejudice them. If on the one hand, no duties, or less duties had been payable, the defendants would have been entitled to the benefit: and by the same reason they will now be held to the payment of of the double duties. The penalty of the bond however is less than the double duties, and unless the court can award damages beyond the amount of the penalty, the United States cannot in this suit recover the whole money due to them. Notwithstanding some contrariety in the books, I think the true principle supported by the better authorities is, that the court cannot go beyond the penalty and interest thereon from the time it becomes due by the breach. See Londsdale v. Church, 2 Term R. 388; Wilde v. Clarkson, 6 Term R. 303; McClure v. Dunkin, 1 East, 436; Hefford v. Alger, 1 Taunt. 218. I adjudge the bar bad, and order judgment for the United States in the penalty

of the bond and interest from the time it became payable. Bar adjudged bad.

Affirmed on appeal. 9 Cranch [13 U. S.] 104.

Case No. 14,470.

UNITED STATES v. ASHTON et al.

[2 Sumn. 13.] [1]

Circuit Court, D Massachusetts. Oct. Term, 1834.

SEAMEN—INDICTMENT FOR REVOLT—COMPELLING MASTER TO RETURN—SEAWORTHINESS — BONA FIDES.

1. On an indictment for an endeavor to commit a revolt against section 12 of the crimes act of 1790, c. 36 [1 Story's Laws, 85; 1 Stat. 115, c. 9], it is a sufficient defence of the parties accused, that the combination charged, as an endeavor, was to compel the master to return into port for the unseaworthiness of the vessel, if they act bona fide and the vessel is actually unseaworthy.

[Cited in The Moslem, Case No. 9,875; U. S. v. Nye, Id. 15,906; The Shawnee, 45 Fed. 770.]

2. So if they act bona fide and upon reasonable grounds and apparent unseaworthiness, and it is doubtful, whether the vessel be unseaworthy or not. But if the vessel, in such case, be clearly seaworthy, it is no defense.

Indictment against the defendants [James Ashton and others] for an endeavor to commit a revolt on board the ship Merrimack, of Boston, on the high seas. Plea, not guilty. At the trial it appeared, that the ship sailed from Boston on Saturday, 23d of August, 1834, on a voyage to Rio Janeiro, under the command of Capt. Eldridge. She was then in a leaky condition, and some efforts had been made by the captain to conceal the extent of the leakage from the crew at the time of their shipment and coming on board. The ship was twenty-nine years old. The crew, on discovering the leak, in going out of port, expressed a wish to the captain to return and have repairs made. The captain declined; but said if the leak increased he would return. On Wednesday, the 27th of August, the vessel encountered a gale, and strained very much; and the crew were up all the night pumping, and were much exhausted. The gale still continued, with every appearance of a continuance. The crew then conversed together, and went to the captain, and requested him to return to Boston to repair; and expressed a firm belief, that the ship was unseaworthy, and that they were all in imminent danger of their lives. The captain declined; but proposed, that they should keep on, and, if necessary, he would stop at the Western Islands for repairs. The crew insisted, that he ought to return back to Boston, and that the hazard of proceeding on the voyage was imminent. And then finding, that the captain persisted in going on the voyage, declaring, that he thought the vessel seaworthy, they refused to do duty any further, and seceded, and remained below several hours, during which time the gale increased, and the ship was in great danger. The captain, at length, in order to induce the crew to return to duty, agreed to return to Boston; and accordingly he wore ship and returned to Boston, where he arrived on the ninth day after her departure. The crew at all other times during the voyage and in all other respects conducted themselves unexceptionably.

There was a good deal of evidence, at the trial, as to the seaworthiness of the ship. The chief mate swore, that in his opinion she was seaworthy. The second mate swore she was not. And there was the testimony of a number of highly respectable witnesses, who had examined the ship before her departure, and who affirmed that she was old and rotten, and in very bad condition, and wholly unseaworthy in all respects; and in their testimony they entered into the particulars of her defects. On the other hand, one of the owners testified, that she was bought in July, 1834, for $2,500, and that about $1,000 had been laid out upon her in repairs; and that the owners believed her seaworthy for the voyage; and policies of insurance had been underwritten on her cargo for the voyage, after an examination made of her by one of the officers of one of the insurance companies in Boston; that after some slight repairs she had again gone to sea with the same captain and a new crew, who made no objection; and that before her last departure she had been surveyed and pronounced to be seaworthy. No imputation or suggestion of fraud or misconduct was cast upon the owners. On the contrary, the counsel for the defendants expressly disclaimed any ground of this sort.

In the course of the trial, Mr. Dunlap, Dist. Atty., objected to the admission of any evidence to establish the unseaworthiness of the ship as irrelevant to the matter in issue, upon the ground, that unseaworthiness would constitute no defence to the charge in the indictment. But the court, after hearing Shipley & Moore, for defendants, overruled the objection, and admitted the evidence.

Upon the posture of the facts, as disclosed in the evidence, a doubt having been suggested by the court, whether the evidence supported the indictment, the case was briefly argued to the court by Mr. Dunlap, for the United States.

STORY, Circuit Justice. I do not think that the act for the government and regulation of seamen in the merchants' service (Act 1790, c. 56 [1 Story's Laws, 102; 1 Stat. 131, c. 29]) has any bearing on the present case. The third section of that act merely provides for the case, where the mate and a majority of the crew of a vessel bound on a foreign voyage, after the voyage is begun, and before the vessel shall have left the land, shall discover the vessel to be too leaky or otherwise unfit to proceed on the voyage; and under such circumstances it makes it the duty of the master to return to port. It does not, in the slightest man-

[1] [Reported by Charles Sumner, Esq.]

ner, trench upon the general rights and duties of the seamen under the maritime law; but merely imposes an absolute duty on the master in the case specified. All other cases and circumstances remain, therefore, as they were before, to be governed by the general principles of law. In the present case the combination to resist the authority of the master is clearly established; and unless the seamen were, by the circumstances, justified in compelling the master to return home, the offence charged in the indictment is fully made out; and the onus is on the seamen to establish the justification. If the ship was at the time clearly seaworthy, and fit for the voyage, whether the seamen acted by fraud, or by mistake, or upon a fair but false judgment of the facts, it seems to me the offence was committed. If, on the other hand, the ship was at the time clearly unseaworthy and unfit for the voyage, they were fully justified in insisting upon her return home; and were guilty of no offence. The law deems the lives of all persons far more valuable than any property; and will not permit a master, under color of his acknowledged authority on board of the ship, from rashness or passion or ignorance, to hazard the lives of the crew in a crazy ship, or compel them to encounter risks and perform duties, which are so imminent and overwhelming, that they can escape only by the most extraordinary chances, and, as it were, by miraculous exertions. If he should order them into a boat on the ocean, at a time when they could scarcely fail of being swamped or foundered, they would not be bound to obey. His commands, to be entitled to obedience, must, under the circumstances, be reasonable. The proposition cannot for a moment be maintained, that the crew are bound to proceed on the voyage in an unseaworthy and rotten ship, at the imminent hazard of their lives, merely because the master and officers choose in their rashness of judgment to proceed. It is true, that in all cases of doubt the judgment of the master and officers ought to have great weight, and from their superior intelligence, ability and skill, it may be relied on with far more confidence than that of the crew. They are embarked in the same common enterprise and risks, and it cannot be ordinarily presumed that they will hazard their own lives in a vehicle, which is really unfit for the voyage. Still, if the case does occur, if they will insist on proceeding, no matter at what hazard to life, and the ship is unseaworthy, I am clear, that the crew have a right to resist, and to refuse obedience. It is a case of justifiable self-defence against an undue exercise of power. Neither of these cases is of any real difficulty. But the case of difficulty is this, —suppose the ship to be in that state, in which the presumption of apparent unseaworthiness really arises, and the crew bonâ fide act upon that presumption, and the jury should be of opinion, that they acted justifiably upon that presumption at the time; and suppose upon the trial it should turn out, (as in the present case it may) that there is real doubt, whether the ship be seaworthy or not; or upon the evidence the case is nearly balanced in the conflict of credible as well as competent testimony, and the jury should on the whole deem the preponderance of evidence just enough to turn the scale in favor of seaworthiness; but not to place it entirely beyond doubt—I ask, whether, under such circumstances, the crew ought to be convicted of the offence charged, having acted upon their best judgment fairly, and in a case where respectable, intelligent, and impartial witnesses should assert, that they should have done the same; and where even the jury themselves might adopt the same opinion, although there might be an error in the fact of seaworthiness, as established at the trial? I have great difficulty in coming to the conclusion, that under such circumstances the crew were guilty of the offence charged. I am aware of the dangers of not upholding with a steady hand the authority of the master; but I am not the less aware of the necessity of having a just and tender regard for life. Seamen, when they contract for a voyage, do not contract to hazard their lives against all perils which the master may choose they shall encounter. They contract only to do their duty and meet the ordinary perils, and to obey reasonable orders. The relation between master and seamen is created by the contract; but that relation, when created, is governed by the general principles of law. Unlimited submission does not belong to that relation. I have great repugnance to creating constructive offences, and especially where there is perfect integrity of intention. I am aware, that in some cases crimes may be committed independently of any supposed intention to do wrong. But in most cases, and I think in a case of this nature, the intention and the act must both concur to constitute an offence. There are cases even of the highest crimes, as of homicide, where an honest and innocent mistake in killing another, under circumstances of a reasonable presumption, though a mistaken one, that the party killed intended to kill the other party, when the latter will be excused by law.

I have had this subject a good deal in my thoughts during the progress of this trial, (and the point is certainly a new one); and the strong inclination of my opinion at present is, subject to be changed by any argument hereafter urged, that the defendants ought not to be found guilty, if they acted bona fide upon reasonable grounds of belief, that the ship was unseaworthy, and if the jury, from all the circumstances, are doubtful, whether the ship was seaworthy, or even in a measuring cast should incline to believe the ship seaworthy. If she was

clearly seaworthy beyond reasonable doubt, then the defendants ought to be convicted, for the facts of the combination and resistance are admitted.

Upon these suggestions of the court, the district attorney said, that his own opinion coincided with that of the court, and that he would enter a nolle prosequi. But he had thought it his duty to bring the case before the court. And the court said, that the case was very properly brought before it for decision.

Case No. 14,471.

UNITED STATES v. ASKINS.

[4 Cranch, C. C. 98.] [1]

Circuit Court, District of Columbia. Nov. Term, 1830.

CRIMINAL LAW—FORFEITURE OF RECOGNIZANCE—MOTION TO RESCIND—PERSONAL APPEARANCE—MALICIOUS DISFIGURING—BITING OFF EAR.

1. The court will not order the forfeiture of a recognizance, in a criminal case, to be rescinded, and permit the defendant's counsel to move in arrest of judgment, without the personal appearance of the defendant.

2. Biting off an ear is not within the Virginia act of December 17, 1792, to prevent malicious disfiguring.

Indictment for biting off the ear of John Taylor, with intent to disfigure him. Verdict "Guilty." The defendant was called, and not appearing, his recognizance was forfeited at the present term.

Mr. Hewitt, for defendant, moved the court to strike out the forfeiture, and permit him to move in arrest of judgment.

Mr. Swann, U. S. Atty., objected that it could not be done without the defendant's personal appearance.

THE COURT (THRUSTON, Circuit Judge, absent,) was of that opinion, and overruled the motion.

The defendant having personally appeared, his counsel, Mr. Hewitt, was permitted to move in arrest of judgment.

The indictment purports to be under the Virginia statute of 17 December, 1792, "to prevent malicious shooting," &c., by which it is enacted, that if any person "shall unlawfully cut out or disable the tongue, put out an eye, slit a nose, bite, or cut off a nose, or lip, or cut off or disable any limb or member of any person whatsoever, within the commonwealth, with intent, in so doing, to maim or disfigure, in any of the manners before mentioned, such person; the person or persons, so offending," &c., "shall be and are hereby declared to be felons, and shall suffer as in case of felony."

Mr. Hewitt, for defendant, cited 6 Bac. Abr. 181, 182, 384; Act Cong. April 30, 1790, § 13 (1 Stat. 112), by which it is enacted, that if any person, within the sole and exclusive jurisdiction of the United States, "on purpose, and of malice aforethought, shall unlawfully cut off the ear or ears, or cut out or disable the tongue," &c., he shall be imprisoned, &c., and fined, &c. The present indictment is not under that act for it does not charge the malice aforethought, nor that the defendant cut off the ear. There is a difference between cutting and biting. The former shows a previous intention, biting does not.

If the Virginia act of 1792 includes the ear, there was no necessity of the act of 1802, which expressly provides for the biting off an ear when done maliciously and of malice aforethought. 4 Tuck. Bl. Comm. 207.

THE COURT (nem. con.) was of opinion, that the offence, as stated in the indictment, was not within the Virginia act of 1792, p. 178. And CRANCH, Chief Judge, thought that biting could not be called cutting; that an ear cannot be "disabled" within the meaning of the statute; nor is the ear such a member as was intended by the statute, which had enumerated the tongue, the eye, the nose, and lip.

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

Case No. 14,472.

UNITED STATES v. ASTLEY et al.

[3 Wash. C. C. 508.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1819.

PARTNERSHIP — CUSTOMS BOND — EXECUTION BY ONE PARTNER—AGREEMENT—ASSIGNMENT—PARTNERSHIP ASSETS.

1. B. & I. partners, being indebted to the United States for duties, B. executed a bond for the debt, in his separate name. B. & I. afterwards made a voluntary assignment of their property to the defendants, for the use of their creditors; and B. assigned his estate, for the use of his separate creditors. Before the bond was given, B. & I. authorized, in writing, each to execute custom-house bonds for duties,—each one of the partners agreeing to be bound for the payment of the bonds, as if executed by both. This action was instituted, (indebitatus assumpsit,) against the assignees of B. & I., to recover from them the amount of the bond given by B. to the United States, out of the partnership effects of B. & I.

2. The bond is not evidence of a debt due by B. & I., because not signed by them; nor of a debt due by I., because not signed by him.

3. One partner cannot, by deed, bind his copartner; unless executed in his presence, and by his consent.

[Cited in brief in Johns v. Battin, 30 Pa. St. 86; McDonald v. Eggleston, 26 Vt. 157.]

4. Although B & I. were bound, on the importation of the goods, for the duties on the goods, yet the bond of B. is not admissible in evidence, to prove the amount of those duties; because the bond, although given by one partner, extinguished the debt for which it was given, and made it the separate debt of B.

[1] [Originally published from the MSS. of Hon. Bushrod Washington. Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

[Error to the district court of the United States for the Eastern district of Pennsylvania.]

This was an action of indebitatus assumpsit, for money had and received by the defendants [Astley and Brooks], to the use of the United States, brought in the district court. Upon the general issue, the plaintiffs offered in evidence, that Samuel F. Bradford, and John Inskeep, were indebted to the plaintiffs, in the sum of 6,828 dollars, being the amount of four several bonds, for duties on the importation of goods into the United States; which bonds had been put in suit against the said Bradford, and Moses Thomas, his surety, on which judgments were regularly obtained, but on which no executions had issued; and proposed further to prove, that the said Samuel F. Bradford & John Inskeep, trading under the firm of Bradford & Inskeep, not having sufficient property to pay all their debts, on the 7th of January, 1815, made a voluntary assignment of all their estate and effects to the defendants, in trust for their creditors; and that the said S. F. Bradford and his wife, on the same day and year, made another assignment of all his separate estate and effects to the defendants, in trust, for the benefit of his separate and individual creditors; and that the defendants, as assignees, had sufficient assets of the estate and effects of Bradford & Inskeep, to satisfy the debt due to the United States on said bonds; and that, prior to instituting the said action, due notice thereof was given to the defendants, who refused to pay the said debt: and the plaintiffs offered in evidence, the said four bonds, together with a certain power of attorney, bearing date the 7th of July, 1808, the said bonds having been executed by the said Bradford and Moses Thomas; and the said power of attorney having been executed by the said John Inskeep & Samuel F. Bradford. The admission of these bonds in evidence, being objected to by the defendants, the court decided that they were not competent evidence, and overruled and rejected them; and the jury, under the direction of the judge, found a verdict for the defendants—to which decision and direction, the plaintiffs filed a bill of exceptions, stating all the above matter. Judgment upon the above verdict, having been entered for the defendants, the case was brought by the plaintiffs into this court, by writ of error. The power of attorney referred to in the above bill of exceptions, bears date prior to the four bonds, and is executed by Samuel F. Bradford & John Inskeep, and is in the following words: "Know all men, &c. that we the subscribers, &c. trading under the firm of Bradford & Inskeep, mutually authorize and empower each other, from time to time, in our several and respective names, to sign, seal, and deliver bonds at the custom-house; hereby agreeing, jointly and severally, to be bound for the payment of all such bonds, with like remedies and effects, as if we had severally signed, sealed, and delivered the same." The bonds, for the amount of which this suit was brought, are executed by Samuel F. Bradford, in his own name only, and by Moses Thomas.

WASHINGTON, Circuit Justice. The case upon which this action is founded, is stated in the bill of exceptions, and is as follows: Bradford & Inskeep, being indebted to the United States in a certain sum for duties, four several bonds, for the amount of the same, were executed by Samuel Bradford, one of the partners, in his individual and separate capacity, and by Moses Thomas, his surety; and being unable to pay all their debts, Bradford & Inskeep made an assignment of all their estate and effects to the defendants, for the benefit of their creditors; from which estate, the defendants received a sufficiency to satisfy the said bonds; but refused, upon demand made by the plaintiffs, to pay the same; and the only question for the consideration of this court is, whether the court below ought to have admitted these bonds to be given in evidence, to prove a debt due by Bradford & Inskeep, or by Samuel F. Bradford, to the United States? The objection made to the admission of this evidence is, that they are incompetent to prove a debt due by Bradford & Inskeep, because they were not executed by them; and consequently, the defendants cannot be charged as receivers of money belonging to that firm, to the use of the United States. If, in point of law, the premises be correct, the conclusion unquestionably is so. The question then is, whether these were the bonds of Bradford & Inskeep? The affirmative is contended for, by the counsel for the United States, upon the following grounds: 1st. That one partner has a general authority to bind his co-partner by deed; and if not so, then, 2d. Samuel F. Bradford was authorized to bind his co-partner, by virtue of the power of attorney mentioned in the bill of exceptions.

The first ground cannot for a moment be maintained; and even the counsel, who stated it, did not appear to have much confidence in it. There is not, it is confidently believed, a solitary case to be found, which supports the doctrine, that one partner can, by deed, impose a charge upon his co-partner; and the authorities to the contrary are numerous and positive: Harrison v. Jackson, 7 Term R. 207; Green v. Beals, 2 Caines, 254; 4 Bac. Abr. 608, tit. "Merchant." It is true, that one partner may release a partnership debt, so as to bind his co-partner; but this proceeds upon a general and well established principle of law, that a release by one joint creditor bars the other;—the release is a satisfaction in law, and is equivalent to a satisfaction in deed. Ruddock's Case, 6 Coke, 25, 2 Rolle, Abr. 411.

2. That one partner may, by a power of attorney, authorize the other to execute a deed in his name, or in the name of the copartnership, is not to be doubted. Indeed,

without such a power, one partner may bind the co-partnership by a deed executed in his own name, and in that of his partner, if it be done in his presence, or by his authority. Ball v. Dunsterville, 4 Term R. 313, cited in 3 Ves. 578.

In this case, it must be admitted, that Bradford was fully authorized, by the power of attorney, to bind his partner, by placing his signature and seal to the bonds in question; and if he had done so, the case would have admitted of no doubt. But he has not thought proper to execute the bonds, either in the name of the co-partnership, or in the separate names of his partner and himself; and the bonds are therefore the separate bonds of Samuel F. Bradford; as much so as if the power to bind his partner had not been given. It was insisted, indeed, though somewhat indirectly, that the power of attorney contained an agreement, by each partner, to be bound by any bond which the other might execute in his own name. This is by no means the fair construction of the instrument. It authorizes each partner to execute custom-house bonds, not in his own name, which would have been useless and absurd, but in their several and respective names; that is, in the names of Samuel F. Bradford and John Inskeep, and not in the name of either. The agreement to be bound by bonds so executed, was certainly an unnecessary stipulation; but, nevertheless, the insertion of it cannot control the plain construction of the words which grant the authority. Neither are we prepared to admit, that an agreement between Bradford and Inskeep, that each would be bound to pay bonds executed by the other, alone, would make such bonds the deeds of the party who did not execute the bonds. This, however, is a point not necessary to be decided in this case.

But it is contended, that, notwithstanding these bonds, Bradford and Inskeep were bound, as importers of the goods upon which the duties arose, to pay the same to the United States; and that the bonds ought to have been suffered to go to the jury, as evidence of the amount of the debt for which they were so liable. To this argument, there is this conclusive answer,—that the bonds, being given by one partner for a partnership debt, extinguished the simple contract debt, due by the co-partners, as importers, and made it the debt of Bradford alone, who executed them. We entirely concur in the opinion of the supreme court of New-York, in the case of Tom v. Goodrich, 2 Johns. 213. The reason upon which the doctrine is founded, is obvious. The bond is clearly obligatory upon the partner who executed it; and is therefore an extinguishment of the simple contract debt as to him. A joint action, therefore, to recover on the original debt, could not be supported against both partners. Neither could an action be maintained against the partner who did not execute the bond, because he has a right to insist that his partner should be joined with him in the action; of which right the creditor and the other partner cannot, without his consent, deprive him. It is precisely like the case of a release, which, if given to one joint debtor, discharges both. A bond, given for a simple contract debt, operates as a release of that debt, and creates another of a superior dignity, which can be enforced only against the person who executed the bond. The case of U. S. v. Lyman [Case No. 15,647,] does not contradict this doctrine, even as applied to custom-house bonds; and we subscribe entirely to the decision made in that case. There, the bond for the duties was given by a purchaser from the importer, after the importation was complete, and had fixed the importer with the debt. The bond, therefore, was given by a stranger to the original contract; and it is a clear principle of law, that a simple contract debt is not extinguished by a higher security, afterwards given by a third person; unless where it is done in pursuance of an agreement made at the time when the original debt was created.

It is true, that the learned judge intimates an opinion, that a bond given by the importer himself, would not extinguish the original debt; but he gives no positive opinion upon the point; and, noticing the case of Tom v. Goodrich, he observes merely, that the doctrine it establishes may admit of some doubt; but that in that case, it was unnecessary to consider it, as the case he had to decide was not that of a partnership. And he concludes, by considering the bond given by Lovejoy, only as the security of a third person, for the proper debt of the importer, which would not, per se, extinguish it; and most unquestionably it was no more than a collateral security.

Again, it is contended on the part of the United States, that, although this bond might not be proper evidence of a debt due by Bradford & Inskeep to the United States, it clearly constituted a debt of Samuel F. Bradford; out of whose separate estate, in the hands of the defendants, his trustees, the United States were entitled to be paid the amount of these bonds, in preference of Bradford's other creditors. To this argument there are two objections. The first is, that the bonds, as the bonds of Bradford alone, were merged in the judgment, stated in the bill of exceptions to have been obtained against him; and therefore, they had no legal existence for any purpose whatever. And secondly, the evidence so offered, did not correspond with the case stated by the plaintiffs as constituting the foundation of their action; the former being the evidence of a debt due by Bradford alone; and the latter, that of a claim of a partnership debt due by Bradford & Inskeep; and the defendants being sued as receivers of the joint funds of the co-partners, debtors of the United States, it was necessary for the United States to prove, not only that they were such receivers, but also, that the debt

chargeable upon those funds, in the hands of the defendants, was due from the co-partners.

Upon the whole, we are of opinion, that the judgment of the district court ought to be affirmed.

Case No. 14,473.

UNITED STATES v. ATHENS ARMORY.

[2 Abb. (U. S.) 129;[1] 35 Ga. 344.]

District Court, N. D. Georgia. April 3, 1868.

PRIZE—STATUTORY CONSTRUCTION—CONFISCATION—PARDON.

1. Even in determining the construction of a statute authorizing a confiscation of property for an offense by its owner, words are not to be confined to a strict technical sense, when so doing will clearly defeat the evident intent of the statute.

2. Thus, the employment of the phrase "prize and capture," in the act of August 6, 1861 (12 Stat. 319), declaring private property used in promoting insurrection to be "lawful subject of prize and capture," does not limit the operation of the act to property taken at sea. Property found on shore, or even land itself, may be condemned under the act.

3. In prosecuting an information to enforce a seizure, under the act of August 6, 1861, issues of fact should be submitted for trial by a jury, according to the course of the common law. The act does not contemplate the determination of the facts by the judge, as in causes of admiralty jurisdiction.

[Cited in People v. Sponsler, 1 Dak. 289, 46 N. W. 463.]

4. An unqualified pardon, granted to the owner prior to the seizure of property, or the institution of any proceedings to condemn it, under the acts authorizing confiscation of property used to promote the Rebellion of 1861–65, is a bar to a judgment of condemnation.

[Cited in Carr v. State, 19 Tex. App. 635.]

Trial of an information. At March term, 1867, of this court, the district-attorney, in behalf of the United States, filed an information against certain property, real and personal, particularly described in the pleadings, and consisting of a tract of land near Athens, Georgia with the buildings and improvements thereon, together with a great variety of articles, chiefly machinery, implements, and material for the fabrication of arms, some of the material being unwrought, and some of it advanced more or less towards completion as weapons of war. The property, of every kind, was of the value of one hundred and fifty thousand dollars; and it came to the custody of the marshal under a warrant of seizure issued on November 22, 1866, by the district-attorney. The information treated the property as having belonged, prior to the occurrence of the alleged causes of forfeiture, to Ferdinand W. C. Cook and Francis L. Cook, copartners, using the name of Cook Brothers, and prays, on three grounds, for its condemnation under an act of congress approved August 6, 1861, and, on an additional ground, for its condemnation under an act approved July 17, 1862 [12 Stat. 589]. The provisions of these acts were, in part, recited; and it was averred that the proclamations of the president therein contemplated were issued and published.

The grounds of forfeiture alleged under the act of August 6, 1861, were the following: (1) That after the passage of said act, and after the publication of the president's proclamation in pursuance thereof, and during the late Rebellion, Cook Brothers, for one hundred and fifty thousand dollars, sold and conveyed the property to the so-called government of the Confederate States, knowingly, with intent that the same should be used and employed in aiding, abetting, and promoting the Rebellion. (2) That Cook Brothers, having on April 1, 1862, entered into a contract with the so-called Confederate States for the manufacture of thirty thousand rifles, did, on July 14, thereafter, to secure the sum of one hundred and fifty thousand dollars, paid in advance on said contract, make a deed of trust or mortgage to the said so-called Confederate States, covering the property now libeled; that the said Cook Brothers used and employed said property in aiding the Rebellion, and especially in manufacturing said rifles, and that said deed of trust or mortgage was executed by them, knowingly, with intent to aid the Rebellion, or to suffer the property to be used by others in aiding it. (3) That during the Rebellion, and after the act of congress and the president's proclamation, as aforesaid, the property was mortgaged by Cook Brothers to the so-called Confederate States, knowingly, with intent to employ the same, or suffer it to be employed, in aiding the Rebellion; and that the said so-called Confederate States, in consideration of such mortgage, paid them one hundred and fifty thousand dollars, which they received with intent that it, too, should be used in aiding the Rebellion, or by persons engaged in the Rebellion.

The ground of forfeiture alleged under the act of July 17, 1862, was as follows: "That Cook Brothers did not, within sixty days after the publication of the president's proclamation conveying the warning provided for by said act, cease to aid, countenance, and abet the Rebellion, and return to their allegiance to the United States, but that they contracted to manufacture, and did manufacture upon the land and with the machinery and implements described in this information, a large number of rifles for the so-called Confederate States, receiving, to that end and for that purpose, certain advances and sums of money, and did sell and deliver said rifles to the so-called Confederate States in accordance with the contracts, mortgages, deeds of trust, and conveyances before mentioned, 'with the intent and purpose aforesaid.'"

After the filing of the information, Francis

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

L. Cook, as survivor of Cook Brothers, his copartner, Ferdinand W. C. Cook, having departed this life on December 11, 1864, appeared and interposed a claim to said property, asserting thereby his right to the same. He answered both the information itself and sundry special interrogatories propounded to him by the district-attorney. From these answers, which were uncontradicted, it appeared that Cook Brothers were workers in iron, and from the year 1854 to April, 1862, had their establishment in New Orleans, La. It was there that, on April 1, 1862, they entered into the contract set forth in the information, with the so-called Confederate States, for the manufacture of thirty thousand rifles. From New Orleans they removed to Selma, Alabama, where they remained for a short time, and where the deed of trust referred to in the information was executed by them, not, however, directly to the so-called Confederate States, but to a disinterested individual as trustee, and not affecting the whole of the property embraced in the information, but only a part of the machinery and implements. It was made to operate as a mortgage, and as such, to secure the said so-called Confederate States for an advance of one hundred and fifty-thousand dollars in so-called Confederate currency. From Selma they removed to Athens, Ga. They there, in August and December, 1862, and January, 1863, by different deeds and in several parcels, acquired title to the land proceeded against by this information, some of which was paid for out of the above mentioned advance; and said advance was further secured by a mortgage upon the whole property, real and personal, executed in Georgia by Cook Brothers to the so-called Confederate States, on October 7, 1862. A similar mortgage, to secure another advance of one hundred thousand dollars in like currency, was executed in Georgia, on January 5, 1864. The buildings upon the land, except a mill, were erected by Cook Brothers, in the years 1862 and 1863, and cost three hundred thousand dollars in Confederate currency. They were paid for in part out of the advances already mentioned, and in part with funds derived from other sources. They were made and used chiefly, though not exclusively, for the manufacture of arms. At least two-thirds of the machinery, tools, &c., in the establishment, were on hand in and prior to the year 1861. Additions costing about seventy-seven thousand dollars in Confederate currency, were made thereto in the three following years, and, like the land and buildings, were paid for in part out of the advances of currency made by the so-called Confederate States. Upon the premises, and with the machinery and implements covered by this information, the manufacture of arms was carried on by Cook Brothers, both members of the firm knowing of the same, and consenting thereto. They delivered, at Athens, to the government of the so-called Confederate States, between three thousand eight hundred and four thousand rifles, believing that the same were to be employed in the war then going on against the United States; and the Confederate currency received by them in the years 1862, 1863, and 1864, from said pretended government, amounted to over six hundred thousand dollars. This was for rifles, horse-shoes, repairing old guns, &c., &c., with an admitted balance in favor of said government, at the time of its overthrow, of sixty-nine thousand one hundred and four dollars, in said currency.

Coupled with the foregoing facts, the claimant's answer contained a formal denial of the motives, purposes, and intent charged in the information, and averred, on the contrary, that all these things happened in the course of business transactions—Cook Brothers being engaged simply in their ordinary vocation, and actuated solely by the desire of gain and the hope of legitimate profit. The claimant, also, in bar of the information, pleaded the pardon of the president, bearing date December 11, 1865. He exhibited said pardon with proof that he accepted it on the day after its date, and of his having taken the oath of amnesty on the 29th of November preceding.

H. S. Fitch, U. S. Atty.

W. Dougherty and William H. Hull, for claimant.

ERSKINE, District Judge. This is a proceeding in rem, instituted in this court at the March term, 1867, by the district-attorney, "who prosecutes for the United States and an informant," to confiscate and condemn certain real and personal property, situate in Clark county, in this district, and known as the "Athens Armory." The information contains four counts: three are founded on the act entitled "An act to confiscate property used for insurrectionary purposes," approved August 6, 1861 (12 Stat. 319); and the fourth, on the act entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved July 17, 1862 (12 Stat. 589.)

Section 1 of the act of August 6, 1861, is as follows: "If during the present or any future insurrection against the government of the United States, after the president of the United States shall have declared, by proclamation, that the laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person or persons, his, her, or their agent, attorney, or employee, shall purchase or acquire, sell or give, any property of whatsoever kind or description, with intent to use or employ the same, or suffer the same to be used or employed, in aiding, abetting or promoting such insurrec-

tion or resistance to the laws, or any person or persons engaged therein; or if any person or persons, being the owner or owners of any such property, shall knowingly use or employ, or consent to the use or employment of the same as aforesaid, all such property is hereby declared to be lawful subject of prize and capture wherever found; and it shall be the duty of the president of the United States to cause the same to be seized, confiscated, and condemned." Section 2: "Such prizes and capture shall be condemned in the district or circuit court having jurisdiction of the amount, or in admiralty in any district in which the same may be seized, or into which they may be taken and proceedings first instituted."

During the discussion of this case, various and very opposite views were presented by counsel, as to the sense in which the words "prize" and "capture," and the phrase "prizes and capture," as used in this act, are to be understood. But, I apprehend, that on a careful reading of the whole statute, the question will not prove difficult of solution. For, whether these naval and military terms —here evidently intended to include, not only seizures of property water-borne, but seizures of land, and of property found on land—were incautiously introduced into the statute, is not a matter for critical examination. No one can read this law, without learning from its entire perusal, that it was the controlling purpose of congress, in enacting it, to make it one of the means to suppress the Rebellion. Therefore, it is obvious, that it could not have been in the mind of congress to confine these words or terms to their technical meaning exclusively; for "prize means maritime captures only—ships, and cargoes taken by ships." 2 Dod. 446.

Statutes must not be so construed as to produce a result different from what was intended by the lawgiver. Limit the term "prize" or "capture," as here employed, to a strict technical import, and the statute fails of its object, and becomes an absurdity; for, in many instances, cases have arisen fairly embraced within its purview, wherein the intention of the legislature would be defeated, if these terms were restricted to their narrow sense. This act was passed to confiscate property—"any property of whatsoever kind or description"—used or employed (after warning by proclamation), in aid of the Rebellion; whether the contaminated property be found afloat, or on shore, or even if it be land itself.

A brief synopsis of such portions of the act of July 17, 1862, as were invoked in argument, may be given: Section 5 declares, that "to insure the speedy termination of the present Rebellion, it shall be the duty of the president of the United States to cause the seizure of all the estate, property," &c., of the persons therein named, and to apply and use the same, and the proceeds thereof, for the support of the army.

The next section provides for the seizure of all the estate, &c., as in the preceding one, of persons "other than those named as aforesaid," who being engaged in armed rebellion, or aiding or abetting the same, shall not, within sixty days after public warning and proclamation, cease to aid, countenance, and abet such rebellion, and return to their allegiance.

The seventh declares that "to secure the condemnation and sale of any such property, after the same shall have been seized," proceedings in rem, in the name of the United States, shall be instituted in any district court thereof, in which the property or any part of it may be found, or into which the same, if movable, may first be brought, and the proceedings "shall conform, as nearly as may be, to proceedings in admiralty or revenue cases;" and if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid and comfort thereto, "the same shall be condemned as enemies' property, and become the property of the United States," &c.

This act also makes all sales, transfers, and conveyances of any such property null and void; "and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described," in the fifth or sixth section.

The capture, or—more accurately—the seizure before the court, consists of realty, and of personalty found on land. A capture, in technical language, is a taking by military power; a seizure, a taking by civil authority; and it is upon the latter mode of gaining possession that the district-attorney has counted in the information.

These statutes, being laws to work forfeitures, or confiscations of property, are within that class which requires a close construction. But notwithstanding the rule, that in statutes of this kind, the intention is to be attained by strict interpretation, it is nevertheless the duty of the judge to give full expression to the legislative will,—"to ascertain which will," says Bishop (1 Cr. Law, § 231), "is the great end of all interpretation." U. S. v. Eighty-Four Boxes Sugar, 7 Pet. [32 U. S.] 453; The Enterprise [Case No. 4,499]; U. S. v. Wigglesworth [Id. 16,690]; Taylor v. U. S., 3 How. [44 U. S.] 197; Attorney General v. Radloff, 10 Exch. 84.

Both acts are simply municipal laws; consequently, the government cannot demand, nor the claimant oppose, the confiscation of any of the property covered by the information, by force of the law of nations; each must rely for success on the statutes alone. In the source from whence they spring, and in their effect, as real or personal statutes, they differ essentially from those laws which regulate the intercourse of independent or foreign nations.

The district-attorney, in replying to the question made by the counsel for the claim-

ant as to the proper mode of procedure and trial to be adopted in the adjudication in this case, said: "The proceedings for condemnation, under the act of August 6, 1861, of such 'prize and capture,' should conform to proceedings in admiralty causes; and such," continued the counsel, "has been the construction placed upon the act by the United States court of Alabama, in similar cases."

I have not been favored with the perusal of any ruling of the federal courts for Alabama, on this question. This I regret. But after a careful resolving of the statute itself, I am constrained to entertain the opinion, that neither in its words nor in its essence does it warrant the conclusion, that in seizures of land, or of property seized on land, the proceedings for condemnation should conform to proceedings in admiralty, further than what may be necessary, in a suit in rem, to initiate the cause and shape it for trial.

The principles governing the district courts of the United States in the determination of seizures of this kind are in accordance with the common law, and the trial has, hitherto, been in pursuance of the manner of the English exchequer on informations in rem, where the decision of issues of fact devolve on a jury. This court cannot undertake to say that the national legislature, in passing this statute, contemplated the expansion of the jurisdiction of the admiralty, so far beyond what was understood and intended by it at the time of the formation of the constitution, as to withdraw from the suitor, in a seizure like this, the right of a trial by jury, and to transfer the determination of the cause to the breast of a single judge. U. S. v. The Betsey, 4 Cranch [8 U. S.] 443; Six Hundred and Fifty-One Chests of Tea v. U. S. [Case No. 12,916]; U. S. v. Fourteen Packages [Id. 15,151]; The Sarah, 8 Wheat. [21 U. S.] 391.

Section 9, chap. 20 of the judiciary act conferred [1 Stat. 76], inter alia, on the district courts, exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, and of all seizures on land and on water, and of all suits for penalties and forfeitures incurred under the laws of the United States, "saving to suitors, in all cases, the right to a common law remedy, where the common law is competent to give it." And Mr. Justice Field, in delivering the opinion of the supreme court of the United States, in the case of The Moses Taylor, 4 Wall. [71 U. S.] 411, gave the following comprehensive exposition of this reservation: "It is not a remedy in the common law courts, which is saved, but a common law remedy. A proceeding in rem, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute."

The judiciary act confined the original cognizance of suits for penalties and forfeitures to the district courts exclusively. But the act of August declares, that property used or employed for insurrectionary purposes shall be "lawful subject of prize and capture wherever found," and that "such prizes and capture shall be condemned in the district or circuit court having jurisdiction of the amount;" thus bestowing upon the latter court concurrent original cognizance with the district court, when the amount is sufficient. And if the district court for this district proceed by virtue of the circuit court powers bestowed on it by act of August 11, 1848 [9 Stat. 280], the course of proceeding and trial must, on principle, be the same as in the district court proper.

Counsel on both sides admitted that the proceedings and trial, under the act of July, to condemn this property should be in accordance with the common law.[2]

I would here remark that if the views which I have expressed on the act of August are erroneous;—if, under this statute, the procedure and trial in seizures like this, instead of being in pursuance of the rules of the common law, should be in conformity to those of the admiralty or civil law;—then a peculiar anomalous jurisdictional diversity arises, and opposite modes of trial follow; the first three counts in the information would be decided by the judge alone, and the fourth by a jury.

During the discussion of some of the foregoing questions, the court intimated that the trial for the condemnation of this property must be according to the course of the common law. The counsel then agreed to dispense with the intervention of a jury, under section 4 of the act of March 3, 1865 (13 Stat. 501), for the purpose of casting the trial of the issues of fact upon the court; and to effect this, they filed a stipulation with the clerk, as required by that section of the act.

But to impose the trial and determination of issues of fact on the court, two things are necessary: (1) It must be a civil case. (2) It must be pending in a circuit court. Under the act of August, as remarked, the proceedings, without regard to amount, may be instituted in the district court, and, concurrently with it, in the circuit court, when the amount is sufficient to give the latter jurisdiction; while all proceedings under the act of July must be brought in the district court.

This is, as already observed, a proceeding in rem; an information filed by the district-attorney, ex-officio, who prosecutes for the United States and an informer, to enforce the condemnation of realty, and of personalty seized on land. The act of August provides that the attorney-general, or district attorney, "may institute proceedings of condemnation;" but the name or the nature of the remedy to be adopted in effectuating the condemnation is not given; and, therefore, what is a proper remedy can be inferred only from the spirit of the statute and its evident object.

The act of July, however (to which informers are unknown), is more definite. It de-

[2] [From 35 Ga. 344.]

clares that, "to secure the condemnation and sale of any such property, after the same shall have been seized, so that it may be made available for the purposes aforesaid, proceedings in rem shall be instituted in the name of the United States in any district thereof," &c.; "which proceedings shall conform as nearly as may be to the proceedings in admiralty or revenue cases."

For the government, it was said that these statutes are remedial laws, and clearly distinguishable from penal or criminal statutes. Whereas, on the part of the claimant, it was insisted that they are criminal laws, and that the confiscation inflicted by them is a punishment for crime; and further, that an information in rem is not a suitable remedy by which to invoke a judgment of confiscation.

Whether these statutes are remedial laws, as contra-distinguished from penal or criminal enactments, is an intricate and perplexing question—inwrapped in doubt, and difficult to determine so as to satisfy the judicial mind. They are of a nature peculiar to themselves, and cannot, I think, be assigned to any particular department of jurisprudence.

By the district-attorney these acts were likened also to revenue laws. The argument failed to convince. Mr. Justice Grier, in pronouncing the decision of the court in Francis v. U. S., 5 Wall. [72 U. S.] 338, remarked that the act of August 6, 1861, "is not an act for the collection of revenue." What was there said will apply with still greater force to the act of July 17, 1862.

Counsel for the claimant contended that confiscations under these statutes are in no manner different from forfeitures of enemy property in times of war; and that the law of nations is the touchstone for construing them. To this argument the Prize Cases, 2 Black [67 U. S.] 635, would seem to furnish an answer.

In ulterior consequences, these statutes appear to me to resemble those laws enacted by some of the states during the War of Independence, by which the estates of persons absenting themselves from the country, lapsed, or escheated, or were otherwise forfeited to the people. Gilbert v. Bell, 15 Mass. 44; Borland v. Dean [Case No. 1,660].

After the careful perusal of the acts of August and July, I am inclined to be of the opinion, that there are some portions of each which may be found to possess a nearer affinity to criminal law, than to remedial jurisprudence. But the question will receive no discussion, as a decision upon it is not essential. If, however, it were necessary to decide it, some aid might be gathered from the case of Fisher v. McGirr, 1 Gray, 1.

Under the act of August, the offense stamps itself primarily on the property,—that is the offender; and its forfeiture is the consequence of the act of the owner in knowingly using it, or consenting to its employment for illegal purposes. His transgression—in acquiring or disposing of property with intent to use or employ it, or to suffer it to be used or employed, in aiding, abetting, or promoting rebellion; or, being the owner of property, knowingly using or employing or consenting to the use and employment of it as aforesaid—is the point upon which the confiscation turns. But under the act of July, the offense impresses itself primarily on the owner,—he is the offender; and the forfeiture of his property is a penalty inflicted for his crime. And, under this last act, it is not necessary, to work the forfeiture, that the property be adherent to the Rebellion.

Concurrent with, and explanatory of this statute, congress passed a joint resolution, which, inter alia, provides as follows: "Nor shall any punishment or proceeding, under said act, be construed so as to work a forfeiture of the real estate of the offender beyond his natural life." 12 Stat. 627.

It was insisted on behalf of the claimant, that these statutes are unconstitutional and void; and, if not so, that they expired with the Rebellion. But as the claimant, among other matters relied on by him, has, to his claim and answer, superadded a plea of pardon, the court is relieved from considering either of those propositions.

As to the question raised, whether the proceeding instituted by the government to confiscate this property is a civil suit or a criminal proceeding. Mr. Justice Story, in an anonymous case [Case No. 444], said: "But it is not true that informations in rem are criminal proceedings. On the contrary, it has been solemnly adjudged that they are civil proceedings." And see The Palmyra, 12 Wheat. [25 U. S.] 1.

The case of U. S. v. La Vengeance, 3 Dall. [3 U. S.] 297, was an information filed by the district-attorney, founded on a statute prohibiting the exportation of arms and ammunition. It was argued that the proceeding was of common law jurisdiction, and a criminal cause. But the court held it to be of admiralty jurisdiction. And Chief Justice Marshall, in the course of the opinion, said: "In the next place, we are unanimously of opinion that it is a civil cause; it is a process in the nature of a libel in rem; and does not, in any degree, touch the person of the offender." These cases were in admiralty.

Notwithstanding the action in rem may be deemed a civil proceeding, yet it is held to be a proper remedy to enforce a forfeiture incurred under the provisions of a penal statute. U. S. v. Eighty-Four Boxes of Sugar, supra. See 2 Pars. Mar. Law, 682; Attorney General v. Radloff, supra.

This last case arose on an information filed to recover penalties for smuggling. Counsel for defendant proposed to call the defendant himself as a witness on behalf of the defense, under an act allowing parties, in civil cases, to testify on their own behalf. The crown objected, and the objection was al-

lowed. A rule nisi followed, and it was heard before the court of exchequer.

The point in judgment was under an act of parliament declaring that "all penalties or forfeitures incurred or imposed by this or any other act relating to the customs, or to trade or navigation, shall and may be sued for, &c., by action of debt, plaint, bill, or information," &c. Martin and Platt, BB., held, that the information filed under this section was not a criminal proceeding, and, therefore, the defendant was improperly rejected. But Parke, B., and Pollock, C. B., decided that it was a criminal proceeding. Said the former: "An information by the attorney-general for an offense against the revenue laws, is a criminal proceeding—it is a proceeding instituted by the crown for the punishment of a crime—for it is a crime and an injury to the public to disobey statute revenue law, and, accordingly, the old form of proclamation, made before the trial of informations for such offenses, styles these offenses 'misdemeanors.'" The opinion of Pollock, C. B. (who tried the case below), was to the same effect.

The court being equally divided, the rule was dropped, and, consequently, the decision at nisi prius remained undisturbed.

But it has already been seen that these statutes are not revenue laws. They are, in fact, the fruit of a more vigorous exertion of the powers of the government than takes place in passing laws simply for the collection of revenue. The general object of revenue laws is merely the collection of duties and taxes, though they may impose fines and work forfeitures of property.

In the first count of the information it is alleged, that after the passage of the act of August 6, 1861, and after the promulgation of the president's proclamation in pursuance thereof, and during the Rebellion, Cook Brothers, for one hundred and fifty thousand dollars, granted, bargained, sold, and conveyed the property embraced in the information, to the so-called Confederate government, knowingly, with intent that the same should be used and employed for insurrectionary purposes. In the other counts, based on this statute, it is alleged that Cook Brothers mortgaged this property to the so-called Confederate government, after the passage of the act and the publication of the proclamation, knowingly, and with intent that it should be used and employed in aiding and promoting the Rebellion. I have carefully examined all the conveyances relied on by the district-attorney, and find them to be, in every instance, deeds of mortgage.

Now, if the rule of the common law prevailed in this state, the legal title would undoubtedly have passed to the so-called Confederacy; but here a mortgage is a mere security for the debt, and nothing more.

In Davis v. Anderson, 1 Kelly, 176, the court said, that "a mortgage in Georgia is nothing more than a security for a debt, and the title in the mortgaged property remains in the mortgagor until foreclosure and sale in the manner pointed out by the statute." Other cases followed to the same effect. 4 Ga. 169; 10 Ga. 66, 300; 27 Ga. 389. In Jackson v. Carswell, 34 Ga. 279, the same court, in express terms, per Walker, J., affirmed Davis v. Anderson. So this question, in the doctrine of mortgages, may be considered as settled in Georgia.

Mr. Justice Davis, in pronouncing the opinion of the supreme court of the United States in the case of Chicago v. Robbins, 2 Black [67 U. S.] 418, said: "Where rules of property in a state are fully settled by a series of adjudications, this court adopts the decisions of the state courts." See Id. 428.

It is in evidence that Ferdinand W. C. Cook, of the late firm of Cook Brothers, died in 1864. The surviving partner, Francis L. Cook, interposes, and claims the legal title to the property before the court. In his claim and answer to the information, and likewise in his responses to certain special interrogatories propounded by the government, he confesses that, upon the premises, and with the machinery and implements, the manufacture of arms for the so-called Confederate government was carried on by Cook Brothers, both members of the firm knowing of the same, and consenting thereto, and believing that the arms were to be used and employed in the war then going on against the government of the United States.

He adds to the foregoing confession a formal denial of the motives, purposes, and intent charged in the information, and avers that all these things happened in the course of business transactions, Cook Brothers being workers in iron, and engaged simply in their ordinary vocation, and actuated solely by the desire of gain, and the hope of legitimate profit.

But that Francis L. Cook cannot thus purge himself of the offenses just confessed, —voluntarily fabricating arms for the so-called Confederate government, and believing at the very time, that they would be employed in levying war against his country; and knowingly using and consenting to the employment of the property covered by the information, for insurrectionary purposes,—is a principle of the criminal law too well established to bear discussion. Respublica v. McCarty, 2 Dall. [2 U. S.] 86; U. S. v. Vigol, Id. 346; Ex parte Bollman, 4 Cranch [8 U. S.] 75, 126.

In addition to the many matters discussed during the hearing of this cause, the district-attorney alluded to a balance admitted by the claimant to be due by him to the rebel government, at the date of its downfall, amounting to sixty-nine thousand one hundred and four dollars, in "Confederate treasury notes." But this question cannot be adjudicated in a suit in rem.

The claimant interposed a plea in the nature of a plea of pardon, alleging that par-

don was granted to him by the president of the United States, on December 11, 1865, and prior to the issuing of the warrant of arrest.

In his plea, he alleges that the president granted to him (using the words of the grant) "a full pardon and amnesty for all offenses by him committed, arising from participation, direct or implied, in the Rebellion," —adding an averment, that he has performed all and singular the conditions therein contained, and prays judgment and a writ of restitution.

The pardon was produced, and inspected by the court. It contains the following conditions, to wit: (1) That he shall take the oath prescribed by the president in his proclamation of May 29, 1865. (2) That he shall never acquire any property whatever in slaves, nor make use of slave labor. (3) That he shall "first pay all costs accrued in any proceedings instituted or pending against his person or property before the date of the acceptance of this warrant." (4) That he "shall not by virtue of this warrant, claim any property, or the proceeds of any property that has been sold by the order, judgment, or decree of a court under the confiscation laws of the United States." (5) That he shall notify the secretary of state, in writing, that he has accepted said pardon. A copy of the acceptance was annexed to the plea, and bears date December 12, 1865.

In proceeding to inquire into the legal effect of this pardon, it may be borne in mind that the documentary proofs show that it was granted on December 11, 1865, accepted on the ensuing day, and the proper officer notified. That the warrant of arrest was issued on November 22, 1866, and very shortly thereafter the property was seized by the marshal; and at the March term, 1867, of this court, the district-attorney filed the information.

It is manifest from the language of the pardon itself, without resorting to construction, that the executive, by this warrant or grant to Francis L. Cook, not only forgave and buried in oblivion all offenses by him committed, arising from participation, direct or implied, in the Rebellion; but also clearly intended to restore to him all his confiscable property. Observe the words, found in the premises, — "full pardon and amnesty," — words the most comprehensive and potent that could be employed to carry out this intention. And if the grantee has performed all conditions precedent, and has not violated any of the conditions subsequent, then all the right, title, and immunities bestowed by the grant, vested, and continue vested in him; and—if the charter of pardon be construed agreeably to the laws of this state—in his heirs.

If this last conclusion is sound, it may be assumed—provided the conditions subsequent, in the pardon, were affirmative conditions, and not personal and inseparable from the grantee—that had he died before complying with these conditions, his heirs could come in and comply; premising, of course, that the forfeitures or confiscations imposed under the provisions of these statutes, extend beyond the life of the grantee. This question might arise under the act of August, but not under the act of July, unless personal estate is included in the term "forfeiture" as understood in section 3 of article 3 of the federal constitution. And this proposition is equally as applicable to personal representatives as to heirs. Sir Edward Phitton's Case, 6 Coke, 79b, is in point. Sir Edward was outlawed at the suit of one R. after judgment, and before the general pardon of 43 Eliz.; and after the pardon Sir Edward died. The court held, that his executors could avail themselves of the pardon, and have the benefit of it; and this, too, whether executors or administrators were named in it or not. Citing Lord Mordant's Case, Cro. Eliz. 294.

A pardon is an act of mercy flowing from the fountain of bounty and grace; its effect, when it is a full pardon, is to obliterate every stain which the law attached to the offender, to place him where he stood before he committed the pardoned offense, and to free him from the penalties and forfeitures to which the law had subjected his person and property:—"to acquit him," says Sir William Blackstone, "of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon." 4 Comm. 402.

"A pardon," says Lord Coke, "is a work of mercy, whereby the king, either before attainder, sentence or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical. All that is forfeited to the king by any attainder, &c., he may restore by his charter." 3 Inst. 233d.

King v. Greenvelt, 12 Mod. 119. Motion to discharge Dr. Greenvelt from a fine, pro mala praxi. It was urged, that the king having granted the fines to the college, he could not by his own pardon destroy his own grant; and that the fines remained notwithstanding. But per curiam, seriatim: "The penalty pro mala praxi, is only a satisfaction to the public justice, and not to the party, who had his action on the case; and that whenever a crime is pardoned, all the effects and consequences thereof are discharged; that when an act of parliament appoints a fine for a public offense, such fines, of common right, belong to the king, unless they are otherwise particularly disposed; that the king, by granting away his fines, does not extinguish his power of pardoning, for that would be an extinguishment of his prerogative by implication; and the power of pardoning being inseparably annexed to the crown, and not grantable over, the king therefore pardoning this offense, before the fine actually imposed, whereby an interest would have vested in the grantee, the offense

was thereby gone, and the penalty pending thereon discharged."

In Ex parte Wells, 18 How. [59 U. S.] 307, it was said by a distinguished jurist,—Mr. Justice Wayne,—in pronouncing the opinion of the court, that "when the words, to grant pardon, were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. * * * We must, then, give the word the same meaning as prevailed here and in England, at the time it found a place in the constitution."

Mr. Justice Field, in delivering the opinion of the court, in Ex parte Garland, 4 Wall. [71 U. S.] 333, said: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

Although laws are not framed on principles of compassion for guilt; yet when Mercy, in her divine tenderness, bestows on the transgressor the boon of forgiveness, Justice will pause, and, forgetting the offense, bid the pardoned man go in peace.

Judgment: On hearing the above cause, and having inspected the charter of free and full pardon granted by the president of the United States, on December 11, 1865, (before any judicial proceedings had been instituted in court for the condemnation of the property covered by the information), to Francis L. Cook, the claimant, and by him pleaded in bar of these proceedings, it is considered and adjudged by the court here, that the said plea of the claimant be allowed, and that this cause be dismissed, and it is so ordered. The court adjudges nothing further.

Case No. 14,474.

UNITED STATES v. ATKINS.

[1 Spr. 558;[1] 19 Law Rep. 95.]

District Court, D. Massachusetts. Sept., 1856.

BOUNTY—FISHING—PERJURY—INTENT TO DEFRAUD.

1. A vessel is not entitled to the fishing bounty, unless the fishermen are, by a written agreement, to share in the proceeds of the voyage.

2. Perjury, under the statute, may be either by swearing to a fact which the party knows is not true, or to his knowledge of a fact, when he has not knowledge.

[Disapproved in U. S. v. Moore, Case No. 15,803.]

3. Rash swearing, to what is not true, is not, necessarily, perjury.

4. An intent to defraud the government, is not a necessary element in this statute perjury.

[2] [The defendant was put upon trial for obtaining the fishing bounty for the schooner Waldemar, of Provincetown, by making a false declaration in an oath, required by law, before the collector of Barnstable. The prosecution relied in this case upon the act of 1823, [3 Stat. 723], which provides that "if any person shall swear or affirm falsely, touching the expenditure of public money, he shall, upon conviction thereof, suffer as for wilful and corrupt perjury." The defendant, who was not interested in the vessel or voyage, undertook to obtain the bounty under a power of attorney from the owner, which authorized him to do all things lawful and necessary to obtain the bounty money. He produced to the collector a fishing agreement, drawn in legal form, and signed by the master and crew, and countersigned by the owner, and thereupon took and subscribed the oath before the collector, in which he swore as follows:—"I, Ruel Atkins, lawful agent of the schooner Waldemar, do solemnly swear, that the paper now produced by me, is the original agreement made between the owner, master and fishermen, of the schooner Waldemar, employed on board said vessel during the last fishing season," upon which the collector paid to him the bounty, $238, for which the defendant signed a receipt. It was proved by the collector that the oath was required and taken, and that he should not have paid the bounty unless this oath had been taken, or the papers produced as the true agreement. Two of the fishermen testified that they did not go on shares, but were hired by the master, at the rate of $27 and $24 a thousand, for each thousand fish they caught, and that there were but three sharesmen on board the vessel. They signed the printed agreement, on shares, at the request of the master, but it was not read to them, and they never agreed to go on shares. They were told by the master that there could be no more sharesmen, and he wanted men by the thousand catch. They received nothing from the bounty. It was contended by the counsel for the defendant, that to make out the offence of false swearing, it must be proved that the defendant swore to a falsehood, knowingly, with intent to defraud the United States, and that the defendant did not know of the fraud, but took the oath ignorantly, as a matter of course, believing that the agreement was genuine, and not with the intent to deceive the collector. The attorney for the United States, argued that this was not the common law offence of perjury, but a statute offence of swearing falsely. That ignorantly and deliberately swearing to a positive fact, which the defendant did not know of his own personal knowledge, was wilfully, falsely swearing. That he had knowledge that the agreement on shares was not the true agreement, be-

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

[2] [From 19 Law Rep. 95.]

cause the evidence showed, he must have known that the men were paid off before the voyage was settled, and the shares ascertained; and further, that when he swore positively to the agreement as the true agreement, he knew that he had no personal knowledge of the fact that it was the true agreement, and thereby deceived the collector, who relied on his positive oath to the fact, and paid the bounty. That the effect of the oath was to induce the collector to pay the bounty, by which the United States was defrauded, and the fishermen deprived of their share of the bounty, which the law designed for their benefit, and not for the owners and masters, who had thus obtained the whole of the bounty. That the expenditure of public money had thus been brought about by an oath, which was false in fact, and the defendant having acted deliberately in taking that oath, was liable for the consequences of his acts from which all the criminal intent necessary to constitute the statute offence, was to be legally inferred.] [2]

B. F. Hallett, U. S. Dist. Atty.

T. K. Lothrop, for defendant.

SPRAGUE, District Judge, in charging the jury as to the law, said that the statute did not allow the fishing bounty, unless, by the agreement under which the voyage was performed, the fishermen were severally to share in the bounty and proceeds of the voyage. That engaging a man for so much for every thousand fish caught by him, or hiring by the month or season, except the cook, was not a compliance with the requisitions of the law, and no vessel was entitled to bounty, where each fisherman did not have a share in the proceeds of the voyage, in proportion to the number of fish caught by him. It was necessary, in order to obtain the bounty, that after certain deductions from the proceeds of the fish, the residue should be divided among the fishermen according to the number of fish they had respectively taken, and that five-eighths of the bounty should be divided in the same proportion. And the owner, his agent or representative, must swear that such was the agreement, in order to get the bounty. But to make the offence perjury, under the statute, the jury must be satisfied that the defendant swore to a declaration which, at the time, he was aware was false. And that may be either by swearing to a fact which he knows is not true, or by swearing to his knowledge of the fact, when he knew he had no such knowledge. Rash swearing to what is not true, is not necessarily perjury; and the jury would inquire whether it was honestly done, or was done to deceive the officer and get the bounty by making a false declaration. If the prisoner had no intention of stating a falsehood to mislead, it was not the offence charged in the indictment. But it was not necessary, in order to constitute this offence, that the defendant should have intended to defraud the government, by obtaining the bounty for a vessel which he did not think had earned it. He might believe that the vessel had been employed the full time, with the requisite crew, under the proper agreement, and so was entitled to the bounty; and yet he might, under the statute, be guilty of the offence charged, by swearing falsely, as to documents not genuine, or allegations not true, to induce the collector to pay the bounty.

[The following report of Judge Sprague's charge is given in 19 Law Rep. 95]:

SPRAGUE, District Judge, in charging the jury, affirmed his former instructions to the same jury in the trial of David A. Smith, for perjury in a like case, and then referred to the law applicable more particularly to those guards upon which the attorney for the prosecution in the present case relied, under the act of 1823, as not perjury at common law, but the offence of false swearing created by the statute. The learned judge said that the allegation in the indictment is, that the defendant falsely swore that the fishermen's agreement produced by him to the collector, was the original agreement for the performance of the fishing voyage, when in fact it was not the original agreement. The fishermen testify that they were not engaged upon shares, but were hired for a specific time, to be paid for every thousand of fish caught by them during the voyage. If you believe them, the shipping paper upon which the defendant took the oath was not the actual agreement with the fishermen, and if they were hired as they have testified, the vessel would not be entitled to the allowance of bounty, because the law in that respect had not been complied with, and whoever knew that such was the fact, and was concerned in procuring the payment of the bounty, with that knowledge, participated in a fraud upon the United States.

But if a fraud was committed, was the defendant guilty of the offence of false swearing in order to obtain the bounty with which he is charged?

Was the oath which the defendant took when he obtained the bounty from the collector, false within the meaning of the law? That it was not the truth is apparent, but to make the defendant guilty of false swearing, it must have been intentionally false. It must be false as to him, and he must be proved to have been guilty of the intent to swear to a falsehood.

First—It is contended for the prosecution, that from all the evidence in the case the defendant must have known it was not the agreement.

Second—That he swore positively it was the agreement, when he was conscious that he did not know it was the agreement.

[2] [From 19 Law Rep. 95.]

These are distinct grounds, and if either is made out beyond a reasonable doubt, the offence charged has been committed. As to the first, did the defendant wilfully undertake to swear to that which he was well aware was untrue, and further did he do so for the purpose of deceiving the collector, in order to obtain the bounty? The motives and intent are to be drawn from the acts and declarations of the defendant. What were the facts? It does not appear that there was any communication between him and the owner, Crowell, who is deceased. The power of attorney to procure the bounty was given by Crowell to the defendant, who had no interest in the vessel. The defendant went to the collector with the fishing agreement drawn up for the division of the proceeds in shares, in the form required by law. That paper was signed by the master and fishermen and countersigned by the owner. Upon the back of it was the oath of the master of the vessel, taken before the deputy collector, that it was the actual contract with the fishermen. There was also the certificate of the inspector, made before the vessel sailed, that it was the agreement under which the voyage was to be performed. What other knowledge he had does not appear. It is said that any stranger who looked at the papers might have the same knowledge, and thereupon swear that the paper was the true agreement. The collector came to the conclusion that it was genuine, and administered the oath. He says that he relied upon that oath, and did not go behind it, but he also examined the papers, which all appeared to be genuine, and in the form required by law. From the whole evidence the jury will determine whether they are satisfied beyond reasonable doubt, that when the defendant swore it was the original agreement, he knew it was not the original agreement, and intentionally swore falsely.

The second ground taken by the attorney for the prosecution, is distinct from this, and I instruct you that it would be false swearing if the defendant swore that he had personal knowledge of a fact, when he had no such knowledge, and was conscious he had none, and also so swore to deceive the collector, and induce him to pay the bounty.

The form of the oath is positive. "I solemnly swear that the paper now produced by me, is the original agreement." Did the defendant by swearing positively mean to swear that he had personal knowledge that it was the original agreement? The defendant could not swear of his actual personal knowledge that it was the original agreement, unless he was present when it was made. All else would be information and hearsay. The question is, did he intend to make the collector understand that he had knowledge it was the original contract, or did he merely mean to swear that it was such to the best of his knowledge and belief? The matter for you to decide, gentlemen, is, whether you are satisfied that the defendant, in order to deceive the collector, wilfully and intentionally swore to what he knew was false, either as to the agreement being genuine when he knew it was not, or to his knowledge of that fact when he was conscious he had no such knowledge.

The jury were kept together seven hours, and being unable to agree, were discharged.

Case No. 14,475.

UNITED STATES v. ATWILL.

[7 Bett's D. C. MS. 66.]

District Court, S. D. New York. April 14, 1846.

ACTION ON RECOGNIZANCE — INSUFFICIENCY OF DECLARATION—CURE BY PLEA—REARREST OF PRISONER—EFFECT ON SURETY.

[1. A declaration on a recognizance should state that the recognizance was filed in court.]

[2. A recognizance, entered into in a fixed penalty to appear at a circuit court and answer such matters as may be there objected against the party, and not to depart without leave of court, is binding on the sureties, without stating the particular charge on which the party is under arrest, and to which he is to appear.]

[3. The obligation imposed by a recognizance remains valid and operative on the prisoner's release, notwithstanding his detention, after the giving of the recognizance, for the purpose of obtaining additional security, and notwithstanding his subsequent arrest or arrests to compel him to keep the securities good.]

[4. A surety on a recognizance, who binds himself for merely a portion of the total bail, is not released by the fact that the United States retakes the prisoner to compel him to keep good the additional security, though his arrest on a bench warrant on an indictment for the same offense would have that effect.]

[5. In an action on a recognizance, a plea averring that the complement of security was made up, and that the principal was therefore discharged from custody, and that on the same day he was again arrested and imprisoned by the United States on three bench warrants issued on the indictment, is open to the intendment that the bench warrants were enforced to compel better securities, and hence states no sufficient defence.]

[6. Where the breach of the recognizance assigned by plaintiff is that the prisoner did not appear according to the stipulation of the defendant, a plea answering that he was arrested and committed to custody by the plaintiff, after having been released upon the recognizance, is bad as leaving the case open to the intendment that the prisoner did not escape, and was not set at large by the plaintiff, as freed from his arrest.]

[7. Plaintiff is not called upon to reply when the plea does not state what necessarily precludes a recovery by plaintiff.]

[This was an action at law by the United States against William C. Atwill on a recognizance.]

PER CURIAM. The United States demurs to the second plea interposed by the defendant, and the questions raised and discussed upon the pleadings are: (1) Whether a recognizance entered into to appear at a circuit

court and answer such matters as may there be objected against the party, and not depart without leave of the court, is valid, without stating facts showing the matter within the jurisdiction of the officer taking it, and also specifying on what particular charge the party is under arrest, and to which he is to appear. (2) Whether on an order of court to admit a prisoner to bail (committed under seven indictments for perjury) in the sum of $16,000, and the taking of different securities for the amount in aliquot parts thereof, and the failure and insufficiency of some of the bail on their separate undertaking, and the arrest of the prisoner on bench warrants issued on three of the indictments, for the purpose of compelling sufficient bail, the defendant is thereby discharged his engagement on the recognizance entered into by him. (3) Whether the declaration is not defective in substance in not averring that the recognizance was filed in court.

The first and last objections are taken to the declaration, it being argued for the defendant that judgment must be in his favor because of those defects, if his plea is adjudged insufficient. It is not necessary to discuss the last objection, because it is admitted by the plaintiffs that the averment is not made, and by the defendant that the plaintiffs can on motion be allowed to amend their declaration by averring that the recognizance is on file. The substantive defect of the declaration is then supposed to be that it counts on an instrument not valid and obligatory at law, inasmuch as it does not contain any specification of the cause for which Frost, the principal, was under arrest, and for what cause he was bound to appear and answer, and does not allege that the commissioner had competent authority to take it.

Two cases decided by the supreme court of Massachusetts are referred to as deciding the precise point raised by the demurrer in the case. Com. v. Downey, 9 Mass. 521; Com. v. Daggett, 16 Mass. 447. The recognizances in both instances were taken by a justice of the peace, and in Daggett's Case was in substance the same in form as the one declared upon in this cause. The reports of the cases are very concise, but in both the language of the court imports that the recognizances are vitally defective in not setting forth the cause of taking them, and judgment was rendered against the actions on general demurrer. It is by no means made certain by the terms in which the opinion of the court is expressed that the invalidity of the recognizances consisted in not setting forth the accusation or cause for which the party was to appear. In one case the recognizance is pronounced bad, because it does not "recite the cause of its caption," and in the other "that it does not shew the cause of taking it." The supreme court of Maine in reviewing these decisions understood them to turn upon the want of authority in the magistrate, stated upon the recognizances, to take them. They say it is settled law that a recognizance should state the ground on which it is taken, so that it may appear that the magistrate taking it had jurisdiction and authority to demand and receive it. State v. Smith, 2 Greenl. 62 In that case the recognizance set forth the ground of complaint, and to what matter the party was to appear and answer, but was still held void, it not appearing upon the recognizance, and not being avowed in the scire facias, that the magistrate acquired jurisdiction of the subject matter. Id. 63 In some modern elementary works it is asserted that the recognizance should mention the particular crime for which the party is bound over to take his trial (Davis, J., 102; Barbour, Cr. Treat. 504), and such is the purport of the definition given by Chitty (1 Cr. Law, 85). But I find no established doctrine in the English books or the decisions in this state holding such specification to be a cardinal requisite, if the recognizance contains an undertaking to appear and answer generally.

By the ancient English law persons in prison accused of crimes were repleviable only by means of a special writ or mandate issued by the king. 2 Reaves, Hist. & L. 14, 131, 252; 3 Reaves, Hist. & L. 238; Crabbe, Hist. & L. 189; 2 Co. Inst. 190. In such case the writ designated the offence for which the party was detained, and ordered him set at liberty, on sufficient mainpernor to have him in court, &c., to stand to right touching that charge according to the law and custom of the realm. Fitzh. Nat. Brev. 249, G; Id. 250, F; 4 Co. Inst. 178; Hawk, P. C. 132, c. 15, § 82; Stamford, bk. 2, c. 18. Lord Hale, after adverting to the early doctrines of the law concerning bail and main prize and the different forms in which bail was taken, says the true and regular bail is a recognizance in a sum certain, and he gives the form in the original Latin taken from Lambert's Justice. 2 Hale, P. C. 126. The condition of the recognizance was that the prisoner should appear at the next general gaol delivery, then and there to answer the lord the king in the premises, "or," as Lord Hale says, "to answer those things which shall then and there be objected against him," or rather, according to the ancient form, "to stand to the right concerning the (felony) aforesaid." It is plain upon the authority that the recognizances would be complete if the condition was single only; that is, to appear and answer a particular accusation, or to appear and answer those things to be objected against the party. The forms in the older treatises usually embrace the special and general clauses in the condition; that is, that the accused shall appear and answer to a particular charge, and also do and receive what shall be objected to him. Nelson's Justice (1724) p. 75; 1 Shew's Justice, 91; 4 Bun. J. 99; Conducter Generalis, 55. The further clause has also become an usual, if not invariable, part of the condition, that the prisoner shall

not depart without leave of the court. This stipulation it would seem is sufficiently efficient to subserve the purposes of all the special conditions, for it is clear upon the authorities that under it the bail are bound to have the prisoner in court to answer any matter or charge that may be preferred against him, whether included in the cause of his commitment or not. Hawk, P. C. bk. 2, c. 15, §§ 83, 84; 10 Mod. 152; Fortes. 358; 1 Bun. R. 10, 54, 398, 471; 3 Bun. R. 1461; 4 Bun. R. 2326; 5 Davis, Ab. 277, § 2; 5 Davis, Ab. 299, § 29

The supreme court of this state held that clause need not be inserted in the recognizance in respect to the charge on which the prisoner is committed, and that its effect is to detain the party upon the charges which may be exhibited against him. People v. Stager, 10 Wend. 431. The undertaking would therefore be equally complete upon this stipulation alone as on either of the alternatives specified by Lord Hale (2 Hale, 126), for it would be no less stringent and obligatory, standing by itself, than when coupled with other independent conditions. It would be for the bail to object to an obligation so indefinite as to its terms, and to insist that his liability should be confined to the appearance of the prisoner upon some specific charge; but if he consents to enter into an engagement so broad he cannot escape the consequences because his responsibility has become greater than he intended to make it, and than the prisoner would have been compelled to give, had he objected to it. I am not aware of any authority to compel a prisoner to give security for more than to answer the matters upon which he is under arrest, but the stipulation that he shall abide the order of the court and not depart without its leave is essentially for his own benefit, as without such engagement he would necessarily be committed to close custody on the day of his appearance, and be thus detained until the court ordered his discharge. It appears to me therefore that the recognizance in itself is substantially sufficient to bind the parties. It imposes on them, under a fixed penalty, the condition that Frost shall appear at the next circuit court for the district, and there abide the order of the court, and not depart the court without leave; and within the principle of the cases on this subject that undertaking subjected him to answer any indictment that might be preferred against him by the United States.

The declaration, however, would seem to be defective in two particulars: First, that it does not aver that the recognizance was filed or made of record in the circuit court; and, secondly, it does not allege a case within the jurisdiction of the commissioner, and in which he could legally exact the recognizance. The want of such record is the ground of the first plea, but the objections are also matters of substance, and may be raised by a general demurrer. 9 Mass. 521; 16 Mass. 447: 2 Greenl. 62; 4 Wend. 387. These objections may be removed by amendment, if they are not covered by the special plea interposed by the defendant. The second plea is therefore to be considered in two aspects: First, whether it makes the declaration good by setting forth a competent jurisdiction in the magistrate to take the recognizance, and sufficiently avers the entry of the recognizance in court; and, secondly, whether it alleges matter of legal bar to the action. The second consideration is the essential one, because, as already suggested, any imperfection in the frame of the declaration in respect to the other particulars may be rectified by amendment. The facts asserted by the plea are that seven indictments were presented against Frost in the circuit court of July term, 1842; that he was held in custody on those indictments; that the court ordered him to be held to bail in the sum of $16,000. In pursuance of that order the defendant on the 12th day of August entered into the recognizance for $5,000 now in suit, on the 15th day of the same month Warren Wild entered into a separate recognizance for $10,000, and on the same day John T. Butler entered into one for $1,000, each subject to the same condition as that of the defendant; the principal, Frost, being held in custody of the marshal on the indictment, until the acknowledgment of all the recognizances, when he was discharged from such custody; that after his discharge, and on the said 15th of August, the plaintiff caused Frost to be arrested and imprisoned on three bench warrants issued on the said indictments, or some of them, and he was thereby placed in custody of the marshal upon the said indictments, or some of them, whereby the recognizance of defendant was vacated, annulled, and discharged.

It is not only competent to the court to take bail in different recognizances, but it seems originally to have been the usual method. Lord Coke says at common law, in cases of felony, the sureties are severally bound in a certain sum that the prisoner shall appear, &c. 4 Co. Inst. 178, c. 31. Hawkins says it is the practice of the court to take a several cognizance from each of the bail, in a sum certain to the king. Hawk. P. C. bk. 2, c. 15, § 82. Their undertaking is several and separate, although all appear and acknowledge the recognizance at the same time, and the nature of the undertaking would necessarily be the same, whether concurred in at one time by all the sureties, or they entered into it independent of each other. The full penalty of the stipulation must be paid if the condition is not performed, and neither can require that the burthen shall be taken from him and thrown on another. So also it is clear upon all the authorities that the release of a prisoner on bail carries with it the implication that the surety is adequate to the sum demanded, and, if found insufficient, whether a deceit was intended by the bail or otherwise, the

principal is subject to arrest and detention until he supplies competent bail. Burns, J., Bail; Hawk. P. C. bk. 2, c. 15, § 4. Insufficient securities being regarded in law as no securities. When therefore the recognizance is taken by acknowledgement in court, it would be correct, and probably the true practice, to extend a separate record against each party, it being considered by the supreme court of this state necessary to its validity that the mere minute or memorandum taken by the clerk should be drawn up into a formal record. People v. Rundle, 6 Hill. 506. This would present each surety in the character of a distinct and absolute obligee, according to the terms of his recognizance. It must be obvious also that these sureties, where they all undertake for the same sum, and may thus be regarded in some acceptation as joint obligors, must often enter into the recognizance at different periods of the same day, or on different days, with greater or less intervals of time; so that the obligation may be perfected as to some of the bail before the prisoner furnishes all the security required or can claim his discharge.

The argument so strenuously pressed that the release of the prisoner must be concurrent with giving the recognizance in order to charge the bail with their undertaking cannot therefore be sound. His manucaptors cannot demand his surrender to their keeping until the full condition of his release is complied with by giving security to the amount and by the numbers directed, and yet the obligation of those who have entered into the recognizance is complete in respect to them, even if the public prosecution chooses to waive all other security and throw the whole responsibility on them, and will remain so if the prisoner's imprisonment is protracted by his delay to supply the security ordered, being only suspended, as to its operation, during his being held in custody. The principle from the necessity of the case must be that the obligation remains operative and valid on the prisoner's release, notwithstanding his detention after the recognizance given, for the purpose of additional security, and notwithstanding his subsequent arrest, how often soever it may be, to compel his keeping his securities good. This doctrine applicable to undertakings apparently entered into at one time, and for a common sum by several bail, becomes still more apparent and appropriate when the bail actually come in at different periods, and undertake for different and distinct amounts. In this case, it is to be presumed for the relief of the prisoner and his friends, the court allowed the large sum required for bail, $16,000, to be divided into three sums: $1,000, $5,000, and $10,000. On the 12th day of August the defendant executed his undertaking, and became bail for $5,000, the prisoner then being in custody. Manifestly this must carry with it the implication that the imprisonment was to continue until the residue of the bail was procured. The validity and operation of the recognizance cannot accordingly be regarded as impaired by that fact. The bail proffers his undertaking to the United States in connection with that condition, because the plea avers that the recognizance was given by him in pursuance of the order of the court, and that order, as stated by the plea, was that the prisoner should be discharged on giving bail in $16,000. Although the plea does not assert that the order farther directed the security to be taken in proportions of that sum, it must necessarily be so inferred from the allegations that the defendant gave his recognizance for the distinct sum of $5,000, in pursuance of the order of the court. He assumed then the independent and positive liability to that amount whenever the prisoner should give the security farther required: and the obligation carried with it, as a necessary incident, that the prisoner would be subject to continued and reiterated imprisonments so long or so often as the further security offered by him should be found insufficient. It would accordingly be no acquittance or relinquishment of the objection of the defendant for the United States to retake the prisoner in order to compel his keeping good the additional security. So often as he should be discharged from imprisonment on putting in that security, so often and for such time the liability of the defendant on his recognizance would attach. He would be discharged from the obligation of his liability if the United States subsequently arrested the principal on a bench warrant on an indictment for the same offence, though he escaped from such imprisonment. People v. Stager, 10 Wend. 431. This would be a proceeding not in furtherance of the order to put in sufficient bail, but would be assuming to themselves what had before been delegated to the bail, the possession of the accused, in order to hold him to meet the indictments pending against him.

The plea to avail the defendant then as a bar to his undertaking must show that the United States rearrested the accused, and held him in custody on the charge for which the defendant had become his bail. And his averment must be direct and explicit, so as to leave no ambiguity or ground for implication that the arrest might be for a different cause, or so as not to affect his liability. A cardinal rule in respect to pleas in bar is that the defendant must state his case with its legal circumstances, and if the plea be susceptible of two intendments it shall be taken most strongly against him. 1 Chit. Pl. 522. He must also set forth his case according to the truth. The averment of the plea is that on the 15th of August the complement of security was made up, and the principal was therefore discharged from custody; and that on the same day he was

arrested and again imprisoned by the United States on three bench warrants issued on all the said seven indictments, or on some of them. This is all that is averred in respect to the imprisonment. The court had a right to arrest the accused instantly on his discharge, if it was found that his security was inadequate, and demand fresh securities. Chit. Cr. Law, 100. This re-arrest must necessarily be on the indictments, for they were the authority for holding the prisoner and demanding bail. On this averment, as it stands, the presumption at least is equally as strong that the bench warrants were enforced to compel better securities, as for the purpose of reimprisoning and holding the accused on the indictments. If for the purpose of compelling the bail offered on the day of discharge to be made good, the arrest was not inconsistent with the bail taken of the defendant, and could not operate to annul or vacate it. Indeed, the proceeding would be for the benefit of the defendant, as enforcing further good bail to the amount of $11,000 would tend to his security, and guaranty under his recognizance. His plea should have removed all uncertainty, and not left the case open to an intendment defeating the defence. The bearing of the intendment or presumption is doubtless strengthened by the omission of any averment in the plea that the United States suffered the prisoner to escape and go at large.

To the breach of the cognizance assigned by the plaintiff that the prisoner did not appear according to the stipulation of the defendant the plea answers that he was arrested and committed to custody by the plaintiff, after having been released upon the recognizance. This qualified and restricted method of stating the facts leaves the case open to the intendment that the prisoner did not escape, and was not set at large by the plaintiffs, as freed from his arrest. In People v. Stager, 10 Wend. 431, the plea carefully avers that after the arrest of the prisoner he was arraigned on the indictment, and was afterwards permitted by the court to escape, and go at large. Ordinarily it belongs to the plaintiff to reply matter of avoidance, and such would be the fact that the arrest of the prisoner in this case was to compel fresh securities, and that he was set at large again after having furnished them. But I think he is not called upon to reply when the plea does not state what necessarily precludes a right of recovery on the part of the plaintiff. It has been shown that the United States might lawfully arrest the prisoner for the purpose of additional bail, without impairing the form and obligation of the defendant's recognizances, provided he was again set at liberty on such security; and although the point of pleading is exceedingly strict and technical, and not free of doubt, yet on the whole I am of opinion that it belonged to the defendant to negative the implication or intendment to which his plea is open, and that accordingly it is an insufficient bar to the action.

My opinion accordingly is that the first plea is good, and that the declaration is defective in not averring that the recognizance was filed or made of record in court. The plaintiff will have leave to amend on this point. I am of opinion that the plea makes good the other defect of the declaration, and shows that the court and its officer had jurisdiction of the subject-matter to take bail, and that accordingly the recognizance is legal and valid. I am further of opinion that the second plea furnishes no bar to the action, inasmuch as it does not aver that the prisoner was discharged or permitted to escape by the plaintiff or by the court, nor does it state the facts which prevented his appearing and answering according to the condition of the recognizance. The defendant will also have leave to amend his plea, and no costs are adjudged as against either party.

Case No. 14,476.

UNITED STATES v. AUBREY.

[1 Cranch, C. C. 185.] [1]

Circuit Court, District of Columbia. Nov. Term, 1804.

DISTURBING RELIGIOUS WORSHIP — PUNISHMENT.

Upon an indictment for disturbing a religious congregation, the punishment is fine and imprisonment, to be assessed by the jury.

Indictment for disturbing the religious worship of a society of Methodists, under the 4th section of the act "for the effectual suppression of vice," &c., passed 26th December, 1792 (Old Rev. Code, p. 287; New Rev. Code, p. 276); by which if any person shall maliciously disturb any congregation, assembled in any place of religious worship, he may be put under restraint during religious worship by any justice present, who may cause the offender to find two securities for his good behavior, and in default thereof shall commit him to prison, there to remain until the next court, "and upon conviction of the said offence before the said court, he shall be further punished by imprisonment and amercement at the discretion of a jury."

Mr. Jones, U. S. Atty., contended that the jury were to assess the fine and imprisonment, that both species of punishment must be applied, and both must be at the discretion of a jury. See the case of U. S. v. M'Farlane, [Case No. 15,675]. By the act of 13th November, 1792, § 26 (Old Rev. Code, p. 112), it was enacted that in every indictment for a trespass or misdemeanor, the fine or amercement shall be assessed by a jury.

THE COURT were of opinion that imprisonment was a necessary part of the punish-

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

ment, and that the jury were to ascertain the term of imprisonment, as well as the fine.

FITZHUGH, Circuit Judge, contrâ. The 4th section of the act "for the effectual suppression of vice," &c., after stating the power of a justice of the peace to bind the offender to appear at the next court, &c., says, "and upon conviction of the said offence before the said court, he shall be further punished by imprisonment and amercement at the discretion of a jury." Imprisonment has always been imposed by courts, and amercements by juries, in Virginia. Old Rev. Code, p. 112, § 26. It is improper so to expound a law as to make it repeal another by implication. The meaning of the act is that a jury shall decide on the defendant's guilt and his fine; and if, from the atrocity of the offence, the court should think the further punishment of imprisonment proper, another jury fixes the period. The words "upon conviction," and "further punished," show that the same jury that ascertains the guilt do not imprison. The words "further punished" are accumulative. "Conviction means that the defendant's guilt is to be ascertained by verdict, and as this conviction is to precede the 'further punishment,' &c., it follows that the defendant [William Aubrey] is not to be imprisoned under the first verdict. By this construction the defendant will be punished as in the case of trespasses and misdemeanors in general." The indictment also contained counts for a rescue, and for beating Abercrombie, the constable.

Verdict guilty, on all the counts. The jury assessed the fine at twenty-five cents, and the term of imprisonment at three calendar months.

Case No. 14,477.

UNITED STATES v. The AUGUSTA.[1]

District Court, S. D. New York. September, 1861.

SLAVE TRADE—EVIDENCE—JUDICIAL NOTICE.

[1. A vessel was purchased and fitted out ostensibly for a short whaling voyage, but her outfit, admitted to be nearly complete, was entirely inadequate for such a voyage; her meat being deficient in quantity, and a large part of it tainted. No adequate preparations had been made for shipping such experienced officers and crew as were indispensable for a whaling voyage. The whaling business had ceased to be generally profitable, and her pretended voyage would have exposed a whaler, but not a slaver, to capture by Confederate cruisers. She had an immense quantity of salt, and an excess of rice, corn, beans, and firewood, for a whaling voyage, with an unusual quantity of water, partly in oil casks, all suitable for a slaver. *Held*, that she was fitted out with the intent to employ her in the slave trade, within the meaning of Act March 22, 1794, § 2 (1 Stat. 349), and Act April 20, 1818 (3 Stat. 450), and must, with her tackle and lading, be declared forfeited to the United States.]

[2. Where a libed in rem against a pretended whaling vessel by the United States charges that she is being fitted out with the intent to employ her in the slave trade, a court of admiralty will take judicial notice of the fact that the projected voyage would have exposed a whaler, but not a slaver, to capture by Confederate cruisers.]

[See The Augusta, Case No. 647.]

In admiralty.

C. Delafield Smith, U. S. Dist. Atty., and Stewart L. Woodford, Asst. Dist. Atty.

Benjamin F. Sawyer, for owners of the bark.

SHIPMAN, District Judge. The libel is founded on the second section of the act of March 22, 1794, and on the act of April 20, 1818, and charges that the bark in question was fitted out at Greenport, L. I., with the intent to employ her in the slave trade. A claim and answer have been filed by Jacob A. Appley, alleging that the vessel is owned by him, and that she was fitted by him and Appleton Oaksmith, his agent, for a whaling voyage, and that there was no intent to employ her in the slave trade, nor in any unlawful enterprise whatever. The vessel was purchased by Appley about the 1st of June, last, and was seized on the 23d of the same month. The simple question that arises on the pleadings and proofs is whether the Augusta was fitted out with the intent to employ her in the slave trade. The answer denies the allegations of the libel charging the illegal intent, and avers that the intent was an innocent one, to wit, to employ the vessel in a whaling voyage, and that she was fitted for that purpose. I will condense the several general claims urged by the libellants, under separate heads, and examine them severally, together with the considerations urged in reply by the respondent. It is insisted by the government that it appears from the evidence: (1) That the outfit of this vessel was made from a port at which the whaling business had been abandoned several years ago. (2) That she is a larger and a much more expensive vessel than is ever used on a short voyage like the one for which the claimant says he fitted her. (3) That her outfit and fittings were admitted by Oaksmith, at the time of the seizure, to be nearly complete, except a few small cabin stores; and the libellants insist that this outfit, and the provisions and water, were entirely inadequate for such a whaling voyage. (4) That no adequate preparations had been made for shipping such experienced officers and crew as were indispensably necessary, and as would have been made, had such a voyage been contemplated. (5) That the comparatively low price of oil, and the general declension of the whaling business to a point where it ceased to be generally remunerative, are inconsistent with the claim that she was designed for that business. (6) That her outfit, water, and provisions indicate that she was intended for the slave trade.

1. With regard to the first of these claims, I do not think it entitled to much weight. It is true that it appears from the evidence that

[1] [Not previously reported.]

the whaling business, which was formerly prosecuted with success from Greenport, has been, for several years, entirely given up. But there is nothing in the place, as to harbor or facilities for outfit, that I can discover in the evidence, which renders it at all difficult to fit a vessel at that port for the business of whaling. It is not very far from several other whaling ports, where officers and crews of experience in the business could be found, if desired.

2. The second claim is that the vessel is entirely too large and expensive for the voyage for which the claimant insists he intended her. On this point, several highly-respectable witnesses have testified that the Augusta was a much larger vessel than it is usual to fit for so short a time as 15 months,—the period for which the claimant says he fitted her. These witnesses are thoroughly acquainted with the business, and speak from long experience. And it is quite obvious that no man would think of sending a large vessel on a voyage which could be as well, and perhaps better, performed by a small one, thereby increasing the number of men, the expenses of the outfit, and the whole cost of the voyage, unless, indeed, he had the vessel on his hands, and had no other employment for her. He certainly would not do this in a business which is so liable to losses as that of whaling now is, where the risks, and even probabilities, of a losing voyage, are already too great, without loading the enterprise with unnecessary expense in advance. The witnesses already referred to testify that these short voyages are prosecuted by a very much smaller class of vessels, and, of course, are fitted at a much less expense, and with a smaller crew, who are to receive wages, and share in the fruits of the voyage. The claimant did not own this vessel, and therefore employ her in this unpromising business in order to keep her from lying idle, but he went into the market and bought her, paying cash for her. It is true that vessels were cheap at the time, owing to the depression of commerce, but it has not been shown that large vessels were cheaper than small ones; nor, if cheaper, that they were enough so to justify their employment at greater expense in a business where smaller ones would answer just as well. There were several witnesses who testified on behalf of the claimant who had some experience in the whaling business; and I now recollect no one pretending that this vessel was of such a size that they should have purchased her for such a voyage, unless it be Mr. Wells, who stated that, if he was going to fit the Augusta, he should fit her for a short voyage, of 15 or 18 months, and for this he gave no reasons.

3. We next come to a much more important point,—that relating to the outfit of this vessel, including her provisions. The libellants insist that the outfit and the provisions of the Augusta were substantially complete when she was seized; and they rely mainly as to this point, upon the alleged admission of Oaksmith, the agent of the claimant, that such was the fact. This admission of Oaksmith is said to have been made on board of the vessel, the day after her seizure. Dr. Skinner, the surveyor of the port of Greenport, his son E. D. Skinner, and Horton, the deputy marshal, all testify that Oaksmith said that everything was on board except a few small or cabin stores. They recollect the conversation substantially alike, except that Horton says that Oaksmith added that the hatches were down for the voyage. To the direct testimony of these three witnesses is opposed the denial of Oaksmith, and it is no disparagement to him to say that the testimony of the two Skinners and Horton must prevail. And even Oaksmith, in his testimony, says that he might have stated that the vessel was nearly ready for sea, except some whaling gear and some cabin stores. But this does not alter the comparative weight of this part of the evidence, for there is no evidence in the case which shows that there was any whaling gear, worth mentioning, purchased, or intended to be purchased, to be put on board, except a small quantity of tow line, which belonged to Mr. Floyd. It might be said that this was a foolish admission for Oaksmith to make, and one manifestly against the interest of his principal, and uncalled for. But as it is pretty obvious, from the whole case, that nearly or quite all the articles which were specially adapted to whaling, which it was intended to take, were already purchased and on board, and as Horton asked the question whether she was loaded, it became necessary to answer it; and, if the answer had been in the negative, it would not have excluded the inference that any deficiencies which existed in an illegal outfit were still to be supplied. Assuming, then, the fact as proved, that the outfit of this vessel, so far as those articles which are specially appropriate for a whaler are concerned, was as complete as it was intended to be by the fitter, let us see if it was such an outfit as a whaler would require. Was it, in other words, a bona fide preparation for a whaling voyage, intended to conceal the true purpose of the voyage? On this branch of the case, I do not intend to go into minute details, but to name some of the important articles in which she was deficient for a voyage of the character mentioned. She was materially wanting in tow lines, whale irons, iron poles, knives, axes, hoop iron, and grindstones. She was also greatly deficient in flour, molasses, and vinegar, and considerably in the quantity of beef and pork. There is one very extraordinary fact in regard to the beef. Several barrels of it were good and sweet, and suitable for the crew to eat, but the greater portion was more or less tainted. An explanation of this fact was attempted, but was wholly unsatisfactory to my mind. Mr. Oaksmith's account of it is that in purchasing provisions he came across a very fine lot of

clear beef, that had been intended for the navy, in good condition, but requiring repacking, and that it was understood that Capt. Case was to repack it at sea. Oaksmith says that he was not disappointed to hear it was found spoiled, after the time which had elapsed after the seizure, the beef not having been repacked. But why did he not communicate the fact that this large quantity of beef required immediate care to preserve it, so that the officers of the law, who had the vessel in charge, could have had it repacked, and thus have prevented the loss? Here were 47 barrels of beef, that, according to his statement, could have been saved, had he stated its condition to the marshal, or to any one in charge of the vessel after the seizure. And why this extraordinary explanation, left without any support, except the testimony of Mr. Oaksmith, when, if it is true, the most abundant confirmation could be had? Where are the parties of whom this beef is purchased? Why are they not called to prove its quality? This meat, when first examined after the seizure, was found to be injured; and, in the absence of any better explanation than has been given thus far, I shall hold that it was in that condition when shipped. This being the case, this vessel was in no condition to go on a voyage of 15 months, nor even 6 months. And, taking her beef and pork together, it was deficient in quantity, assuming it all to be good. The effect of this was attempted to be obviated by the claimant by proof that this deficiency could be supplied at reasonable rates in foreign ports, but this attempt wholly failed. It was proved conclusively, to my mind, that no one would send a whale ship to sea, short of provisions, upon the idea of supplying the deficiency in foreign ports, where they are higher than here at home. There are other deficiencies in the outfit of this vessel that are, to my mind, inconsistent with the idea that she was bound on a long voyage, but many of which could be well dispensed with if her voyage was to be a short one. True, it was said on the trial, by Oaksmith, that there were some things purchased and in the store that were to have been put on board. But no list of them has been given, and no merchant of whom they were purchased has been produced to prove such purchase. A general statement that there were many articles in packages in the loft of the store in Greenport that were to supply the glaring deficiencies of this outfit, without particularizing the articles, or showing when, where, and of whom they were purchased, is altogether too vague to be entitled to material weight.

4. The fourth claim of the libellants, that no proper steps had been taken to engage that portion of the officers and crew which must have been taken from experienced whalemen, is entitled to consideration. Capt. Case says that he had engaged his mate, Mr. John Firman. The latter is not here to testify; having, it is said, shipped on another vessel since the seizure of the Augusta. Capt. Case says he asked him if he would go as mate of the Augusta, and he said he would; but at what day, or upon what terms, does not appear. It is in proof that another mate, three boat steerers, and several experienced seamen, who had served on board of whalers, would be necessary for the voyage, not one of whom was engaged. Capt. Case testifies that a boat steerer came, and applied for a berth, and was told that some inquiries would have to be made as to his competency. None were ever made. A second mate and some experienced whalemen also applied, but none were engaged, and no inquiries made about the competency of those who had applied. No inquiries seem to have been made as to where they could be found if wanted. The vessel was seized the 23d of June, and Capt. Case testifies that he expected to get away the 5th to the 8th of July. About two weeks only remained before the time of sailing, and no inquiries made even for an officer, or for experienced whalemen, and not even a first mate definitely engaged. I think this entirely inconsistent with the idea that this was intended as a bona fide whaling voyage. It is quite consistent with the idea that her officers and men were to consist, not of our honest whalemen, but of those desperate adventurers and reckless sailors who infest our large seaports, and who are ready to enbark in that inhuman traffic which the courts and the navies of most of the civilized world have as yet in vain striven to suppress.

5. It appears in proof that from the present price of oil, the scarcity of whales, and the losses that are constantly accruing in the business, it is fast being abandoned. This branch of our fisheries, so full of peril and hardship to the mariner engaged in it, and once so lucrative to those who supplied the capital, must probably very soon be discontinued altogether. The one-season voyages—voyages very much like that which the Augusta was alleged to be fitting for—are almost, or quite entirely, discontinued by vessels of any considerable size. Capt. Case, who has followed whaling until within three years past, says that the last one-season voyage he made was in 1838. But, where the whaling business is continued at all, it is generally by those who have the ships on hand, and not by those who build or buy them for that purpose. And it would be very extraordinary for this claimant, who lives at Southold, in the vicinity of Greenport and Sag Harbor, old whaling ports,—in the former of which he has witnessed the total extinction of the business, and in the latter its rapid decay,—to undertake to purchase ships, and embark in so expensive and yet so precarious an enterprise. Both Appley and Oaksmith were unacquainted with the details of this business, which, in its depressed condition, if to be pursued at all, should be superintended by that rigid economy and thorough appreciation of its conditions and necessities

that experience alone could give. It is true that one or two men were consulted in regard to the outfit, but it was mere consultation as to what would be needed. There was no such thorough preparation touching the outfit or provisioning of this vessel as the nature of the alleged enterprise demanded, either as to the quality or quantity which she would need. Capt. Case's attention to her, according to his own statement, seems to have been of the most indifferent character, and wholly unlike what might have been expected from the excellent reputation he bore as a good whaleman, knowing as he did the inexperience of both Oaksmith and Appley. But there is another consideration which must have operated as a heavy discouragement against embarking just at this time in this already greatly depressed business, and, although it was not noticed on the hearing, yet as it is a fact of which the court is judicially cognizant, I cannot pass it over; and that is the danger of capture by so-called privateers. The claimant alleges the voyage was to be in the Atlantic,—the only ocean infested by these depredators. It might be replied that a valuable slave cargo would be equally or more liable to capture by the same cruisers. But it may be well doubted whether these cruisers would capture a slave cargo at the present time. There must be little or no sale in the Southern ports for this kind of "property," in the present condition of things there, and the captors would not be permitted to sell the prize in Cuba. There would be very little danger, therefore, that such a cargo would be molested in that quarter.

I am therefore of the opinion, upon these branches of the case which I have already examined, that the Augusta was not fitted for a whaler, but that what was done ostensibly for that purpose was merely colorable, and to conceal the real enterprise contemplated. What was that enterprise? That it was a guilty one, there can be no doubt, assuming the concealment to have been proved. But was it the particular guilty intent charged in the libel? The answer to this question involves our sixth and last topic of consideration. It is quite obvious that this vessel was well adapted, as to size and construction, to carry a slave cargo. She had two permanent decks, which dispensed with the necessity of a temporary slave deck. The large fry works were admirably fitted for cooking the slaves' food, and were ample in size for the necessities of a large number of negroes. She was evidently provisioned, so far as the wants of the crew were concerned, for a short voyage, for her sweet provisions would only last for such a voyage. Yet she had 20 cords of wood, which would not be needed for a short voyage, except upon the idea that she was going into high, cold latitudes, which is not pretended, or that she was going to have a large number of persons on board to cook for. She had eight barrels of salt, which would be needed in cooking the farinaceous food necessary for such a cargo, but which was utterly uncalled for on board a whaler, except upon the notion that the beef, as suggested by Oaksmith, was to be repacked at sea. This witness says that this is what it was intended for, but I have already disposed of that claim, and it is in proof that 30 pounds would have been sufficient for a whaling voyage of 15 months. The Augusta had also an excess of rice, corn, meal, and beans, even for a whaling voyage. This excess, it is true, was not very large for such a voyage; but, if the voyage was to be a short one,—and I find it was intended to be,—then the excess would be larger. There were between 13,000 and 14,000 pounds of bread, which was no more than could be needed for the whaling voyage, but, for a short one, was greatly in excess. So the beef, besides being unfit for the sailors, was in a quantity greatly in excess for a short voyage with only a crew. Now, it is an extraordinary coincidence that the articles that are in excess are all well adapted for slave consumption, unless it be the injured meat; and, as the present evidence stands on that point, I infer that that was intended for their use, also. The vessel also had an immense supply of fresh water in casks. A portion of this was in casks that once had oil in them, but it seemed to be generally conceded on the hearing, and was so stated by some witnesses for the respondent, that the fact that these casks had once oil in them would only injure the flavor, but not the salubrity, of the water. On this point the counsel for the respondent insists that the water would have a very disagreeable and repulsive taste, and that the court ought not to assume that even slave traders are destitute of all humanity, and that they would provide water of this character for the slaves to drink. But, unfortunately, the well-known history of this traffic discloses very few humane features. Language failed to furnish an adequate description of its enormities when it was legalized by Christian nations, and pursued in open day; and, by common consent, that inadequate description was longe since condensed into the single phrase, "Horrors of the Middle Passage." Now that it is carried on under the ban of nations, its vessels stealing forth from our ports in disguise, and running the gauntlet of navies, those employed in it under fear of being seized and tried as pirates, it can hardly be expected to have become more humane. This immense quantity of water was necessary only for the transportation of such a crew or cargo as would require it for consumption; and if I am right in the conclusion that this was not a whaling voyage, but was to be a comparatively short one, and for a different object, then to what kind of a voyage does this outfit point? Concealment implies guilt, and what other guilty traffic demanded such an outfit? It might be claimed that the quantity of provisions was not adequate to feed a slave cargo, and this is probably true, so

far as many of the articles are concerned. But all the heavy articles were on board,—the water, the beef and pork, boilers for cooking, and wood, and a considerable quantity of rice, beans, corn meal, and a large quantity of bread. All that would be necessary to complete the outfit of slave food could have been done in a very brief time. I think the fitment in this particular sufficient to clearly indicate, under the peculiar circumstances of this case, the real object of this voyage. My opinion, therefore, is that this vessel was fitted out by the claimant with the intent to employ her in the slave trade. I have carefully examined the evidence in the case, and, on a review of the whole of it, no reasonable doubt rests in my mind that such was the intent with which she was fitted. She must, therefore, with her tackle and lading, be declared forfeited to the United States, and a decree of condemnation accordingly entered.

Case No. 14,478.

UNITED STATES v. AUJA.

[10 Int. Rev. Rec. 52.]

Circuit Court, S. D. New York. 1869.

INTERNAL REVENUE — PROSECUTION FOR VIOLATIONS—FAILURE TO MAKE ENTRY IN BOOKS.

It is no defence for a dealer in leaf tobacco, to a charge of violating the provision of section 76 of the act of July, 1868 [15 Stat. 158], in not making proper entries in the book, form 77, that his bookkeeper had neglected to make the entries. The principal is criminally responsible. *Held* to await action of grand jury.

Before J. A. SHIELDS, United States Commissioner.

The defendant in this case [L. J. Auja] was charged with a violation of the seventy-sixth section of the internal revenue act of 1868, which provides "that all dealers in leaf tobacco shall enter daily, in a book kept for that purpose, the number of hhds., cases, and pounds of leaf tobacco sold by him, &c., with the name and residence in each instance of the person to whom sold, and, if shipped, to whom and to what district." The evidence in this case showed that the defendant had failed to make the entries in the book for the space of nearly two months, viz., from 22d May until 19th July, the day he was arrested, the book being put in evidence showed such an omission. The defence admitted the omission, but claimed that the defendant was not responsible, for the reason that his bookkeeper had neglected to make the entries, and, consequently, the defendant was not criminally responsible.

The commissioner held that the act made it imperative for every dealer in leaf tobacco to make such entry daily, as provided by the law. And that if such dealer delegated such duty to another person to do, and such person neglected it, it would not excuse the defendant, and that he must be held responsible for such omission.

Defendant held to await action of grand jury.

Case No. 14,479.

UNITED STATES v. The AUSTIN.

[9 Ben. 350.] [1]

District Court, E. D. New York. Feb., 1878.

PRACTICE IN ADMIRALTY — APPLICATION TO SET ASIDE SALE—LACHES.

An application to set aside the sale of a vessel regularly made under a final decree in admiralty must be promptly made. Such application denied when three months had elapsed since the sale, and no excuse for its delay was offered, and the parties could not be put back into the same position as that occupied at the time of the sale.

In admiralty.

A. W. Tenney, for the United States.
J. J. Allen, for the Vessel.

BENEDICT, District Judge. The motion made in this cause to set aside the sale of the vessel cannot be granted. The delay of nearly three months before making the application is too great. Applications of this character must be promptly made. Here the applicant had full knowledge of the proceedings against the boat and of her sale, and no valid excuse for the delay has been offered.

Furthermore, the parties cannot be put back into the same position they were before. The boat has since the sale been largely repaired, and the interest of parties in the boat has been changed by an assignment of a mortgage which covered this as well as other boats.

Finally, the proceeds of the sale have been distributed, and with full knowledge of the proceedings on the part of the applicant.

Under such circumstances there is no ground on which to justify the setting aside a judicial sale regularly made; and, the motion must be denied.

Case No. 14,480.

UNITED STATES v. AUSTIN.

[2 Cliff. 325.] [2]

Circuit Court, D. Massachusetts. Oct. Term, 1864.

COLLECTOR OF PORT—EXTRA SERVICES—MAXIMUM COMPENSATION—PREPARING CERTIFICATES—SET-OFF.

1. By the act of the 2d of March, 1799 [1 Stat. 659], casks, chests, or cases of distilled spirits, wines, and teas, when imported, were required to be branded or otherwise marked by the surveyor or other officer acting as inspector of the revenue for the port where such merchandise was landed.

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

[2] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

2. When thus branded, it was the duty of the surveyor or chief officer of inspection to give a certificate to the proprietor, importer, consignee, or agent, of the whole quantity of such spirits, etc., also the name of such proprietor, etc., the name of the vessel from which such importation was landed, and of the marks of each cask, etc.

3. The treasury circular of the 13th of July, 1795, allowed to the supervisors of the revenue, for preparing, stamping, and distributing among the inspectors, the sum of one cent for every certificate to accompany foreign and domestic distilled spirits, wines, or teas, which should be actually issued in the ports of their respective districts.

4. When the revenue act of March 2, 1799, was passed, it became necessary to issue a new circular upon the subject, because the whole duty of providing such blank certificates was therein imposed upon the supervisors of the several districts.

5. Such supervisors were, by the new circular, allowed one cent for every certificate prepared, stamped, and distributed, and the addition of one cent for numbering and signing every certificate which was actually issued in the ports comprehended within their respective districts.

6. By the act of the 6th of April, 1802 [2 Stat. 148], the duty of preparing and furnishing such certificates was transferred to collectors, and in the same act it was provided that they should receive the same compensation therefor as that before allowed to supervisors.

7. This duty is one directly connected with the office held by the collector, and he cannot be entitled to a greater amount from that source than the sum of $400, which is the maximum allowed by law to collectors for extra services having an affinity or connection with the duties of said office.

8. The act of the 12th of June, 1858 [11 Stat. 320], directed that collectors of customs should act as disbursing agents of money appropriated for the erection of marine hospitals, and with such compensation, not exceeding one fourth of one per cent, as the secretary of the treasury should deem equitable; but any sums charged by a collector on money disbursed for such purpose before the passage of the act, falls within the prohibition of the act of the 23d of August, 1842 [5 Stat. 510], and must be rejected.

9. Sums charged by a collector as commissions on sums disbursed for the erection of a marine hospital, under the act of the 12th of June, 1858, cannot, when they have not been disallowed by the accounting officers of the treasury, be allowed in set-off against the suit by the United States against such collector for sums alleged to be due from him

10. In case of extra services performed by a collector under the directions of the department, beyond the limits of his district, and which have in character no affinity or connection with the duties of his office he may be allowed compensation therefor, although it exceeds the maximum for extra services of the opposite nature.

Assumpsit to recover of [Arthur W. Austin] the defendant $13,996.66, alleged to be due from him as collector of the port of Boston and Charlestown, on the settlement of his accounts with the treasury department. The defendant pleaded the general issue, and claimed a set-off. The principal dispute arose upon the several sums pleaded in set-off, which defendant contended should be deducted from the amount demanded by the plaintiffs. The allowance first claimed in set-off was the sum of $464.78, alleged to be due as compensation for signing spirit certificates under the several acts of congress upon that subject; the second was for commissions on disbursements made by the defendant as collector, in the construction of the marine hospital at Chelsea, in this district, which amounted, deducting the sum allowed by the accounting officers of the treasury, to $812.50; the third was for commissions on moneys disbursed by the defendant as collector for the light-house establishment in districts other than the one for which he was appointed. The case came up on an agreed statement of facts. For the purposes of this suit the defendant admitted the receipt of $6,400 for every year while he was collector, and at that rate for every fraction of a year during his term of service, which was from April 1, 1857, to March 1, 1860. If the court should be of opinion that all the charges made by the defendant should be disallowed, a verdict was to be taken for the plaintiffs for the whole amount claimed, with such interest if any, as the court might think proper to allow. If the court should be of opinion that any or all of the charges should be allowed, a verdict was to be taken for the plaintiff for the amount found to be due, according to the principles established by the court.

R. H. Dana, Jr., U. S. Dist. Atty., and T. K. Lothrop, Asst. U. S. Atty.

The act of April, 1802, may be considered as having transferred to collectors the duties of the supervisors of the revenue, so far as concerned the signing of spirit certificates; and these duties may be comprehended under the language of the act of May 7, 1822 [3 Stat. 693], as services performed in another office or capacity, for which the collectors may be entitled to not more than $400 annually. This seems to have been the construction of this statute by the treasury department at the time of its passage. The facts agreed in this case find that the defendant has received in each year, during the whole term of his office, the full sum of $6,400, which sum is the amount of the maximum compensation allowed him as collector by the act of March 3, 1841 [5 Stat. 419], $6,000, and of the extra allowance permitted by the act of May, 1822, $400. There is no ground for claiming that the defendant is entitled to an allowance for these certificates over and above these two sums. The case at bar, so far as the defendant's claim for signing spirit certificates is concerned, is briefly thus: The duties performed by the defendant were a part of, or incident to, his official duties as collector; the law has provided a maximum compensation for such services, and the defendant has already received this compensation in full. He cannot, therefore, claim any additional payment on this account. The defendant's claim for commissions on his disbursements for the construction of the marine hospital is precisely one of those which, by the very words of the act, cannot be allowed. It is a claim for

compensation for the disbursement of public money. It is ot authorized by law. There is no appropriation therefor. The appropriation for the construction of the hospital does not explicitly set forth that it is for such compensation. On the contrary, it makes no provision explicitly, or even by the remotest implication, for such compensation. The act of 1855, providing for the building of the hospital, was the only statute on this subject-matter, and the only act really bearing on this question, except that of August, 1842. The fact that there was no appropriation to pay a commission on these disbursements distinguishes the case from that of Converse v. U. S., 21 How. [62 U. S.] 463, for in that case there was a specific appropriation to pay the commission claimed by Converse's intestate, and the case was decided upon the ground that it came within the very terms of the statute of August, 1842, and was a compensation authorized by law, and the appropriation for which "explicitly set forth that it was for such compensation." [Converse v. U. S.] 21 How. [62 U. S.] 474.

The remainder of the defendant's claim to a set-off is confined to his claim for a commission of two and a half per cent on all disbursements made by him on account of the light-house establishment for purposes outside of, and disconnected with, the district of which he was collector. This claim may be divided into three classes: 1st. The amount of $564.43, not included in the defendant's accounts rendered to the treasury department at any time during his continuance in office, or after his retirement therefrom in March, 1860, and up to the time of the bringing of this suit, the 14th of January, 1862. This amount, not having been submitted by the defendant to the accounting officers of the treasury, and by them disallowed, cannot be the subject of a set-off. Act March 3, 1797, c. 20, §§ 14, 15 (1 Stat. 415). 2d. The defendant's claim for commissions on the amount expended by him for this purpose, during the fiscal year from June 30, 1858, to June 30, 1859, must be disallowed. The ground on which a similar claim for commissions on similar disbursements was sustained by the supreme court in Converse v. U. S., ut supra, was that the claim was for a compensation authorized by law, and the appropriation explicitly set forth that it was for such compensation. Both these elements must combine to make a valid claim against the government. The act of June 12, 1858 (11 Stat. 320), which contains all the appropriations for light-house disbursements for that year, makes no provision for the payment of commissions on the disbursements; and as there was no appropriation made for the payment of any commission on the disbursements for this purpose for the fiscal year from July 1, 1858, to July 1, 1859, the defendant's claim to set-off must be diminished by the amount charged for these commissions. It is claimed that these commissions charged for this fiscal year may be paid from the unexpended surplus of the appropriations. But the statement of facts shows no surplus. The defendant's remaining claim for commissions on other disbursements for light-house purposes, outside of his own district, should not be allowed The case is to be distinguished from that of Converse v. U. S. In that case the plaintiff in error, as administrator of Philip Greely, collector of the port of Boston, claimed an allowance as commissions due him from the United States upon "contracts, purchases, and disbursements made by him for oil and other articles for the light-house service of the United States, under the direction of the secretary of the treasury." None of the like services for which the supreme court decided that Mr. Greely was entitled to compensation were performed by the defendant. He made no contracts, prepared and published no proposals, took charge of none of the purchased property or materials for safe-keeping or distribution. He did nothing involving time, labor, or responsibility. The only service performed by him was paying bills, duly certified to him, out of the moneys in his hands. In order to bring any case within the reason of the decision of the supreme court in the case of Converse v. U. S., three requisites are necessary: 1. The services specified must have been actually performed by the party claiming remuneration. 2. The compensation must be fixed by law. 3. There must be a law making an appropriation, and explicitly setting forth that it is for such additional pay, extra allowance, or compensation. The like services, for which it was decided that Greely was entitled to remuneration, were not performed by the defendant, and there is not a law setting forth, explicitly, any appropriation for the compensation claimed.

Mr. Austin, pro se.

On the subject of disallowances it may be remarked that, agreeably to the spirit of the former decisions of the supreme court of the United States, what is not allowed by the department must be considered disallowed. Defendant claims that, agreeably to the decision in U. S. v. Converse, 21 How. [62 U. S.] 464, he has fulfilled all the requisitions entitling him to the commissions on light-house disbursements. "The services were foreign to his official duties, and beyond the limits of the district to which the law confined his official duties." "The commissions are to be paid on the whole amount, without any reference to the person or office who performs the service." Congress has never acted upon the principle that the head of a department should exercise unlimited power over his appointees or subordinate officers, and require of them services without compensation, not within the legal contemplation of their duties. Here are services rendered outside of the collection district, and it would be conferring upon a sec-

retary of the treasury or a postmaster-general arbitrary powers, if they could require of their respective appointees, without compensation, duties or services, having no reference to their offices, which would make the appointment originally conferred upon them a burden. All the appropriation acts after the establishment of the light-house board recognize the same disbursing agents as before, and not only that, but practically they were always appointed by the secretary of the treasury after, in the same manner they were before, the existence of the light-house board. The money has been disbursed during the three years of Mr. Austin's collectorship by Mr. Austin, by the same disbursing agent, appointed in the same way and by the same authority as before the creation of the light-house board. That the duties of the disbursing agent were not dependent upon and not qualified by the light-house board act. It must be conceded that the two and a half per cent. commissions appropriated since the creation of the light-house board were intended for some one; from 1852 to 1861 they amount to over $63,000, and over $26,000 during the time Mr. Austin was collector. For whose use was this large sum appropriated, if not for the persons who performed the service? As collectors were absolutely restricted from receiving anything beyond a small fixed sum in their own districts, of course the large appropriation was intended to supply a sum to compensate for services as disbursing agents out of their own districts, else there was no necessity for any such appropriation. The claim of two and one half per cent. commissions for disbursements on construction of marine hospital depends very much on the same principles as that for disbursements outside of the light-house. The claim is for two and one half per cent commissions, to May 31, 1858. The claim after that period, by the statute of June 12, 1858, is limited to one fourth of one per cent. I cite that statute for a double purpose, to examine its bearing on this as well as on the question of disbursements for light-house purposes outside of the district. The statute is as follows: "And be it further enacted, that the collectors of the customs in the several collection districts be, and they are hereby and hereafter required to act as disbursing agents for the payment of all moneys that are or may hereafter be appropriated for the construction of custom-houses, court-houses, post-offices, and marine hospitals, with such compensation, not exceeding one quarter of one per cent, as the secretary of the treasury may deem equitable and just." 11 Stat. p. 327, c. 154, § 17. The collector is undoubtedly entitled to two and a half per cent commissions up to May 31, 1858, agreeably to the decision in U. S. v. Converse, unless the court should think the appropriation was not direct enough. The act for the construction of the marine hospital appropriates a sum sufficiently large to build it, but makes no specific appropriations for the benefit of those who perform the necessary incidental services. I refer to chapter 175, p. 669, 2d Sess. 1855 [10 Stat.]. Sections 5 and 6, in relation to building marine hospital. An appropriation is made to cover the whole expense. but no special specification, two and a half per cent being the usual amount allowed by the government, unless controlled by special legislation, like the act of June 12, 1858, before quoted. The charge of two and a half per cent was commonly made by collectors up to that time; the duties were onerous and entirely outside of the duties required of the collector by law. Another question is also presented, whether the secretary having continued to employ the collector after June 12, 1858, the provision of one quarter of one per cent does not relate back (by the terms of the act) to the former service, if the collector is not entitled to the two and a half per cent up to that time. Still another consideration is presented: This act of June 12, 1858, was passed, and undoubtedly framed at the treasury department while the Converse Case was under discussion, but not a word therein curtailing commissions of light-house disbursing agents; from which it may justly be inferred that the whole question arising on that point was to be left to the decision of the court in the Converse Case.

Signing Spirit Certificates. This charge has always been allowed. This charge, as appears by the statement of facts, was presented, and the transcripts do not show its allowance; it is, therefore, to be considered disallowed. The authority for the allowance is the act of 1802, §§ 7 and 8, which are as follows: Section 7. Authorizes the secretary to designate collectors to sign certificates. Section 8. That for preparing and issuing the certificates, the collectors performing that duty shall be entitled to, and receive, the same compensation as has heretofore been allowed to the supervisors respectively. This duty was transferred to collectors by circular of June 29, 1802. This claim is not only supported by an unvaried admission of it at the department, but all the requisitions in the Converse Case are fulfilled. The duty to be performed has no affinity with the collector's duty; he is directed to perform it, and provision is made for his payment by a specified sum. See 1 Mayo, U. S. Fiscal Dept. 80. The compensation is modified in consequence of increasing duties in numbering and signing the certificates, raising the compensation to two cents for each certificate.

CLIFFORD, Circuit Justice. The maximum compensation of the collector of this port as such is $6,000 as was decided by the unanimous judgment of the supreme court. U. S. v. Walker, 22 How. [63 U. S.] 299 (5

Stat. 432). The eighteenth section, however, of the act of congress of the 7th of May, 1822, provides that no collector, etc., shall ever receive more than $4,000 annually, exclusive of his compensation as collector, and the fines and forfeitures allowed by law, for any service he may perform for the United States in any other office or capacity. 3 Stat. 696. Collectors, at the time this law was passed, were required, in certain contingencies, solely to execute all the duties in which, otherwise, the co-operation of the naval officer was requisite, and in case of the disability or death of the naval officer, they were also required to act solely until a new appointment was made. 1 Stat. 643. The settled practice of the department also was to require them, without any special law upon the subject, to superintend the light-houses in their respective districts, and to disburse money for marine hospitals and the revenue-cutter service. Such services were uniformly charged as extra services, and as such were allowed by the department. The attention of congress was eventually attracted to the subject, and the result was that the act of the 7th of May, 1822, was passed. The supreme court held that by the true construction of that provision it does not forbid compensation for extra services, which have no affinity or connection with the duties of the office held by the collector. On the contrary, the court held that the provision recognizes such a right, and gives to the collector an additional sum, over and above his salary as an officer, for extra services rendered as agent, which had no legal connection with his office. Converse v. U. S., 21 How. [62 U. S.] 468. The practice of the department has also uniformly conformed to this rule, as appears by the record in this case. The agreed statement shows that the defendant was appointed, on April 1, 1857, and continued to perform the duties of the office until March 1, 1861; and it also appears that throughout that period he has been allowed and paid $400 per annum for extra services, in addition to the maximum compensation allowed to the office. The remark, however, should be made that the services for which a compensation has been received are altogether separate and distinct from those charged in set-off, and which are now the subject of dispute. Allusion is made to the subject, not as calling in question the propriety of the allowance, but as showing the settled construction of the provision under which the services were allowed and paid.

The most important objection made to the several claims of the defendant, as exhibited in his set-off, is that every such allowance to a collector for extra services beyond the sum of $400 is prohibited by law, and as that proposition, if sustained, is a complete answer to the entire claim of set-off, it will be first considered.

Support to the proposition is chiefly derived from, or attempted to be derived from, the second section of the act of August 23, 1842, and kindred provisions to be found in subsequent acts of congress. 5 Stat. 510. The prohibition as contained in that provision is that "no officer in any branch of the public service, or any other person whose salary, pay, or emoluments is or are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation in any form whatever for the disbursement of public money, or for any other service or duty whatsoever, unless the same shall be authorized by law, and the appropriation therefor explicitly sets forth that it is for such additional pay, extra allowance, or compensation." The important words of the section, as contradistinguished from prior provisions upon the same subject, are those which follow the word "therefor," near the close of the provision. The question as to the true construction of the provision came directly before the supreme court in the case of Converse v. U. S. 21 How. [62 U. S.] 471, and the court expressly held that those words only show that the legislature contemplated duties imposed by superior authority upon an officer, as a part of his duty, and which the superior authority had, in the emergency, a right to impose, and the officer was bound to obey, although the duties were extra and additional to what had previously been required. "But," say the court, "those words can by no fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law or usage, with the line of his official duty; and where the service to be performed is of a different character and for a different place, and the amount of the compensation is regulated by law." Circumstances, such as are recited in the opinion of the court, must be regarded as constituting a case to which the provision under consideration does not apply, else the greatest injustice would be done in numerous cases which may be supposed, and which are likely, to arise in the ordinary course of public affairs. Were the rule in such cases otherwise, then, indeed, it would be true that an officer of the United States whose salary or compensation does not exceed $10 per quarter, if employed to proceed to the coast of the Pacific, and there to examine the accounts of all the principal officers of the government in those distant states, would be entitled to no compensation whatever for his services, although an act of congress directed the proper department to cause the investigation to be made, and fixed the compensation and actually appropriated the money to pay for such a service. Foreseeing that such consequence might follow, the supreme court wisely rejected the construction assumed in the proposition of the plaintiffs, and adopted the more liberal one to which reference has been made. The reasons for the construction adopted are given at great length in

the opinion, and need not be further considered, except to say that, in the course of the opinion, all the acts of congress upon the subject were carefully reviewed. The conclusion of the court was, that the just and fair inference. from all the provisions, is, that no discretion is left to the head of a department to allow an officer who has a fixed compensation any remuneration beyond his salary, "unless the service he has performed is required by existing laws, and the compensation therefor is fixed by law, nor even then if the service performed had any affinity or connection with the duties of the office which he held." But the converse of the proposition was also held to be true, that where the service performed was foreign to the duties of the office which he held, and was directed by the proper department in pursuance of the requirements of law, and the compensation was fixed by law and actually appropriated, the officer performing the service was entitled to the compensation. Applying that rule to the present case, it is quite obvious what the result must be in respect to each of the three claims presented by the defendant. He does not deny the receipt of the amount claimed by the plaintiffs, but contends that the same should be diminished by the set-off filed by him as before explained.

Distilled spirits, wines, and teas when imported were required by the act of March 2, 1799, to be landed under the inspection of the surveyor or other officer acting as inspector of the revenue for the port, and the officers of inspection were required to brand or otherwise mark the several casks, chests, vessels, and cases containing the importation. When so landed and marked or branded, it was made the duty of the surveyor or chief officer of inspection to give a certificate to the proprietor, importer, consignee, or agent, of the whole quantity of such spirits, wines, or teas, specifying also the name of such proprietor, importer, consignee, or agent, and of the vessel from on board which the importation was landed, and of the marks of each cask, chest, vessel, or case. 1 Stat. 659. The treasury circular of July 30, 1795, allowed to the supervisors of the revenue for preparing, stamping, and distributing among the inspectors, the sum of one cent for every certificate to accompany foreign and domestic distilled spirits, wines, or teas, which should be actually issued in the surveys and ports of their respective districts. Inspectors of surveys and supervisors of the revenue, when acting as such inspectors, were allowed the sum of two cents and one half for every certificate to accompany domestic distilled spirits, signed by them, and one cent for every such certificate to accompany foreign distilled spirits, signed by them, and issued in the survey under their inspection, or in the ports within the same. When the revenue act of March 2, 1799, was passed, it became necessary to issue a new circular upon that subject, because the forty-second section of the act devolved the whole duty of providing such blank certificates, under such checks and devices as should be prescribed by the proper officers of the treasury, upon the supervisors of the several districts. 1 Stat. 660. The comptroller of the treasury accordingly, on the 28th of October, 1799, issued a new circular, in which he informed the collectors that the duty of numbering and signing all certificates to accompany foreign distilled spirits, wines, and teas had been devolved upon the supervisors of the revenue. They were allowed by that circular, for preparing, stamping, and distributing among the inspectors of the revenue, the sum of one cent for every such certificate, and the additional sum of one cent for numbering and signing every such certificate, which should be actually issued in the ports comprehended within their respective districts. The duty of preparing and furnishing such certificates was, by the seventh section of the act of April 6, 1802, transferred to collectors; and by the eighth section of the act, it is provided that they shall receive the same compensation as heretofore has been allowed to the supervisors. 2 Stat. 150. Accordingly the secretary of the treasury, Mr. Gallatin, on June 11 of the same year, issued a circular designating the collector of the customs for this port as the proper officer, under that authority, to furnish such certificates. Granting that the duty is an extra one, still it is a duty directly connected with the office held by the collector, and in no view of the case can the defendant be entitled to any greater amount from that source of income than the sum of $400 which he has already received.

An examination will next be made of the claim of the defendant for two and a half per cent commissions on all sums disbursed by him in the construction of the marine hospital at Chelsea, in this commonwealth. The authority was conferred upon the secretary of the treasury by the fifth section of the act of March 3, 1855, to erect such marine hospital, for the construction of which the disbursements in this case were made. The sale of the land and buildings previously occupied as a marine hospital was authorized to be made, and a sum of money was appropriated for the construction of the new hospital, equal to the proceeds of such sale; but the act of congress contains no provision fixing the compensation of any disbursing agent, and makes no appropriation for any such purpose. 10 Stat. 669. The subsequent act of June 12, 1858, directs in substance and effect that the collectors of the customs shall act as the disbursing agents of money appropriated for the construction of marine hospitals, and with such compensation, not exceeding one fourth of one per cent, as the secretary of the treasury shall deem equitable and just. 11 Stat. 327. The record shows that $812.55 of the claim of the defendant accrued before the passage of the last-named

act. authorizing the secretary of the treasury to allow such a compensation. Obviously, all that portion of the claim must be rejected as falling directly within the prohibition of the act of August 23, 1842, as expounded by the supreme court. Converse v. U. S., 21 How. [62 U. S.] 473. The defendant is clearly entitled to such compensation as the act of June 12, 1858, allows to collectors, as disbursing agents of money for the construction of marine hospitals, but nothing can be allowed in this suit on that account, because the sum claimed has never been disallowed by the accounting officers of the treasury. 1 Stat. 575. The result is that no part of this claim can be allowed as a set-off against the demand of the plaintiffs.

Disbursements were also made by the defendant while he held the office of collector, for the light-house establishment, and for purposes outside of the district to which he was appointed, and having no affinity or connection with the duties of the office which he held. The sum thus claimed is $9,279, but the agreed statement shows that $564.43 of that sum had not been presented to the treasury department when the suit was brought, and there is no evidence that it has ever been disallowed. The allowance of that sum cannot be made, as there is no evidence to bring the case within any of the exceptions in the act of congress. 1 Stat. 515.

The residue of the claim, amounting to the sum of $8,714.57, was duly presented to the department and was disallowed, as appears by the agreed statement. The services are admitted, and the case, as stated by the parties, falls directly within the rule established by the decision of the supreme court. Converse v. U. S., 21 How. [62 U. S.] 473. The attempt is made to distinguish the case from the operation of the rule there laid down, chiefly upon two grounds. The suggestion in the first place is made that, some parts of the services performed by the collector in that case were not performed by the defendant; but the agreed statement shows, as the bill of exceptions showed in the case decided in the supreme court, that the sum claimed is two and a half per cent commission upon the disbursement made by the defendant within the period mentioned for light-house purposes, outside of his collection duties, and no evidence is introduced or offered to show that the commission charged is not the proper one, if the defendant is entitled to anything. The respective claims of the defendant were resisted at the department and finally disallowed, upon the ground that he was entitled to nothing; and such is the theory of the plaintiffs here, as is obvious from a careful reading of the agreed statement. The remaining suggestion is that no appropriation was made for any such purpose during the fiscal year ending the 30th of June, 1859, and consequently that no allowance can be made for the fiscal year preceding; but the answer of the defendant to this suggestion is decisive. The unexpended balances of appropriations of a preceding year may always be applied to the purpose for which they were made in a succeeding year, and undoubtedly it was on account of the excess of the appropriations that the suggested omission occurred. A sufficient amount always stood credited on the books of the treasury, and available as a fund for that purpose, to pay the just claims of the defendant.

Judgment for plaintiffs. The amount to be computed in conformity to the opinion of the court.

Case No. 14,481.

UNITED STATES ex rel. BIGLER v. AVERY.

[1 Deady, 204; 1 Pac. Law Mag. 241.] [1]

Circuit Court, N. D. California. April 10, 1867.

ASSESSOR OF INTERNAL REVENUE — APPOINTMENT —POWER OF REMOVAL—SURRENDER —PLEA—COSTS.

1. The act of July 1, 1862 (12 Stat. 433), creating the office of assessor of internal revenue, does not prescribe the tenure thereof, and therefore the incumbent is deemed to hold such only during the pleasure of the appointing power.

[Cited in Re Commissioners of Circuit Court, 65 Fed. 319.]

2. Where congress has the power to create an office, it may prescribe the term for which it shall be holden by the incumbent, and in such case there is no power of removal during such term.

3. The constitution does not expressly authorize or provide for removals from office otherwise than as a consequence of impeachment, and as an implied power "necessary and proper for carrying into execution" any power expressly vested in the government or any department or officer thereof, and therefore the power of removal can only be claimed by or attributed to the appointing power.

4. In this case the appointing power is the president and senate, acting concurrently, and, in the absence of legislation and precedent to the contrary, it follows that the president alone has not the power of removal.

5. By the action of the first congress and the uniform practice on the subject, down to the time when this controversy arose, the power of removal by the president had been practically conceded by congress, and the question being one which properly belongs to that body to regulate, its past action and acquiescence must be regarded by the courts as establishing or evidencing a regulation on the subject.

[Cited in People v. Freese, 83 Cal. 456, 23 Pac. 378.]

6. The power to regulate the subject of removals from office belongs to congress, and that body having for three fourths of a century practically conceded the authority to the president to make removals without the advice and consent of the senate, the court does not feel at liberty at this late day to deny him this power.

7. The defendant, having surrendered the office in controversy, to a person duly authorized to receive it, since the filing of the answer, is entitled to file a supplemental answer setting up this fact as a plea puis darrein continuance; and such

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission. 1 Pac. Law Mag. 241, contains only a partial report.]

surrender terminates the controversy, except as to costs, for which the plaintiff is entitled to judgment.

This was an information in the nature of a quo warranto, brought on the relation of John Bigler, to oust the defendant [John M. Avery] from the office of assessor of internal revenue for the Fourth district of California. It was tried by the court without the intervention of a jury, and the facts as stated in the findings are as follows: I. That in the month of February, 1863, the defendant was duly appointed assessor of internal revenue for the Fourth district of California, and thereupon, being first duly qualified therefor, did enter upon such office, and perform the duties and receive the emoluments thereof, continuously, until October 20, 1866. II. That on September 19, 1866, in the recess of the senate, John Bigler was duly commissioned by the president assessor of internal revenue for the district aforesaid, "for the time being, and until the end of next session of the senate of the United States, and no longer." III. That on October 20, 1866, said Bigler, having first taken the oath of office prescribed by law, did demand of the said defendant the surrender of the books and papers pertaining and belonging to the office aforesaid, then in the possession and control of said defendant, who then refused to surrender or deliver the same to said Bigler; and at the date of filing the information herein, still so refused. IV. That from and after October 20, 1866, and at and after the filing of the information herein, the defendant claimed to be the legal incumbent of the office aforesaid, by virtue of his appointment and qualification aforesaid, and that during the periods last aforesaid, did act as assessor of internal revenue of the district aforesaid, and deny that said Bigler, by virtue of the commission granted to him as aforesaid, or otherwise, had or acquired any right to enter upon such office, or exercise the powers or perform the duties thereof. V. That during the session of the senate next following the issuing of the commission to Bigler as aforesaid, the president nominated said Bigler for the office aforesaid, but the senate refused to consent to such nomination, and rejected the same; and that afterwards, during the session of the senate last aforesaid, the president nominated T. J. Blakeny for the office aforesaid, to which nomination the senate then consented, and thereupon said Blakeny was duly commissioned as assessor for the district aforesaid. VI. That on March 9, 1867, W. C. Felch was duly appointed assistant assessor for a portion of the district aforesaid; and that at the date of such appointment, said Blakeny was absent from the state of California, and had not then entered upon the office aforesaid, and therefore said Felch was authorized by law to act as assessor of the district for the time being. VII. That on March 14, 1867, and while said Felch was acting as assessor as aforesaid, he demanded of the defendant the possession of said office and the books and papers pertaining thereunto; and the defendant then surrendered and delivered the same to said Felch, as required.

Delos Lake and Joseph Hoge, for plaintiff.

George Cadwallader and John McCullough, for defendant.

DEADY, District Judge. The constitution provides that the president "shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers, and consuls, judge of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments." Section 2, of the internal revenue act of July 1, 1862 (12 Stat. 433), creates the office in controversy, and provides for the appointment of the incumbent. The material words of the section are these: "That the president of the United States be, and he is hereby authorized * * * to nominate, and by and with the advice and consent of the senate to appoint an assessor * * * for each such district, who shall be resident within the same." Upon these provisions of the constitution and statute, and the facts found in this case, arises the question, did the commission to Bigler, in conjunction with his subsequent qualification and demand upon the defendant, operate, in contemplation of law, to remove the defendant from the office of assessor of the fourth district? By the terms of the act under which the defendant was appointed, there is no limitation upon the tenure of the office, and the constitution is silent upon the subject, except as to judicial offices. The defendant not having any fixed term in the office, must be considered as holding it at the pleasure of the appointing power. I admit that, to my mind, this conclusion is not a necessary one; for, from the premises, it appears equally logical to conclude that the defendant is entitled to hold the office during good behaviour. But this question is not now open to argument in this court. In Ex parte Herman, 13 Pet. [38 U. S.] 258, 259, it was expressly decided by the supreme court, that when the law does not fix the term of office, it is held at the pleasure of the appointing power. In that case a clerk of a district court had been removed by the judge of the court, and there could be no question but that the removal was made by the appointing power. In this case the appointing power is the president and senate, acting concurrently, and the alleged removal is the act of the president alone. Had the president this power as the law was at the time

of the commission to Bigler? No case in which the question has been directly decided has been cited in the argument, and I am not aware that any exists. The Case of Herman, supra, states the historic fact, that at an early day in the existence of the national government, it was "much disputed," whether the power of removal was in the president and senate, or in the president alone, and that, by both practical and legislative construction, it was assumed and acted upon, that the power was in the president alone. But the court did not actually decide that this construction of the constitution was warranted by its language, and the question was not really before them for adjudication; yet it cannot be denied that in some measure the court gave its sanction to this doctrine. They speak of "its having become the settled and well understood construction of the constitution, that the power of removal was vested in the president alone in such cases, although the appointment of the officer was by the president and senate."

In the case of U. S. v. Guthrie, 17 How. [58 U. S.] 284, the power of the president to remove an officer, appointed with the advice and consent of the senate, was called in question but not decided. The act of congress creating the office of judge in the territory of Minnesota had provided that the incumbent thereof should hold for four years. The president removed the relator before the expiration of his term, and mandamus was brought against the defendant—the secretary of the treasury—to compel him to pay the relator his salary. A majority of the court, avoiding the decision of the main question—the power of removal—decided that the remedy was not well taken, and dismissed the application for the writ. Mr. Justice McLean delivered a dissenting opinion, in which he discusses the president's power of removal at great length. As to the particular case then before the court, he maintained that the removal was not only unauthorized, but contrary to law. He says: "If congress have the power to create the territorial courts, of which no one doubts, it has the power to fix the tenure of office. This being done, the president has no power to remove a territorial judge, more than he has to repeal a law." This conclusion appears to me both just and legal. Congress having the power to create an office, may prescribe the term for which it shall be holden, or whether it shall be holden at pleasure. In the former case there is no power of removal anywhere, except as a consequence of impeachment. If the president alone, or the president and senate in conjunction, were allowed to make removals in such cases, it would be equivalent to allowing him or them "to repeal a law." But in that case there was a fixed term of office, while in the case of the defendant, Avery, no term is provided for, but the incumbent holds at the pleasure of the appointing power. Upon the real question in this case, had the president the power to remove the defendant without the consent of the senate? Justice McLean argues for the negative, but seems to think that the power had been "too long established and exercised to be now questioned." Referring to the controversy in congress upon the subject, upon the passage of the act creating the department of foreign affairs, in 1789, he says: "There was great contrariety of opinion in congress on this power. With the experience we now have, in regard to its exercise, there is great doubt whether the most enlightened statesman would not come to a different conclusion. The attorney general calls this a constitutional power. There is no such power given in the constitution. It is presumed to be in the president, from the power of appointment. This presumption, I think, is unwise and illogical. The reasoning is: The president and senate appoint to office; therefore, the president may remove from office. Now, the argument would be legitimate, if the power to remove were inferred to be the same that appoints. * * * If the power to remove from office be inferred from the power to appoint, both the elements of the appointing power are necessarily included. The constitution has declared what shall be the executive power to appoint, and by consequence, the same power should be exercised in a removal. But this power of removal has been, perhaps, too long established and exercised to be now questioned. The voluntary action of the senate and the president would be necessary to change the practice; and as this would require the relinquishment of a power by one of the parties, to be exercised in conjunction with the other, it can hardly be expected."

So far as adjudged cases are concerned, this is all that can be found bearing upon the subject. Among the elementary writers the question is discussed by Kent and Story. The former (1 Kent. Comm. 309-10), after stating the opinion of the Federalist, pending the ratification of the constitution, that "the consent of the senate would be necessary to displace as well as to appoint," and referring to the different construction given to the constitution by the First congress, says: "This amounted to a legislative construction of the constitution, and it has ever since been acquiesced in and acted upon as of decisive authority in the case. * * * This question has never been made the subject of judicial discussion, and the construction given to the constitution in 1789 has continued to rest on this loose, incidental declaratory opinion of congress, and the sense and practice of the government since that time. It is, however, a striking fact in the constitutional history of our government, that a power so transcendent as that is, which places at the disposal of the president alone, the tenure of every executive office appointed by the president and senate, should depend upon infer-

ence merely, and should have been gratuitously declared by the First congress, in opposition to the high authority of the Federalist; and should have been supported or acquiesced in by some of those distinguished men who questioned or denied the power of congress, even to incorporate a national bank." Story (2 Comm. § 1538) says: "The power to nominate does not naturally or necessarily include the power to remove; and if the power to appoint does include it, then the latter belongs conjointly to the executive and the senate. In short, under such circumstances, the removal takes place in virtue of the new appointment, by mere operation of law. It results, and is not separable, from the appointment itself." After stating the arguments on both sides of the question, and referring to the legislative construction in favor of the executive power, by the congress in 1789, the distinguished commentator concludes (section 1543): "That the final decision of this question so made was greatly influenced by the exalted character of the president then in office, was asserted at the time, and has always been believed. Yet the doctrine was opposed, as well as supported, by the highest talents and patriotism of the county. The public, however, acquiesced in this decision, and it constitutes, perhaps, the most extraordinary case in the history of a government, of a power, conferred by implication on the executive by the assent of a bare majority of congress, which has not been questioned on many other occasions." And again (section 1544), "Whether the prediction of the original advocates of the executive power, or those of the opposers of it, are likely, in the future progress of the government, to be realized, must be left to the sober judgment of the community, and to the impartial award of time. If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, and perhaps impracticable, after forty years' experience, to recall the practice to the correct theory. But, at all events, it will be a consolation to those who love the Union, and honor a devotion to the patriotic discharge of duty, that in regard to inferior offices (which appellation probably includes ninety-nine out of a hundred of the lucrative offices of the government), the remedy for any permanent abuse is still within the power of congress, by the simple expedient of requiring the consent of the senate to removals in such cases."

The constitution does not expressly provide for removal from office, otherwise than as the legal effect or consequence of "impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Article 11, § 4. If the power of direct removal from office is to be attributed to any department of the government, as necessary to some express power, my mind inclines to the conclusion, that upon the language of the constitution, such power can only be attributed to the appointing power. The appointing power, in this case, is the president and senate, acting concurrently. In the absence of legislation and precedent, I think it should be held that the president alone had no power to remove the defendant, and that, consequently, the commission of Bigler was a void act—there being then no vacancy in the office in question, and the president having no power to create such a vacancy. But, by the action of the First congress, and the uniform practice of the government down to the time when this controversy arose, the president's power of removal had been practically admitted and acted upon. The subject is one which, in my judgment, properly belongs to congress to regulate, rather than the courts. It is a legislative or political question, and not a judicial one. Heretofore, the supreme court has regarded the action of congress in the premises and subsequent practice, as establishing or evidencing a regulation of the subject, which it was not at liberty to ignore or disregard. Such considerations, at this late day, should have even more force in this court of inferior jurisdiction. It is true that many of the wisest and best men of the republic have always regarded the construction given to the constitution, by the congress of 1789, as unwise and impolitic, and I think subsequent events have vindicated the correctness of their opinion. But in this government the people must learn by experience, and within the constitutional limits of legislative action and judgment, they must be free, through their representation in congress assembled, to conduct the administration of their government uncontrolled by the courts. In the progress of time, it has been found or deemed that the unqualified power of removal from office by the president works injuriously, and congress has interfered to control and regulate the exercise of that power, by the passage of what is known as "The Tenure of Office Bill." In the passage of this act by congress it must have been assumed, and as I think correctly, that the constitution left the subject of direct removals from office to be regulated by the legislative power. In the great debate, which occurred in the senate on this subject in 1835, Mr. Clay, Mr. Webster and Mr. Calhoun, all agreed in maintaining that the constitution did not give the president the power of removal, and that the power was properly subject to legislative control and regulation.

From Mr. Calhoun's speech on this occasion, I quote, as follows: "If the power to dismiss is possessed by the executive, he must hold it in one or two modes; either by an express grant of the power in the constitution, or as a power necessary and proper to execute some power expressly granted by that instrument. All the powers under the constitution may be classed under one or the other of these heads; there is no intermediate class. The first question then, is, has the

president the power in question by any express grant in the constitution? He who affirms he has, is bound to show it. That instrument is in the hands of every member; the portion containing the delegation of power to the president, is short; it is comprised in a few sentences. I ask senators to open the constitution, to examine it, and to find, if they can, any authority of the president to dismiss any public officer. None such can be found; the constitution has been carefully examined, and no one pretends to have found such a grant Well, then, as there is none such, if it exists at all, it must be as a power necessary and proper to execute some granted power; but if it exists in that character, it belongs to congress, and not the executive. I venture not the assertion hastily; I speak on the authority of the constitution itself—an express and unequivocal authority which cannot be denied nor contradicted. Hear what that sacred instrument says: 'Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers (those granted to congress itself), and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.' Mark the fullness of the expression, congress shall have power to make all laws, not only to carry into effect the powers exclusively delegated to itself, but those delegated to the government or any department or officer thereof; comprehending, of course, the power to pass laws necessary and proper to carry into effect the powers expressly granted to the executive department. It follows that, to whatever express grant of power to the executive the power of dismissal may be supposed to attach; whether to that of seeing the laws faithfully executed, or to the still more comprehensive grant, as contended for by some, vesting executive power in the president, the mere fact that it is a power appurtenant to another power, and necessary to carry it into effect, transfers it by the provisions of the constitution cited, from the executive to congress, and places it under its control to be regulated in the manner which it may judge best. Such are the arguments by which I have been forced to conclude that the power of dismissing is not lodged in the president, but is subject to be controlled and regulated by congress. I say forced, because I have been compelled to the conclusion in spite of my previous impressions; relying upon the early decision of the question, and the long acquiescence in that decision." To the force of this argument, I think nothing can be added. It amounts to demonstration. The power is with congress to regulate removals from office. Congress, by early action and long acquiescence, has allowed, if not authorized, the president to make removals without the consent of the senate in each particular case. The question being one of the exercise of a political power, which is within the power of congress to control and regulate, I do not deem it meet or proper for this court, at this late day, to assert by its judgment that all the presidents, from Washington to the present, have, in making removals from office, acted without authority or right in the premises. As the law and long established usage stood at the time of the commission to Bigler, the power of removal must be conceded to the executive by the courts. Congress had practically so conceded it, for three fourths of a century In the determination of political questions, the courts are subordinate to the political department of the government. In Ex parte Herman, supra, the supreme court, without deciding the question, expressed a strong opinion that so well established a practice upon such a subject, could not be disregarded by the court, even at that early day.

A supplemental answer has been filed in this case, stating the facts as found by the court since the demand upon the defendant by Bigler. This answer was filed, subject to the defendant's right to plead these facts at the time. I think the answer may be filed, and that the matter set forth is material. It is a plea puis darrein continuance—good at common law and under the Code. From it, it appears that the defendant had relinquished the office to the United States and delivered the books and papers to an officer duly authorized to receive them. At any time before trial the defendant may yield the controversy and surrender the office. This terminates the controversy, except as to costs, and for these judgment must be given in favor of the United States.

One other question made by the learned counsel for the defendant remains to be noticed. The tenure of office bill, which is understood to have become a law on March 3, provides, as appears from a newspaper report read in court by counsel, that a person holding office by the consent of the senate shall only be removed by the concurrence of that body. Assuming this to be the correct reading of the tenure of office act, I cannot bring my mind to agree with counsel for the defendant—that the defendant, at the passage of this act, held the office, in contemplation of law. True, he was in the office, as the information alleges, but without legal right. At that time, so far as he can be said to have held the office, it was not by virtue of his appointment by and with the advice and consent of the senate, but rather as an intruder, and without legal right. Judgment for the plaintiff for its costs and disbursements.

Case No. 14,482.

UNITED STATES v. AYLWARD.

[24 How. Prac. 142.]

District Court, D Connecticut. 1853.

COUNTERFEITING — RESEMBLANCE TO GENUINE — ORDINARY CAUTION.

1. In order to make counterfeiting an offence, within the act of congress (Act 1825, c. 65, § 20 [4 Stat. 121]), it is not necessary for the prosecution to show that the prisoner made the base in exact resemblance of the true coin.

2. The words "similitude" and "resemblance," as used in that statute, must be construed to mean, not an exact copy, but such a one as might deceive an ordinary observer.

3. If the spurious article had not a resemblance strong enough to deceive persons exercising ordinary caution, then the passing was not a public crime.

The prisoner in this case was indicted for passing a counterfeit coin, in the similitude and resemblance of an English sovereign, made current by the laws of the United States. He had pleaded guilty of passing the coin, but his counsel had taken exception, and called on the district attorney to bring into court the alleged base coin for inspection. This had been done. The coin on the one side bore a close resemblance to a sovereign, impressed with the likeness or head of the queen of England, and the date 1849, etc.; but on the reverse side was a prince, mounted on a charger, with the words "To Hanover," and the figures "1837," in imitation, somewhat, of the sovereign of 1824 and of a double one of 1823.

It was contended for the defence (D. McMahon, of counsel) that there was not such a similitude and resemblance between the genuine sovereign and this counterfeit as to render the passing of it a crime, within the act of congress; and the counsel referred to U. S. v. Morrow [Case No. 15,819], and Rex v. Varley, 1 Leach, 76.

J. Prescott Hall, contra.

THE COURT (JUDSON, District Judge) now gave judgment. In support of the motion it might be stated as a principle, that if the spurious article had not a resemblance strong enough to deceive persons exercising ordinary caution, then the passing was not a public crime. The cases relied upon showed clearly that one ingredient in the crime was the tendency of the false coin to deceive and defraud the person to whom it was uttered; and in both those cases it was apparent that the coins could not deceive any one. So, also, it had been held with regard to promissory notes. The important question arising here was the true import of the terms "similitude" and "resemblance," as used in the act. In point of fact, these false coins had a decided resemblance to the genuine sovereign, in many particulars; but in others they wanted a strong similitude. He then stated the points of resemblance and dissimilarity. The latter was principally the difference between the George and the dragon on the genuine sovereign of 1823 and 1824, and the prince galloping over the dragon, with the words "To Hanover," and the date "1837," as appeared on the counterfeit coins in question; but these dissimilarities would only be known by those thoroughly conversant with those distinctions, and a very large portion of the community, who know nothing of these marks of resemblance, might easily be deceived; as in fact the persons were, to whom they were passed. It has been stated by counsel for the defence, that the similitude and resemblance should be strong and exact; but such could not have been the sense in which the words were used in the act. This construction would let loose every counterfeiter of coins, for an exact resemblance would extend to the metal itself. A reference to the best authors, (some of whom he quoted) warranted him in saying that the terms, as used in the act of congress, did not mean an exact copy, but such a one as might deceive an ordinary observer; and such were those base coins.

The plea of guilty would require judgment to be entered against the prisoner, and he was sentenced to imprisonment, with hard labor, for the term of two years and eight months.

Case No. 14,483.

UNITED STATES v. AYMAR et al.

[13 Int. Rev. Rec. 151.]

Circuit Court, S. D. New York. May 3, 1871.

CUSTOMS DUTIES—WAREHOUSE BOND—WEIGHTS—AVERAGE.

This was an action brought to recover an alleged balance of duty due on a warehouse bond executed by defendants on an importation of tea in 1864. The defence was payment. The importation was in June, 1864, of 3,834 half chests, and before the weigher's return was made the defendants obtained permission to withdraw from warehouse 2,555 half chests, which were exported, and in November, 1864, paid duty on 1,279 half chests, in both cases at estimated weights. On liquidation of the entry there was found after crediting the estimated weights an apparent balance of $2,116 due the United States. It appeared on the trial that the weight of tea was taken by weighing twenty chests at a draft, without regard to the lines of teas, or marks per invoice; nor could the weight of the particular chests exported, or duty paid, be ascertained from it, but simply the gross weight of the importation. The claim of the United States was made up by averaging the weight of the importation, and distributing it ratably among the chests. For the defence, it was shown that the chests were of different weights and tares, and teas of different values, and that relatively the heavier teas were exported; and they pro-

duced the return of a city weigher showing they had paid duty on more tea than was left in the country after the export, and their account of sales to the same effect. The jury found for the defendants.

H. E. Davies, Jr., Asst. Dist. Atty. Gen., for United States.

Chase, Hartley, & Coleman, for defendants.

Case No. 14,484.

UNITED STATES v. BABCOCK.

[3 Dill. 566; [1] 3 Cent. Law J. 101.]

Circuit Court, E. D. Missouri. Sept. Term, 1876.

PRACTICE — SUBPŒNA DUCES TECUM — TELEGRAPH MESSAGES—CERTAINTY.

1. Practice of the court in respect to the issue and form of subpœnas duces tecum stated.

[Cited in Johnson Steel Street-Rail Co. v. North Branch Steel Co., 48 Fed. 192; Re Storroo, 63 Fed. 567.]

[Cited in brief in Pynchon v. Day, 118 Ill. 11, 7 N. E. 65.]

2. Where the writ is directed to an officer of a telegraph company, to produce certain messages, it need only describe the messages with such practicable certainty that the witness may know what is required of him

3. The writ, in this case, *held* to specify the messages with sufficient certainty.

[Cited in Re Storroo, 63 Fed. 567.]

[Disapproved in Ex parte Brown, 72 Mo. 83.]

4. It is the duty of the person to whom the writ is directed, to use reasonable diligence to obey it, and to find and produce the required instruments of evidence if they are within his custody.

[Cited in Wertheim v. Continental Ry. & Trust Co., 15 Fed. 716.]

[See Babcock v. Terry, Case No. 702.]

Mr. Henry Hitchcock presented the following:

And now comes William Orton, and moves the court to vacate the order granting a subpœna duces tecum for him to appear in said court, and bring with him the papers and books therein mentioned, for the reason that the order granting such subpœna was improvidently made.

The petition for the order for a subpœna duces tecum was as follows:

Now comes David P. Dyer, attorney of the United States, and petitions for a subpœna duces tecum in the above-entitled cause, to be addressed to William Orton, and requiring him to appear as a witness in the above entitled cause, on the 3d day of January, A. D. 1876, and for the United States generally, and to bring with him, respectively, the following described papers and books, to-wit: Copies of all telegrams received through the office of the Western Union Telegraph Company, at Long Branch, in the state of New Jersey; from June 15 to September 15, 1874, and from June 15 to September, 1875, addressed to General Orville E. Babcock, signed John McDonald, John A. Joyce, John, or J., with books showing the delivery of the same; all telegrams sent from Long Branch through said office, during said months, signed O. E. Babcock, O. E. B., Bab., or B., addressed to John McDonald, or John A. Joyce, St. Louis, Mo., or Ripon, Wisconsin, all telegrams sent through the office of said company at the city of New York, upon the 9th, 10th, 11th, or 12th days of December, 1874, signed John McDonald, John, Mac, or Mc., addressed to John A. Joyce, St. Louis, Mo., or General O. E. Babcock, Washington, D. C.; also, copies of all telegrams received at the city of New York, from said city of St. Louis, on the 25th, 26th, 27th, 28th, and 29th days of October, 1874, addressed to Mrs. John A. Joyce, Mrs. Kate M. Joyce, Mrs. Kate Joyce, Kate Joyce, or Kate M. Joyce, together with books showing delivery of same. And for cause said attorney states that the above cause is pending against said defendant for having, during the period aforesaid, conspired with certain parties to defraud the United States, and said books and papers are material and necessary evidence in said cause, and are now in possession, as said attorney has good reason to believe, of William Orton. David P. Dyer, United States Attorney for Eastern District of Missouri.

Hitchcock & Shepley, for the motion.

D. P. Dyer and James O. Broadhead, contra.

DILLON, Circuit Judge (with the concurrence of TREAT, District Judge), in delivering, orally, the opinion of the court, in substance said:

We are now preparing to decide the motion presented this morning on behalf of Mr. Orton, the president of the Western Union Telegraph Company, to vacate the order for a writ of subpœna duces tecum which has been served upon him.

A petition was presented, in due form, some days ago, for an order for the issuing of subpœna duces tecum, to be directed to William Orton, who is the president of the Western Union Telegraph Company, to appear as a witness, generally, in the case against Orville E. Babcock, on behalf of the United States, and particularly to bring with him respectively the following described papers, books and telegrams. (DILLON, Circuit Judge, here read the list of telegrams described in the petition for the subpœna, and grounds set up therein.) This petition is to be taken as having the same effect as if it were made in an ordinary case under oath—the official statement, by the district attorney, of the facts therein alleged. The petition was presented, and an order made for the writ to issue. The writ conforms to the petition. Mr. Orton, as president of the Western Union Telegraph Company, appears in court by his counsel, and makes a motion to set aside the writ, on the ground that it was improvidently issued,

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

and counsel have been heard in support of that motion. The question is, whether the writ was properly ordered to be issued.

Several objections are made to the writ. No objection is made on the ground that these messages are privileged, confidential communications; that is, the telegraph company does not insist that they stand in any different relation from what private persons would if they had custody of the same papers. Therefore, we need not consider whether there is any ground to suppose that, in law, the telegraph company occupies a different relation than would be occupied by private persons having custody of the same papers. But Mr. Shepley suggested, in argument, that there was no sufficient showing here that these papers were material, but we understood him, finally, not to insist on that point. It is to be observed that the district attorney does state that these papers are material evidence in the case, but, whether they are material or not, is a question which cannot be determined in advance—that depends upon the actual posture and situation of the case when they come to be offered; and when the district attorney asserts that they are material papers, we must assume, for the present, that he is fully informed, and that they are material.

The only other objection made was that the petition and writ do not sufficiently identify the messages, or show them to be in the possession of the company, and that the writ, in fact, requires the company to make search for these messages. We think that the objection is not made with a proper view of the statements of petition in that regard, and of the functions of the writ. It is very easy, if Mr. Orton or the company is not in possession of the papers, for them to come here and say, "We have no such papers." That excuses them to the court, if the court is satisfied that such is the fact. But some degree of certainty is undoubtedly required in undertaking to specify the papers, and we have looked through books which have been referred to by counsel and others, and we find the law and practice quite well settled. It is this: The papers are required to be stated or specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him, and to have the papers on the trial, so that they can be used, if the court shall then determine that they are competent and relevant evidence. There is no specific statute of the United States upon the subject. The fifteenth section of the judiciary act refers alone to civil cases at common law, and provides that the courts of the United States may compel parties to produce papers and documents pertinent to the issue on trial, under circumstances such as a court of equity can compel the production of like papers and documents. The practice in equity is very well settled. Of course, when a party wants the production of a paper, document, or book, he must specify it with as much particularity as is practicable; he must state what it is; he must make a prima facie showing that it is in the possession of the other party, and that it is material. But this statute has no reference to this case; it was enacted to enable a court of common law to obtain books and papers from the parties. A court of equity has the power to compel the discovery and production of papers in virtue of its inherent and general jurisdiction. Here are dispatches which are alleged to be in the possession of the telegraph company, which is no party to the suit, and to be material in order to inquire into the legal rights of the parties, and the writ would be just as available for the defendant, as for the United States, if he required the messages. The writ describes, with sufficient particularity, indeed, with all the particularity that seemed to be practicable, under the circumstances, the very messages that are wanted. Vasse v. Mifflin [Case No. 16,895].

It is objected that the writ, as framed, in effect, though not in terms, commands Mr. Orton to make search for messages. It is the duty of a person to whom such writ is directed, to make reasonable search for the papers and documents required, if they are in his possession. And Mr. Chitty recommends the insertion of a clause in the writ commanding the witness to search for the papers or documents he is required to produce; not, indeed, because this is necessary, but as a means of calling the attention of the witness to the duty of using reasonable diligence to obey the writ, and the more effectually to secure the production, at the trial, of the required instruments of evidence. 3 Chit. Prac. 829. The views above stated are fully supported by the authorities. Amey v. Long, 1 Camp. 14; Id., 9 East, 473; 3 Starkie, Ev. 1722. Motion denied.

[See Cases Nos. 14,485, 14,486, 14,487, and 16,594.]

Case No. 14,485.

UNITED STATES v. BABCOCK.

[3 Dill 571.] [1]

Circuit Court, E. D. Missouri. 1876.

EVIDENCE—LETTERS DEPOSITED IN POST-OFFICE—PRESUMPTION AS TO RECEIPT—TELEGRAPHIC DISPATCHES.

1. The deposit of a letter in the post-office, postage prepaid, directed to a person at his usual place of residence, is evidence tending to show, and from which a jury may infer, that it reached its destination, and was received by the person to whom it was addressed, if there is nothing in evidence to rebut such inference.

[Cited in Henderson v. Carbondale Coal & Coke Co., 140 U. S. 37, 11 Sup. Ct. 695.]

[Cited in Sullivan v. Kuykendall, 82 Ky. 686.]

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

2. Same general principle applied to telegraphic dispatches.

[Cited in Flint v. Kennedy, 33 Fed. 822.]

[Approved in Smith v. Easton, 54 Md. 146.]

[This was an action by the United States against Orville E. Babcock.] On the trial, one Everest, a witness on the part of the government, and a confessed conspirator, testified that he had procured, at the instance of Joyce, from the United States sub-treasury in St. Louis, two $500 bills; that Joyce received them, and the witness gave evidence from which it might be inferred that each of these bills was placed in a different envelope, and that after they were so placed and directed, postage paid, the witness deposited them (Joyce watching him from the window), in one of the street post-office mail-boxes.

The witness was then asked the question "Whether he observed and could state the address upon the envelopes so deposited?" This question was objected to by the defendant.

[See Case No. 14,484.]

Dyer & Broadhead, for the Government.

Storrs & Porter, for defendant.

Before DILLON, Circuit Judge, and TREAT, District Judge.

DILLON, Circuit Judge. We are prepared to dispose of the questions raised on the objections to the reception of certain evidence this morning. Mr. Everest, the witness on the stand, gives testimony tending to show that a $500 bill—we will not say that it shows it was actually in the envelope, but evidence tending to show that a $500 bill was placed in an envelope, that the envelope was sealed, and that he deposited it, postage prepaid, in one of the United States post-office mail-boxes, and thereupon the question is put by the counsel for the government: "Did you observe the address or direction of the letter which you say you deposited in the letter-box?" And, to that, objection is made by the counsel for the defendant.

The objection rests, as we understand, upon three grounds. One is, that the evidence is inadmissible because it does not tend to show the fact, or establish the fact, that the letter was ever actually received. The second is, that, even if it is evidence tending to show that, still, in the circumstances of the case, as it actually stands, being all the evidence so far during the progress of the trial that has been introduced for the purpose of inculpating the defendant, it has no probative force. The third objection, as we understand it, is, that the original of the envelope ought to be produced; and the witness cannot be allowed to testify how it was addressed.

We have looked at the authorities as fully as the limited time at our disposal since the recess would allow. Upon the subject of the admissibility of letters, by one person addressed to another, by name, at his known post-office address, prepaid, and actually deposited in the post-office, we concur, both of us, in the conclusion, adopting the language of Chief Justice Bigelow, in Com. v. Jeffries, 7 Allen, 563, that this "is evidence tending to show that such letters reached their destination, and were received by the persons to whom they were addressed." This is not a conclusive presumption; and it does not even create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters. "A fact," says Agnew, J. (Tanner v. Hughes, 53 Pa. St. 290), "in connection with other circumstances, to be referred to the jury," under appropriate instructions, as its value will depend upon all the circumstances of the particular case. It is objected, also, that the evidence, even if admissible, as tending to prove the receipt of the money, should be rejected as immaterial or irrelevant, as having no probative force. If it was admitted here by the counsel for the government, that this was all the evidence which they expected to produce for the purpose of connecting the defendant with the alleged conspiracy, its inconclusive character standing alone, in a case where the defendant's mouth is sealed, would doubtless be such as that the court would be bound to say to the jury that it could not be safely made the basis of a conclusion inculpating the defendant.

It may not have been actually received; the writer may not have been known; his purpose may not have been known, or the person who received it may not have known why it was sent, or may not have invited it, or have known that it was in any way connected with the guilty purpose ascribed to it by the prosecution, or any illegal purpose or plan; and, as men act differently under the same circumstances, it is for the jury, under proper instructions from the court, to look at the letter, if it was sent and received, in connection with all the other circumstances in evidence.

In relation to the third point, no authorities have been adduced to show that it would be necessary to produce the actual envelope before a witness could testify as to how it was superscribed. It strikes us that the rule does not extend so far. For these purposes, and these purposes only, and with these qualifications, we think the testimony is admissible. Evidence admitted.

Upon the announcement of the foregoing opinion, the witness took the stand and testified as follows:

"Colonel Dyer (to the witness). You stated, Mr. Everest, that Colonel Joyce, on the occasion referred to by you, handed to you two sealed envelopes, containing two $500 bills? Mr. Storrs. I object to the question; I object to the statement of the question by the counsel. DILLON, Circuit Judge. Let the wit-

ness restate what he said in that regard. Colonel Dyer. Restate, then, if you please, to the jury, what you said in regard to the two envelopes after you received them from Joyce. A. When Colonel Joyce handed me those two envelopes, he directed me to put them in the letter-box opposite the office, which I did. Q. Where was Joyce at the time you deposited the letters in the letter-box? A. He was watching me from the window. Q. At the time you deposited the letters, did you observe him at that time? A. I saluted him, and he saluted me. Q. You put the letters in? A. I was facing him when I put them in. Q. After the letters came into your hands, and before they were deposited in the box by you, did you examine and see the name and direction on the envelopes? A. Yes, sir. Q. Will you state to the jury how the letters were directed, and to whom they were directed? A. There was one of them directed to W. O. Avery, Washington, D. C., and one to General O. E. Babcock, Washington, D. C. Q. Anything else on the envelopes? A. There was a post-mark, and each one of them had 'Personal' on the left-hand corner. Q. State whether there was any written or printed matter on the envelopes other than you have given. A. None at all. Q. What kind of envelopes were they, Mr. Everest? A. Just ordinary envelopes. Q. You state that the envelopes were post-marked. What do you mean? A. They had postage-stamps upon them."

Telegraphic dispatches. Subsequently the court admitted telegrams in evidence, addressed to the defendant by name, care of the executive mansion, Washington, D. C., on proof that they were received by the telegraph company in Washington, and delivered to the door-keepers at the executive mansion, it being shown that the defendant had an office therein as the private secretary of the president, and that the usage of the door-keepers was to deliver such messages to the persons to whom they were addressed, or place them on their desks. Under such circumstances, telegrams were admitted, without direct proof of their actual delivery to, or actual receipt by, the defendant.

The following is the opinion of the court overruling the objections of the defendant to the introduction of dispatches purporting to be to and from the defendant, and to and from McDonald and Joyce:

DILLON, Circuit Judge (TREAT, District Judge, concurring).—Respecting the objections against the admissibility as evidence of certain dispatches, we have united in a conclusion as respects all except two dispatches, respectively dated the 3d and 5th of December. We reserve the questions arising upon these two dispatches, which are somewhat novel and peculiar, for further consideration. All others fall within certain objections, which we proceed to state and decide.

We are of the opinion that the objection to the dispatches which have been offered in evidence, based upon the ground that they are not relevant or material, is not well taken. The jury is the constitutional tribunal to determine controverted questions of facts, under appropriate advice from the court to assist them in the discharge of this duty. If the evidence offered tends, in any degree, to establish the existence of any material fact, it cannot be rejected as irrelevant, but must be received and submitted to the consideration of the jury in connection with all the other facts and circumstances of the case. To reject the dispatches offered, on the ground that they were irrelevant and immaterial, would be a decision by the court that such dispatches had nothing to do with the alleged conspiracy, and would take that question, which is a question of fact, from the jury, whose exclusive province it is to decide questions of fact. We do not deem it expedient, or even proper, to remark upon the several dispatches, or to say anything in the presence of the jury calculated to disclose the views of the court as to the force and effect of the several dispatches offered in evidence. It is not to be inferred that, in admitting the dispatches, the court holds that they do or do not connect the defendant with the alleged conspiracy. That is a question for the jury, under advice and direction from the court, which should properly come in the charge or summing up to the jury.

As to the objection that some of the dispatches addressed to the defendant were unanswered, we are of the opinion that, under the circumstances of the case, this alone does not constitute a sufficient ground to exclude them. Such dispatches are to be viewed in connection with all the circumstances of the case, including the nature of the dispatches themselves, as calling for an answer or otherwise, and the situation and relation of the parties, and the effect to be given to the circumstance, that no answers were returned (if the jury find the dispatches were received by the defendant), is to be determined by the jury upon the whole evidence, under the rules of the law to be given in the charge to the jury, bearing upon the subject.

As to the dispatches between McDonald and Joyce, confessed conspirators, such dispatches are admissible as statements or acts of conspirators among themselves, in furtherance of the conspiracy; but, as to the defendant, they go for naught, unless he is shown, by other evidence, to be connected with the conspiracy charged in the indictment.

DILLON, Circuit Judge (to District Attorney Dyer). Have you offered all the evidence that you intend to offer respecting the dispatches of December 3d and 5th?

District Attorney Dyer. No, sir.

After the production of other evidence touching the dispatches of December 3d and 5th, the dispatch of December 3d was admitted, and the dispatch of December 5th reject-

ed, because the original dispatch was not produced, nor was it proved to have been in the handwriting of the defendant, or to have been authorized or sent by him, or his direction. The important dispatches received in evidence are given in the charge of the court. See [Case No. 14,486].

In admitting the dispatches to and from William O. Avery, the court remarked that "they do not purport on their face, as we read them, to connect the defendant with this matter, and they are admitted, not by reason of any declarative force upon their own face, but only to show the acts and declarations of Mr. Avery—on the assumption that he shall be found by the jury to be connected with the conspiracy—to show his acts and declarations in connection with Joyce and McDonald, admitted conspirators. The force of the evidence is not for the court to determine. It may or may not be unfavorable to the defendant, as tending to show that some one else, at the other end of the line, was giving information in connection with these frauds."

[See Case No. 14,487.]

Case No. 14,486.

UNITED STATES v. BABCOCK.

[3 Dill. 577.] [1]

Circuit Court, E. D. Missouri. 1876.

PRACTICE — RELATIVE FUNCTIONS OF COURT AND JURY.

1. The testimony being closed, the defendant moved for a peremptory direction to the jury to acquit the defendant. *Held*, that the motion must be denied, first, because there are material facts in the case, depending upon the weight of evidence and the credibility of witnesses which are in dispute; second, because the proper inferences to be drawn from the evidence were not certain, necessary or undisputed.

[See Babcock v. Terry, Case No. 702.]

[Cited in State v. Foot You (Or.) 32 Pac. 1036.]

2. Relative functions of the court and jury stated, and the cases in the supreme court of the United States, cited.

The testimony in the case being closed, the defendant's counsel moved that the court instruct the jury that, there being no evidence, or no sufficient evidence to convict the defendant [Orville E. Babcock], it was their duty to return a verdict of not guilty.

[See Cases Nos. 14,484 and 14,485.]

This motion was argued by Messrs. Porter and Storrs, for defendant, and by Messrs. Dyer and Broadhead, for the United States, and was submitted to the court, which, after taking a recess for an hour for its consideration, gave thereon the following opinion.

Before DILLON, Circuit Judge, and TREAT, District Judge.

DILLON, Circuit Judge. The testimony on both sides being closed, the defendant's counsel moved the court for a peremptory direction to the jury to acquit the defendant. The case which the government seeks to make against the defendant is one which largely, if not wholly, depends upon circumstantial evidence, which it claims shows that the defendant had criminal knowledge of the conspiracy to defraud the revenues in St. Louis, and that he participated in that conspiracy. The government has sought to implicate him, mainly by certain telegraphic dispatches, to and from him, and by the testimony of Everest as to the mailing of a letter, under circumstances which the counsel for the government maintain would authorize the jury, not standing alone, but in connection with the other facts in evidence, to infer that it contained a five hundred dollar bill, and that it was sent to and received by the defendant for guilty purposes.

The present motion involves a question as to the relative functions of the court and jury which is of great importance. Undoubtedly the court is the judge of the law in criminal as well as in civil cases, and the jury are bound to then receive and apply the law as expounded by the court in the one class of cases the same as in the other.

A motion of the character of the one here made is well known to the practice in the federal courts. "It is equivalent" says the supreme court of the United States, "to a demurrer to the evidence." "It answers the same purpose, and should be tested by the same rules. A demurrer to the evidence admits, not only the facts therein stated, but also every conclusion which a jury might fairly or reasonably infer therefrom." Schuchardt v. Allens, 1 Wall. [68 U. S.] 359, 370. In deciding the present motion, it must be assumed that all the evidence in the case is true, and that the witnesses are all credible, for if there are questions relating to the credibility of witnesses, or if what the evidence proves depends upon the credibility of witnesses, or upon the proper deduction to be drawn from the evidence—these are questions, not for the court, but for the jury under the direction of the court. Counsel have referred to cases in which some courts may have interfered with the province of the jury in a manner which it might be difficult to reconcile with the views above expressed; and particularly to the cases of U. S. v. Anthony [Case No. 14,460], and U. S. v. Fullerton [Id. 15,176]. We do not think it necessary to pass upon the soundness of the decisions in those cases. The case against Fullerton is too briefly reported to enable us to judge exactly of its circumstances or precisely on what principle it was taken from the jury. But it is on the present occasion unnecessary to go into a review of the cases in the inferior courts, or of cases determined in the state courts, since the principles which must guide us have been settled by the supreme court of the United States, whose judgments have in this court the force of authority.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

The doctrine of the supreme court of the United States is well shown in Hickman v. Jones, 9 Wall. [76 U. S.] 197. This was a case of malicious prosecution, in which the court peremptorily instructed the jury to acquit two of the defendants. In holding this to have been erroneous, under the circumstances, the supreme court of the United States says: "There was some evidence against most of them: whether it was sufficient to warrant a verdict of guilty, was a question for the jury under the instruction of the court. The learned judge mingled the duty of the court and jury, leaving to the jury no discretion but to obey the direction of the court. Where there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff to be given, such an instruction may be properly demanded, and it is the duty of the court to give it. To refuse is error. In this case the evidence was received without objection, and was before the jury. It tended to maintain, on the part of the plaintiff, the issue which they were to try. Whether weak or strong, it was their right to pass upon it. It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact, as of the court to decide questions of law. The jury should take the law as laid down by the court, and give it full effect. But its application to the facts —and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has approved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law. We think the exception to this instruction was well taken."

The supreme court, in cases where the facts are not controverted, and where the inference to be drawn from them is certain, necessary, and undisputed, or where there is no evidence tending to establish a necessary element in the case, has held that the trial court may peremptorily direct what verdict shall be given. Bevans v. U. S., 13 Wall. [80 U. S.] 56; Klein v. Russell, 19 Wall. [86 U. S.] 463; Insurance Co. v. Baring, 20 Wall. [87 U. S.] 159. The distinction between cases which fall within the rule first stated, and those which are for the decision of the jury, is well illustrated in Railroad Co. v. Stout, 17 Wall. [84 U. S.] 657. In this case the supreme court hold that where in any case it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from even undisputed facts; where different men equally sensible and equally impartial would make different inferences—such cases the law commits to the decision of the jury, under instructions from the court.

The motion here made must, in our judgment, be denied for two reasons, first, there are facts which are not undisputed—for example, those relating to the letter testified to by Everest and Magill; second, the proper inferences to be drawn from the telegrams and other facts are not so clear and certain, that the court can decide their effect as a matter of law. The doctrine contended for by the learned counsel for the defendant, if applied to this case, would require this court to disregard the well-settled rules laid down by the United States supreme court in the case of Hickman v. Jones, above cited, in which that tribunal holds that the constitutional province of the jury, under instructions from the court, extends to the right to decide upon issues of fact in a weak case as well as in a strong case.

It is not to be inferred by the jury from the overruling of this motion, or from anything we have said, that the court expresses any opinion as to the weight or force of the testimony in the case. The only point we decide is, that it is not our right to take the case as it stands from the jury. At the proper time the court will instruct the jury as to the legal rules, in the light and by the guidance of which they will analyze the evidence before them, and determine the weight to be given to it and the several parts thereof. Motion denied.

[Subsequently, at a trial before a jury, a verdict was rendered for the defendant. Case No. 14,487. See, also, Id. 16,594.]

Case No. 14,487.

UNITED STATES v. BABCOCK.

[3 Dill. 581;[1] 3 Cent. Law J. 143; 1 Cin. Law Bul. 52.]

Circuit Court, E. D. Missouri. 1876.

CONSPIRACY — CIRCUMSTANTIAL EVIDENCE — DECLARATIONS OF CONSPIRATORS—TESTIMONY OF ACCOMPLICES.

1. What is necessary in order to constitute a conspiracy; essential to prove some one of the overt acts as charged. Guilty knowledge and participation necessary, but same may be proved by circumstantial evidence.

[Cited in U. S. v. Howell, 56 Fed. 32; U. S. v. Cassidy, 67 Fed. 702.]

2. Necessity of showing motive, where the evidence is circumstantial.

3. The testimony of Everest and Magill, as to the mailing, at the instance of Joyce, of an envelope to the defendant containing a $500 bill, and the subsequent withdrawing of it from the letter-box, and the returning of it to Joyce, analyzed, and its effect stated.

4. The dispatches, correspondence, and testimony of the president, with regard to the appointemnt of a successor to Collector Ford, grouped for the convenience of the jury, and the questions arising thereon stated.

5. The dispatches and correspondence which took place at the time of Joyce's trip to Califor-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

nia, grouped, and the respective theories of the prosecution and defence with reference thereto stated.

6. The dispatches and testimony relating to the contemplated visit of inspection by Brooks and Hogue to the St. Louis distilleries; and also those in regard to the projected transfer of revenue officers, grouped for the convenience of the jury.

7. After the indictment of McDonald, one of the conspirators, letters were sent to him by the defendant through Major Grimes. Neither the prosecution nor the defendant produced the letters, or proved their contents. *Held*, that the jury were not at liberty to conjecture what their contents were, but were to receive the fact as a circumstance that the defendant and this conspirator were in correspondence with each other about some matter undisclosed, and might consider the time when the correspondence took place, and the manner in which it occurred.

8. The acts and declarations of conspirators are not, of themselves, evidence to connect a third person with the conspiracy; but, if such third person is shown to have been a member of the conspiracy, then telegraphic dispatches of fellow conspirators, among themselves or to others, sent for the purpose of promoting the objects of the conspiracy, become evidence against him.

9. The credit to be given to the testimony of the accomplices stated.

10. Some rules laid down for the guidance of the jury in determining the credibility of witnesses.

11. The effect to be given to evidence of good character of the defendant stated.

12. In cases where the evidence tending to show guilt is wholly circumstantial, the following rules are laid down: 1. The hypothesis of delinquency or guilt of the offence charged in the indictment should flow naturally from the facts proved, and be consistent with them all. 2. The evidence must be such as to exclude every reasonable hypothesis but that of his guilt of the offence imputed to him; or, in other words, the facts proved must all be consistent with and point to his guilt only, but they must be inconsistent with his innocence. People v. Bennett, 49 N. Y. 144. If the evidence can be reconciled either with the theory of innocence or of guilt, the law requires the jury to give the accused the benefit of the doubt, and to adopt the former. The burden of proof does not shift in criminal cases; it is on the prosecution throughout to establish the defendant's guilt by the evidence, and, in criminal cases, the defendant, not being permitted to testify, cannot be called upon to explain or produce any proof, until the prosecution, by the evidence it actually produces, establishes the defendant's guilt beyond a reasonable doubt.

13. The law clothes a person accused of crime with a presumption of innocence, which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt — "beyond a reasonable doubt" — which means that the evidence of his guilt, as charged, must be clear, positive and abiding, fully satisfying the minds and consciences of the jury. It is not sufficient, in a criminal case, to justify a verdict of guilty, that there may be strong suspicions, or even strong probabilities, of guilt, nor, as in civil cases, a preponderance of evidence in favor of the truth of the charge against the defendant; but, what the law requires, is proof, by legal and credible evidence, of such a nature that, when it is all considered by the jury, giving to it its natural effect, they feel, when they have weighed and considered it all, a clear, undoubting and entirely satisfactory conviction of the defendant's guilt.

[Cited in brief in State v. Shaeffer, 89 Mo. 274, 1 S. W. 293.]

[This was an indictment against Orville E. Babcock. For former proceedings, see Cases Nos. 14,484, 14,485, 14,486, and 16,594.]

DILLON, Circuit Judge (charging jury). In preparing what I have to say to you, I am happy in having had the assistance of my Brother TREAT, and his concurrence in all the statements and propositions which follow.

Gentlemen, if it is a source of gratification to the court and counsel that their respective labors in this case are drawing to a close, it must be doubly so to you, since, for more than two weeks, you have been restrained of your liberty, deprived of the society of family and friends, cut off from intercourse with the world, and not allowed to converse, even among yourselves, on that subject which has filled the minds of everybody else. The court would willingly have relieved you of this constraint, but the great public interest the case has excited, and the pronounced course of many public journals respecting it—some prejudging it on the one side, and some on the other—and the many imperfect reports of the trial which have met our observation, made it not only proper, but necessary, in the interest of justice, that you should be removed beyond the reach of any popular feeling, however strong or subtle, whether favorable to the government or to the defendant; beyond the influence of the press, one of whose plainest public duties it is to abstain, pending a trial, from a course calculated to interfere with the due administration of justice; in a word, beyond any influence whatever, except that to which the solemn oath you have taken confines you, namely, "the law and the evidence given you in court."

The constitutional guaranty of a trial by jury, upon legal evidence, under the supervision of the court, is designed to protect the innocent and punish the guilty, and this wise provision will be practically subverted if it be not sedulously guarded from all improper influences: and this is especially necessary in cases which, for any reason, are attended with great public interest or feeling.

Gentlemen, it is justly due to the cheerful patience with which you have submitted to this long confinement, not less than to the attentive care you have given, day after day, to the coming in of the vast mass of testimony now before you for your consideration, that we should, before proceeding to give you directions as to the law of the case, thus publicly recognize and commend your course and conduct.

The court has had the benefit of all the suggestions and arguments that could be offered on the one side or the other by the eminent counsel in the case, touching the questions of law arising in it. Thus aided, our duties on the trial were made comparatively easy, and, fortunately, the duty that yet remains to us is plain: for there is no principle of law now belonging to the case which is

controverted by counsel, or which has not been long settled by the courts of Great Britain and this country.

Our further duty is simply to state and define these rules of law, and to make such observations as will assist you in properly applying these rules to the case which the testimony presents for your decision.

The case against the defendant is one which mainly depends upon circumstantial evidence, and it is in such cases that counsel can be of great assistance to the jury in directing their attention to those circumstances which are considered material to their respective theories, and in commenting upon their force and effect. It has been your good fortune, gentlemen, to listen to arguments, both for the government and for the defendant, which have been marked in no common degree with clear statement, great ability, and masterly analysis.

Declaring that you enter the jury-box wholly free from opinion or bias, one way or the other; kept aloof, pending the trial, from any influence that could improperly affect you; aided by the argument of counsel, and by such instructions and advice as the court is able to give, you come to your deliberations with every circumstance which can conduce to the formation of sound conclusions, and the rendition of a true verdict, according to the law and evidence given you on the trial. The two main questions presented for your consideration are:

1. Was there such a conspiracy as is described in the indictment, and was any one of the overt acts committed, as alleged, in furtherance of said conspiracy?

2. If such conspiracy existed, was the defendant a member of it, or one of the conspirators?

As to the first of these questions, you may, perhaps, have very little difficulty. It is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. A combination formed by two or more persons, to effect an unlawful end, is a conspiracy, said persons acting under a common purpose to accomplish the end designed. Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto, from that time, as if he had originally conspired.

The charge in the indictment is substantially that a conspiracy was formed to defraud the United States of the tax of seventy cents per proof gallon on distilled spirits to be produced thereafter in the distilleries named in the indictment. It is necessary, in order to prove the conspiracy as charged, to establish also that some one of the overt acts named was committed by the person alleged in the indictment to have been guilty of said overt act, and that he was one of the conspirators, doing the act to promote the unlawful scheme.

Upon the evidence in the case, and the concessions of counsel, you will, probably, have no doubt as to the existence of a conspiracy of enormous proportions, between the distillers on the one hand and certain internal revenue officers on the other, formed and maintained in the city of St. Louis, whereby the government was systematically plundered for a long period of time, of revenue to a vast amount. It was the duty of the government, on discovering this conspiracy, to crush it—to stamp it out of existence—and to bring the guilty to justice and deserved punishment. But the government sustains a relation and owes a duty to its citizens, as well as to its revenues, and its interests do not demand and will not be promoted by the conviction of any one who is not proved, in the manner required by the rules of law, to be guilty of the offence imputed to him; and so, gentlemen, you must come to a dispassionate consideration of this case, recollecting that the court, and the jury, as a part of the court, have but one duty to discharge, but one object to attain, and that is to ascertain the truth, and to do justice with absolute impartiality and fearless independence.

It is well known that the attention of the country has been drawn to these frauds, and the occurrences which have taken place under your observation show the warm public interest in these trials. We feel it to be our duty to say that, while the indignation of every right-minded citizen is justly excited against the real perpetrators of these frauds, the jury should be especially on their guard that this should not overmaster, or in any way, or in the least degree, influence their judgment in deciding the great issue before them, and that is, whether the defendant was and is fully proved to have been a member of the conspiracy. But, in proportion to the extent of the indignation, there may be the danger, if the jury are not sedulously on their guard, of including in the list of the guilty, persons named in connection with these frauds, but whose connection remains to be established in the manner and to the extent required by the law in all criminal cases. It is just as much

the duty of the jury to acquit the innocent as to convict those proved to be guilty.

Assuming that you will find the existence of the conspiracy between Joyce and the distillers and others, your inquiry will be narrowed to a single ultimate question of fact, namely, was the defendant one of the conspirators—a fellow conspirator with Joyce and the distillers named in the indictment? The government affirms it, and must prove it by legal and satisfactory evidence, in order to ask a verdict in its favor. As the defendant is indicted for conspiracy with Joyce and the distillers named in the indictment, it is clear that the charge implies that the defendant knew there was such a conspiracy in the city of St. Louis, and, with such knowledge, knowingly aided the conspirators in their unlawful scheme; and this guilty knowledge and participation must be proved by the government. No witness has been introduced who has testified that the defendant was ever informed or knew of the conspiracy, or that he ever admitted his knowledge of it, or participation in it. No writing signed by the defendant has been produced which, in direct or express terms, shows such guilty knowledge and participation on his part. But the law does not require direct proof of these facts, but they may be proved by facts and circumstances which show them beyond a reasonable doubt. Accordingly, the prosecution relies upon certain facts and circumstances which it claims to have established by evidence, which it furthermore claims not only justifies, but makes clear and positive the conclusion to be drawn therefrom, viz., that the defendant knew of the conspiracy, and knowingly aided the conspirators.

The case of the defendant is peculiar. He was not a distiller or rectifier. He was not in the internal revenue service as an officer or agent. The theory of the government is that he was sought out by Joyce and McDonald, leading conspirators, because of his residence in Washington, where the internal revenue bureau is located, and his supposed facilities to give information which would prevent the detection and discovery of the frauds, and otherwise render services in aid of the conspiracy. This, it is claimed, is their motive, and no motive is ascribed by the counsel for the government as the inducement to the defendant to enter into the conspiracy, except for purpose of pecuniary gain to himself. In all cases, and especially in cases depending on circumstantial evidence, an inquiry into the motives actuating the accused is always important, because human experience shows that men do not commit crime without motive therefor. To show the defendant's motive to be that of pecuniary gain, and to establish his knowledge of, and guilty participation in, the conspiracy, the prosecution relies mainly upon the testimony of Everest as to the mailing of an envelope, by Joyce, with $500 inclosed therein, to the defendant, and upon certain telegraphic messages to and from the defendant, in connection with the cotemporaneous circumstances, and in connection with other dispatches sent to and from other alleged or confessed conspirators.

As different rules of law apply to these different classes of evidence, it is necessary to advert to them separately. You have heard the testimony of Everest and Magill, with respect to the alleged deposit of two letters in a street letter-box, and the removal of the same from the box by Magill at the instance of Joyce. If you believe both Magill and Everest, then the alleged transaction is so far satisfactorily explained as to show that the defendant did not receive the alleged envelope addressed to him. If you discredit the testimony of Magill you should then bear in mind what Everest described as the details of Joyce's manipulation with respect to the $500 bills, and as to the deposit of the same, under the eyes of Joyce, in the letter-box, so as to ascertain satisfactorily to yourselves whether both or either of those bills was placed within the envelopes; also, the fact that Everest is a confessed conspirator, and was, at the time, the collector for the ring, and that, as Bevis testifies, the distillers were then making very little illicit spirits, because they knew their distilleries were being watched. These facts may be important, so far as they show the acts and purposes of Joyce in that transaction, and what he really did and designed to have Everest understand he was doing. As will be hereafter more fully stated, the testimony of accomplices is to be received with extreme caution, and reliance upon it is always held to be dangerous if unsupported. Hence, it is just and proper that the jury should look outside of conspirators' testimony for corroboration. The evidence of Alexander, that Everest obtained two $500 bills, is corroborative of that fact, but not of Everest's testimony as to what was done with them by him and Joyce. Should the jury reach the conclusion, however, that Everest did place in the street letter-box an envelope addressed to the defendant, as alleged, and that said letter contained a $500 bill, and that it was not afterwards removed by Magill, still it is not a conclusive presumption of law, nor a legal presumption, that the defendant actually received it, but it is a fact to be considered by the jury in connection with the routine and usages of the postal service, and with other facts and circumstances, to enable them to determine satisfactorily to themselves whether the defendant did receive that letter and its contents, and whether the same was sent and received for a guilty purpose in connection with, and in furtherance of the conspiracy, and that the defendant knew from whom it came, and that it was sent for such guilty purpose, or in connection with the conspiracy named in the indictment. Under the

circumstances in the case, it becomes one of your most important and delicate duties to determine the credit to be given to the testimony of the accomplice, Everest. He is the only witness who testifies to any fact tending to show the payment of money to the defendant by any of the conspirators. If you credit Magill, the testimony of Everest as to the money becomes unimportant against the defendant, and then important in his favor, as tending to show a design and purpose on the part of Joyce, in promotion of his own schemes, falsely to hold out to the conspirators here that the defendant was a member of the conspiracy; but, if you do not credit the testimony of Magill, then you will have to determine what reliance, if any, taking all the circumstances together, you can safely place on the testimony of Everest, and what it really proves against the defendant, and what inferences of guilt you can safely draw therefrom. These are matters which the law commits to your sound judgment.

Drawing your conclusions on this subject, it will occur to you as obviously just to bear in mind that, according to Everest's evidence, no one but Joyce and himself knew of the transaction; that the defendant's mouth is sealed, so that he cannot testify as to whether he did or did not receive the envelope with the inclosure, so that if the evidence is false, or if the alleged inclosure was never sent or never received by him, he is helpless to prove the negative. These are considerations to be weighed by you in forming a judgment as to whether it has been clearly and satisfactorily established to your minds that the defendant did receive the alleged $500 bill, and for the guilty purpose imputed by the prosecution. As to the credibility of Magill, that is a question wholly for you to determine, guided by the general rule on that subject hereinafter laid down, viz., as to the reasonableness of his statements, his relation to the case, and his manner and conduct on the witness stand, there being no testimony offered to impeach him.

It will thus be understood that on this branch of the case there are four questions for your careful consideration, viz:

1. What credit is due to the testimony of Everest?

2. If he is to be credited, what does his testimony show as to the use made of the $500 bills by Joyce in connection with the envelopes?

3. Whether any such bill was received by the defendant with the guilty knowledge imputed?

4. What credit is to be given to the testimony of Magill?

We now pass to another branch of the testimony.

Evidence has been given tending to show that the conspiracy in St. Louis, between the distillers and rectifiers and internal revenue officers was in full existence and flagrant, when Mr. Ford, collector of internal revenue, died, October 23, 1873.

The first evidence in point of time relied on by the government to connect or tending to connect the defendant with this conspiracy, is that which relates to the appointment of Mr. Ford's successor. It is claimed by the counsel for the government that the defendant, for guilty purposes and to advance the interests of the conspirators, sought to procure the appointment of Joyce or Maguire to that position. On the other hand, the counsel for the defendant claimed that the evidence shows that the defendant did not interfere with or seek to influence the appointment, and that there is nothing to show any improper agency of the defendant, or from which you can infer any unlawful purpose on the part of the defendant in this respect. To sustain this charge against the defendant, the government relies mainly upon the dispatches of Joyce to the defendant, below given, of date respectively October 25, October 27, and October 28, 1873, and particularly the latter, called the "mum" dispatch. On the other hand, the defendant contends that, when these dispatches are read in connection with contemporary dispatches and letters upon the same subject, and the testimony of the president upon the appointment of Mr. Ford's successor, they fail to support the theory of the government as to the agency of the defendant or the unlawful purpose or motive alleged in respect to supplying that vacancy. This, you will perceive, gentlemen, thus becomes a question of fact for you to decide upon the whole testimony in the case relating thereto. The evidence on this point is embraced in the following dispatches and letter of Joyce to the defendant, and the deposition of the president, which we have arranged by days in chronological order, commencing October 25, and ending October 29, 1873. It does not appear in evidence whether the death of Ford was communicated to the president previously to October 25, 1873.

Ford-Maguire Dispatches.

"St. Louis, October 25, 1873.—Gen. O. E. Babcock, Executive Mansion, Washington, D. C., Care President Grant: Poor Ford is dead. McDonald is with his body. Let the president act cautiously on the successorship. John A. Joyce."

"St. Louis, Mo., October 25, 1873.—To His Excellency U. S. Grant, Washington: Please see our dispatch of this day to Delano, and tell us how we, as securities of our friend C. W. Ford, can protect ourselves from any wrong action of his deputies. Wm. H. Benton. John M. Krum. Wm. McKee."

This is all that bear date October 25; the next are dated October 27.

"St. Louis, October 27, 1873.—His Excellency U. S. Grant: If you received telegram from us please answer. John M. Krum. Wm. H. Benton. Wm. McKee."

"Washington, October 27, 1873.—John A. Joyce, St. Louis. Mo.: See that Ford's bondsmen recommend you. B." (Babcock.)

"St. Louis, October 27, 1873.—To Gen. O. E. Babcock, Executive Mansion, Washington, D. C., Care President Grant: The bondsmen prefer the man they have recommended. An expression of the president to his friends here will secure everything. Let the president do for the best, depending upon McDonald and myself to stand by his action to the last. Answer. John A. Joyce."

"St. Louis, October 27, 1873.—President U. S. Grant, Washington, D. C.: It would be gratifying to your friends and the Republicans of our city, if Constantine Maguire could be appointed collector of revenue of the district. He is on Mr. Ford's bond, has the confidence of Mr. Ford's friends, and is really an honest, straightforward man, as well as capable. Henry T. Blow."

"St. Louis, October 27, 1873.—To President U. S. Grant, Washington: As your personal and political friends, we urgently request the appointment of Constantine Maguire as successor to our friend, the late C. W. Ford. Wm. H. Benton. Wm. McKee. John M. Krum."

On this subject the president testified as follows: "Q. (Handing witness a copy of telegram). I wish you would state what you know in relation to that? A. This dispatch seems to be dated 'Washington, October 27, 1873.—To Wm. H. Benton, Wm. McKee and John M. Krum: Your request in regard to collectorship will be complied with. (Signed) U. S. Grant' Those gentlemen were part of the bondsmen of Ford, and they had recommended Constantine Maguire for Ford's place as collector. Q. The original of that I believe is in your handwriting? A. Yes, I wrote that myself. I saw the original this morning."

The above are all the dispatches of October 27. On the next day the following:

"St. Louis, October 28, 1873.—To the President: We have the honor to recommend Col. Constantine Maguire for collector of internal revenue, First district Missouri. (Signed) John A. Joyce. C. A. Newcomb. Jno. McDonald. Wm. Patrick."

"St. Louis, October 28, 1873.—Gen. O. E. Babcock, Washington: See dispatch sent to president; we mean it; mum. John A. Joyce."

Letter of Joyce to the defendant:

"St. Louis, October 29, 1873.—Dear General: I heard from you in due course in regard to the collectorship, and went at once to 'see the bondsmen,' but found they were fixed on the man they had recommended, and not being in a position to induce them to act in my behalf, telegraphed as I have already done. Of course the telegrams to parties here revolving in and about the Globe office got out among the particular friends, and therefore the newspaper hawks got just enough of the action already had to spread themselves and tell more than anybody else knew. I am sure if the president acts upon the recommendation of the bondsmen, and what has been sent from the officers, the interest of the government will be secure, and the public generally will be satisfied. Words are not sufficient to convey to yourself and the president the pride I feel for the confidence thus far displayed in me in connection with the vacancy. I shall endeavor in my future actions to meet the good wishes of the president, and you will please convey to him my most hearty thanks for his kindness and confidence. Now that poor Ford is dead and gone I can tell you truly that there are few men on earth that can fill his place. I would like to telegraph and write you more confidentially; but as the interest of the government will be fully protected in your hands, I will say nothing further on the collectorship at present. The resolutions passed at a public meeting in honor of Ford's memory, I have already engrossed on parchment paper, and will forward to his sister and the president in a few days. I am, under all circumstances, your friend, etc., (Signed) John A. Joyce.

"Gen. O. E. Babcock, Washington, D. C.

"P. S. Gen. McDonald sends kindest regards."

Ford's Successor.

On the subject of the appointment of a successor of Mr. Ford, the president, whose deposition was taken on behalf of the defendant and read in evidence, testifies as follows:

"Q. State, please, what, if any, applications were made at the time of his decease as to the appointment of his successor. A. It is impossible for me to remember all the applications that were made for the place. I do recollect, however, that Gen. Babcock brought me a dispatch addressed to him by John A. Joyce, in which the latter practically applied for the position. Q. What other, if any, applications were made as to the appointment of a successor? But first let me enquire if you have the dispatch to which you have just made reference? A. I do not know. Q. Do you know where it is? A. I do not, but presume it could be found. I think it very likely that it is in possession of Gen. Babcock's counsel or of the district attorney. Q. Were there any requests or communications with regard to the appointment of Mr. Ford's successor from his sureties? A. When Gen. Babcock exhibited to me the dispatches from Mr. Joyce, I said to him that as Mr. Ford died away from home, and very suddenly, I would, in the selection of a successor, be to a great extent guided by the recommendation and wishes of his bondsmen. I thought they were at least entitled to be heard respecting the person to be selected, and upon whom would devolve the settlement of the affairs of the office. Q. What did you do with reference to the appointment, and to whom, if any one, did you decide to leave the nomination of Mr. Ford's successor? A. That information is

embraced in the answer just given. Q. Whom did the bondsmen actually recommend? A. Constantine Maguire. Q. And on their recommendation exclusively he received the appointment? A. I could not say exclusively, because he was well recommended and was satisfactory to the bondsmen of Mr. Ford. Q. Did Gen. Babcock ever, in any way, directly or indirectly, urge, or request, or seek to influence the appointment of Mr. Maguire, or did he ever exchange a word with you upon the subject which indicated that he desired his appointment? A. I do not think he ever did; nor do I believe that he was aware of the existence of Constantine Maguire prior to his recommendation as the successor of Mr. Ford. Q. Did you inform Gen. Babcock that you intended to leave the naming of Mr. Ford's successor to his bondsmen? Did you request him so to notify the parties? A. The question has, I think, already been answered. Q. It embraces perhaps this addition: Did you request him to notify the parties? A. I do not remember."

On his cross examination, the president, in answer to questions by the counsel for the government, testified on the subject as follows:

"Q. Do you remember whether John A. Joyce was recommended to you as Ford's successor, by General Babcock? A. He was not. Q. Was any thing said to you by General Babcock, between the time of the death of Ford and the appointment of Constantine Maguire, touching Joyce's fitness for the place? A. General Babcock presented me a dispatch that he had received from Joyce, saying that he was an applicant, or making application for it; I do not remember the words of it; the substance of it was that he wanted to be Ford's successor; my reply to him was, that I should be guided largely in selecting the successor of Mr. Ford by the recommendation of his bondsmen; he having died suddenly, unexpectedly, and away from home, I thought they were entitled to be at least consulted as to the successor who should settle up his accounts. Q. Did you advise General Babcock to telegraph to Joyce to get the bondsmen of Ford to recommend Joyce for collector? A. I made the statement, in substance, that I have given in answer to a former question; whether I told him to so telegraph or not, it would be impossible for me to say; that might be regarded as at least authority to so telegraph. Q. Did you see any telegram of that character from Babcock to Joyce at that time? A. I do not remember to have seen any. Q. Did Gen. Babcock at that time show you a dispatch from Joyce in these words: 'St. Louis, October 28, 1873.—See dispatch to the president. We mean it. "Mum." (Signed) Joyce'? A. I do not think that my memory goes back to that time; since these prosecutions have commenced I have seen that. Q. I am asking you in regard to that time? A. I do not recall it to memory. Q. Did you receive a protest against the appointment of Constantine Maguire, signed by James G. Yeatman, Robert Campbell, and others? A. I do not remember such a letter. If such a one was received, it is, no doubt, on file in the treasury department. Such a protest may have been received. Q. Your purpose in leaving the nomination of Mr. Ford's successor to his bondsmen was because they were liable on his bond for the administration of his office, was it not? A. Yes, sir. Further than that, some of them were men that I knew very well and had great confidence in."

Unless we have overlooked something, this constitutes all the evidence produced on either side upon the subject of the appointment of Mr. Ford's successor. If we have omitted anything which the counsel on either side think material, they have leave to call it to our attention at this time, or the omission may be supplied by the jury. Upon this testimony two questions of fact concerning it arise for the decision of the jury. 1. Whether the defendant did, in point of fact, seek to influence the appointment of Mr. Ford's successor. 2. If so, whether he did this for the unlawful purpose alleged, that is, knowing that there was in existence such a conspiracy as is charged in the indictment, and thus knowing it, sought to exert such influence to aid and promote the illegal purpose of Joyce or the other conspirators in this city.

Joyce's Trip to California.

The next class of dispatches relates to the order for Joyce to visit California, and are as follows:

"Washington, March 7, 1874.—John A. Joyce, Revenue Agent, St. Louis, Mo.: I need an agent to make investigations at San Francisco, in place of Sewell, confirmed as supervisor and ordered home. Can you go for me, say for two months? J. W. Douglass, Commissioner."

"St. Louis, March 8, 1874.—Hon. J. W. Douglass, Commissioner Internal Revenue, Washington, D. C.: Shall be pleased to serve the honorable commissioner at San Francisco, or any other place where my work can benefit the government. Before starting to California would like to consult you and receive instructions. John A. Joyce, Revenue Agent."

"Washington, March 9, 1874.—John A. Joyce, Revenue Agent, St. Louis, Mo.: Not necessary to come here. Will write you full instructions care of the supervisor of San Francisco. J. W. Douglass, Commissioner."

On the same day, March 9th, the commissioner telegraphed leave to Hogue to go out of his district to follow up cases of fraud, and a night telegram from Washington, not from the defendant, but over the signature of "Mack," was sent to Joyce, at St. Louis, stating that "if sickness of your family prevents your going West, R. A. Hogue may pay you a visit."

Following that telegram were these, viz.:

"St. Louis, March 10, 1874.—Hon. J. W. Douglass, Commissioner Internal Revenue, Washington, D. C.: When will my instructions to go to California be here? John A. Joyce, Revenue Agent."

"Washington, March 10, 1874.—John A. Joyce, Revenue Agent, St. Louis, Mo.: Full instructions will be mailed to San Francisco. J. W. Douglass, Commissioner."

"Washington, March 11, 1874.—H. Brownlee, Revenue Agent, Newcastle, Ind.: You have permission to follow evidences of fraud out of your district. J. W. Douglass, Commissioner."

"March 11, 1874.—Col. John A. Joyce, Revenue Agent, St. Louis, Mo.: Did you receive Mack's telegram? Your friends will doubtless make you a visit. Wm. O. Avery."

"St. Louis, March 11, 1874.—Col. Wm. O. Avery, Internal Revenue Office, Washington, D. C.: Telegrams received. Start for San Francisco Sunday night. All perfect here. Joyce."

"St. Louis, March 14, 1874.—Gen. O. E. Babcock, Executive Mansion, Washington, D. C.: Start for San Francisco to-morrow night. Make D. call off his scandal-hounds, that only blacken the memory of F. and friends. Business. J."

This was written and sent by Joyce; only one, and that the last of this series, was addressed to the defendant. To it he wrote this answer by mail:

"Washington D C., March 17, 1874.—Dear Joyce: I received your telegram just before you left. I have seen D., and he assures me that no mention has ever been made of Ford's name in the matter of a brewery, and he says there are no charges against any official out there, that it is against a brewery. I do not know your instructions or trip to San Francisco. I think, though, that it is because D. trusts you to do important work. I hope you will have a pleasant trip, and a successful. Nothing new here. All well. Yours truly etc., etc. O. E. Babcock. To Col. J. A. Joyce, Girard Hotel, San Francisco, California."

In this connection the jury should bear in mind that Douglass testifies that the defendant visited the former to enquire if there were any charges in his (the commissioner's) office against Ford, and that the commissioner said there were none; also the relations which Ford bore in his life-time to the president, as especially shown by the latter in his deposition And also Douglass's testimony to the effect that the defendant did not, in any way, seek to prevent investigation into frauds on the revenue, and also the reasons for sending Joyce to California.

The prosecution claims that the purpose of Joyce in appealing to the defendant under pretense of protecting the memory of Ford, was merely to prevent investigations into frauds in St. Louis during his (Joyce's) absence in California, and that the defendant knew of Joyce's guilty purpose, and sought to aid therein.

On the other hand, the counsel for the defendant insist that the testimony distinctly proves that whatever may have been Joyce's purpose, the defendant merely enquired, as Douglass testifies, whether there were any charges against Ford, and denies explicitly that anything was asked as to proposed investigations in St. Louis district. What defendant did on receiving the dispatch from Joyce, depends largely, if not entirely, on the testimony of Douglass, just referred to. It is not here rehearsed in detail, but if the jury are in doubt as to the statements of Douglass on this point, an official copy of his evidence will be furnished to them.

Joyce's Visit to Washington—Telegrams.

It appears that Joyce proceeded to California pursuant to the orders of the commissioner, and returned by leave in June, 1874, and, at his own request, visited Washington as early as July 1, 1874. While in Washington, the following dispatches passed between him and McDonald:

"Washington, July 1, 1874.—John McDonald, St. Louis: Things look all right here. Let the machine go. Joyce."

"Washington, July 3, 1874.—John McDonald: Matters are hunkey. Go it lively and watch sharply. Joyce."

"Washington, July 17, 1874.—John McDonald, St. Louis: Am here on my return. What can I do for our side? Joyce."

"St. Louis, July 18, 1874.—John A. Joyce, Washington: See Maguire's letter to the commissioner concerning Busby's house, sure. John McDonald."

The Projected Tour of Brooks and Hogue.

The next group of telegrams is supposed to relate to the projected visit of Brooks and Hogue to St. Louis. Rogers, the deputy commissioner, testifies that the plan to send them to St. Louis was formed in August, 1874. You have heard what was done in respect thereto, the frequent postponements that occurred and the reasons given therefor. In this connection your attention is directed to the following:

"St. Louis, August 5, 1874.—Col. Wm. O. Avery, Treasury Department, Washington, D. C.: Have friends started West again? Find out—let me know. A."

This telegram was in the handwriting of Joyce, and was a night dispatch.

"Cincinnati, O., August 6, 1874.—J. W. Douglass, Commissioner Internal Revenue, Washington, D. C.: I have just received important information showing extensive frauds in St. Louis in 1871 and 1872. If one W. A. Woodward applies for special commission to attend to this matter, it is not necessary. I have the same information he has, and more conclusive. Send Brooks and we can bring all out that is in this matter. Answer. Hogue, Revenue Agent."

From the evidence as to Hogue's conduct from early in 1874 to the close of the alleged conspiracy, the jury may be able to deter-

mine the force and significance of the telegrams just read, as also that from Joyce to Avery, dated August 5, a night dispatch.

"St. Louis, August 26, 1874.—Col. Wm. O. Avery, Chief Clerk, Treasury Department, Washington D. C.: Are friends coming West? See H. and give me soundings."

This is in Joyce's handwriting. Whether "H." referred to Hogue or some other person is not directly shown in evidence.

This was also a night dispatch:

"Washington, October 17, 1874.—John A. Joyce, St. Louis, Mo.: Your friend is in New York and may come to see you. Avery."

According to Brooks's testimony, he (Brooks) had been in Washington with reference to the projected visit to St. Louis, and was in New York under orders of the commissioner on October 17, 1874.

"St. Louis, October 18, 1874.—Col. Wm. O. Avery, Treasury Department, Washington, D. C.: Give me something positive on movements of friend; act surely, prompt. A."

This was a night dispatch from Joyce:

"St. Louis, October 25, 1874.—Gen. O. E. Babcock, Executive Mansion, Washington, D. C.: Have you talked with D.? Are things right? How? J."

This was a night dispatch from Joyce, and was not answered, nor does it appear so far as we can see, from Mr. Douglass's testimony, that it was ever acted on. If our memory is at fault in this respect, you will correct the omission.

Pursuant to telegraphic orders from Washington, Hogue was to be in St. Louis November 13. From the testimony it seems that he arrived here on November 12, and remained to the 19th, but did not put his name on the hotel register until the 19th—the day he left.

On November 23, Hogue was ordered to report at Washington in person at once, the telegraphic order having been directed to Xenia, O. On November 26, he telegraphed that he had been detained by sickness in his family, and would report on the 1st of December following. He reached Washington on December 3, and Brooks was summoned on that day to Washington to meet Hogue.

Joyce sent a night dispatch as follows:

"St. Louis, December 3, 1874.—Gen. O. E. Babcock, Executive Mansion, Washington, D. C.: Has secretary or commissioner ordered anybody here? J."

This was not answered.

As Brooks could not go to Washington on December 3, Hogue went to Philadelphia to meet him, and on December 7 both went to Washington, where Brooks remained until noon, of December 8. On November 24, Brooks had written this letter:

"United States Secret Service, 56 Bleeker Street, New York, November 21, 1874.—To H. C Rogers, Deputy Commissioner, Washington, D C —My Dear Sir: I am summoned in the United States court at Philadelphia, on Monday, the 23d. The cases will probably be disposed of on that day, so that I can be at Washington on Tuesday. If possible, please have Mr. Hogue there by that time, and may I ask that any western case you think we can work, shall be put in such a state as we can take charge of it, and so make the trip profitable to the department, and satisfactory to ourselves. Very respectfully, Jas. J. Brooks, Special Agent."

On December 7, the same day that Brooks and Hogue arrived at Washington from Philadelphia, McDonald also arrived there. On the 8th he informed Rogers that he knew revenue agents had been ordered to St. Louis, and protested against such action.

Whilst then in Washington, he sent the following telegrams:

"Washington, D. C., December 7, 1874.—Col. John A. Joyce, Planter's House, St. Louis, Mo.: Had long ride with the president this afternoon. B. and H. are here, you will hear from me to-morrow. John."

"Corridor House of Representatives, December 8, 1874.—John A. Joyce, Planter's House, St. Louis, Mo.: Dead dog; goose hangs altitudelum; the sun shines. John."

"December 9, 1874.—Col. John A. Joyce, Planter's House, St. Louis, Mo.: I leave to-night for New York—stop at Windsor House; will telegraph you from there. John."

On or about December 10, 1874, the defendant had an interview with Commissioner Douglass, and showed to him a copy of Brooks's letter to Rogers, dated November 21, 1874, the original of which Rogers said had been taken surreptitiously from his desk by some one unknown to him. It is admitted that the defendant did not abstract that letter from Rogers's office; he urged on Douglass that the phraseology of the letter indicated blackmailing purposes, and suggested the employment of a superior class of persons for the intended work; the conversation on that subject as detailed by Mr. Douglass, must be fresh in your memory.

The president in his deposition, states, concerning that matter, as follows:

"Q. Did Gen. Babcock, so far as you know, ever seek in any way to influence your action with reference to any charges made, or proposed to be made against Joyce or McDonald? A. I do not remember of his ever speaking to me upon the subject; he took no lively interest in the matter, or I should have recollected it. Q. Did Gen. Babcock, so far as you know, ever seek in any way to influence your action in reference to any investigation of the alleged whisky frauds in St. Louis or elsewhere? A. He did not. I will state at this point, that I do not remember but one instance where he talked with me on the subject of these investigations, excepting since his indictment. It was then simply to say to me that he had asked Mr. Douglass why it was his department treated all their officers as though they were dishonest persons, who required to be watched by spies, and why he could not make inspections similar to those which prevailed in the army,

selecting for the purpose men of character who could enter distilleries, examine the books and make reports which could be relied upon as correct. Gen. Babcock simply told me that he had said as much to Mr. Douglass. Q. Do you remember the circumstance of John McDonald being in the city of Washington on the 7th day of February, 1874? A. I do not remember the particular date; I remember the time in question. Q. Did you ride with him (McDonald) on or about that date or occasion, and was anything whatever said by him to you with reference to the investigation of alleged frauds in that district? A. I picked him up on the sidewalk as I was taking a drive, and invited him to go with me; I have no recollection of any word or words on any matter touching his official position or business. Q. If I understood correctly the answer, Gen. Babcock's conception was, that in making this investigation it would be wiser to have it done by men of superior character than by men of inferior and suspicious character? A. Yes, sir. Q. Did Gen. Babcock, at or about that time, say anything to you with reference to such investigations, and, to your knowledge, did he in any way undertake to prevent them? A. I have no recollection of his saying anything about that. Certainly he did not intercede with me to prevent them."

On the cross-examination the president said: "Q. Do you remember that Gen. Babcock, prior to May, 1875, talked with you about the propriety of sending detectives into the several districts to detect frauds? A. I do. I remember of his telling me at one time of what he had proposed to Mr. Douglass, but the date of it I do not remember. And that was not a suggestion to me; it was merely telling me what he had suggested to Mr. Douglass, and this is the same that I have before stated. Q. Did you have any conversation with Gen. Babcock prior to May, 1875, in reference to a letter written by J. J. Brooks to deputy commissioner Rogers? A. I do not remember dates, but I remember of his showing me a letter that had been handed to him from somebody in Philadelphia to Mr. Rogers, and he said that that appeared to his judgment to be simply blackmailing; and I think that was the occasion when he told me what he had said to Mr. Douglass, that is, as I remember now. Q. Do you remember when that conversation was? A. No, I do not. My recollection is that he had shown that letter to Mr. Douglass before he did to me, and that was the occasion when he told me of his suggestion."

On December 13, 1874, the defendant and Douglass had a conversation in Washington, while walking, in the course of which Douglass informed the defendant, that the proposed visit of Brooks and Hogue to St. Louis was "off." The following night dispatch was sent by the defendant:

"Washington, D. C., December 13, 1874.—Gen. John A. McDonald, St. Louis, Mo.: I succeeded. They will not go. I will write you. Sylph."

We have thus endeavored to recall the more important portions of the testimony with reference to this branch of the case; your memory will supply the minor details.

The theories, both of the government and of the defendant with respect thereto, have been so fully and elaborately discussed as to require no special comment from the court in this immediate connection.

Transfer of Revenue Officials. As to the Order Transferring Supervisors and the Suspension of that Order.

Passing to another part of the case, it appears from the testimony of Douglass, Tutton, and the president, that an order was issued about January 27, 1875, transferring supervisors and revenue agents from one district to another, in the supposed interests of the revenue service, and for the detection and prevention of frauds. Mr. Douglass and Mr. Rogers have stated the conversation defendant had with them respectively on the subject, and concerning the impolicy of the order and the reasons assigned to them in support of his views. The prosecution claims that he actively interfered to cause the suspension of that order for the guilty purpose of aiding the conspiracy in St. Louis.

Mr. Douglass testifies that letters for the various transfers were mailed January 27, 1875.

On February 3, the following telegrams were sent and received:

"St. Louis, Mo., February 3, 1875.—Hon. J. W. Douglass, Internal Revenue Office, Washington, D. C.: Don't like the order. It will damage the government and injure the administration. Will explain when I see you. John McDonald."

"Washington, D. C., February 3, 1875.—John McDonald, Supervisor, St. Louis, Mo.: The order of transfer is general and only temporary. J. W. Douglass, Commissioner."

"St. Louis, February 3, 1874.—Gen. O. E. Babcock, Executive Mansion, Washington, D. C.: We have official information that the enemy weakens. Push things. Sylph."

This was written by Joyce, and was a night dispatch and unanswered.

"Washington, February 4, 1875.—Gen. John McDonald, Supervisor, St. Louis, Mo.: The order transferring you to Philadelphia is suspended until further orders. J. W. Douglass, Commissioner."

"Washington, February 5, 1875.—John A. Joyce, Revenue Agent, St. Louis, Mo.: The order directing you to report to Supervisor McDonald, at Philadelphia, on the 15th, is suspended. J. W. Douglass, Commissioner."

Joyce seems to have been in Washington at that time and several telegrams subsequently passed between him and McDonald, as follows:

"St. Louis, February 5, 1875.—To Col. John A. Joyce, Ebbitt House, Washington: Order

to transfer to Philadelphia is suspended. John McDonald, Supervisor of Internal Revenue."

"Washington, February 6, 1875.—To Gen. John McDonald, Planter's House, St. Louis, Mo.: Order busted forever. D. & Co. mad. Hold things level. Kearney."

(This was written by Joyce.)

"Washington, February 10, 1875.—Gen. John McDonald, Supervisor of Internal Revenue, St. Louis, Mo.: Start home to-night. Things look lovely. Watch and wait. John."

It is admitted that this was also written by Joyce. These dispatches indicate that Joyce left St. Louis for Washington on the 4th of February, and did not leave Washington for St. Louis before the 10th:

"Washington, D. C., March 1, 1875.—General John McDonald, Supervisor of Internal Revenue, St. Louis, Mo.: Letter received; have seen the gentleman, and he seems friendly; is looking after improvements of the river. O. E. Babcock."

You have heard from Commissioner Douglass, Revenue Agent Tutton, and the president, their respective statements concerning the suspension of the order for the transfer of supervisors and revenue agents. Mr. Tutton stated his interview, first with the commissioner and next with the secretary of the treasury, to whom he presented his reasons for advising a suspension of that order. He stated, as the result of his conversation with the secretary, that the latter acquiesced in the propriety of his suggestions, and requested him to call on the president and present the subject to him. He testified that he did as thus requested, and gave at considerable length what he said to the president in favor of suspending the order. He stated that his interviews with the secretary and president were on February 3d, and within about two hours of each other; and, before leaving the president, the latter announced that he should at once cause the order to be suspended. The following is the order:

"Executive Mansion, Washington, February 4, 1875.—Sir: The president directs me to say that he desires that the circular order transferring supervisors of internal revenue be supended by telegraph until further orders. (Signed) Levi P. Luckey."

The following is what the president testifies to on that point:

"Q. Do you recollect the circumstances attending the promulgation of an order transferring the various supervisors from their own to other districts. A. I do. Q. State fully with whom the idea upon which that order was based originated, and the particular reasons which induced you to direct it to be so? A. Some time when Mr. Richardson was secretary, I think, at all events, before Secretary Bristow became the head of the department, Mr. Douglass, in talking with me, expressed the idea that it would be a good plan occasionally to shift the various supervisors from one district to another. I expressed myself favorably toward it, but it was not done then; nor was it thought of any more by me until it became evident that the treasury was being defrauded of a portion of the revenue that it should receive from the distillation of spirits in the West. Secretary Bristow at that time called on me, and made a general statement of his suspicions, when I suggested to him this idea. On that suggestion, the order making these transfers of supervisors was made. At that time I did not understand that there was any suspicion at all of the officials, but that each official had his own way of transacting his business. These distillers, having so much pecuniary interest in deceiving the officials, learn their ways and know how to avoid them. My idea was, that, by putting new supervisors, acquainted with their duties, over them, they would run across and detect their crooked ways. This was the view I had, and explains the reason why I suggested the change. Q. Can you state whether Mr. Douglass, at that time commissioner of internal revenue, was aware of the fact that you suggested or made the order? A. I do not know that he knew anything about it. Q. After the order had been finally issued, were any efforts made to induce you to order its revocation or suspension? A. Yes, sir; most strenuous efforts. Q. Were such efforts made by prominent public men? A. They were. Q. Did you resist the pressure which was made upon you for revocation or suspension of the order; and if you finally decided to direct the revocation of the order, will you please state why you were induced to do so, and by whom? A. I resisted all efforts to have the order revoked, until I became convinced that it should be revoked or suspended in the interests of detecting frauds that had already been committed. In the conversation with Supervisor Tutton, he said to me that if the object of that order was to detect frauds that had already been committed, he thought it would not be accomplished. He remarked that this order was to go into effect on the fifteenth of February. This conversation occurred late in January, and he alleged that it would give the distillers who had been defrauding the treasury three weeks notice to get their houses in order, and be prepared to receive the new supervisor. That he himself would probably go into a district where frauds had been committed, and would find everything in good order, and he would be compelled so to report. That the order would probably result in stopping the frauds, at least for a time, but would not lead to the detection of those that had already been committed. He said that if the order was revoked, it would be regarded as a triumph for those who had been defrauding the treasury. It would throw them off their guard, and we could send special agents of the treasury to the suspected distilleries—send good men, such an one as he mentioned, Mr.

Brooks. They could go out and would not be known to the distillers, and, before they could be aware of it, the latter's frauds could be detected. The proofs would be all complete, the distilleries could be seized and their owners prosecuted. I was so convinced that his argument was sound, and that it was in the interest of the detection and punishment of fraud that this order should be suspended, that I then told him that I would suspend it immediately, and I did so without any further consultation with any one. My recollection is, that I wrote the direction for the suspension of the order on a card, in pencil, certainly before leaving my office that afternoon, and that order was issued and sent to the treasury, signed by one of my secretaries. Q. Did General Babcock ever, in any way, directly or indirectly, seek to influence your action in reference to that order? A. I do not remember his ever speaking to me about it or exhibiting any interest in the matter. Q. From anything he ever said or did, do you know whether he desired that the order should be revoked or suspended? A. That question, I think, has been fully answered. Q. You have said that you resisted the pressure brought to bear upon you, by prominent men, in regard to the suspension or revocation of the order transferring supervisors. If you have no objection, will you please state the names of those prominent men who brought that pressure to bear against you? A. There were many persons, and I think I could give the names of several senators, and probably other members of congress; but probably I should have to refer to papers that are on file; I do not know that it is material; I know that the pressure was continual from the supervisors and their friends. Q. Can you, from memory, name any senator or representative? A. I could name two or three, but I do not believe it is necessary."

Correspondence with Major Grimes, etc.

The prosecution has also offered the testimony of Major Grimes to show that the defendant sent under cover to him (Major Grimes) three letters to McDonald, after the latter had been indicted. Neither the prosecution nor the defence has produced these letters or shown their contents.

The jury, in cases of this kind, are not at liberty, under the rules prescribed by law, to conjecture what their contents were, but are to receive that fact as a circumstance indicating that the parties thereto were in correspondence with each other on some subject undisclosed, and to consider the time when said correspondence took place and the manner in which it occurred.

The defendant has produced several letters from Joyce to himself, for the purpose of explaining the nature of their correspondence with each other. He has also shown, by the testimony of the president and of many other witnesses, that the duties of his office made him a kind of intermediary between the president and those having business with the latter or the several departments at Washington. These facts it is for you to consider in reaching a conclusion. They may serve to explain what otherwise might appear obscure, and hence are important in any aspect which you may view the evidence in regard to the respective theories advanced.

Declarations and Dispatches—Legal Rules.

Various classes of dispatches, as you will have perceived, have been laid before you—some to the defendant and some from him; some between confessed conspirators, not referring to the defendant, and unaccompanied by proof that he knew of them; and other dispatches between revenue officers and agents of the government. The dispatches between other persons than the defendant are no evidence to show his connection with the conspiracy, unless they are brought home to him. They were admitted to show the nature and purpose, the plan and operations of the conspiracy.

Guilt cannot be fastened upon any person by the declarations or statements, oral or written, of others. Guilt must originate within a man's own heart, and it must be established by his own acts, conduct or admissions. Hence, in determining the question of the defendant's guilt, so far as it is sought to be shown by the dispatches, primary reference must be had to the dispatches to and from the defendant, and more especially such dispatches as he is shown to have answered or acted on. If the dispatches to and from the defendant, in connection with the other facts and circumstances in the case, show that he knew of the alleged conspiracy, and that he was a guilty participator therein, then the dispatches of his fellow conspirators among themselves, or to others, sent for the purpose of promoting the conspiracy, become evidence against the defendant, but not otherwise. What weight, if any, is to be given to the dispatches which are not shown to have been acted upon by the defendant, must depend, among other considerations, upon whether an answer was called for or not, and upon his associations with the persons sending the same; what they import on their face, and whether he knew that the senders were engaged in the conspiracy alleged in the indictment. For it must be understood that, under the established rules of the law, the various acts and declarations of persons, other than the defendant, are not evidence to show that he was one of the conspirators—for no man's connection with a conspiracy can be legally established by what others did in his absence and without his knowledge and concurrence.

You will also remember, gentlemen of the jury, that confessed conspirators in St. Louis testified that they were frequently warned of proposed visits of agents of the revenue service to investigate frauds in this district.

Hence, one of the essential inquiries in this case is as to the sources of the information thus given.

According to the testimony of Brooks, he and Hogue, after a visit to New Orleans, arrived in this city on May 4, 1874, to make an investigation concerning the destruction of books at the establishment of Bevis & Fraser. There had been, in January preceding, an unsatisfactory report on that subject by the local officers here, in respect to which it is alleged that Joyce had visited Washington with fraudulent purposes, indicated by his dispatches, at the time, to McDonald, asking the latter to send his report. The result of the investigation by Brooks and Hogue, when they were here, was the institution of judicial proceedings which culminated in the payment of $40,000, by Bevis & Fraser, to the government, by way of compromise. Mr. Brooks testified that, while here, he cautioned Hogue against his familiar association with persons in this city, who, though not then considered connected with frauds, are now known to have been actively engaged in them.

The letters of Hogue to Bingham show that, early in 1874, if not previously, he (Hogue) had been corrupted, and was working persistently in aid of the conspirators by conveying the information essential to the success of their fraudulent schemes. Bingham had distilleries in Indiana and one here, and information given him by Hogue was sent to Barton, Bingham's superintendent in St. Louis, and by that superintendent promptly communicated to the other conspirators in this city. It appears that Hogue was in St. Louis from the 12th to the 19th of November of that year, his name being omitted from the hotel register until the day he left. About that time, the conspirators here paid him, as a bribe, the sum of $10,000, and his letters indicate that he worked for a long period, and, down to the seizure in St. Louis, in the interests of the conspirators.

The telegraphic dispatches to and from Avery, who was, part of the time, chief clerk in the treasury department, and, part of the time, chief clerk in the internal revenue bureau of Washington, are also before you, and also the frequent visits of McDonald and Joyce to that city, at times when arrivals at St. Louis of revenue agents were apprehended.

These significant facts it is for you to weigh, in order to determine whence the needed warnings to the conspirators came. The prosecution contends that the defendant gave from Washington the information needed by the conspirators here, and aided in preventing the visits here which the conspirators were anxious to avoid. The defendant contends, on the other hand, that Hogue furnished the needed warnings, and, perhaps, Avery also; that the defendant did not know of the existence of the conspiracy, and gave knowingly no aid thereto; that, as the conspirators had full sources of information through Avery and Hogue, they had no adequate motive in seeking his assistance as a member of the conspiracy, or in permitting him to know of their fraudulent schemes.

That Brashear and Hogue, two of the revenue agents sent here, were bribed by the conspirators remains uncontradicted. The facilities which Hogue enjoyed for learning the plans of the revenue authorities at Washington for the detection of frauds in the West, Rogers, Brooks, and Douglass show, and how he used these facilities for the benefit of the conspirators, his letters indicate. In the light of such testimony the jury should examine the alleged connection of the defendant with the conspiracy here, and weigh his acts, conduct, and declarations, oral and written. It is not so much from isolated facts and circumstances, as from all of them taken together, and duly weighed, that a right conclusion can be reached. It may often happen that one or many acts, or groups of acts, taken separately, will fail to establish the existence or nature of a general plan, when all of them, considered together in a careful and painstaking way, will show that there was a general and common plan, and disclose the nature and scope thereof.

We have thus endeavored to recall to your recollection the more prominent features of the evidence, not that any part thereof is to be excluded from your attentive and careful consideration, but, trusting that these references will bring to your memory the minor and other facts and circumstances, which may shed light on the case.

Testimony of Accomplices.

Some of the witnesses on the part of the government, on material and disputed points, are confessed members of the conspiracy, and under indictment therefor. Such a connection with the offence makes them accomplices, and it thus becomes necessary that the court should state to the jury the law touching the testimony of such witnesses. The rule of law is that accomplices are competent witnesses. That means that the parties have a right to have them sworn. It also implies that, when sworn, you shall consider their testimony. They are competent witnesses, and, under the legislation of congress, they may be compelled to testify. The testimony of conspirators is always to be received with extreme caution, and weighed and scrutinized with great care by the jury, who should not rely upon it unsupported, unless it produces in their minds the fullest and most positive conviction of its truth. It is just and proper, in such cases, for the jury to seek for corroborating facts in material respects. It is just and proper to do it. It is not absolutely necessary, provided the testimony of the accomplice produces in the minds of the jury, full and undoubting conviction of its truth.

Credibility of Witnesses.

To the jury exclusively belongs the duty of weighing the evidence, and determining the credibility of witnesses. With that the court has absolutely nothing to do. The degree of credit due to a witness should be determined by his character and conduct; by his manner upon the stand; his relation to the controversy and to the parties; his hopes and fears; his bias or impartiality; the reasonableness, or otherwise, of the statements he makes; the strength or weakness of his recollection, viewed in the light of all the other testimony, facts and circumstances in the case. If any of the witnesses are shown knowingly to have testified falsely on this trial, touching matters here involved, the jury are at liberty to reject the whole of their testimony on the trial of this case.

Character of the Defendant.

The defendant has produced an impressive array of witnesses of the highest character who have testified to his previous uniform and general good reputation, as a man of unquestioned integrity. This is competent evidence, and the good character of the defendant in this respect is a fact to be weighed and considered by the jury, in the light of which they should view all the evidence and determine the question of his innocence or guilt of the crime charged against him in the indictment.

The above is the settled rule of the law in all criminal cases, as well in those in which direct and positive evidence is relied on, as those in which the proof is circumstantial. But in cases of the latter kind the evidence of previous good character has more scope and force than in cases where the proof of the offence is positive and direct. In the language of an eminent judge, speaking upon this point: "There may be cases so made out that no character can make them doubtful; but there may be others in which evidence given against a person without character would amount to conviction, in which a high character would produce a reasonable doubt, nay, in which character will actually outweigh evidence which might otherwise appear conclusive." So that we repeat, the evidence on the subject of character is a fact fit and proper, like all the other facts in the case, to be weighed and estimated by the jury, who, when forming their conclusions upon the various facts and circumstances relied on against the defendant, will inquire and determine whether a person whose character is such as the defendant's has been stated to be by the witnesses testifying on that subject has or has not committed the particular crime for which he is called upon to answer. Whart. Cr. Law (7th Ed.) §§ 643, 644.

Circumstantial Evidence.

In cases depending upon circumstantial evidence, certain rules of law have long been settled, which it is essential that you should understand and apply. We adopt as a correct exposition of the law on this subject, the opinion of the court of appeals of New York:

"1. The hypothesis of delinquency or guilt (of the offense charged in the indictment) should flow naturally from the facts proved, and be consistent with them all.

"2. The evidence must be such as to exclude every (reasonable) hypothesis but that of his guilt of the offense imputed to him; or, in other words, the facts proved must all be consistent with and point to his guilt not only, but they must be inconsistent with his innocence." People v. Bennett, 49 N. Y. 144.

If the evidence can be reconciled either with the theory of innocence or of guilt, the law requires the jury to give the accused the benefit of the doubt, and to adopt the former. The burden of proof does not shift in criminal cases; it is on the prosecution throughout to establish the defendant's guilt by the evidence, and in criminal cases the defendant, not being permitted to testify, can not be called upon to explain or produce any proof until the prosecution, by the evidence it actually produces, establishes the defendant's guilt beyond a reasonable doubt. Chaffee v. U. S., 18 Wall. [85 U. S.] 516.

Degree of Proof.

The defendant, by the policy of our law, can neither be compelled nor permitted to testify.

As a substitute for this deprivation, the law clothes the defendant with a presumption of innocence, which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt- "beyond a reasonable doubt"—which means that the evidence of his guilt, as charged, must be clear, positive, and abiding, fully satisfying the minds and consciences of the jury. It is not sufficient, in a criminal case, to justify a verdict of guilty, that there may be strong suspicions, or even strong probabilities of guilt, nor, as in civil cases, a preponderance of evidence in favor of the truth of the charge against the defendant; but what the law requires is proof, by legal and credible evidence, of such a nature that when it is all considered by the jury, giving to it its natural effect, they feel, when they have weighed and considered it all, a clear, undoubting and entirely satisfactory conviction of the defendant's guilt. This, and this only, is required. But this much is required. If thus proved, the jury should convict; if not, they should acquit.

Conclusion.

We trust, gentlemen, that it is unnecessary to remind you that neither partisan feelings nor outside views should have the slightest influence upon your minds as jurors. In every free government it is not

only the right, but the duty, of each citizen to form and express, on all suitable occasions, his convictions and opinions as to the governmental policies and party organizations. It is natural and proper for him to join such a party as most nearly accords with his views. But such views and party associations should remain entirely outside of the jury box. No popular or partisan clamors, no extraneous wishes or considerations, no thoughts other than those which pertain to strictly impartial justice, can be permitted to invade the sanctity of the jury-room, to bias or warp, or even shade its deliberations, without destruction of the safeguard to life, liberty and property furnished through trials by jury. It has been often and forcibly said, that so long as trials by jury retain their full force, impartiality and purity, the liberty, and rights of the citizens, are alike safe against despotism and anarchy. If popular clamor usurp the judgment seat, the era of Marats and Robespierres will return, and frenzied faction sweep away all justice and right. So will justice be gradually undermined if outside influences are suffered insidiously to enter within that threshold where naught should be known save the sworn evidence in the case, and the rules of law as pronounced by the court—rules which the experience and wisdom of ages have demonstrated to be essential to the ascertainment of truth and the due administration of justice.

It will be a sad and shameful day for this country when courts and juries having lost their independence, shall sit simply to register the edict of popular opinion to acquit this man or convict that one.

Thus we commit this case, with all its issues, to your decision, and may the good Father of us all give you the light to see and the grace to discharge your duty.

NOTE. The jury returned a verdict of not guilty.

The indictment in the above case was framed upon section 5440 of the Revised Statutes, and is as follows:

The Indictment.

"United States of America, Eastern District of Missouri, ss: In the District Court of the United States, for the Eastern District of Missouri. At the November Term of said Court, A. D. 1875. The grand jurors of the United States of America duly impanelled, sworn, and charged to inquire in and for the eastern district of Missouri, on their oaths present that Orville E. Babcock and John A. Joyce, late of said district, on the first day of January, in the year of our Lord one thousand eight hundred and seventy-four, at the said district, did conspire, combine, confederate, and agree together among themselves, and with John McDonald, Joseph M. Fitzroy, Alfred Bevis, Edward B. Fraser, Rudolph W. Ulrici, Louis Teuscher, John Busby, Gordon B. Bingham, and John W. Bingham, with certain other persons, to the grand jurors aforesaid unknown, to defraud the United States of the internal revenue tax of seventy cents, then and there imposed by law upon each and every proof gallon of a large quantity, to-wit, one million proof gallons of distilled spirits, thereafter to be produced at certain distilleries, then and there situated in the city of St. Louis, within said district, to-wit, the distillery then and there occupied by the said Alfred Bevis and Edward B. Fraser, and then and there situated at the northeast corner of Barton street and DeKalb street, in said city of St. Louis, and within said district; the distillery then and there occupied by the said Rudolph W. Ulrici, and then and there situated at the southwest corner of Cedar street and Maine street in the said city of St. Louis, and within said district; the distillery then and there occupied by the said Louis Teuscher, and then and there situated at Nos. 2808, 2810, 2812, 2814, and 2816, inclusive, North Second street, in said city of St. Louis, and in said district: the distillery then and there occupied by the said John Busby, and then and there situated at the southwest corner of Cass avenue and Eleventh street, in said city of St. Louis and within said district; the distillery then and there occupied by said Gordon B. Bingham and John W. Bingham, and then and there situated at No. 1313 Papin street, in said city of St. Louis, and within said district. That afterward, to-wit, on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, and at the eastern district of Missouri, the said Alfred Bevis and Edward B. Fraser, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy, and agreement, so had as aforesaid, did remove from the said distillery situated as aforesaid at the northeast corner of Barton street and DeKalb street, in the said city of St. Louis, to a place other than the distillery warehouse situated upon and constituting a part of the distillery premises, to-wit, to a place to the jurors aforesaid unknown, a large quantity of spirits, to-wit, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents, then and there imposed by law upon each and every proof gallon thereof, had not been first paid, and thereby did then and there defraud the United States of said tax. That afterward, to-wit, on the said fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, and at the said eastern district of Missouri, the said Rudolph W. Ulrici, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy, and agreement, so had as aforesaid, did remove from the said distillery situated as aforesaid at the southwest corner of Cedar street and Main street, in the said city of St. Louis, to a place other than the distillery warehouse, situated upon and constituting a part of the said distillery premises, to-wit, to a place to the jurors aforesaid unknown, a large quantity of spirits, to-wit, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents then and there imposed by law upon each and every proof gallon thereof had not been first paid, and thereby did then and there defraud the United States of said tax. That afterward, to-wit, on the said fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, and at the said eastern district of Missouri, the said Louis Teuscher, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy, and agreement, so had as aforesaid, did remove from the said distillery, situated as aforesaid at Nos. 2808, 2810, 2812, 2814, and 2816, inclusive, North Second street, in the said city of St. Louis, to a place other than a distillery warehouse, situated upon and constituting a part of the said distillery premises, to-wit, to a place to the jurors aforesaid unknown, a large quantity of spirits, to-wit, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents, then and there imposed by law upon each and every proof gallon thereof, had not been first paid, and thereby did then and there defraud the United States of said tax. That afterward, to-wit, on the said fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, and at

the said eastern district of Missouri, the said John Busby, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy, and agreement, so had as aforesaid, did remove from the said distillery, situated as aforesaid at the southwest corner of Cass avenue and Eleventh street, in the said city of St. Louis, to a place other than the distillery warehouse situated upon and constituting a part of the said distillery premises, to wit, to a place to the jurors aforesaid unknown, a large quantity of spirits, to-wit, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents, then and there imposed by law upon each and every proof gallon thereof, had not been first paid, and thereby did then and there defraud the United States of said tax. That afterward, to-wit, on the said fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, and at the said eastern district of Missouri, the said Gordon B. Bingham and John W. Bingham, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy and agreement, so had as aforesaid, did remove from the said distillery situated as aforesaid at No. 1313 Papin street, in the said city of St. Louis, to a place other than the distillery warehouse, situated upon and constituting a part of the said distillery premises, to-wit, ten thousand proof gallons thereof, upon which said spirits the internal revenue tax of seventy cents, then and there imposed by law upon each and every proof gallon thereof, had not been first paid, and thereby did then and there defraud the United States of said tax. That afterward, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and seventy-four, and at the said eastern district of Missouri, the said John A. Joyce, in pursuance of, and in order to effect, the object of said conspiracy, combination, confederacy, and agreement, so had as aforesaid, did aid and abet in the removal from the said distillery of Alfred Beris and Edward B. Fraser, to a place to the jurors aforesaid unknown, of a large quantity of distilled spirits, to-wit, one thousand proof gallons thereof, upon each and every proof gallon of which said spirits the internal revenue tax of seventy cents, then and there imposed by law, had not first been paid, contrary to the form of the statute of the United States in such cases made and provided, and against their peace and dignity. David P. Dyer, United States Attorney for the Eastern District of Missouri."

Case No. 14,488.

UNITED STATES v. BABCOCK.

[4 McLean, 113.] [1]

Circuit Court, D. Michigan. June Term, 1846.

PERJURY—EXTRA-JUDICIAL OATHS—USAGE—MINISTERIAL OFFICER—INDICTMENT—FALSITY—MOTIVE.

1. Where a clerk of a circuit court administers an oath as to the travel of a witness, which is not required by law, nor by a rule of court, it is not false swearing, under the act of congress.

[Cited in Com. v. Kimball, 108 Mass. 476.]

2. The oath must be required by law, or by usage, sanctioned by the court, or the department of the government, to make it perjury.

[Cited in U. S. v. Howard, 37 Fed. 667.]

3. The act of congress applies to oaths made in behalf of claims against one of the departments of the government.

4. A ministerial officer can not institute a usage, which shall bring a case within the law.

[Cited in U. S. v. Evans, 2 Fed. 152.]

5. A voluntary or extra-judicial oath is not perjury.

6. The indictment should charge that the oath was false, and known to be so by the witness.

[Cited in Downey v. Dillon, 52 Ind. 449.]

7. Also, the motive must be stated in the indictment to be corrupt, or words equivalent.

[Cited in Downey v. Dillon, 52 Ind. 449.]

At law.

Mr. Norvell, U. S. Dist. Atty.

Mr. Bates, for defendant.

OPINION OF THE COURT. This is an indictment for perjury. The defendant is charged with having been duly summoned as a witness in the case of the United States v. John Allen [unreported], then pending in this court. That by his attendance he became entitled to five cents mileage in coming to and returning from the place of holding court. And the indictment charges, that in order to substantiate his claim against the United States for said mileage, and to procure payment therefor, he appeared before John Winder, clerk of this court, and then and there made his corporal oath, and answered to the question put to him by said clerk, that the distance from his place of abode to this court, was one hundred and seventy miles, whereas it was a much less distance, being ninety-two miles, etc. The indictment also charges that the defendant deceitfully and fraudulently, intending to defraud the United States by claiming and obtaining a larger amount of money than he was entitled to as a witness in the said cause, he did of his own wicked and corrupt mind, falsely swear as aforesaid in support of his said claim against the United States, etc. Other counts varied somewhat the charge, but not altering the allegations, substantially, as above stated. There was a general demurrer filed to the indictment, on the ground that the indictment charges no offense against the laws of the United States. In the 13th section of the act of congress of the 3d of March, 1825 [4 Stat. 118], it is declared, "If any person, in any case, matter, hearing, or other proceeding, when on oath or affirmation, shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and willfully swear or affirm falsely, every person so offending shall be deemed guilty of perjury, and shall, upon conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years." The oath in this case, as charged in the indictment, was not taken under any law of the United States: and this is necessary to bring the charge within the above act. The courts of the United States have no criminal jurisdiction, except that which is given to them by the laws of the United States. They can not punish common law offenses. In a criminal case, the defendant is entitled to a strict construction of

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

the law under which he is arraigned, and he can not be punished unless he is clearly within the law. But it is insisted that the offense comes under the 3d section of the act of the 1st of March, 1823. It reads, "If any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for willful and corrupt perjury." The objection to this law is, that it refers, exclusively, to claims made against the United States, through one of the departments of the government. The first part of the section refers to the disbursements or expenditures of public money; the second, where an individual swears in support of any claim against the United States. There can be little doubt that this section was intended to apply to the authentication of claims made to one of the departments. It is connected with the expenditures of public money, and was designed to protect the treasury from false oaths, in regard to such expenditures. But is the provision limited to such applications? May it not be held to embrace the present case? The oath was not required to be administered by any law of the United States, nor any rule of the court. It was a usage introduced by the clerk, in ascertaining the mileage that witnesses were entitled to claim. There can be no doubt that the clerk, in the presence of the court, or any other person acting under the sanction of the court, is authorized to administer oaths. It is the act of the court, in such a case, and not an act done by the authority of the individual who administered the oath. But where the clerk, out of court, in the ordinary performance of his duties, thinks proper to administer oaths, for his own convenience or security, which are not required by the law or an order of court, it is exceedingly doubtful whether such a swearing is within the above section.

The claim, in one sense, is against the United States, as the United States were a party to the suit, and the indictment avers that the claim was against them. But the oath was, substantially, only before the clerk, no record being made of it. The fact sworn to, conduced to fix the amount of compensation for traveling, as it established the distance, on which mileage was allowed. Had the law required this oath to be taken, or had it been required by an order of court, we should have had great difficulty in saying it was not perjury or false swearing, within one of the above sections. If the taking of the oath may be called a usage, it is the usage of the clerk, and not of the court. And it seems to be more than doubtful, whether an officer of the court, without any higher authority, should institute a usage which, to individuals, might be attended with consequences so serious. An extra-judicial oath lays no foundation for a prosecution of perjury. Indeed, the policy of multiplying oaths, is questioned by persons of the most enlarged experience. Make anything common, of this nature, and the solemnity which it would otherwise impart, is, measurably, lost. Custom house oaths, in all countries, have become a proverb and a reproach, and tend but little to secure the public against frauds. The clerk, by a rule of court, may be authorized to administer oaths. But in what cases? Surely not in all cases where he may deem expedient. In performing that duty, he must act under the authority of law, or under the orders of the court. He is a mere ministerial officer, and must, consequently, act under authority. The indictment seems to be defective in not averring that the oath was willfully, knowingly, and corruptly taken, knowing it to be false, or words of the same import. If the affiant swore falsely, through ignorance as to the distance in this case, he was not guilty. We do not say, that under either of the sections cited, the indictment must charge the offense with all the technical accuracy as in an indictment for perjury. But the averments must show that the defendant knew that he swore falsely, and that his motive was corrupt.

Upon the whole, the demurrer is sustained, and the defendant is discharged from custody.

Case No. 14,489.

UNITED STATES v. BABSON et al.

[1 Ware (450), 462.] [1]

District Court, D. Maine. June Term, 1838.

INFORMATION — CONCLUSION—RESISTING REVENUE OFFICER—SEVERAL OFFENCES.

1. In an action or information to recover a fine or penalty under a statute, the declaration must conclude against the form of the statute, or by words of equivalent import.

[Cited in Fish v. Manning, 31 Fed. 341.]

2. It is sufficient if the conclusion is contrary to the act of congress in such case made and provided.

3. The offence of resisting a revenue officer in the execution of his duty, under the act of March 23, 1823, c. 58 [3 Stat. 781], when several persons are concerned in it, is not joint, but the several offence of each individual; and there are as many penalties due as there are persons engaged.

[Cited in Re Ward, Case No. 17,144.]

[See Babson v. Thomaston Mut. Fire Ins. Co., Case No. 704.]

This was an information of debt filed by the district attorney to recover a penalty against the defendants for resisting a revenue officer. There were two counts in the information, one founded on the act of February 18, 1793 c. 8, § 31 [1 Stat. 316], for a penalty of 500 dollars; and the other on the act of March 3, 1823, c. 58, § 3, for a penalty of four hundred dollars. The verdict was for the plaintiffs. A motion was made to

[1] [Reported by Hon. Ashur Ware, District Judge.]

set aside the verdict, because the plaintiffs had not averred in the information that the act was done against the form of the statute.

Mr. Howard, U. S. Dist. Atty.
Mr. Rand, for defendant.

WARE, District Judge. The authorities relied upon by the defendant's counsel in support of the motion are Cross v. U. S. [Case No. 3,434], and Sears v. U. S. [Id. 12,592]. In both those cases it is ruled in general terms that in an action of debt for a penalty on a statute, the declaration must conclude against the form of the statute or it will be bad on error. In both those cases the averments were in the same form "whereby and by force of said acts the defendant hath forfeited and become liable to the United States," &c. This was held to be insufficient, principally upon the authority of Lee v. Clarke, 2 East, 333. In that case it was decided that when an offence is created by statute and there is a suit for the penalty, in whatever form the suit may be brought, whether by indictment or by action, the act must be distinctly averred to be against the form of the statute. The reason given for this rule of pleading in its application to indictments by Mr. Justice Lawrence, is that every offence for which a party is indicted is supposed to be prosecuted as an offense at common law, unless the prosecutor by reference to a statute shows that he intends to rely upon it. If it is no offence at common law the court will not look into the acts of parliament to see whether it has been made so by statute, unless the prosecutor refers to the act. Where the action is founded on two statutes, the conclusion should be against the form of the statutes, and it is at least doubtful whether in this case statute in the singular is good. Chit. Pl. 358. Com. Dig. tit. "Action upon Statute," 12. But in the case in East the court does not go so far as to say this averment must of necessity be in that precise formula most usually employed, "against the form of the statute," and that no form of words of equivalent value can be substituted for them. On the contrary, after an examination of the authorities, Lord Ellenborough stated the result to be, that in all cases where an action is founded upon a statute it is necessary in some manner to show that the offence, against which you proceed, is an offence against the statute. In the present case the averment is that the act is against the peace and dignity of the United States, and contrary to the act of congress in such case made and provided. This is precisely equivalent to the common formula, against the form of the statute, and admonishes the defendants as explicitly that the action is founded upon a statute as any form of words can. It seems to me that it must be held to be sufficient under the strictest rules of pleading.

Another question has been raised at the bar, whether the offence in this case is joint or several, whether each of the defendants is liable severally to the whole penalty, and there are as many penalties due as there are offenders, or whether all are jointly liable for a single penalty. There may be cases undoubtedly in which, though several persons concur in the offence, they may be all liable to but a single penalty. As when under the game laws of England several persons were sued for killing a hare, and it was held that it was but a single offence, and but one penalty was due. Hardyman v. Whitaker, 2 East, 571, note; Bull. N. P. 189. See also Rex v. Bleasdale, 4 Term R. 809. An action was brought against three defendants for impounding a distress, and in three different pounds, contrary to the act of 1 & 2 Phil. & M., and a judgment was rendered against each for the entire penalty, but it was reversed on error because it was but one offence, and but one penalty was due. Partridge v. Naylor. Cro. Eliz. 480. When an offence is created by statute of such a nature that several persons may concur in committing it, sometimes it may be a matter of difficulty to determine whether each individual is severally liable for the entire penalty, or all are liable jointly but for one. When the penalty is imposed on the offence it is said that but one penalty is recoverable, how many soever may be concerned in its commission. But if the penalty is imposed on the offender then there are as many penalties due as there are persons who concur in committing it. Esp. Pen. Act., 68. The rule as laid down by Lord Mansfield (Cowp. 610) is that where an offence made penal by statute is in its nature single and cannot be severed, then the penalty shall be single, though several persons join in the commission; but where the offence is in its nature several, each offender is separately liable for the penalty. In that case the offence was identical with the present, resisting custom-house officers in the execution of their duty. A general verdict of guilty was brought in against all, and it was moved in arrest of judgment that the offence was one, and that one penalty only could be recovered. But the motion was overruled and judgment rendered for the penalty against each. The offence was several, and each individual guilty of his own separate acts.

But the language of the statute on which this information is founded leaves no doubt as to the legislative intention. The terms of the act of 1823, c. 58, § 3, are, "if any person shall forcibly resist, prevent, or impede any officer of the customs, &c., such person so offending shall for every such offence be fined a sum not exceeding four hundred dollars." The language of the act of February 18, 1793, is, if possible, still more explicit. There can be no doubt that each individual who concurs in resisting or impeding an officer of the customs in the execution of his duty is liable for the entire penalty.

The attorney took judgment upon the first count founded on the act of 1823. Judgment was rendered against the master for four hundred dollars, and against the others for five dollars each and costs.

Case No. 14,490.

UNITED STATES v. BACHELDER.

[2 Gall. 15.] [1]

Circuit Court, D. New Hampshire. May Term, 1814.

OFFICER—OATH OF OFFICE—PRESUMPTIONS—OBSTRUCTING OFFICER—INDICTMENT—STATUTORY WORDS—PARTICULARS.

1. An officer of the customs, duly commissioned, and acting in the duties of his office, is presumed to have taken the regular oaths.

[Cited in U. S. v. Hudson, Case No. 15,412.]

[Cited in Com. v. Kane, 108 Mass. 425; Johnston v. Wilson, 2 N. H. 206; Jones v. Gibson, 1 N. H. 268; State v. Roberts, 52 N. H. 496; Sterling v. Warden, 51 N. H. 241.]

2. If the collector appoints and commissions an inspector, the approbation of the secretary of the treasury is presumed.

3. What is a sufficient allegation of a forcible impeding within the act of 2d of March, 1799, c. 128, § 71.

[Cited in Frelinghuysen v. Baldwin, 12 Fed. 397; U. S. v. Hughitt, 45 Fed. 49.]

[Distinguished in Lamberton v. State, 11 Ohio, 285.]

4. In an indictment for a statute offence, it is sufficient if the offence is substantially set forth, though not in the exact words of the statute.

[Cited in U. S. v. Quinn, Case No. 16,110; U. S. v. Hendrick, Id. 15,346.]

[Cited in Com. v. Nax, 13 Grat. 790; State v. Abbott, 31 N. H. 439. Cited in brief in State v. Chandler, 24 Mo. 371. Cited in State v. Gove, 34 N. H. 516; State v. Little, 1 Vt. 355; State v. Watson, 65 Mo. 74; Weinzorpflin v. State, 7 Blackf. 195.]

5. It is not necessary, in an indictment for resisting a public officer, to set forth the particular exercise of office, in which he was engaged, or the particular act and circumstances of obstruction.

[Cited in U. S. v. Hudson, Case No. 15,412.]

[Cited in State v. Fifield, 18 N. H. 36.]

[See Bachelder v. Moulton, Case No. 706.]

This was an indictment against the defendant for an obstruction of one Nehemiah Jones, an inspector of the customs, in the duties of his office. The indictment charged as follows: "That the said Bachelder, on the 10th day of October A. D. 1812, at Amherst, in said district, did with force and arms violently and unlawfully resist, prevent and impede Nehemiah Jones of, &c. in the execution of his office, as an officer of the customs for the port and district of Portsmouth in said New Hampshire district, he the said Nehemiah Jones, being then and there an officer of the customs as aforesaid, to wit, an inspector of said port and district of Portsmouth, duly appointed and authorized to seize goods imported into said New Hampshire district contrary to law, and being then and there in the peace of the said United States, and being also then and there in the due execution of his said office, as aforesaid, having then and there seized and holding in his possession for trial, as the duty of his office required, a certain trunk containing goods and merchandise, nineteen dozen of cotton hose, of the value, &c. as having been imported into the said United States, and into said New Hampshire district, contrary to law, and the said Bachelder then and there, with the same force and arms, did seize and wrest and carry away the said trunk containing the goods and merchandise aforesaid from the possession and custody of the said Jones, to a distant place." The defendant was arraigned and tried on the indictment at October term, 1813, and a verdict of guilty was found by the jury.

At the trial, STORY, Circuit Justice, for the court, after summing up the facts, stated to the jury, that if an officer of the customs be duly commissioned and be found acting in the duties of his office, the law presumes that he has taken the regular oaths until the contrary is shown. That if the collector of the district appoints and commissions an inspector, the consent and approbation of the secretary of the treasury, as required by the act of 2d of March, 1799, c. 128, § 21, is presumed until the contrary is shown. U. S. v. Sears [Case No. 16,247]. That if an officer of the customs has seized property as forfeited and it is tortiously taken away from him, while under his personal and immediate superintendence and custody, the law implies that the taking is forcible; and if the rescue be for the purpose of impeding or preventing him from following up his seizure and conveying the property to a place of security to wait a legal adjudication, it is a "forcible impeding" &c. within the meaning of the act of 2d of March, 1799, c. 128, § 71. That it is not necessary, on an indictment for such an offence, to prove that the property seized was actually condemned. It is sufficient if the officer were acting within the line of his duty, and his conduct be founded on probable cause of suspicion of illegal importation.

After the verdict, a motion was made in arrest of judgment for the insufficiency of the indictment; and at this term it was argued by Cutts & Mason for the defendant, and Mr. Humphreys, Dist. Atty., for the United States.

The counsel for the defendant argued, that the indictment was insufficient; because the offence was not specially set forth in the indictment, nor alleged in the language of the statute. The forms of indictments in England for obstructing custom-house officers state more specially the nature of the offence and the circumstances attending it. There is no allegation here, that the goods were illegally imported, or that the inspector had probable cause to suspect an illegal importation, or was searching for the purpose of ascertaining their character, and as

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

to the necessity of certainty in indictments they cited 4 Hawk. P. C. c. 25, § 29, &c. Further, the indictment does not allege the offence in the words of the statute. This is necessary, and the defect is fatal. 2 Hawk. P. C. c. 80, § 23. The manner and the special act of resistance ought also to have been set forth.

Mr. Humphreys, for the United States.

The indictment contains every material allegation required by the statute. It is true, that the exact words of the statute are not used, but words of the same meaning are; and it is sufficient to set forth the substance, without adhering to the technical wording of the statute. The word "violently," is equivalent to "forcibly."

STORY, Circuit Justice. The objections moved in arrest of judgment cannot prevail. It is not in general necessary, in an indictment for a statutable offence, to follow the exact wording of the statute. It is sufficient, if the offence be set forth with substantial accuracy and certainty to a reasonable intendment. The cases cited from the common law, where a different rule is supposed to prevail, do not apply. In those cases the very technical words used are those only, which constitute the specific offence. The law allows of no substitute in the indictment, because no other words are exactly descriptive of the offence. It is not necessary, in an indictment for the obstruction of public officers, to set forth the particular exercise of office, in which they were engaged at the time, or the particular act and circumstances of obstruction. These are properly matters of evidence; and so in fact are the best precedents. Cr. Cir. Comp. 161, 166, 176, 177. And this is a sufficient answer to the objection of a want of specific allegations as to any illegal importation, or just suspicion thereof. Admitting that the special statement as to these facts, in the indictment, were not sufficient; still the indictment contains a direct allegation of the substance of the offence, and the mere introduction of surplusage does not vitiate.

As to the objection, that the offence is not alleged in the words of the statute, it is certainly to be regretted, that an error, so easily avoided, should have crept in. The words of the act are, "if any person shall forcibly resist, prevent or impede, any officers of the customs, &c. in the execution of their duty," &c. The averment in the indictment is, that the defendant "did with force and arms violently and unlawfully resist, prevent and impede," &c. Now, even supposing that "violently and unlawfully" are not equivalent with "forcibly," still the objection must be overruled, for "forcibly" doing an act is merely doing an act with force; and therefore the offence is substantially stated. Judgment must therefore be entered on the indictment. Judgment against the defendant.

Case No. 14,491.

UNITED STATES v. BACKUS.

[6 McLean, 443.] [1]

Circuit Court, D. Michigan. June Term, 1855.

UNITED STATES — CLAIM AGAINST DECEDENT'S ESTATE—STATE PROBATE LAW—PRIORITY—LIMITATION—CONSTITUTIONAL LAW.

1. A state regulation that the estates of deceased persons shall be settled in the probate court, which shall appoint commissioners to adjust the claims against the estate, and prescribe the time within such claims must be presented, and if not presented, shall be barred, is not obligatory on the federal government, in the collection of its debts.

[See Backus v. The Marengo, Case No. 713.]

2. The amount claimed has been adjusted by the accounting department of the government, and must be collected under its own laws.

3. It has a priority of claim, and cannot, therefore, do any injustice to general creditors by enforcing its claim. A law of a state, which gives eighteen months before suit can be brought against executors, does not apply to a demand by the federal government.

4. If the act could be so construed, it would be in conflict with acts of congress, and would consequently be inoperative.

At law.

Mr. Hand, U. S. Dist. Atty.

Mr. Backus, for defendant.

OPINION OF THE COURT. This action was brought against H. F. Backus, James D. Doty, and Lindsey Ward, executors of Michael Drousman, deceased, to recover a balance due, from the estate of the deceased, as late post master at Mackinaw. These persons were appointed executors in the will of the deceased, and on the 11th of October, 1854, proof of the will was made in the probate court, and letters testamentary were granted. By the act of Michigan (Rev. Laws 1846, p. 290) in relation to the payment of debts and legacies of deceased persons, it is provided that when letters testamentary are granted the probate court is required to appoint "two or more suitable persons to be commissioners, to receive and examine and adjust all claims and demands of persons against the deceased, except in cases where no debts exist, or the value of the estate, exclusive of the furniture, shall not exceed one hundred and fifty dollars." This amount is assigned to the widow, and in law is a final administration, and bars all claims against the estate. At the time of granting letters, the probate court is required to "allow such time as the circumstances of the case shall require for the creditors to present their claims to the commissioners for examination and allowance, which time shall not exceed eighteen months; and all creditors are required to present their claims for the action of the commissioners within a limited time, or they shall be barred." The commissioners allow or disallow the claims

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

thus presented. All cases pending against the deceased at the time of his death, the statute requires to be presented against the executor for judgment, which when entered, shall be transmitted to the probate court, and the amount thereof shall be paid in the same manner as other claims duly allowed against the estate. Eighteen months were allowed by the probate court, for creditors to present their claims. The writ was returned served on Backus, and non est as to the others; and the declaration was filed against Backus, the other defendants not being served. The defendants pleaded the above statute, and alleged that the defendants not served were citizens of Wisconsin, and it was also alleged that this writ was brought, before the time expired allowed by the probate court, to the commissioners, for the adjustment of the claims against the estate, and that said court, under the statute, has exclusive jurisdiction over the estates of deceased persons, and that suit cannot be brought against the estate, until after the expiration of the time allowed, and in such form as the statute authorized, &c. To this plea the plaintiffs demurred.

The objection that two of the executors are citizens of Wisconsin, and consequently this action against the defendant is not sustainable, we think, is obviated by the provision of the act of February 25th, 1839, which declares, "that the non joinder of parties, who are not found within the district, shall constitute no matter of abatement, or other objection to the suit." By the statute, the judgment against the party served with process, shall not prejudice other parties. And we suppose that this provision applies as well to persons jointly liable as executors, as to any other joint liability. It is a well settled principle, that an executor is not liable to be sued, in any other jurisdiction than that under which the letters testamentary were granted. And if the suit must abate on the ground stated, the effect would be to defeat the demand of the government. The exclusive jurisdiction given to the probate court, in the settlement of decedents' estates, cannot affect the claims of the government, however it may bear on private claims. The mode of proceeding in the probate court, and the time given for the settlement of accounts, cannot regulate the claims of the government, nor affect the remedies given to it under its own laws. The demand in this case has been adjusted by the accounting department, under the laws of congress, and there can be no obligation to present the account for adjustment, to the probate court of Michigan. Such a rule of procedure, would subject the action of the federal government, to the regulation of a state government. The federal government being entitled to a priority over other creditors, by the enforcement of its demand, no injustice is done to the general creditors. It could not have been contemplated by the legislature of Michigan, that the law should apply to the general government as a creditor. Such a construction of the act is not required from its language. It is true, there is no exception in it, but the exception necessarily arises from the nature of the case. Executors are responsible under the laws of the state, but their liability attaches on the acceptance of the trust. The eighteen months given for the adjustment of accounts against the estate of the deceased, relates to the remedy, and cannot apply to a demand of the federal government. If the statute could be so construed, it would be in conflict with the laws of congress, and would be, consequently, inoperative. The demurrer to the plea is sustained.

Case No. 14,492.

UNITED STATES v. BACON et al.

[14 Blatchf. 279.] [1]

Circuit Court, N. D. New York. July 27, 1877.

QUI TAM ACTION — SPECIAL AGENT — ENTRY OF SATISFACTION—MOTION TO SET ASIDE.

C., as special agent of the post-office department, prosecuted an action given by statute, as well for himself as for the United States, to final judgment, against T., the avails of which, as to costs, would belong to him alone, and, as to damages, to him and the United States, in equal parts. The bond of T. and B., running to the United States alone, was taken in satisfaction of such judgment. A large part of the sum due on the bond was paid, and, out of it, the costs of the suit, belonging to C., were paid, and the balance was divided between him and the United States. Suit was then brought by the United States, on the bond, to recover the balance due on it, and judgment was obtained. Satisfaction of such judgment was entered, without payment made, by the law officers of the United States, by direction of the post-office department. C. moved to set aside the entry of satisfaction. *Held*, that the motion must be denied.

[See Bacon v. Stark, Case No. 715.]

Richard Crowley, U. S. Dist. Atty.
John H. Buck, for Carlisle.
George Wadsworth, for Bacon.

WHEELER, District Judge. This cause has been heard upon the motion of Frederick Carlisle to set aside the entry of satisfaction of judgment recovered therein as of the October term, 1870, entered by the law officers of the government of the United States, under direction of the post-office department, on the ground that the judgment had been obtained at his expense, and that one-half the damages and all the costs therein belonged to him, and that the satisfaction had been entered in violation of his right. From the documents and evidence made a part of the case for the purposes of this hearing, it appears, that he, as special agent of the post-office department, prosecuted an action given by the statutes of the United States, as well for himself as for the United States, to final judgment, against

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

Calvin F. S. Thomas and one Andrew F. Lee, the avails of which, as to costs, would belong to him alone, and, as to damages, to him and the United States, in equal parts; that the bond of Thomas and the defendant [Charles E.] Bacon, running to the United States alone, was taken in satisfaction of that judgment; that a large part of the sum due on the bond was paid by the obligors, or one of them, out of which the costs of the suit, belonging to Carlisle, were paid, and the balance was divided between him and the United States; that this suit was brought to recover the balance due on the bond, in which judgment for that balance, $33,021.98, was entered; and that satisfaction of that judgment was entered, without payment made, by the law officers of the government, by direction of the post-office department, to which branch of the government the control of the suit, so far as the government was concerned, belonged. From this statement, it appears clearly, that the bond, when taken, actually belonged to the United States and to Carlisle in equal parts. The ownership of it was precisely the same as that of bank notes would have been, if such notes had been taken in satisfaction of the same judgment. The bond ran, in terms, to the United States, but it was the same, in effect, as if it had run to the United States and to Carlisle. Then it would have been an obligation to him and the United States jointly. Now it was an obligation to the United States, as to one-half, in the right of the United States, and, as to the other, in trust for him. His right, in equity, was just the same as if it had run to both, but was not, either at law or in equity, any greater than as if it had so run. Both now and then the United States owned or would own one-half of it, and would have the right to release that half, either with or without satisfaction. After such release, no action could, in either case, be maintained by the owner of the other half. Not if made to the two, because neither could maintain an action on it without both; and both could not, for one had been satisfied. Ruddock's Case, 6 Coke, 25; 1 Pars. Cont. 26; Pierson v. Hooker, 3 Johns. 68; Wilson v. Mower, 5 Mass. 407; Eastman v. Wright, 6 Pick. 316; James v. Aiken, 47 Vt. 23. And not if made to the one, because that one had been satisfied for his part. Had the United States been the mere trustee of Carlisle, and he the real owner of the bond, the United States would have had nothing in it to release; and the court, in such a case, would always prevent a release or entry of satisfaction from having operation. But, here, the United States was nominally the sole, and, in reality, a joint, plaintiff, and, as such joint plaintiff, had the right, so far as the defendant was concerned, to release the action or the judgment in it. It was mentioned by Parsons, C. J., in Wilson v. Mower, and stated by Morton, J., in Eastman v. Wright, above cited, that, if a joint promisee unjustly releases an action, to the injury of others, they have a remedy by action. Whether Carlisle has a remedy otherwise than upon his motion, is not in question here. The only question is, as to whether the United States could release the action on the bond belonging to the United States and Carlisle. For the reasons stated it is considered that the release was valid, and the motion is denied.

Case No. 14,493.

UNITED STATES v. BADGER et al.

[6 Biss. 308.] [1]

Circuit Court, N. D. Illinois. Feb., 1875.[2]

OFFICERS — RESIGNATION — JUDGMENT AGAINST TOWN — MANDAMUS — RETURN.

1. Under the Illinois township organization law, the town officers continue to be such until their successors are qualified, and resignation does not relieve them from duty and liability.

[Cited in U. S. v. Justices of Lauderdale County, 10 Fed. 467.]

2. Where town officers had resigned in order to avoid auditing and paying a judgment against the town, it is not a sufficient return to an alternative writ of mandamus that the respondents, the officers, had resigned. If it does not also appear that their successors have been elected, or appointed, and qualified, they will be ordered to audit the judgment. And it seems that they may be ordered to hold a special meeting for that purpose.

Proceeding by mandamus to compel the officers of the town of Amboy, Lee county, in this state, to audit and report to the proper officers of the county of Lee certain judgments recovered in this court by Bolles & Co., against the town of Amboy.

Paddock & Ide, for relators.

Barge & O'Brien, for respondents.

BLODGETT, District Judge. It appears from the petition filed in this case, and from the records of the court, that at the May term of this court for the year 1874, the relators recovered two judgments against this town amounting in the aggregate to $2,517.40, including costs. Some time in August, 1874, after the recovery of the judgments, the plaintiffs notified the supervisor of the town, the town clerk, and the justices of the peace of the town, who compose the auditing board, of these recoveries, and demanded of them that they should audit and report said judgment to the clerk of the county for the purpose of having a tax levied for the collection of the amount of the judgments.

Instead of proceeding to audit the relators' judgments as a valid claim against the town, the supervisor handed in his resignation to the justices of the peace, and two of the justices of the peace handed in their resignations to another justice of the peace, and the town clerk then handed in his resignation, so that no auditing board met, and the plaintiffs'

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

[2] [Affirmed in 93 U. S. 599.]

claim was not reported and certified by the town clerk to the county clerk of the county, and no tax was extended for the collection of a fund wherewith to pay these judgments.

The plaintiffs now ask for a writ of mandamus against the town board of auditors, requiring them to proceed to audit these judgments as a valid claim against the town. To this the defendants have made return, in substance, that they are no longer officers of the said town, and cannot audit this claim, and that the notice was served on them too late, having been served on the 29th of August, 1874, whereas the auditing board was to have met on the second Monday in August.

The township organization law provides for the contingency of resignation by the various town officers, and provides for a method by which the vacancies caused by these resignations shall be filled. Rev. St. 1874, p. 1079, art. 10. It also provides that persons who are elected and qualified to any town office shall hold their offices until their successors are elected or appointed, and qualified. Rev. St. 1874, p. 1078, § 92. It does not appear from this return that any successor has been appointed to Mr. Chester Badger, who was the supervisor of this town, nor to any of the justices who resigned, nor to any of these town officers, who resigned their offices, as is evident, for the purpose of avoiding the auditing of the plaintiffs' judgments. If they had, in addition to the allegation of their own resignation, alleged that their successors had been duly qualified and accepted the offices, they would of course have shown that they were no longer responsible, as the principle clearly deducible from the township organization law, as it now stands in this state, is that when once a town officer is elected, and accepts the office and qualifies, he remains such officer until his successor is appointed, either by election or by appointment. Until his successor is appointed and qualified, and is ready to take possession, he is such officer. Mr. Badger and these other officers, according to their own return made in this case, were duly elected to the various offices of this town; they acted as such; they qualified as such, and continued to act up to the time that they found they were obliged to either audit these judgments of the plaintiffs or resign, and they resigned, evidently, to avoid the auditing of the plaintiffs' judgments. It was an expedient resorted to by these town officers, apparently to avoid the levying of taxes and to enable the property-owners of this town to escape the payment of taxes that should have been levied to liquidate the plaintiffs' demands.

Now the question is, have they evaded it by their resignations? I think they have not. I think that these men, being still town officers of this town,—their places not having been filled,—are still bound to proceed and audit these claims. The law requires that this board of town officers shall meet twice a year, on the Tuesday preceding the annual town meeting, and on the first Tuesday in September, being the Tuesday preceding the time fixed by law for the regular annual meeting of the board of supervisors.

I am not disposed to require them to hold any special meeting; the Tuesday preceding the annual town meeting will soon be here. I think the mandamus should require the board of auditors to meet and audit these judgments at that time. I have no doubt of the right of the court to require them to meet at some other time,—some time previous to that,—but nothing would probably be gained, as the tax cannot be levied now until another year. The mandamus will therefore issue, requiring these respondents to audit these judgments at the regular meeting of the auditing board on the Tuesday preceding the annual town meeting in April next.

The demurrer to the answer will be sustained, and an order made for a peremptory writ of mandamus.

[On error, this judgment was affirmed by the supreme court. 93 U. S. 599.]

It was held upon application for a writ of mandamus against a city to compel the authorities thereof, to levy and collect taxes for the purpose of paying a judgment, that such available means as are at the disposal of a city, raised under the taxing power, and without diverting the funds from their original purposes as specified in the charter, should be applied to the payment of the judgment. People v. City of Cairo, 50 Ill. 154. A writ of mandamus will lie to a board of school directors, commanding the assessment and levy of taxes to pay a judgment against a school district. Beverly v. Sabin, 20 Ill. 357.

Case No. 14,494.

UNITED STATES v. BAGWELL.

[20 Int. Rev. Rec. 121.]

District Court, N. D. Georgia. Sept. Term, 1874.

ILLICIT DISTILLING—EVIDENCE.

[1. To bring one within the definition of a "distiller" given by Act July 20, 1868,—as one producing distilled spirits,—it is not necessary that the spirits produced be of a particular degree of strength, it being sufficient if they are low wines or singlings.]

[2. The provision of Act July 20, 1868, that every person who, by any process of vaporization, separates alcoholic spirits from any fermented substance, shall be regarded as a distiller, is satisfied if the spirits extracted partake of the qualities of alcohol.]

[3. A part owner of a still is guilty of a violation of the internal revenue law if he knows that the law is being transgressed by his co-owner, or any other person with the still; and it is immaterial that he does not share in the alcoholic spirits produced, or in the profits.]

Criminal information [against Berry Bagwell] for carrying on the business of a distiller without having given bond as required by law. There was a second count for retailing, which was abandoned.

Hilliard & Degraffenried, Mr. Branham, and Mr. Culberson, for the motion.

U. S. Atty. Farrow and U. S. Asst. Atty. Thomas, contra.

ERSKINE, District Judge. Some ten days ago the jury found the defendant guilty of carrying on the business of a distiller, as charged in the information. A new trial was asked for on the following grounds: That the verdict was contrary to evidence. That it was contrary to the weight of evidence. That it was contrary to law. Fourth, "Because the court charged the jury that if they found that John Owens carried on the business of a distiller at the still, without giving bond, and that the defendant owned a half interest in the still, and knew that John Owens was carrying on the business, the defendant was guilty, and they would so find whether the defendant was present participating or not." Fifth, "Because the court charged the jury that if they found that Berry Bagwell owned one-half of the still, and Owens the other half, that the possession of Owens was the possession of the defendant." This objection was finally abandoned. The sixth and last objection was this: "Because defendant and his counsel have been informed since the trial that W. L. Clay, one of the talesmen had not resided in the Northern district of Georgia for six months prior to the trial, and was, therefore, an incompetent juror; and the defendant having objections to said Clay as a juror, was deprived of the privilege of a third strike, for the reason that if he had exercised it, Clay's name being the next on the roll, he would have been placed on the jury for the trial of the defendant, and the defendant desired to strike one other juror from the regular panel, who was also objectionable to him, but whom he preferred to Clay." This objection was supported by an affidavit; it was agreed by counsel on both sides that the issue of residence be submitted to the court. The affidavit of one Seymour was read, and the oral testimony of Clay was given. The court decided that Clay was a resident of this district for six months preceding the trial; counsel then said that they did not desire that any other point in the sixth objection be passed upon. The fourth and fifth exceptions being abridged from a single paragraph on one subject-matter—in the charge, and the fifth being abandoned, the entire paragraph may be properly quoted in full, though the synopsis is as substantially correct, as, within its compass, it could be made: "This is a misdemeanor, and in offences of this grade or kind, the distinction between principals and accessories is not admitted; and all advisors, contrivers and procurers, are principals equally with those who commit the offence, though the advisors, contrivers and procurers are absent at the time of its commission. 2 Bish. Cr. Proc. (2d Ed.) § 2. Therefore, gentlemen, if you are satisfied, from the evidence that the still belonged absolutely to Bagwell, or to him and Owens, as tenants in common, joint tenants, or as partners, the possessions of one would, in law, be deemed the possessions of both, unless the contrary is shown; and if Owens, while such relation lasted, committed the particular act, producing alcoholic spirits with the still, which would, under any part of the statute, cause him to be regarded a distiller, and Bagwell had knowledge of the doing of such act with the still, he would be equally guilty with Owens; and to make him so, it would not be necessary to a conviction to prove that he was present aiding Owens."

Mr. Holtzclaw, the revenue collector, testified that he and Blagster went between 12 and 3 o'clock at night to defendant's house; and (defendant had just been arrested by Cooper and Sheridan) rode with him next day to Rome, he was pretty drunk. "He confessed to me that he owned a half interest in the still, and had built the house, but had nothing to do with the running of the still, or with working there; said the land was not his." Witness added that it was so long ago that his memory was indistinct, but his impressions were that Bagwell's statements were as he had given them. The still was set up, saw no mash, saw some beer, and low wines, called singlings; saw no one at the still. Owens had not given bond; nor had Bagwell.

Mr. Isaac Car had owned the still and sold half interest to the defendant, and the other half to Daniel Bagwell, who sold his interest to Owens. Was at the still twice afterwards; found defendant there both times; saw him take still slops out of the house, and put them in a hole to feed his hogs; next time he was sitting down doing nothing; still set up, no cap on; beer there fit for the distillation of corn whiskey; defendant asked witness how he thought the bar was doing? "Men saw him working there, saw no whiskey or liquor; he said he wanted to make some brandy, and a run or two of whiskey, and wanted to hire me to work for him, but I told him that I did not want to have anything to do with it; I might get into trouble. Have been committed for stilling with the same still, and am now under sentence of this court."

Mr. Cooper: When defendant was told the cause of his arrest, he said: "We have not made a run for two weeks, and the last we made was such mean whiskey, we thought if we could not do better we had better quit. Said still was his; land not. Saw some corn meal at the still nearly dry; saw a few gallons of low wines; saw no liquor—no one there; still set up; cap on, worm attached."

Mr. Daniel Bagwell: Owens made a run of the still; turned out a few gallons of stuff which was not liquor; he made a failure, defendant did not work there, and never made any liquor there; saw him drive his hogs down there and feed them with the slops; about a week after the house was built, still was set up; don't know who set it up.

Several witnesses were introduced by the defendant to impeach the general character of Jesse Car; some were under indictment;

some not. The court left this testimony and the opinions of the witness to the jury.

Com. v. Gannett, 1 Allen, 7. Indictment for keeping a house of ill-fame. "It appears," says the reporter, "in evidence, that the defendant owned the house in question, and had lived there for a number of years with his family; and in reference to this the court charged the jury, that although the defendant's daughters nominally kept the house, yet if he actually kept it himself, or if he aided and assisted them in keeping and maintaining it for the purposes specified in the indictment, they might find him guilty." Biglow, C. J., said: "The instructions to the jury were correct. If the defendant aided and assisted them in committing the offence charged in the indictment, he was equally guilty, in the eyes of the law, with those who actually hired and controlled the house." Exceptions overruled. The case of U. S. v. Harbison [Case No. 15,300] was for distilling and retailing contrary to the act of congress. The witness testified that he leased the still and apparatus from the defendant (Harbison), on which he made one run of whiskey, and paid defendant one-seventh part of the whiskey for the use of the still; defendant introduced no evidence. But the counsel contended that only the principal in the transaction could be said to be "carrying on the business of a distiller." Emmons, Circuit Judge, charged the jury that, "if upon this evidence you believe that Harbison did the acts sworn to, they constitute the offence of distilling without a license; it is not necessary that a defendant should carry on the business personally, that he should be responsible for the labor, or interested as owner, or act as chief agent; it is enough that he aids and abets the manufacture, knowing that it is carried on in violation of law; a citizen has no right to aid in breaking the laws of his country, and is bound alike in law and morals to abandon all service for another the moment he has good reason to believe his business is carried on in disregard of them. Should the owner of an illicit distillery be absent from the state, or, being within it, be unknown, if such were not the rule, this statute might, through the instrumentality of agents and laborers, be broken with impunity. It is a necessary doctrine that all who knowingly aid are alike guilty. A thousand may be as much so as one, if they have common knowledge of the illegality. . . If you believe, therefore, that Harbison was a party to an agreement, in pursuance of which a distillery and apparatus, or any part of it, was used in the unlawful manufacture of whiskey, you will find him guilty under the first count." There was also a count for retailing. Defendant was convicted of both offences.

Congress, in section 59 of the act of July 20, 1868 (15 Stat. 150), has defined or described a distiller. It declares that: "(1) Every person who produces distilled spirits shall be regarded as a distiller. (2) Every person who brews or makes mash, wort or mash fit for distillation or for the production of spirits shall be regarded as a distiller. (3) Every person who, by any process or vaporization, separates alcoholic spirits from any fermented substance, shall be regarded as a distiller. (4) Every person who making or keeping mash, wort or mash, has also in his possession or use a still, shall be regarded as a distiller." It is possible that those do not include all the instances in which a party may be regarded as a distiller. It is enacted by section 104, that the word "person" shall include a firm, partnership association, company, or corporation, and that the singular number shall include the plural. To bring a person within the first definition or description, it is not necessary that the distilled spirits produced should be of a particular degree of strength in spirit; as for example, of first, second, third or fourth or high proof; if the extracted spirits be which is known as low wines or singlings, it will be sufficient. And under the third description, the phrase "alcoholic spirits" will be satisfied if the spirit extracted partake of the qualities of alcohol. It is a matter of little moment whether Owens and the defendant were copartners, or how otherwise interested in the still. If they embarked in the illegal adventure; or, if by any artifice, scheme, device, or procurement of the defendant the act of congress was violated, he, equally with the more positive actor, Owens, or with any other participant, would be guilty of the offence charged in the information. So, too, if the defendant knew that the statute was being transgressed by his co-owner or any other person, with the still, and it would make no difference, in the eye of the law, whether the defendant was or was not to, or did or did not, share in the illicit alcoholic spirits, or in the profits.

I am clearly of the opinion that the evidence warranted the verdict of the jury. And I think the charge of the court was correct. Motion for a new trial overruled.

Case No. 14,495.

UNITED STATES v. BAILEY.

[1 McLean, 234.] [1]

Circuit Court, Tennessee.[2] Oct. Term, 1834.

CONSTITUTIONAL LAW — POWERS OF CONGRESS — FEDERAL TERRITORIAL JURISDICTION—INDIAN COUNTRY WITHIN STATE—MURDER.

1. The powers of the federal government are limited.

2. It possesses no powers but such as have been delegated.

3. Congress have power to regulate commerce among the Indian tribes, which affords a wide scope for legislation.

4. Under a similar power, as regards foreign nations, congress have passed non-intercourse,

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

[2] [District not given.]

embargo, and other acts which are admitted to be constitutional.

5. Congress have a right to select the means, which have a direct relation to the object, in the regulation of commerce with the Indians.

6. Such are the provisions of the intercourse law of 1802 [2 Stat. 139].

7. But congress cannot under this investure of power exercise a general jurisdiction, over an Indian territory within a state.

[Cited in U. S. v. Ward, Case No. 16,639.]

[Cited in State v. Doxtater, 47 Wis. 292, 2 N. W. 447.]

8. In a territory of the United States where congress possesses the legislative power, there can be no objection to the power.

9. Congress cannot punish for an offence, within the Indian territory, in a state, which has no relation to the Indians, and which cannot affect their commerce.

[Cited in U. S. v. Ward, Case No. 16,639.]

10. The act of 1817 [3 Stat. 383], which assumes to exercise a general jurisdiction over Indian countries, within a state, is unconstitutional, and of no effect.

[Cited in U. S. v. Sa-coo-da-cot, Case No. 16,212. Disapproved in U. S. v. Partello, 48 Fed. 674.]

[Disapproved in State v. Campbell, 53 Minn. 358, 55 N. W. 555.]

11. The crime of murder charged against a white man for killing another white man, in the Cherokee country, within the state of Tennessee, cannot be punished in the courts of the United States.

[Cited in U. S. v. Sa-coo-da-cot, Case No. 16,212; Ex parte Sloan, Id. 12,944.]

Mr. McKinney, U. S. Dist. Atty.

Mr. Meigs and others, for defendant.

OPINION OF THE COURT. The defendant, a white man, has been indicted for the murder of a white man in the state of Tennessee, and within the limits of the Indian country occupied by the Cherokees. A plea to the jurisdiction of the court has been filed, and it becomes the duty of the court to decide the question raised by the plea.

The indictment is found under the first section of the act of congress of 1817 which provides, that "if any Indian, or other person or persons, shall, within the United States, and within any town, district, or territory, belonging to any nation or nations, tribe or tribes of Indians, commit any crime, offence or misdemeanor, which if committed in any place or district of country under the sole and exclusive jurisdiction of the United States, would by the laws of the United States, be punished with death, or any other punishment, every such offender, on being thereof convicted, shall suffer the like punishment, as is provided by the laws of the United States for the like offence, if committed within any place or district of country under the sole and exclusive jurisdiction of the United States." From the provisions of this section no doubt can be entertained, that it was the intention of congress to punish all offences specified; and especially the crime of murder committed in the Indian country, though within the limits of a state; and the jurisdiction of the court must be sustained, unless this act shall be found repugnant to the constitution of the United States. This is a grave question, involving on the one hand the life of a fellow being, and on the other the powers of the federal government. At October term, 1816, of this court, an indictment was found against two Indians for killing Vincent Davis, a white man, on a public road passing through the Cherokee Nation of Indians, ceded by treaty with the Cherokee Nation to the United States. A plea to the jurisdiction being filed in the case, the court decided against the jurisdiction on the ground that there was no law of the United States, which "makes the facts as charged and laid in said indictment a crime, affixes a punishment and declares the court which shall have jurisdiction of it." The failure of this prosecution, it is suggested, led to the passage of the act now called in question.

That the federal government is one of limited powers, is a principle so obvious as not to admit of controversy; though the extent of those powers has given rise to much discussion and wide differences of opinion. It would seem however, to be clear, from the 10th article of the amendments to the constitution which provides, that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people; and from other considerations, that the federal government can exercise no powers beyond those which are expressly delegated to it. When therefore the validity of an act of congress is called in question, we must look to the constitution for the power to pass such an act. In the present case the power is alleged to be given by the 3d article, in the 8th section of the constitution, which declares, that congress shall have power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes." There is no other clause of the constitution which can have any bearing upon the point under consideration; and if the power is not given by this article, it is given nowhere. On the part of the prosecution it is insisted, that congress had power to pass the law in question; and that laws involving the same principle have been enforced by the courts of the United States. The intercourse law of 1802, and other acts of congress, and Indian treaties are referred to; and the decisions of the supreme court and of the circuit courts of the United States, under these laws, it is contended, sustain this position. Under the power to regulate commerce with the Indian tribes, there is undoubtedly a wide scope for legislation; and that too without extending the power beyond what has been exercised in relation to foreign nations. Acts of non-intercourse have been passed; embargos have been imposed, and other restrictions in a great variety of forms

have been enacted, affecting foreign commerce, which are admitted to come within the constitutional powers of congress. So as it regards the Indians, various laws have been passed under the above grant of power. The act of 1802 prohibits all intercourse with the Indians, by the whites, except on certain conditions. Agents and other persons are permitted to reside among them for the advancement of their prosperity; and to facilitate our commercial intercourse with them. The persons of these agents are protected from violence and injustice; and our own citizens are punished for committing violence upon the persons or property of the Indians. All these provisions come clearly within the scope of the power to regulate commerce with the Indian tribes; and substantially the same power has been exercised in regulating commerce with foreign nations. All intercourse with a foreign nation, as before remarked, may be prohibited; or it may be admitted under a license or permit. Our agents abroad are protected, and we punish depredations committed by our own citizens on the persons or property of a foreign people, with whom we are at peace. Thus far it would seem the power may be exercised by congress, both as it relates to foreign nations and our Indian tribes. But the act under consideration asserts a general jurisdiction for the punishment of offences, over the Indian territory, though it be within the limits of a state. To the exercise of this jurisdiction within a territorial government there can be no objection, but the case is wholly different as is regards Indian territory within the limits of any state. In such case the power of congress is limited to the regulation of a commercial intercourse, with such tribes of Indians that exist, as a distinct community, governed by their own laws, and resting for their protection on the faith of treaties and laws of the Union. Beyond this, the power of the federal government, in any of its departments cannot be extended.

It is argued that unless the defendant can be tried under the act of congress, there is no law by which he can be punished. If on this ground the federal government may exercise jurisdiction, where shall its powers be limited? The constitution is no longer the guide, when the government acts from the law of necessity. This law always affords a pretext for usurpation. It exists only in the minds of those who exercise the power, and if followed must lead to despotism. It will not be pretended that congress can ever exercise jurisdiction over such parts of a state, as may not be organized into counties. And yet is not this substantially the case under consideration? A murder has been committed by one white person on another within the Indian territory, which act in no respect is connected with the commerce of the Cherokee Indians, or interferes with their prosperity or safety. That congress have power to inflict punishment on all who violate the laws, which regulate a commercial intercourse with the Indians, who maintain a certain relation to the federal government, is admitted; but because this is a legitimate exercise of power, does it follow that the jurisdiction may be extended without limit? Is the Cherokee territory subject to the jurisdiction of the federal government, to the same extent, as it may exercise over forts and arsenals where a cession of jurisdiction has been made by a state. In the act of 1817, congress seem to have considered their power as unlimited in the one case as in the other, as to the punishment of offences; for they provide that the same punishment shall be inflicted, for the commission of crimes within the Cherokee country, as for the like offences, if committed within any place or district of country under the sole and exclusive jurisdiction of the United States. The Cherokee country can in no sense be considered a territory of the United States, over which the federal government may exercise exclusive jurisdiction; nor has there been any cession of jurisdiction by the state of Tennessee; or any prohibition to its exercise of jurisdiction over this territory, constitutionally, except such as the rights recognized and guaranteed to the Indians by treaties and the laws regulating commerce with them, may impose. But it is not necessary in determining the question of jurisdiction in this case, to decide whether any or what jurisdiction may be exercised by the state of Tennessee over the Cherokee country within her limits. If the state has no jurisdiction, or has failed to exercise it, it does not follow that the federal government has a general and unlimited jurisdiction over the territory; for its powers are delegated, and cannot be assumed to supply any defect of power on the part of the state. It is clear that the state of Tennessee either by failing to exercise jurisdiction or by positive enactment, short of a cession of jurisdiction for purposes specified in the constitution, can neither enlarge nor diminish the powers of congress on the subject. The state of New York, for many years has punished its citizens for crimes committed in the Indian territory within its limits; and the state of Georgia, before its laws were extended over the Cherokee country, within the state, punished its own citizens for offences committted within that territory; and we are not aware that the right of either state to do this has been questioned. It is not pretended that any provision by treaty, between the Cherokee Nation and the federal government has been made to embrace a case like the present; or that the treaty-making power can be thus exercised. The connection which exists by treaty between the Indian tribes and the federal government, is of a political character; and the enforcement of such stipulations must mainly depend on the executive power. There is nothing, therefore, in the treaties referred to, which can give to this court jurisdiction of

the offence charged in the indictment. This prosecution cannot be sustained, except upon the ground that congress may exercise the same general and exclusive jurisdiction over the Cherokee country, as over a territory of the United States. In this view, if one citizen commit a depredation upon the property of another, or do violence to his person, within the boundaries of the Indian lands within a state, he may be arrested and punished under the act of congress. Indeed it would be difficult to prescribe any limit to this legislative power, if it may be extended beyond the objects for which it was given. It is insisted that the word "commerce," as used in the constitution, is not necessarily limited to the purposes of trade; but may well be construed to embrace every species of intercourse, which the federal government may think proper to establish with our Indian nations. That the word "commerce" does refer to trade, would seem to be clear, from its being used in the same sentence in reference to foreign nations; but it is admitted that the "power to regulate commerce with the Indian tribes" confers on congress the right of selecting such means as may be necessary to attain the object of the power. But these means must have a direct relation to the object. Congress have power to establish post offices and post roads, consequently, they have power to protect the mail of the United States, by providing for the punishment of those who violate it. They have power to coin money, and they may provide for the punishment of those who shall counterfeit the coin. They have power to regulate commerce with the Indian tribes, consequently, they may provide by law in what manner this intercourse shall be carried on, and impose penal sanctions for a violation of the law. But may they by reason of this special power, assume a general jurisdiction and prescribe for the punishment of all offences? If this may be done under the power to regulate commerce with the Indian tribes, why may it not be done in all other cases, where a limited power is exercised by congress to effectuate a special object? Congress have power to regulate commerce among the several states; and if the same power, given in the same words, in relation to the Indians, may be exercised as contended, why may not congress legislate on crimes for the states generally? That congress have not this general power, is a proposition too clear for demonstration. The thing itself is so palpable that it is susceptible of no illustration. Who would attempt after reading the federal constitution, to prove by any course of argument, that this is a limited government? The very instrument that gives existence to the government imposes the limitations. And is it not equally clear, that where a special jurisdiction has been given to congress; a general one cannot be exercised? Is not the jurisdiction under consideration special? Does it not relate exclusively to the regulation of commerce, with the Indian tribes? And does not the act in question provide for the punishment of a crime committed by one citizen upon another, wholly disconnected from any intercourse with the Indians? If this be a constitutional provision, the jurisdiction by congress for the punishment of offences in the Indian country, within the boundaries of any state, is without limit. Believing that in the passage of this provision of the act of 1817, congress have transcended their constitutional powers, I feel bound to say so, and consider this part of the act as having no force or effect.

Case No. 14,496.

UNITED STATES v. BAIN et al.

[3 Hughes, 593.] [1]

Circuit Court, E. D. Virginia. Aug., 1879.

WHARVES—GOVERNMENT PURCHASE—DOCK—STATE LEGISLATIVE ACT—INJUNCTION.

1. The town of Gosport was sold to private purchasers by the state of Virginia, according to a plat of lots and streets. The streets were at right angles with the Elizabeth river, and terminated on the river. The law of Virginia gives title to riparian owners as far as low-water mark. It authorizes riparian owners to extend wharves from the land to the channel, provided navigation be not thereby obstructed. The United States became subsequent purchaser, from a private owner, of one of the lots of land in Gosport, bordering on Elizabeth river, and built a wharf out from its own lot, and from an adjoining lot to the channel. One of the streets of Gosport (which is part of the town of Portsmouth) is called "Randolph Street." The lot of the United States bordered on this street from a foot or a few feet above high-water mark, to low-water mark, and the government's wharf is in front of its lot, and on a line with the side of Randolph street.

2. The legislature of Virginia, by special act authorized the town of Portsmouth to lease out the space between the end of Randolph street to the channel of Elizabeth river, for the purpose of a dock, which license was exercised by the town by a lease to defendants, and a dock was made which brings deep water from the channel to the street, and extends along the side of the wharf of the United States.

3. This dock being private property, is sometimes closed by its proprietors by a chain boom, and the United States is thereby sometimes prevented from using the side of its wharf, and confined to the use of its front.

4. A bill was filed on behalf of the United States by the United States attorney, praying for an order of injunction restraining the proprietors of the dock from obstructing the United States in the use by its vessels of the side of its wharf, the question being on the validity of the act of the legislature of Virginia authorizing the lease to private persons of the space occupied by the dock. *Held*, that the state had power to authorize such a lease, that the lease was valid, and that the bill must be dismissed.

[Bill in equity by the United States against George M. Bain, Jr., and others.] The bill complains of the defendant's dock in front of Randolph street, in Gosport, as an obstruction of a highway, and prays for an appropriate restraining order. Before the year

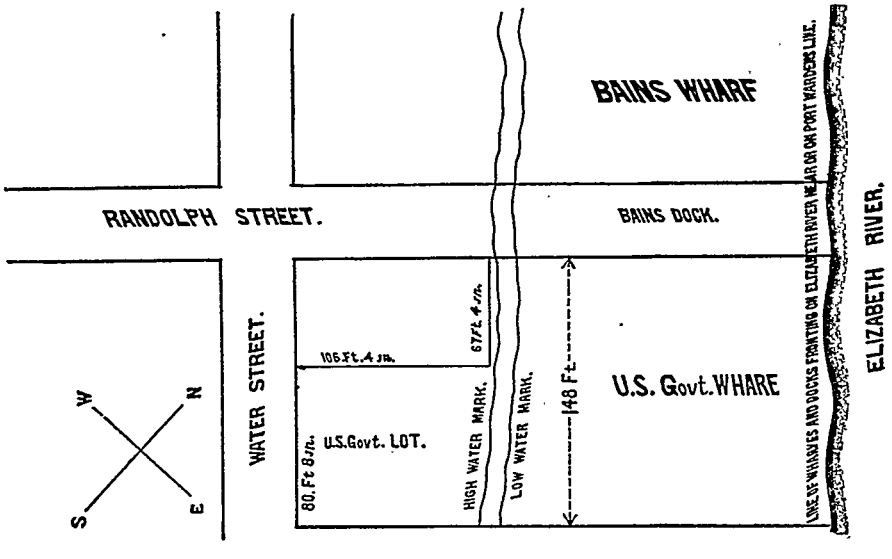
[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

1792 the site of the town of Gosport (now a part of the city of Portsmouth) was a common belonging to the state of Virginia. In that year the legislature directed the site to be laid off for a town, according to the present plan of streets and lots, and the lots to be sold. Amongst other lots sold by the treasurer of Virginia, on the occasion, was the one now owned by the United States, and mentioned in its bill of complaint in this cause, which is in the use of its lighthouse establishment as a depository for buoys and materials and implements of the lighthouse service. Nothing is said in the act of the general assembly of Virginia, directing the sale of lots in Gosport, about water privileges; nor do the deeds by which these lots were conveyed make mention of such privileges. The lots were described by their numbers as laid down on the general plat of the town, and the purchasers took title, as implied by the lots being sold by numbers, in the plat of a proposed town. Some of them, and amongst others this lot of the United States, mentioned in the bill of complaint, fronted on Elizabeth river. The deed from the state to the original purchaser of this lot is not in evidence. The deed to the United States, made in 1870, gives the following boundaries: "Beginning at a point on the south side of Randolph street, 106 feet 4 inches eastwardly of the east side of Water street; from thence running southwardly, and parallel with Water street, 67 feet 4 inches; thence westwardly, parallel with Randolph street, 106 feet 4 inches to the east side of Water street; thence southwardly along the east side of Water street 80 feet 8 inches; thence eastwardly, and parallel with Randolph street, to the Elizabeth river; thence northwardly along Elizabeth river 148 feet to Randolph street; thence westwardly, and along the south side of Randolph street, to the beginning." We may presume that all the deeds, through which this title has come to the United States, have used like terms of description. It would seem from these terms that the fee in half the streets did not pass to lotholders abutting on them, nor anything but an easement in them.

The following is a plan of the lot as thus described in the deed, and as extended by a wharf from the shore to, or near to, the port warden's line in Elizabeth river.

It will be observed that the description of the lot, by boundaries, in the deed, does not give the depth of the lot measuring from Water street to Elizabeth river. It does not, by any terms, express or implied, convey title further than to the shore of Elizabeth river.

The title of a riparian owner, on the tide-waters of Virginia, extends to low-water mark; subject, however, as to the space between high and low water mark, to the jus publicum of all the people of the state, who are allowed, by law, the privilege of fishing, hunting, and fowling on this space, and on the shores and beds of these tide-waters. See sections 1, 2, c. 62, Code Va. This space, and these beds and shores, are subject, also, of course, to the usual public right of navigation. But it is provided by section 59 of chapter 52 of the Code, that any owner of riparian land may extend a wharf into the water as far as desired, provided that navigation be not obstructed, nor the private rights of other persons impaired. As to the cities of Norfolk and Portsmouth, it is provided by a law of the state, passed February 18th, 1875, that "the harbor commissioners of these cities shall have full power to regulate and define the port warden's line along the water-front of the two cities, and the Elizabeth river and branches thereof, for five miles above and below the limits of the said cities; that they shall have power to fix the lines along said rivers within which riparian owners may erect wharves, docks, and other



proper erections and fixtures for commercial and manufacturing purposes; that they shall have authority to cause the removal of any wharf, dock, wreck, or other obstruction to navigation, or that may, in their opinion, be injurious to the harbor, at the expense of the owner or owners, or the parties causing the obstructions; provided, that the right of any owner or owners of wharves, whose lines have heretofore been fixed by authority of state legislation, are in no wise to be disturbed." It does not appear in evidence that the harbor commissioners have ever objected to the action of the defendants in this cause, either in constructing or managing their dock at the end of Randolph street. Their rights accrued before the passage of the law.

The United States has extended a wharf from its lot as described, out into the river to, or nearly to, the port warden's line, as marked in the above plat. This extension is about 170 to 175 feet beyond the natural shore. It will be seen from this plat that the lot of the United States, considered as bounded by low-water mark, abuts very little, if any at all, on Randolph street; indeed, the bill of complaint alleges that "at the time the said lot of land was purchased by the United States, so much of Randolph street as forms a portion of the boundary of the said lot was covered by mud and water, and that that portion of it was afterwards dredged out by them." In fact this portion was under water and wholly below low-water mark. In 1871 the legislature of Virginia, by special act, authorized the city of Portsmouth, which includes the town of Gosport, "to lease out for a term of years, to private parties or corporations, 'the ends of the streets running to Elizabeth river,'" with certain exceptions. By "ends of streets" is meant the space in front of streets, extending from low-water mark out into the river to the front line of the docks and wharves, which is usually the port warden's line.

On June 28th, 1875, Bain & Bro. petitioned the council of Portsmouth for a lease of the ends of certain streets in Gosport, adjoining lots of theirs, for a term of twenty-five years; stating that their object was to open docks wider than the streets, by encroaching upon their own property, and of sufficient depth of water to admit large ships to come in and load in them; expressing the belief that "the proposed improvement would redound to the advantage of the city commercially and financially." By deed, which embodied this petition, the city of Portsmouth did make the lease of the ends of Randolph and one or two other streets to Bain & Bro. at a certain annual rent, for twenty-five years, and Bain & Bro. say, in their answer in this cause, that they "have converted the end of Randolph street into a dock with water twenty-two and eighteen feet deep, so that ships and vessels of large draft may lie at ease in it; and that it has been made so by dredging it out at their own cost and expense, the space having been previously covered with water, though not deep." The Bains made a sub-lease of this dock to O. O. Vandenberg, one of the defendants in this suit, who is a purchaser of timber for shipment to Europe, and who uses this dock, and a wharf and shed of the Bains contiguous to it, for the purpose of mooring logs and storing lumber preparatory to shipment abroad. Vandenberg occasionally confines his logs in the dock by means of a boom chain stretched across its mouth. This boom, during the periods when thus stretched, prevents the vessels of the lighthouse establishment from entering the dock, and confines them to the front of the wharf of the government. Vandenberg is willing to lend, and has proffered the key of the chain buoy to the officers of the government, so that they may at all times enter the dock and lay alongside of the government wharf; but these officers object to the chain and logs as a nuisance, and the government brings this bill to restrain Vandenberg and Bain & Bro. from further obstructing the use of the dock, which the bill claims to be a street and highway. Before the lease was made by Portsmouth to Bain & Bro.,[a] the United States had expended about $1,300 in dredging along the side of its wharf in this dock. They made this expenditure without securing any right which might arise from so doing, either from Portsmouth or Virginia.

The bill charges that the defendants are obstructing, and that they often entirely close, by means of logs and other impediments, the entrance to Randolph street from the Elizabeth river, so that it cannot be used by the United States and the general public for the purposes for which the said street was acquired and established. The bill complains that the said pretended lease from the city council of Portsmouth is utterly invalid; that the authorities of the said city had no power or authority to make or enter into the same; and that no interest inconsistent with the rights of the United States and the general public to use the said street as a common highway was acquired under the same, and that no interest inconsistent with such rights was acquired by the said Vandenberg by virtue of the pretended lease to him.

The defendants, in their answer, allege, among other things, that the whole of said Randolph street upon which the lot of the complainant abuts, is now, and always has been, so far as they know, covered with water and mud, and no street for the passage of men on foot, or beast of burden or vehicles, has ever in fact existed in that part of the shore designated as Randolph street, which forms the boundary of the complainant's lot, either as alleged in the said bill or as laid down on said plat filed therewith; and that at present the whole of the space laid down as Randolph street, on which the complain-

ant's lot abuts, is a dock with water twenty-two and eighteen feet deep in it, and the defendants insist generally that the riparian rights of complainant are confined to the front of their lot and do not extend to the side of it.

L. L. Lewis, U. S. Atty.
W. W. Old, for defendants.

The following is the opinion of the court delivered by—

HUGHES, District Judge. The principal question of fact in the case is whether Randolph street extends farther than low-water mark. It may be conceded that the owner of lots adjoining the streets in Gosport derived from the state of Virginia the right of easement in them, and that the state could not in good faith take away that right except for some important public purpose. But it is quite clear that this claim upon the state belongs only to the owners of lots which abut on the streets. Does, then, the lot of the United States abut on Randolph street? A street is a way upon land, more properly a paved way, lined or proposed to be lined by houses on each side. It is confined to land, and ends on the shore or bank of the land at the border of the water. The deeds from Virginia to owners of lots in Gosport impliedly warranted the free use of the streets laid down on the plat of the town, and did not warrant the use of water, or land under water below low-water mark. When, therefore, the bill of complaint itself alleges that the portion of Randolph street bordering upon the lot and wharf of the United States was covered by mud and water, it admits that the street terminated as a street at Neville's north line, and does not reach to the lot of the United States.

We have, therefore, in this inquiry nothing to do with a street; nothing to do with "Randolph street" as an easement of the lot mentioned; which, as the bill virtually alleges, ceased to be a street when reaching this lot. This being so, it follows that the deed of Virginia to the purchaser through whom the United States derives title, contained no warranty of an easement in Randolph street as a street; and the state has violated no contract in its act allowing Portsmouth to lease out "the end of Randolph street."

The United States attorney seems to feel the stress of this view of the subject, and employs the term "highway" much more frequently than "street" in his argument. He thereby shifts the question into one, whether the owner of the government lot has any right to the use of a water-way in front of Randolph street. Notwithstanding what has been said, I think the deed implies that the lot contains a strip of land between Neville's lot and low-water mark. See accompanying plat. This strip is merely imaginary, if the language which has been quoted from the deed is true. If there be such a strip in fact, however, it is a very narrow one; and it is only the end of this very narrow strip abutting on the end of Randolph street which can give to the owner of the lot any special right in Randolph street, and in the supposed water-way in front of that street. The right in the street is not taken away by the lease to the defendants. It is only the right in the water fronting the street that is taken away; and this deprivation is the matter really complained of in the bill. But there is no warranty of the water-way expressed or implied in the deeds; and the right of the complainants in the water in front of Randolph street is only the jus publicum spoken of in the books, which is the right of the public to use the public waters of rivers and bays in commerce and trade, to pass and repass freely over them, and to enjoy the advantage from them which the public generally may do, as distinguished from that which is private, special, and proprietary. This is the right which is taken away by the action of Virginia and Portsmouth in the lease in question; and the proposition of the United States attorney, in his learned and elaborate brief, is, that a state of this Union has no power to take away the right of the public to the general free use of public waters, in the manner stated. If the proposition be true, the United States has itself violated the jus publicum by building its wharf in front of its lot, for the distance of some 175 feet out from low-water mark into the Elizabeth river which is a public highway between two commercial cities.

The United States owns the lot in question only by private tenure, and is before this court only in the character of a private corporation. It has built its wharf in front of its lot out into the river, either in violation of that jus publicum, upon the sanctity of which it insists in its bill, or else under the authority of a law of Virginia (section 59, c. 52, of the Code of Virginia). If the state had no power to authorize riparian owners to build wharves and bulkheads in rivers washing their lands in prejudice of the jus publicum, then the United States, as owner of its wharf, is here in the character of a wrongdoer, asking the abatement of an obstruction to its free use of a dock as owners of an adjoining wharf which it had no right to construct. If its proposition is true, it must itself go out of court as a trespasser without warrant of law upon the jus publicum in Elizabeth river.

But the proposition is not true. Whatever decisions may be found here and there, denying in special cases the power of the states of the Union over their highways and public waters, the overwhelming preponderance of authority is in favor of this power. True that this power is qualified by two provisions of the national constitution, one of which forbids a state from passing any law impairing the obligation of contracts, and

another of which gives to congress the right of regulating commerce and trade between the states. With these restrictions, it is easy to show that the power exists.

In Willson v. Blackbird Creek Marsh Co., 2 Pet. [27 U. S.] 245, the state of Delaware had authorized a company to construct a dam across the mouth of a navigable stream for the purpose, by shutting off the tides, of reclaiming a large body of marsh lands. The owner of a sail-vessel broke down the dam, and the company sued him for damages. The plea stated that the creek was navigable, in the nature of a highway, in which the tide ebbed and flowed, and denied the right of the state to authorize its closure by a dam. The case went to the supreme court of the United States, and that court, Chief Justice Marshall delivering its opinion, pronounced the law of the state to be valid. The court said of this law of Delaware, "unless it come in conflict with the constitution or a law of the United States, it is an affair between the government of Delaware and its citizens, of which this court can take no cognizance." An examination of the decision will show that it admits, as a proposition not needing argument, that the state had power to close a navigable water in its discretion, and that this power could not be questioned unless it was exercised in conflict with some positive act of congress passed in pursuance of its power "to regulate commerce with foreign nations and between the states."

In the case of Pennsylvania v. Wheeling Bridge Co., 13 How. [54 U. S.] 518, the state of Virginia had authorized the city of Wheeling to build a bridge across the Ohio river, and congress had passed laws regulating commerce and the running of steamboats upon that river. The city of Wheeling was building this bridge, which was charged to be an obstruction to navigation, and the judgment of the court upon a vast body of evidence taken on that point was, that the bridge would, in point of fact, be an obstruction to the navigation. The case was before the court twice. At its first hearing it decided the bridge to be an obstruction, and forbade the building of it. The court in its last decision, speaking of the first one, says: "The bridge had been constructed under an act of the legislature of Virginia; and it was admitted that the act conferred full authority upon the defendants for the erection, subject only to the power of congress in the regulation of commerce. It was claimed, however, that congress had acted upon the subject, and had regulated the navigation of the Ohio river, and had thereby secured to the public by virtue of its authority the free and unobstructed use of the same; and that the erection of a bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the acts of congress, and destructive of the right derived under them; and that, to the extent of this interference with the free navigation of the river, the act of the legislature of Virginia afforded no authority or justification. It was in conflict with the acts of congress, which were the paramount law. This being the view of the case taken by a majority of the court, they found no difficulty in arriving at the conclusion that the obstruction of the navigation of the river, by the bridge, was a violation of the right secured to the public by the constitution of the United States and laws of congress, nor in applying the appropriate remedy in behalf of the plaintiffs." The bridge had been completed before the first decision was rendered. Immediately upon its delivery steps were taken, which soon proved successful, for procuring from congress an act declaring the bridge a post road, and authorizing its owners to have and maintain it at the height at which it stood when condemned by the supreme court. The bridge was soon afterwards blown off by a hurricane, and an injunction was obtained from one of the justices of the supreme court forbidding its owners to rebuild it at the original height. It was built, nevertheless, in contempt of this order; and when the bill of injunction came on for regular hearing the supreme court, notwithstanding the contempt, receded from its former judgment, on the ground that congress had legalized the bridge, and dismissed the bill. The supreme court proceeded in both cases upon the "admission that the act of the legislature of Virginia conferred full authority upon the owners of the bridge for its erection, subject only to the power of congress in the regulation of commerce."

In the case of Martin v. Waddell, 16 Pet. [41 U. S.] 367, the court said (at page 410), through Chief Justice Taney: "When the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their common use, subject only to the rights since surrendered by the constitution to the general government."

In Pollard's Lessee v. Hogan, 3 How. [44 U. S.] 230, the supreme court said: "The right of eminent domain over the shores and the soil under navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdiction, and they, and they only, have the constitutional power to exercise it. But in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by congress."

In Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, the supreme court say: "Inspection laws form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all which can be most advantageously exercised by the states

themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass."

In Gilman v. Philadelphia, 3 Wall. [70 U. S.] 713, the power of the state of Pennsylvania to authorize the construction of a bridge across the Schuylkill river near its mouth, which would entirely prevent its navigation by a large class of vessels, was passed upon. It was held that an act of the state legislature giving the right to build the bridge, notwithstanding such effect, was valid.

In Conway v. Taylor, 1 Black [66 U. S.] 603, the legislature of Kentucky had granted to a person owning the entire shore abreast of Newport, on the Ohio river, the exclusive right to land ferry-boats, plying across the Ohio river, on that shore. This right was assailed as contrary to the common right of landing there, and as a monopoly, and the act of the Kentucky legislature was attacked as exceeding the powers of a legislature of a state. But the supreme court of the United States said: "Rights of commerce give no authority to their possessor to invade the rights of property. * * * He cannot invade the ferry franchise of another without authority from the holder. The vitality of such a franchise lies in its exclusiveness. The moment the right becomes common the franchise ceases to exist. It is property, and rests upon the same principle which lies at the foundation of all other property. * * * There has now been three-quarters of a century of practical interpretation of the constitution. During all that time, as before the constitution had its birth, the states have exercised the power to establish and regulate ferries; congress never. We have sought in vain for an act of congress which involves the exercise of this power. That the authority lies within the scope of 'that immense mass' of undelegated powers which 'are reserved to the states respectively,' we think too clear to admit of doubt." See also Fanning v. Gregorie, 16 How. [57 U. S.] 534. Such is the uniform tenor of all the utterances of the supreme court on this subject, in cases too numerous to be cited here.

Similar decisions have been rendered by the United States circuit courts. In Spooner v. McConnell [Case No. 13,245], where the Ohio legislature had chartered a canal company, with the usual powers, and the company was about to obstruct the navigation of the Maumee river by constructing a dam in aid of the canal, the court held that the act allowing this proceeding was within the power of the state; and this, notwithstanding an express provision of the ordinance of 1787, that the navigable waters of the Northwestern Territory shall be "common highways and forever free." The same was held in Palmer v. Cuyahoga Co. [Id. 10,688]. In the case of The Passaic Bridges, Appendix to 3 Wall. [70 U. S.] 782, the state of New Jersey had authorized certain railroad bridges to be constructed over the Passaic river which entirely obstructed its navigation by a large class of vessels, very seriously impairing the commerce of Newark. The validity of the act was assailed in a bill praying for an injunction to restrain the railroad company from erecting the bridges. Judge Grier dismissed the bill, saying, in the course of his opinion, "whether a bridge over the Passaic will injuriously affect the harbor of Newark, is a question which the people of New Jersey can best determine, and have a right to determine, for themselves. If the bridge be an inconvenience to sloops and schooners navigating their port, it is no more so to others than to them. I see no reason why the state of New Jersey, in the exercise of her absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves of Newark at the mouth of the river."

There have been quite recent cases, involving the same principle, in the supreme court of the United States. In U. S. v. Fox, 91 U. S. 367, that court says: "It is an established principle of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other modes, is exclusively subject to the government within whose jurisdiction the property is situated. McCormick v. Sullivant, 10 Wheat. [23 U. S.] 202. The power of the state in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the general government." Fox had devised his property to the United States to aid in paying off the national debt. The law of New York prohibited devises except to natural persons. The supreme court held that the state law must prevail, and that the United States could not take the property devised. See Kohl v. U. S., 91 U. S. 367. See, also, Judge Sutherland's opinion in People v. Kerr, 37 Barb. 412, where that learned judge, after an elaborate review of the authorities, concludes with this language: "It may be stated as a well-settled American doctrine, that the state legislatures have unlimited power over public rights in a highway, and can obstruct, modify, impair, or extinguish them, as to any highway or portion of a highway, except so far as the state power is qualified by the commercial clause of the constitution of the United States, without making any compensation to individuals for resulting or consequential damages."

In the light of these authorities can there be any doubt of the power of the state of Virginia to authorize the lease of the space between the ends of the streets of Portsmouth and the navigable channel, to men of enterprise and capital willing to undertake

the expense of constructing spacious docks capable of floating the great ships of commerce? The space between the land and the channels of streams needs either to be wharfed or docked to fit them for commerce. Either the water must be deepened by docks, up to the land, or else the land must be extended, by wharves, to the water channel. The United States did the latter with its lot at Gosport by warrant of a general state law. The defendants here did the former by warrant of a special state law. It was competent for the state to pass either law, having "absolute sovereignty over the river," and "the exclusive power over the shores of her navigable streams and the soil under their waters."

This question has been so conclusively settled by the federal courts of the United States that it would be a useless task to examine the decisions of the state and of the English courts upon it. Those of a few of the states have undoubtedly denied this power, and there are many English decisions which deny a similar power to the king. See, for example, Attorney General v. Parmeter, 10 Price, 411. But no English decisions can be found which deny to parliament the absolute power over this subject; and those state courts which have denied it to state legislatures have followed the English precedents which refer only to the king rather than to those which refer to the parliament. "There was a time when the crown could grant away to the subject the royal demesnes and landed possessions at pleasure; but now by statute of 1 Anne, c. 7, § 5, such royal grants are prohibited, and the crown lands cannot be so aliened. So much, therefore, of the seashore as has not been actually aliened by grant, and bestowed on lords of manors and other subjects, still remains vested in the crown incapable of alienation. Hall's Seashore, p. 106. But where the crown has acted under the authority of parliament, it may part with them." Reg. v. Edulgee Byramjee, 5 Moore, P. C. 294

The leading case on this latter point is King v. Smith, Doug. 441, decided by Lord Mansfield. The law has been finally settled in England as to the power of parliament, in Attorney General v. Chambers, 4 De Gex, M. & G. 206; Gann v. Free Fishers of Whitstable, 11 H. L. Cas. 192; and Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 Exch. 221. A very instructive case is Stevens v. Pattersen & N. R. Co. [34 N. J. Law 532]; and in Virginia, Power v. Tazewells, 25 Grat. 786. See, also, Rundle v. Raritan & D. Canal Co., 14 How. [55 U. S.] 80. In dealing with the case at bar, I am bound by the decisions of the supreme court of the United States, and, following them, I must hold that the law of the state authorizing the leasing of the end of Randolph street was valid; that the defendants were fully empowered to construct a dock there, and entitled to the exclusive control of it; and are not committing a nuisance in using and controlling it, in the absence of objections by the harbor commissioners. Even if all this were not so, the principle is well settled that acts authorized by law are not nuisances such as equity can relieve against, and on that principle the bill would not lie, and the complainant must be left to his remedy at common law. See People v. Kerr, 37 Barb. 418; Georgetown v. Alexandria, 12 Pet. [37 U. S.] 98; Crowder v. Tinkler, 19 Ves. 619. Whatever harm results from acts authorized by law is damnum absque injuria. See Weeks, D. A. Inj. § 48, and cases there cited, viz.: Trustees of First Baptist Church v. Utica & S. R. Co., 6 Barb. 313; Hatch v. Vermont Central R. Co., 2 Williams (Vt.) 142; Stoughton v. State, 5 Wis. 291; Com. v. Reed, 34 Pa. St. 275; Hinchman v. Paterson Horse R. Co., 2 Green [17 N. J. Eq.] 75; Samuels v. Mayor, etc., of Nashville, 3 Sneed, 298; Delaware Division Canal Co. v. Com., 60 Pa. St 367; Williams v. New York Cent. R. Co., 18 Barb. 222 (but see s. c., 16 N. Y. 97); Saltonstall v. Banker, 8 Gray, 195; Mazetti v. New York & H. R. Co., 3 E. D. Smith, 98; Hartwell v. Armstrong, 19 Barb. 166; Hodgkinson v. Long Island R. Co., 4 Edw. Ch. 411; and Parsons v. Travis, 1 Duer, 439.

As well, therefore, on the question of jurisdiction, as on the merits, the bill must be dismissed.

Case No. 14,497.

UNITED STATES v. BAINBRIDGE.

[1 Mason, 71; 2 Wheeler, Cr. Cas. 521.] [1]

Circuit Court, D. Massachusetts. June 22, 1816.

NAVY—ENLISTMENT OF MINORS—CONSENT OF FATHER—INFANTS.

1. Congress have a constitutional power to enlist minors, in the navy or army, without the consent of their parents.

[Cited in U. S. v. Garlinghouse, Case No. 15,189; Re Davison, 21 Fed. 623; Re Cosenow, 37 Fed. 670; In re Morrissey, 137 U. S. 159, 11 Sup. Ct. 57.]

[Cited in Re Gregg, 15 Wis. 480; McConologue's Case, 107 Mass. 166; U. S. v. Blakeney, 3 Grat. (Va.) 424. Distinguished in dissenting opinion in U. S. v. Blakeney, Id. 430. Cited in U. S. v. Cottingham, 1 Rob. (Va.) 615.]

2. Under the navy acts, the consent of the father is not necessary to the valid enlistment of boys in the service.

[Cited in Re McLave, Case No. 8,876; Re McNulty, Id. 8,917; Re Doyle, 18 Fed. 371.]

[Distinguished in Com. v. Downes, 24 Pick. 232. Cited in Halliday v. Miller (W. Va.) 1 S. E. 832; State v. Dimick, 12 N. H. 198; Wright v. Steele, 2 N. H. 55.]

3. Of the nature and extent of the paternal power at common law.

[Cited in Hammond v. Corbett, 50 N. H. 509.]

[1] [Reported by William P. Mason, Esq. 2 Wheeler, Cr. Cas. 521, contains only a partial report.]

[4. Cited in Halliday v. Miller, 29 W. Va. 438, 1 S. E. 821; Hollingsworth v. Swedenborg, 49 Ind. 381; Johnson v. Dodd, 56 N. Y. 81; Kelly v. Sprout, 97 Mass. 170; and Mears v. Bickford, 55 Me. 529,—to the point that a father is not entitled to pay earned by his minor son as a soldier.]

[5. Cited in Elliott v. Horn, 10 Ala. 348, and People v. Moores, 4 Denio, 520, to the point that infants are bound by all acts which they are obliged by law to do.]

[6. Cited in Williams v. Hutchinson, 3 N. Y. 320, and cited in brief in Thompson v. Hamilton, 12 Pick. 427, to the point that an infant may enter into a binding contract which is clearly for his benefit.]

Habeas corpus to Commodore [William] Bainbridge to bring up the body of Robert Treadwell, an infant, of the age of twenty years, and about eleven months. By the return of the habeas corpus, and the other proceedings, it appeared, that he was born in Ipswich, on the second day of August, 1795; that in the month of May, 1815, he enlisted into the navy of the United States, to serve two years; that, after this enlistment, he deserted from the service, and, having been apprehended, was on the nineteenth day of June last past, brought to trial on the charge of desertion before a regular court martial, and, having pleaded guilty to the charge, was, by the sentence of the court, among other things, ordered to serve in the navy of the United States the term of two years from the said nineteenth day of June, and to forfeit all the wages then due to him. He has a father who is still living, and now absent at sea; and who, previous to his departure, sued out a habeas corpus for the liberation of his son, but it failed, from the return of the officer to whom it was directed, that the infant was not in his custody. It was alleged in the affidavits and petition, that the enlistment was without the consent of his father.

Mr. Simmons, in behalf of the petitioner.

Mr. Aylwin, in behalf of Commodore Bainbridge.

Mr. Simmons. Robert Treadwell, having a father living, enlisted into the navy without his consent. They now, both of them, wish to avoid the contract of Robert the minor, and obtain his discharge from the service. Is this contract avoidable?

(1) Congress have no power to pass an act, authorizing the enlistment of minors, without the consent of their fathers. Congress have no power, except that delegated to them in the constitution; and all that is not expressly delegated, is reserved by the states. The constitution gives congress power "to provide and maintain a navy, and to make rules for the government and regulation of the same." All the authority here delegated may be exercised, without any encroachment on the common law rights and relations of parent and child. Those rights and relations, are of as solemn a nature, and as important to be preserved, as contracts.

(2) Congress have passed no act, authorizing the enlistment of a minor in the navy without the consent of his father. It is admitted, that the acts of congress relative to the navy, suppose the employment of boys. The mode of obtaining them must be by enlistment, as no compulsory process, or general requisition, is enacted. Enlistment is a contract entered into by the United States on one part, through the agency of their recruiting officers, and the minor, or the father, or both, on the other part; but by the common law, an infant, under the age of twenty-one years, is rendered incapable of binding himself by contract, except in special cases, as for necessaries, &c. This case is not an exception to the general inability to contract. It was not an undertaking to do, what he was bound to do by law, for it was optional, whether he would enlist or not. It was not a contract for his benefit; the situation of a boy in the navy, qualifying himself for the duties of an ordinary seaman, cannot be considered beneficial, either to his moral or physical habits, promising neither honor nor riches. Neither do the cases of beneficial contracts, that are binding on infants, relate to that general and uncertain benefit, that may be supposed to result from any particular situation, or occupation, but to contracts relating to real estate and specific property. Zouch v. Parsons, 3 Burrows, 1794. This contract, then, is not an exception from the general rule, and not binding on the infant, but the father is the natural guardian of the son, and has a right to control his person, and dispose of his services and labor; the consent of the father is, therefore, necessary to render the contract valid. In this case, the consent of the father was not given. Is this inability of the minor, or are these rights of the parent taken away by the acts of congress? No words to that effect are used, and it must be by implication, if at all; and such construction is unwarrantable, because it is unnecessary, in order to carry the statutes into effect. Boys may be enlisted by the consent of the father, and the contract is valid; therefore, where no such consent appears, the contract is voidable. But it is said, that the minor having been convicted of desertion by a naval court martial, and, among other things, sentenced to two years' labor in the navy, is barred from having his discharge; because it would annul the sentence of the court-martial. He was there tried for desertion, and, while in the navy, and his enlistment prima facie binding, he was undoubtedly bound to obey the rules and regulations of the navy, and subject to punishment for any violation of them; it is a consequence of his contracts being merely voidable, at his, or his father's instance. The question before this court is the validity of his enlistment; and if he be discharged, the annulling of the sentence of the court martial is only an incidental consequence. It never could have been intended by congress, that the officers of the navy, who appear to be almost a party, should settle a question of this description, especially where the father

is interested, and has no notice, and is not heard at the trial. This question must be determined by investigating the power delegated to congress by the constitution, a legal construction of their acts, and the principles of the common law, relative to parent and child, for which a naval court martial cannot be supposed competent, and to determine which, they are not authorized. I have not been able to find any cases in point in the English books. In the criminal courts of England, indictments are sustained against indented apprentices for enlisting into the army or navy, and thereby fraudulently obtaining the king's money; from which I infer, they may be reclaimed by their master after enlistment.

Mr. Aylwin contended:

(1) That the contract, as made by the minor, was a valid one.

(2) That if it was in the power of the minor to avoid it, yet that could not be done after he had been legally sentenced by a court martial.

The authority given by the constitution to congress, for the purpose of raising a navy, must necessarily invest congress with all such powers as are indispensably requisite for effecting that purpose. If, then, the nature of the naval service is such, as to require, that the individuals who are employed in it, should become acquainted with its duties at an early period of life, it must follow of course, that congress are empowered by the constitution to authorize the enlistment of minors. In pursuance of this authority we find, that all the acts of congress, upon this subject, make particular mention of the enlistment of boys. That it was the intention of congress, that this enlistment should be effected without the previous consent of the parents, is evident from their having inserted express clauses in the acts relating to the army (in which it is to be remarked an early apprenticeship is not essential) for the purpose of protecting the rights of parents and masters. If the construction contended for is not given to these acts, then the provisions in them, respecting boys, are perfectly idle; for surely parents and masters are not authorized by the common law to bind out their children, or apprentices, to a military service.

But it may be observed, that the premises assumed by the applicant, for a discharge, are not founded in fact, or, at least, do not appear in evidence. In this case there is no evidence, that the father did dissent to the enlistment of his son; nor is there, at this moment, any proof that the father now wishes his discharge. The writ of habeas corpus must be considered as sued out by the minor, and his peculiar rights and privileges are alone to be regarded.

It is conceded, that an infant is protected by the common law from all improvident and unnecessary contracts, but all others he is at liberty to enter into; therefore he may contract matrimony, take the oath of allegiance, and, in short, "do all things necessary for the public good." Com. Dig. tit. "Enfant," B, 6. Throughout the whole system of our laws it appears, that beneficial contracts may be made by minors, and even where a certain class of permitted contracts has been subsequently deemed injurious, the legislature has, from time to time, been obliged to interfere and limit the powers of minors. Thus, the general right of contracting matrimony was limited in England, by the statute of 26 Geo. II. But no such limitation has been enacted in relation to serving the public; and, in England, minors may be compelled to serve in the navy; nor was it until the statutes of 2 and 3 Anne, c. 6, § 15; 4 Anne, c. 19, § 17; and 13 Geo. II. c. 17, that they were exempted, during their apprenticeship, and then only for the term of three years. No court of justice ought to suffer it to be promulgated, that a contract to serve the public is not a beneficial contract. It is, to be sure, denied by the counsel for the minor, to be for his benefit, but is it not for the public good? Without condescending to investigate, whether the most honorable and useful of all services can be for the advantage of a minor, it is sufficient to render it obligatory, that this was entered into voluntarily, and is for the public good.

It being established on general principles, that contracts of this description may be entered into by minors, and particularly where the rights of others are not infringed; do the circumstances of this case form any peculiar exception? Whatever might have been the power of the parent over his child in England anciently, it has been long settled, as laid down by Blackstone, "that the father may have, indeed, the benefit of his children's labor, while they live with him and are maintained by him; but this is no more than he is entitled to from his apprentices or servants." 1 Bl. Comm. 453. This individual was suffered by his father to roam at large, and gain his sustenance where he could. He sent him into the world with his implied, if not his express assent to render valid any of his engagements, at least, for his support and education; it is now too late, did he interpose and withdraw this assent, to say that such engagements were invalid. Being thus at large, the infant may certainly make contracts in relation to the disposition of his person; and if beneficial at the time, they must bind him. Maddon v. White, 2 Term R. 159. It may be added, that at the common law, the parent had no right to dispose of the person of his child; and it was not until the 12 Car. II. c. 24, that he acquired the right of disposing of the custody of him by will. The sentence of the court martial, it is contended, places this question, however, on a different ground. Assuming for the sake of the argument, that this contract was voidable by the minor, but by him

alone (Keane v. Boycott, 2 H. Bl. 511), yet he did not, during his engagement with his government, make known his intention to avoid it by any legal proceedings, or any legal act whatever. And it cannot be doubted, that to enable a party to avoid a contract with the government, some such act or proceeding is indispensable. It appears in this case, on the contrary, that the minor, by a clandestine departure, committed a crime not only against positive law, but against his oath, which bound him to fulfill that law. He is, therefore, now held, not by virtue of his original engagement, strictly speaking, but by the sentence of a competent tribunal, in consequence of the crime that he committed. If his original contract with his country was an invalid one, he ought to have pleaded the disability which rendered it such, at the time he was arraigned. Not having then done it, he must be presumed to have waived his rights, by pleading guilty before the court martial. It was the gist of his defence, that he was not legally bound to serve the United States; unless he was, he could not have been guilty of desertion. The decision, therefore, of that court, having jurisdiction, must be conclusive upon all the world; it cannot, in this collateral manner, be investigated or reversed.

STORY, Circuit Justice. The first question is, whether the contract of enlistment, supposing it to have been made without the consent of the father, is valid or not. By the common law, the father has a right to the custody of his children during their infancy. In whatever principle this right is founded, whether it result from the very nature of parental duties, or from that authority, which devolves upon him, by reason of the guardianship by nature, or nurture, technically speaking, its existence cannot now be brought into controversy. Ex parte Hopkins, 3 P. Wms. 151; Co. Litt. 88, and Hargrave's notes; Rex v. De Manneville, 5 East, 222; De Manneville v. De Manneville, 10 Ves. 52; 1 Bl. Comm. 452, 461. This right, however, is not unlimited; for whenever it is abused by improper conduct on the part of the parent, courts of law will restrain him in its exercise, and even take the custody permanently from him. Archer's Case, 1 Ld. Raym. 673; Rex v. Smith, 2 Strange, 982; Rex v. Delaval, 3 Burrows, 1434; Com. v. Addicks, 5 Bin. 520. By the common law, also, a father is entitled to the benefit of his children's labor, while they live with him, and are maintained by him; but this (as has been justly observed) is no more than he is entitled to from his servants. 1 Bl. Comm. 453. It has also been asserted, that by the same law a father may bind his children as apprentices without their consent; and thereby convey the permanent custody of their persons, as well as benefit of their labor, to their masters during their minority. Com. Dig. "Justice of the Peace," B, 55. But, notwithstanding the aid of the very respectable authorities (Day v. Everett, 7 Mass. 145), it may well be doubted, if this doctrine can be supported to the extent in which it is laid down. The custody of minors is given to their parents for their maintenance, protection, and education; and if a parent, overlooking all these objects, should, to answer his own mercenary views, or gratify his own unworthy passions, bind his child as an apprentice upon terms evidently injurious to his interests, or to a trade, or occupation, which would degrade him from the rank and character, to which his condition and circumstances might fairly entitle him, it would be extremely difficult to support the legality of such a contract. Respublica v. Kepple, 2 Dall. [2 U. S.] 197; Rex v. Inhabitants of Cromford, 8 East, 25. And it would be a strong proposition to maintain that a father might, in time of war, upon the mere footing of the common law, enlist his son as a common soldier in the army, or as a seaman in the navy, without his consent, and compel him to serve during the whole period of his minority, without a right to receive to his own use any of the earnings of his laborious and perilous course of life. Grace v. Wilber, 10 Johns. 453. In such a contract, there would not even be a semblance of benefit to the minor.[2] It is not, however, necessary to decide these points; and they are commented on, merely in answer to some suggestions at the bar. Be the right of parents, in relation to the custody and services of their children, whatever they may, they are rights depending upon the mere municipal rules of the state, and may be enlarged, restrained, and limited as the wisdom or policy of the times may dictate, unless the legislative power be controlled by some constitutional prohibition.

The constitution of the United States has delegated to congress the power "to raise and support armies," and "to provide and maintain a navy"; and, independent of the express clause in the constitution, this must include the power "to make all laws, which shall be necessary and proper for carrying into effect the foregoing powers." It is certain, that the services of minors may be extremely useful and important to the country, both in the army and navy. How many of our most brilliant victories have been won, on land and sea, by persons, who had scarcely passed the age of minority? In the navy, in particular, the employment of minors is almost indispensable. Nautical skill cannot be acquired, but by constant discipline and practice for years in the sea service; and unless this be obtained in the ardor and flexibility of youth, it is rarely, at a later period, the distinguishing characteristic of a seaman. It is notorious that the officers of the navy generally enter the service as midshipmen as early as

[2] It has been recently decided in New York, that a parent has no authority to bind his child to military service. Grace v. Wilber, 10 Johns. 453, 12 Johns. 68.

the age of puberty; and that they can never receive promotion to a higher rank, until they have learned, by a long continuance in this station, the duties and the labors of naval warfare. And to this early discipline and experience, as much as to their gallantry and enterprise, we may proudly attribute their superiority in the contests on the ocean during the late war. It cannot, therefore, be doubted, that the power to enlist minors into the naval service is included within the powers delegated to congress by the constitution; and the exercise of the power is justified by the soundest principles of national policy. And if this exercise should sometimes trench upon supposed private rights, or private convenience, it is to be enumerated among the sacrifices, which the very order of society exacts from its members in furtherance of the public welfare.

The position asserted at the bar, denying to congress the power of enlisting minors without the consent of their parents, is not a little extraordinary. It assumes as its basis, that a granted power cannot be exercised in derogation of the principles of the common law; a construction of the constitution, which would materially impair its vital powers, and overthrow the best settled rules of interpretation. Can there be a doubt, that the state legislature can, by a new statute, declare a minor to be of full age, and capable of acting for himself at fourteen, instead of twenty-one years of age? Can it not emancipate the child altogether from the control of its parents? It has already, in the case of paupers, taken the custody from the parents, and enabled the overseers of the poor to bind out the children as apprentices, or servants, during their minority, without consulting the wishes of the parents. Act Feb. 26, 1794, § 4. It has, without the consent of parents, obliged minors to be enrolled in the militia, and to perform military duties; and although these duties are, in time of peace, but a slight interference with the supposed rights of parents; yet they may, in time of war, expose minors to the constant perils and labors of regular soldiers, and altogether deprive their parents of any control over their persons or services. In time of war, too, the state may, for its defence, establish and maintain an army and navy; and it would be a strange and startling doctrine, that the whole youth of the state might, unless the consent of their parents could be previously obtained, be withheld from the public service, whatever might be the pressure of the public dangers or necessities. And if the state legislature could, in their discretion, abrogate or limit the paternal authority, it must be for precisely the same reasons, that the national legislature could do it, viz. that it is necessary, or proper, to carry into effect some other granted powers.

It has been justly observed, in a work of the very best authority (The Federalist, No. 44), that no maxim is more clearly established in law or in reason, than that wherever the end is required, the means are authorized. Whenever a general power to do a thing is given, every particular power necessary for doing it is included. And I feel no scruple in affirming, that congress, having authority "to provide and maintain a navy," may constitutionally authorize the enlistment into the naval service of any minors, independent of the private consent of their parents; and that the statutes passed for this purpose are, emphatically, the supreme law of the land. Nor is the exercise of this power novel in the institutions of that country, from which we have borrowed most of the principles, which regulate our civil and political rights. It has even been pushed to an extent, which is not only odious, but has become, in a great degree, subversive of the personal liberty of a large class of meritorious subjects. Minors may not only be enlisted into the British navy without the consent of their parents; but they may be forcibly impressed into it against the joint will of their parents and themselves. And even apprentices, regularly bound by contract, are not, except in special cases, and for a limited time prescribed by statute, exempted from the like impressment. Rex v. Reynolds, 6 Term R. 497; Rex v. Edwards, 7 Term R. 745; Ex parte Softly, 1 East, 466; Ex parte Brocke, 6 East, 238; St. 13 Geo. II. c. 17.

Much has been stated in the argument, in reference to what contracts of infants are void, and what are voidable at the common law. There is in the books considerable confusion on this subject, which has not been entirely removed by the learned discussions in Zouch v. Parsons. 3 Burrows, 1794; and see Burgess v. Merrill, 4 Taunt. 468.. The distinctions laid down in another case by Lord Chief Justice Eyre, seem founded in solid reason, viz. that where the court can pronounce, that the contract is for the benefit of the infant, as for instance, for necessaries, there it shall bind him; when it can pronounce it to be to his prejudice, it is void; and that where it is of an uncertain nature, as to benefit or prejudice, it is voidable only; and it is in the election of the infant to affirm it or not. Keane v. Boycott, 2 H. Bl. 511; Rex v. Shinfield, 14 East, 541. It is a material consideration also, that the validity of the infant's act, or contract, is, in point of law, independent of the right of custody in his parent, although this may be an ingredient in ascertaining in point of fact, whether the act, or contract, be for his benefit or not. In short, the disabilities of an infant are intended by law for his own protection, and not for the protection of the rights of third persons; and his acts may, therefore, in many cases, be binding upon him, although the persons, under whose guardianship, natural or positive he then is, do not assent to them. The privilege, too, of avoiding his acts or contracts, where they

are voidable, is a privilege personal to the infant, and which no one can exercise for him. Keane v. Boycott, 2 H. Bl. 511. And whenever any disability, enacted by the common law, is removed by the enactment of a statute, the competency of the infant to do all acts within the purview of such statute, is as complete as that of a person of full age. And whenever a statute has authorized a contract for the public service, which, from its nature or objects, is manifestly intended to be performed by infants, such a contract must, in point of law, be deemed to be for their benefit, and for the public benefit; so that when bona fide made, it is neither void nor voidable, but is strictly obligatory upon them. I say bona fide made, for if there be fraud, circumvention, or undue advantage taken of the infant's age, or situation, by the public agents, the contract could not, in reason or justice, be enforced. It would be strange, indeed, if courts of law could judicially hold contracts to be void, or voidable, which the legislature should deem salutary or essential to the public interests; or pronounce them invalid, because entered into by the very parties, who were within the contemplation of the law.

From these more general considerations, we may now pass to the question, whether the laws of the United States authorized the enlistment of minors into the navy, without the consent of their fathers. All the acts, from the first establishment of the navy, authorize the employment of midshipmen (who are invariably minors, when they enter the service) and all the acts since the statute of 30th June, 1798, c. 81, including those now in force, and under which the present applicant has been enlisted and held in service in express terms authorize the president to engage and employ "boys" in the ordinary duties of the navy. In no one of them is there any provision requiring the consent of parents or guardians to their engagement, or authorizing them to make it. See Acts 30th June, 1798, c. 81 [1 Story's Laws, 520; 1 Stat. 575, c. 64]; 21st April, 1806, c. 35 [2 Stat. 390]; 3d March, 1807, c. 40 [2 Stat. 443]; 31st January, 1809, c. 78 [2 Story's Laws, 1109; 2 Stat. 514, c. 11]; 2d January, 1813, c. 148 [2 Story's Laws, 1282; 2 Stat. 789, c. 6]. The laws manifestly contemplate, that it is a personal contract made by the infants themselves for their own benefit. They are entitled to the pay, the bounties, and the prize-money earned and acquired in the service. This is not denied in the argument. And if the laws be so, then they must, by necessary implication, give a capacity to the infants to make such a contract; and when made, assert its legal validity. Upon any other supposition, the whole object of the legislature would be defeated; for if the contract of the infant, made without the assent of his parent, were void, or voidable, that assent would not, by the mere operation of the common law, change its character. A contract voidable by the common law, cannot be confirmed or avoided by any assent or dissent of the parent thereto. It is binding, or not, solely at the election of the infant himself. And if the contract be void, it is incapable of being set up by any person. To suppose, that the legislature meant to authorize an infant to enlist in the navy and yet that the contract should be voidable at his election, would be to suppose, that it meant to repeal the rules and articles of the navy in his favor, and enable him to desert, when his services were most important to the public. If, indeed, the acts of congress had authorized parents or guardians to bind their minor children to an apprenticeship or servitude in the navy, a valid contract might then have been made by such parents or guardians. But there is no such authority in the acts, nor am I satisfied, that it ever existed at the common law; and if it ever did, the statute of Massachusetts of the 28th of February, 1795, c. 64, seems to have restrained the exercise of that power to the cases and manner specified in that statute. A different doctrine has indeed been held; but it seems to me extremely difficult to be maintained (Day v. Everett, 7 Mass. 145), and, in a case depending upon similar principles of construction, the opposite doctrine has been established in another court (Ex parte M'Dowle, 8 Johns. 253).

Upon the whole, as congress have authorized "boys" to be engaged in the service of the navy, without requiring the previous consent of their parents to the contract of enlistment, that contract, when fairly made with an infant of reasonable discretion, must be deemed to have a semblance of benefit to him, and to be essential to the public welfare, and, therefore, binding to all intents and purposes. And if it were not so binding, but were voidable, even the consent of parents would not infuse into it any farther validity. This construction of the acts respecting the naval establishment, is confirmed by the general practice in that department, and by the consideration, that in the acts respecting enlistments in the army, a proviso was for a long time inserted, "that no person, under the age of twenty-one years, shall be enlisted by any officer, or held in the service of the United States without the consent of his parent, guardian, or master, first had and obtained, if any he have." See Acts 16th March, 1802, c. 9 [2 Stat. 132]; 11th January, 1812, c. 14 [2 Stat. 671]; 20th January, 1813, c. 154 [2 Story's Laws, 1284; 2 Stat. 791, c. 12]. By the acts of 1812 and 1813, this contract must be in writing. And at length the necessities of the public service were such, that the enlistment of minors, over eighteen years of age, into the regular army, was expressly authorized. And the proviso of the act of the 20th of January, 1813, ch. 154, which required the previous consent of their parents, guardians, or mas-

ters was expressly repealed by the act of 10th of December, 1814, c. 10 [3 Stat. 146]. This course of legislation manifestly shows, that whenever the rights of parents were intended to be saved, a special proviso was uniformly introduced for that purpose.

The decisions of two very respectable state courts, which have been cited at the bar, so far as they go, proceed on the same principles, which have been adoped by this court, and are entitled to great weight. Com. v. Murray, 4 Bin. 487; Ex parte Roberts, 2 Hall, Law J. 192. The decisions of our own state court, which have been cited on the other side, are inapplicable; for they turn altogether upon the meaning and extent of the proviso in the army act of 1813, c. 154. It is not now necessary to consider, how far a state court has jurisdiction to discharge a person, who, by the return of the habeas corpus is shown to be enlisted under a contract with the United States. Whenever that question shall arise, it will deserve very grave consideration. See Ex parte Roberts, 2 Hall, Law J. 192; Ferguson's Case, 9 Johns. 239; Martin v. Hunter, 1 Wheat. [14 U. S.] 304. But, with great deference to the learned judges, I have never been able to bring my mind to assent to the construction put upon the act of 1813, in some of the cases in the Massachusetts Reports. Com. v. Cushing 11 Mass. 67.

The view, which has been taken upon the general question, as to the validity of the contract of enlistment, renders it unnecessary to consider the second point made in this cause, viz. how far an infant can, by disaffirming his contract of service, avoid the punishment, which has been regularly adjudged against him by the sentence of a court-martial, for a crime committed by him, the whole proceedings and sentence having been pronounced, while the contract was in force. See Rex v. Inhabitants of St. Nicholas, Burrows, Sett. Cas. 91; 2 Strange, 1066; Gray v. Cookson, 16 East, 13; Grace v. Wilber, 10 Johns. 453, 12 Johns. 68.

If it had been necessary in this case to ascertain, whether there had been any consent of the father, I should have thought it necessary to have required more explicit affidavits than have been made, and a peremptory denial of assent on the part of the father, as well as a special statement of the facts, as to the mode of life and place of residence of the minor previous to his enlistment; for an assent of the father need not be express, but may be implied from circumstances. If a father should voluntarily send his minor children away from home, to obtain a maintenance and support in any manner, that they could; this would be an implied consent to any contract for that purpose, into which they should enter, and a waiver of his parental rights. It is upon this ground, that the ordinary retainers of servants, who are minors, are held valid against the subsequent acts of the father. In strictness of law the contract of the minor in such cases becomes obligatory, because, being an exile from his father's house, whatever contract he forms is, in an enlarged view, necessary for his support, maintenance, or education.

I am of opinion, that Robert Treadwell, the minor, ought to be remanded to the custody of his commanding officer. It is the opinion of the district judge, that the consent of the parent, or guardian, when there is one, is necessary, either expressed or implied, to authorize the engagement of a minor in the naval service; but he concurs in the order to remand the said Robert to the custody of his commanding officer on the special circumstances of this case.

UNITED STATES (BAJORQUES v.). See Case No. 761.

Case No. 14,498.

UNITED STATES v. BAKER.

[See Case No. 14,501.]

Case No. 14,499.

UNITED STATES v. BAKER.

[3 Ben. 68.] [1]

District Court, S. D. New York. Dec., 1868.

SETTING ASIDE VERDICT — DEAF JUROR — CHALLENGE.

1. Nothing that is a cause of challenge to a juror before verdict, can be used to set aside a verdict.

[Cited in Johns v. Hodges, 60 Md. 215.]

2. Where one of the jurors in a criminal trial was deaf, and the defendant was ignorant of the fact when the jury were empanelled: *Held*, that this was no cause for setting aside the verdict.

[Cited in Brewer v. Jacobs, 22 Fed. 239.]

[Cited in Re Waterm»n's Will (R. I.) 28 Atl. 1027; Ryan v. River Side & Oswego Mills, 15 R. I. 436, 8 Atl. 246; State v. Powers, 10 Or. 145; U. S. v. Augney, 6 Mackey, 89.]

The defendant in this case [Garniss E. Baker] was convicted of an offence under the national banking act. After the verdict, a motion was made to set it aside on the ground, among others, that one of the jurors was deaf and did not and could not hear the evidence, and that the defendant was ignorant, at the time the jury were sworn and empanelled, of the deafness of the juror.

B. K. Phelps, Asst. U. S. Dist. Atty.

John Sedgwick, for defendant.

BLATCHFORD, District Judge. On principle, as well as on authority, nothing that is a cause of challenge to a juror before verdict, can be used to set aside a verdict, as for a mistrial, even though the cause of challenge was unknown to the party when the jury

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

were sworn. Hollingsworth v. Duane, 4 Dall. [4 U. S.] 353. The nonpossession of any natural faculty stands, in respect to a juror duly summoned, in the same category with alienage or infancy or sex. That a juror is an alien is an objection that must be taken advantage of before verdict and by challenge. Hollingsworth v. Duane, before cited. So, it is a ground for challenge, that a juror is an infant or a female. Whart. Cr. Law (2d Ed.) p. 856. Where an infant is duly summoned as a juror and returned on the panel, his infancy must be objected to by challenge. In the present case the juror was duly summoned and returned on the panel. His alleged incompetency was, therefore, a cause of challenge. Rex v. Tremaine, 7 Dowl. & R. 684. The motion for a new trial on this ground is denied.

A new trial was granted on a question of the weight of evidence. on two counts of the indictment.

Case No. 14,500.

UNITED STATES v. BAKER et al.

[5 Ben. 251; 13 Int. Rev. Rec. 85.] [1]

District Court, S. D. New York. March, 1871.

CUSTOMS — ENTRY BY MEANS OF FALSE PAPER — BRIBERY—FORFEITURE—INTENT—BURDEN OF PROOF.

1. The meaning of the clause of the 1st section of the act of March 3d, 1863 (12 Stat. 737), which provides that in case of the entry of goods by means of any false paper, &c., "said goods, wares, and merchandise, or their value, shall be forfeited and disposed of, &c.," is that the value of the goods may be recovered by action against the persons making the entry.

[Cited in U. S. v. Willetts, Case No. 16,699.]

2. W. & Co., having imported a quantity of sugar from Manila, presented at the custom house an entry for warehouse, in which was stated the number of mats of sugar and the aggregate weight of the sugar in peculs, and underneath the number of peculs a certain number of pounds. The entry having been completed, and the goods having been afterwards taken out of bond and the duties paid, and an action being brought against W. & Co., under the act above named, to recover the value of the goods, it was claimed that this was a false entry, in that the number of pounds stated was not correct: *Held*, that if the defendants undertook to state in their entry the number of pounds, they were bound to make a true statement thereof; and that that statement would be true if it was a statement of the number of pounds which, by the usage at the custom house at the time, was required to be put in for that number of peculs.

3. If the statement of the pounds was false, and was made with the intent to procure the entry of the sugar on the payment of a smaller sum for duties than ought to have been paid, such act was done "knowingly," within the meaning of the act.

4. In judging of the question of intent, the jury would have a right to take into consideration the subsequent conduct and acts of the defendants.

5. The word "entry," in that act, means the entire transaction by which the importer obtains the entrance of his goods into the body of the merchandise of the United States.

6. The bribing of a weigher by an importer, at any time before the final payment of the duties, with the intent of procuring a false return, and the procuring of a false return from him, whereby the government should receive less duties than it ought to have received, would be an act within the provisions of that section of the act.

7. The act of one member of a firm, in subscribing an entry in the firm name, and taking the oath thereto, is to be deemed the act of the firm.

8. The fact that previous entries of sugar by the defendants had been made at one certain number of pounds to the pecul, would justify the jury in finding that the defendants had knowledge of a usage at the custom house to require the reduction of the pecul to pounds at that rate.

9. The provisions of the 71st section of the act of March 2d, 1799 [1 Stat. 678], in relation to the burden of proof, do not apply to suits under this act of 1863

10. On a forfeiture of the goods by reason of the falsity of the original warehouse entry, the government would be entitled to recover the value of the goods, as it was at the time of such entry; and, on a forfeiture by reason of any false practice subsequent to such original entry, the government would be entitled to recover the value of the goods at the time of the payment of the duties.

[This was an action at law by the United States against Richard Baker, Jr., to recover the value of certain sugar claimed to be forfeited.]

Noah Davis, Dist. Atty., Thomas Simons, Asst. Dist. Atty., and George S. Sedgwick, Asst. Dist. Atty., for the United States.

Sidney Webster and James B. Craig, for defendants.

BLATCHFORD, District Judge (charging jury). At length, after a devotion of now the thirteenth day to this cause, the time has arrived for the court to commit it, upon the law, as it shall be laid down to you by the court, to you, for your determination upon the facts. I shall do so as briefly as possible, confining myself strictly to an exposition of the law applicable to the facts of this case, leaving to you entirely the proper responsibility that falls upon a jury, of deciding upon the facts, on the law, as so laid down. The case is one of great magnitude and importance, not only because of the pecuniary amount involved in it, but because of the principles involved in the case, which have been so fully developed to you by the district attorney in his summing up, as one of a class of cases relating to the subject to which this relates. It is important, also, because, if the facts in this case are proved to be such as the government claims them to be, the case deeply affects the character of the defendants. And, short of a cause involving the life of a fellow being, there is no case that can be presented to a jury, under the laws of the United States, in the courts of the United States, of more importance, more lasting importance, more far-reaching importance, in all its bearings and relations, than

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 13 Int. Rev. Rec. 85, contains only a partial report.]

a case of this kind. These considerations excuse what may have seemed to you on the part of the district attorney, of the counsel for the defendants, and of the court, to have been, perhaps, a needless procrastination, a needless waste of time. These cases have to be tried carefully and patiently. The government must, with fidelity, as in this case, not pushing the thing too far, as has not been done in this case, put in all its evidence bearing on the case. A great deal of it depends on papers and documents; and, if they have matters in them which, on their face, are not perfectly clear, such matters must be explained. So, on the other hand, the defendants, if there is to be a verdict against them, are entitled to have that verdict rendered according to the law of the land. They are entitled to take their objections and have the court rule upon them, in order that, if any error be made by the court in matters of law, the right of reviewing the decisions of the court may be fully preserved. Therefore it is, that this case has consumed a great deal of time and that the investigation has been so thorough. For myself, I can truly say, and, certainly, it seems to me true, in regard to both the district attorney and the counsel for the defendants, that there has been nothing done in this case that has been prompted by any other motive than an earnest desire to accomplish the faithful discharge of duty.

This case is an action at law by the United States, to recover from these defendants a certain sum of money, as the value of certain sugar, which value the United States claim to have been forfeited to the United States by reason of the matters charged in the declaration. The declaration consists of two charges, or, as they are called in legal and technical parlance, two counts. Both of them are founded upon a single section of a statute of the United States, the first section of the act of March 3, 1863 (12 Stat. 737), and, in presenting this case to you, that you may clearly understand it, I shall first call your attention to the statute. The statute, after preliminarily providing for the manner in which invoices of foreign goods shall be made up abroad, shall be produced to a consul, shall have a declaration indorsed thereon, to be signed and made by a specified individual, and shall have a certificate, made by the consul, on each of the invoices, and directing to whom the consul shall deliver the invoices so certified, declares, that no goods shall be admitted to entry in the United States unless these things so required to be done in regard to the invoice, the declaration, and the certificate of the consul, shall first have been done in regular form. Then comes the clause upon which this action is founded: "If any such owner, consignee, or agent, of any goods, wares, or merchandise, shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, or false certificate of a consul, vice-consul, or commercial agent, or of any invoice which shall not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, said goods, wares, and merchandise, or their value, shall be forfeited and disposed of as other forfeitures for violation of the revenue laws." That means, shall be forfeited to the United States; and the forfeiture, as you perceive, is of the goods or their value—in the alternative. This section of this statute, and the 66th section of the act of March 2d, 1799 (1 Stat. 677), are the only two sections to be found in any statute of the United States relating to forfeitures under the customs laws, which are thus expressed in the alternative—a forfeiture of the offending merchandise or its value. All other statutes, of which there are innumerable ones, forfeit the merchandise simply, and forfeit it only in case it is seized and taken bodily into possession by the United States, and proceeded against as an offending thing, in rem, as it is called, when the question is, whether the property so seized and forfeited shall be condemned. But this is a prosecution for the value of goods, under the alternative clause—the goods or their value.

The 66th section of the act of 1799, in declaring that the goods, or their value, shall be forfeited, when entered on a fraudulent invoice, declares, that the goods, or the value thereof, "to be recovered of the person making entry," shall be forfeited, thus designating who shall be the responsible party to be sued by the government. The act of 1863 merely says that the goods, or their value, shall be forfeited. It does not say "to be recovered of the person making entry." But those words are not necessary to give the right of action under the act of 1863. That is the meaning of this law; and, according to the testimony in this case, the value claimed, if to be recovered from anybody, is to be recovered from these defendants.

A great deal has been said, in the course of the trial, respecting the meaning of the word "entry," and I am called upon, in the requests to charge on both sides, which are thirty in number—fourteen on the part of the government and sixteen on the part of the defendants—to give a construction to the word "entry." If any person shall "knowingly make, or attempt to make, an entry thereof," such and such consequences shall follow. One side claims that it shall have a more restricted meaning, and the other side a more enlarged meaning. Without going into any argument on the subject, I shall content myself with stating the ruling which I shall make for the purposes of this trial.

The declaration, as I have stated, is divided into two counts, and, in order to warrant a recovery by the United States, upon either count, that count must be substantially prov-

ed on the part of the United States. Now, what is the first count that must be thus substantially proved? It is this—that, on the 10th of October, 1868, the defendants, W. F. Weld & Co., imported into the United States from Manila [in the ship Franklin],[2] which was a foreign country, certain sugars, [to the value of $400,000],[2] upon which certain specific duties were due to the United States [under the following entry:

M	Nine thousand ninety-two		
T	Eleven thousand seven hundred and fifty-six		
Q	Two thousand twenty-seven		
C	Two thousand fourteen		
S	Fifteen hundred twenty-four		
B	Four thousand seventy-two		
T	Twenty-five hundred sixty bags sugar	Pel. 14,716.36 1,333.52	$64,613.92 6,161.10
		16,049.88	$70,775.02
		-2,139,984 lbs.][2]	

—That is, so much a pound, in contradistinction to an ad valorem duty, of such a percentage on value; and that the defendants made an entry thereof into the United States—meaning, that they made such an entry as is covered by the first section of the act of March 3d, 1863—by means of a certain written paper, known as an entry, and left with the collector of the port of New York, in which entry such sugar was described in the manner set forth in such first count. There is then inserted, in such first count, a verbatim copy of the body of the paper called an entry for warehouse, which has been put in evidence on this trial, as Exhibit No. 1. It contains the letters upon the mats, which were 33,045 in number, and the number of mats marked with each letter, and the aggregate weight of the sugar in peculs—16,049$^{88}/_{100}$ peculs. Underneath the number of peculs is the statement—2,139,984 pounds. The first count also alleges, that the entry so left with the collector was a false and fraudulent paper, and a false and fraudulent practice and appliance, in this, to wit, that, whereas these goods were subject to the payment of specific duties, the entry did not contain a true statement of the actual weight of the sugar, but, on the contrary, contained a false statement of such weight, with the intent, on the part of the defendants, to deceive the collector in relation to the actual weight of the sugar, and procure the entry thereof on the payment of much less duties than were actually and legally due thereon; that, by reason and in consequence of this false paper, and this false and fraudulent practice and appliance, the United States were defrauded of a large part of the duties legally due on these goods; and that, by reason thereof, and of the first section of the act of March 3d, 1863, the value of these goods was forfeited to the United States, and, therefore, the United States claim to recover such value from the defendants

[2] [13 Int. Rev. Rec. 85.]

It is not disputed, that the only allegation of falsity, or of a false practice, or of a false appliance, made in the first count of the declaration, in respect to this original entry for warehouse, made on the 10th of October, 1868, is, that it did not contain a true statement of the actual weight of the sugar—not that the statement of the number of peculs was false, but that the statement of the number of pounds was false, and not the actual weight of the sugar. Therefore, the sole question, under the first count of the declaration is, whether the statement of this number of pounds in the entry was a false statement. For that statement, the defendants are, upon the evidence, responsible, because it is shown that the entry, containing this statement of the number of pounds, bore, when presented to be passed at the custom house, the signature of the defendants' copartnership name, made by Frederick Baker, one of the defendants.

Now, what would make such statement false? How was it false? The averment in the declaration is, that it did not contain a true statement of the actual weight of the sugar. If the defendants, irrespective of the question as to whether they were bound to put into the entry a statement of the weight of the sugar in American pounds, undertook to state therein the number of such pounds, they were bound to make a true statement thereof, and not a false one. Now, what would make such a statement false? and what true statement were they bound to put in, if they put in any statement whatever, as to the number of pounds? This, and only this—a true statement of the number of pounds required to be put in by the usage of the New York custom house at that time, not afterwards, and known to the defendants to be required by such usage, as the weight in pounds, which the collector and the naval officer had adopted as the statement of pounds for the estimation of duties on an entry for warehouse of this character. If they put such weight in, in putting in this number of pounds, there was no falsity. If they did not, there was.

If, on such view of the law, the statement was false, the next question is—Was the false statement made with intent to deceive the collector and to procure entry of the goods on payment of less than the legal duties upon the actual number of pounds of the sugar? If the statement was false, was it the intent of the defendants, in making that statement, in the original warehouse entry, to deceive the collector, and to procure the entry of the sugar on the payment of less duties than were legally due thereon? The statute says, "knowingly"—shall "knowingly" do the act. The pleader, in drawing the declaration, has interpreted the word "knowingly," which is not used in the declaration, but is used in the statute, to mean, with intent to deceive the collector and to defraud the United States; and that is the

proper meaning of the word "knowingly," with reference to this case. The government do not claim at your hands a verdict, unless they have shown that this statement in the original warehouse entry, if false, in the sense I have stated, was made with an intent to procure this result, of getting in the sugar, in the end, at less duties than it ought to have paid—not at a duty of less than three cents a pound, but on the payment to the United States of a less number of gold dollars for duties than ought to have been paid.

In judging of the question of intent, as to the charge in the first count of the declaration, as I have explained it to you, you have a right to take into consideration the subsequent conduct and acts of the defendants, as they have been proved to you, and admitted in evidence in this case, as you shall believe the facts to be. If you believe that the bribery charged took place, you have a right to use the light reflected back therefrom upon the original putting into the custom house of a false weight in pounds, on the question of the original intent in putting in such false weight. Therefore it is, that the whole evidence in the case is proper to be taken into consideration, on the question of intent, in respect to the charge in the first count of the declaration, if you shall reach the consideration of that question. This is all that I have to say in regard to the first count, except what I shall say hereafter, when I come to go over the prayers for instructions.

The first count being pointed to a falsity merely in the statement of the number of pounds in the original entry for warehouse, the second count is of a very different character. The second count alleges, that the defendants, who were the owners, consignees, or agents of these goods, procured the entry thereof into the United States, on the payment of much less duties than were due thereon, by means of a certain false and fraudulent practice and appliance, in this, that the defendants bribed the weigher, in order to procure from him a false return of the weight of the goods, which were subject to the payment of specific duties; that thereupon, and in consequence of such false and fraudulent practice, that is, of the bribery, the weigher made a false return of the weight of the goods to the collector, in this, that, whereas the sugar actually weighed 2,231,434 pounds, the weigher returned the same as weighing 2,175,644 pounds, which is about 56,000 pounds less; that, thereupon, the collector collected duties on the less amount, on a weight 56,000 pounds less than it should have been, whereas, legally and justly, he was entitled to collect duties on 2,231,434 pounds, 56,000 pounds more than he did collect duties on; that, by reason of these false practices and appliances of the defendants in relation to the weighing of the sugar, the government was defrauded of a large portion of the duties with which the goods were legally chargeable; and that, by reason of the premises, and by force of the statute, the value of the goods became forfeited to the United States, and the United States are entitled to recover such value from the defendants in this action.

The word "entry," in the clause of the first section of the act of 1863, which says, that, if any of the persons named shall "knowingly make, or attempt to make, an entry," by means of any false practice or appliance, the goods shall be forfeited, means not only the entry specified in the preceding part of that section, but any entry so called in custom house language—so called in the custom house regulations, known at the time, and prescribed by the secretary of the treasury, under authority of an act of congress, which regulations have the force of law, and must be presumed to have been in the mind of congress, when they, in 1863, enacted this statute. We find, in these treasury regulations, many different descriptions of entries, called and designated therein as entries, and forms for which are therein given. There is an entry for warehouse, such as was the original entry in this case. There is an entry for consumption, which may be made in the first instance, and the goods be taken immediately for consumption. After goods have been warehoused, there is a withdrawal entry, as there was in this case. There is also an entry for transportation, when goods are to be taken to some other place in the United States, to be there warehoused. There is an entry for warehouse at the new place of warehouse, and there is a withdrawal entry at such new place. And there are several other descriptions of entries. This statute covers all these kinds of entries. If any owner of goods knowingly makes, or attempts to make, an entry—an original entry for warehouse, as in this case, or a withdrawal entry, as in this case, or any of such entries as are shown to have been made in this case—by means of a false practice, the transaction is within this statute; and, for the purposes of this statute, the entry is not regarded as completed or finished, until the entire transaction is ended between the owner of the goods and the government, in respect to the duties thereon—until the duties are liquidated and paid. The statute, undoubtedly, in various places, speaks of the entry as having been made at the time when a permit is given for the landing of the goods. But that is a mere mode of speech. This very section states, indeed, that the liquidation of entries shall not be delayed longer than eighteen months from the time of making the entry. But that is a mere fixing of time—the period of eighteen months from the time of putting in the paper called an entry. For the purposes of the clause which I have read to you, inflicting this forfeiture, the word "entry" means the entire transaction by which the importer obtains the entrance of his goods into the body of the merchandise of the United States. Until the entire transaction between him and the government is closed, on

an entry for warehouse, like that in the present case, by a withdrawal of the goods from warehouse, and the liquidation of the duties, and the payment of the duties, on all goods covered by the original paper, called the "entry for warehouse," the entry of the goods, within the meaning of the clause of the statute imposing forfeiture, is not to be regarded as completed, and any false practice, or any false appliance, used as an instrument or means of conducting the business, from the beginning to the end, anywhere, works the forfeiture, if it is done knowingly, or with intent to deceive or defraud the United States, or to procure the payment of less duty on the goods than they ought to have paid. Therefore, upon the second count of the declaration, if you shall believe, that, at any time, after the making of the original entry for warehouse, there was, in connection with any withdrawal entry, or at any stage, down to and including the final payment of the duties which were paid upon these goods, any bribing of the weigher by the defendants, with the intent of procuring a false return by him, and that the false return was procured, whereby the government received less duties on the goods than it ought to have received, then the charge in the second count of the declaration is made out.

The question of fact I shall leave wholly to you. I shall only state to you what I consider to be the theory of the claim on the part of the government in this case, and which is the theory of the declaration, and which the government must make out, to recover. It is this—that these 33,045 mats of sugar, entered for warehouse at a computation of 133⅓ pounds to a pecul, making 2,139,984 pounds, weighed, when weighed by the government weigher, 2,288,646 pounds, gross weight; that, deducting the government allowance for tare, of 57,212 pounds, or 2½ per cent. on the gross weight, left a net weight of 2,231,434 pounds, which was, in round numbers, 91,000 pounds more than the weight for the estimation of duties, put into the original entry; that this 2,231,434 pounds was the true net weight which ought to have been returned by the weigher; that the weigher, instead of returning that weight as the true net weight, took that number of pounds within 4 pounds, that is, took 2,231,430 pounds, and put it down as gross weight and computed 2½ per cent. upon it, as tare, and deducted such 2½ per cent., being 55,786 pounds, from it, and reached a net weight of 2,175,644 pounds, which he in fact returned to the custom house as the true net weight, and upon which the duties were paid; and that this false return was procured by the bribing of the weigher by the defendants. The difference between the number of pounds so returned as the net weight and the number of pounds stated in the original entry, was a difference of nearly 36,000 pounds, the amount stated in the original entry being that much less. Upon the number of pounds so stated in the original entry, the defendants had, on making their withdrawal entries, paid duties, at three cents a pound. Of course, they owed to the government the duties on the 36,000 pounds, in round numbers $1,100. They were called upon to pay it, and they did pay it. The 2,231,434 pounds, which the government claim was the true net weight, and should have been returned as such by the weigher, is the footing up of net weights which appear in the little book of weights, testified to by Mr. George and annexed to his deposition. The tare in that book, 57,212 pounds, is the sum total of eight different lines of tare. There being eight different lines of gross weight, there are eight different lines of tare. The 57,212 pounds tare is the total of those eight different amounts of tare, which are the tares upon the eight parcels of mats, differently lettered. If the 2½ per cent. tare be calculated on the 2,288,646 pounds, in the gross, it would make 57,216 pounds; but it foots up only 57,212 pounds, because, by calculating the tare on each one of the eight lines of gross weight, the fractions make the difference of the four pounds. The return, however, shows, on the face of it, a setting down of 2,231,430 pounds as the gross weight, four pounds less than the number of pounds which the government claims was the actual net weight. But, a setting down of 2,288,646 pounds, and a deduction therefrom of 2½ per cent. thereon, or 57,216 pounds, leaves, precisely, 2,231,430 pounds, which is the gross weight stated in the return. Then, the tare stated in the return, 55,786 pounds, is precisely 2½ per cent. upon the 2,231,430 pounds stated therein as the gross weight. In connection with the fact that the net weight returned was nearly 36,000 pounds more than the weight stated in the original entry, the government claims that such net weight was still 55,000 pounds less than the true net weight, and, hence, that there was a design in reducing the pecul at 133⅓ pounds, instead of at 139½ pounds, in the original entry, thus making the weight, for the estimation of duties, 91,000 pounds less than it should have been, to divert attention from the false return of the weigher, as that would show a greater weight than the entry weight, while still largely less than the true net weight. Upon those views, in connection with all the evidence in the case, the government claims, that there was a design throughout, on the part of the defendants, to commit a fraud upon the government; and, to show this design, it urges, as a fact, in connection with the testimony of George, that the defendants, in paying duties on only 2,175,644 pounds, got the benefit, not only of the 57,212 pounds of tare, which, it is admitted, was proper and legitimate tare, at 2½ per cent., but also, of a further illegal tare, of 55,786 pounds, and that, upon such 55,786 pounds the defendants have never

paid any duty to the government, and that the government has not received, by over $1,670 in gold, the duty it should have received on this sugar. The government claims, that the defendants so received the benefit of a tare, in the aggregate, of within two pounds of 113,000 pounds; and then the government refers to the account of the sales of this sugar by the defendants, whereby it appears, that, in selling the sugar, they allowed to their customers a tare upon it of 114,204 pounds. Such is the theory of the government. On the part of the defendants, the theory is, that the story of Carr and George, as to the bribery, is an utter fabrication. It is for you to pass upon these questions of fact.

In going over the requests to charge, I shall only comment on those to which my assent is given. I shall say nothing about the others, and they will be regarded as refused.

The first proposition on the part of the government I charge you to be law: "That the acts of the defendant Frederick Baker, in subscribing the entry," that is, the original entry for warehouse, "in the firm name, and taking the oath thereto, are to be deemed the acts of the defendants, and the statements contained in the entry, when so signed and verified, are to be deemed the statements of the defendants." This principle applies equally, also, to any entry in the case which was subscribed by the defendant Frederick Baker.

The third proposition on the part of the government I assent to and charge: "That, whether the defendants were required or not, by the regulations of the secretary of the treasury, to state in the entry the quantity of the sugar in the weight of the United States, it was their duty, in stating such quantity in the weight of the United States, to state the same truly, and they are responsible for the truth of the statement they made in relation to such quantity."

I also charge you affirmatively upon the fourth proposition on the part of the government: "That the act of the clerks of the custom house, in taking or adopting such statement of weight, in estimating the duties on the sugar, does not relieve the defendants from responsibility for the truth of the statement, or charge the government with the adoption or recognition of such statement of quantity as accurate, or that the defendants' mode of computing it was correct."

I also charge you in accordance with the fifth proposition on the part of the government: "That the fact, if it be so, that all the entries of sugar shown to have been made by the defendants at the port of New York, prior to the entry of October 10th, 1868, with but one exception, were made by them at 139½ pounds to the pecul, would justify the jury in finding that the defendants had knowledge of a usage of the custom house to require the reduction of the pecul at that rate."

I also charge affirmatively on the sixth proposition on the part of the government: "That, if the jury find that, before the entry in question, the defendants had knowledge of a usage at the custom house to reduce the pecul of sugar to pounds at the rate of 139½, the burthen is upon the defendants to show that some change was made prior to the making of the entry in question, that justified the defendants in changing the rate of reduction to 133⅓ in that entry."

I also charge affirmatively upon the seventh proposition on the part of the government: "That the fact, if it be so, that, in every entry of sugar made by the defendants before October, 1868, in which the pecul was not reduced to pounds by the defendants, it had been taken up by the clerks, and reduced, at 139½, for the estimation of duties, is to be considered as tending, and is the best evidence, to show what the usage at the custom house was prior to the entry in question, provided such reduction at that rate by the clerks was known to the defendants."

I also charge in accordance with proposition No. 7½ on the part of the government: "That the point of time to which the inquiry of the jury is to be directed, as to the usage of the custom house establishing the rate of the pecul, is the time of the entry in question, the 10th of October, 1868."

I also charge affirmatively upon the tenth proposition on the part of the government: "That, to make an entry of goods, wares and merchandise, within the meaning of the penal clause of the first section of the act of March 3d, 1863, comprises all the acts required by statute or regulation to be done by the owner, agent, or consignee of the goods, or by the officers of the customs, concerning the goods, before the absolute right of possession thereof passes from the government to the importer, and, in a case where the goods go into consumption, it includes all the proceedings from the presentation of the original entry to the final delivery of the goods to the importer, upon performance of all the requirements of the law and regulations; and, if the jury find that the defendants knowingly presented, or caused or procured to be presented, in the course of such proceedings, and as a part thereof, any document or paper required for such purpose by law or regulations, and which was false or fraudulent, or, if they knowingly did any act, or caused or procured any act to be done, in the course of such proceedings, and as a part thereof, which was required by law or regulations therefor, and which was false or fraudulent, the defendants must be held to have made an entry of the goods by means of false or fraudulent documents and papers, or by means of false or fraudulent practices and appliances, within the meaning of said statute, and the merchandise or its value is forfeitable." This is subject only to the qualification, that the fraudulent papers, appliances and practices to be considered are those specified in the declaration.

I also charge in accordance with the elev-

enth proposition on the part of the government: "That, for the purposes of the trial, the entry of the sugar in question was not made, within the meaning of the penal provisions of the first section of the act of March 3d, 1863, until the ascertainment of the duties upon the original warehouse entry, upon the weigher's special return of the weight of the sugar," and, I add, until the payment of those duties, "that said return, and all entries for consumption, and all other acts, in evidence, of the defendants and their agents, or of the customs officers, subsequent to the presentation of said warehouse entry, and prior to the said ascertainment of the duties payable on said sugar," and, I add, prior to the payment of such duties, "done, or purporting to be done, in accordance with provisions or requirements of law, to effect the said entry of the said sugar, are to be considered by the jury as parts of the proceeding of making the said entry, and that, if they or any of them shall be found to have been false or fraudulent, and to have been knowingly done or procured to be done by the defendants, the plaintiffs will be entitled to a verdict." As I said before, these acts are to be acts alleged in the declaration.

I also charge in accordance with the twelfth proposition on the part of the government: "That the term 'entry,' in the penal provision of the first section of the act of March 3d, 1863, is not to be restricted, in its application, to any particular form or kind of entry, such as an entry for warehouse, but includes every description of entry of merchandise prescribed or authorized by statute or treasury regulations issued in pursuance of statutory authority; and, therefore, if the jury shall find that, in making the original entry for warehouse, or either of the several entries for withdrawal for consumption, the defendants, or their agents, knowingly presented, or caused or procured to be presented, to the proper officers of the customs, any document or paper which was false or fraudulent, or made use of any false or fraudulent practice or appliance whatsoever, by means of which the government were, or might have been, defrauded and injured, the plaintiffs are entitled to a verdict." As I said before, this is to be confined to the papers and acts alleged in the declaration. With that qualification, the proposition is correct, and, probably, that is all it means.

I also charge in accordance with the thirteenth proposition on the part of the government: "That, if the jury shall find that the defendants, in making the final entry of withdrawal for consumption, presented to the proper officers the documents and papers marked numbers 15 and 15A, containing, or purporting to contain, a statement of the quantity of the sugar not previously withdrawn under former withdrawal entries, and that, prior to such presentation of such papers, the defendants had fraudulently procured the weigher's special return of the weight of the sugar to be made at a less quantity than the weight actually ascertained by him, with intent to avoid the payment of some part of the duties required to be paid by law, and knew that the weight ascertained by the weigher had been fraudulently and falsely returned by him, and that the weight stated by the defendants in said documents and papers was less than the actual weight on which duties had not been paid, and, in making and presenting said documents and papers, concealed from the officers the facts known to the defendants in respect to the false and fraudulent return of the weigher and the mode in which it had been procured, and that the actual weight was greater than that stated in such papers and documents, and greater than the amount stated in said return, with the expectation and intent that the duties should be liquidated, upon such false return, at less than the law required to be paid, then the jury will be at liberty to find that that withdrawal entry was, within the meaning of the law, made by false and fraudulent practices and appliances, and the plaintiffs are entitled to recover the value of the sugar withdrawn thereunder."

Those are all the requests on the part of the government.

I now come to the sixteen prayers on the part of the defendants, and I charge you in accordance with the first proposition on the part of the defendants: "That there is no evidence before the jury that the original entry for warehouse of the sugar in controversy, as presented to the collector by the defendants, is false in any respect, other than in the statement therein, that 16.049 $^{88}/_{100}$ peculs are equal to 2,139,984 pounds."

I also charge you in accordance with the second proposition on the part of the defendants: "That, before the jury can find that the number of pounds thus stated by the defendants in their original warehouse entry is false, within the meaning of the first section of the act of March 3d, 1863, they must find, upon the evidence in this case, that, at the time this entry was presented at the custom house, there was a standard equivalent in pounds, for the Manila pecul of sugar, adopted and used in the New York custom house by the collector and naval officer thereof, for the purpose of estimating duties on the invoice quantity of sugars entered for warehouse from Manila, when such quantity is expressed on the invoice in peculs, and that the statement of the defendants on entry did not conform to such standard."

I also charge you in accordance with the third proposition on the part of the defendants: "That the burden is upon the United States, of satisfying the jury what was the true standard used at the custom house in New York, October 10th, 1868, at the time of the presentation of the original warehouse entry in question, for the reduction of peculs into pounds, by the collector and

naval officer, for the purpose of estimating duty on the invoice quantity thereof, and that the standard of 133⅓ adopted by the agents of the defendants in this case did not conform to such custom house standard."

I also charge you in accordance with the fourth proposition on the part of the defendants: "That, in determining what was the standard, if any, by which, in the New York custom house, in 1868, the pecul of Manila was required by the collector and naval officer thereof to be transmuted into pounds, for the purpose of estimating duties upon the invoice quantity of sugars entered at said custom house from that port, the jury is entitled and permitted, upon the evidence in this case, to inquire and consider what such standard was, in the practice of the entry clerks officially required at that time to make such estimation, and also in the practice of the importers and custom house brokers, as manifested by their action in making entries in said custom house, which is in proof in this case"—that is, as derived from what the court admitted as evidence on that subject.

I also charge in accordance with the fifth proposition on the part of the defendants: "That it was the duty of the collector and naval officer, either personally, or through their entry clerks assigned thereto, to transmute the peculs of the invoice into pounds, in order to estimate the duty on the sugars, and, even if the defendants stated on the entry an equivalent of the peculs in pounds, it was still the duty of the collector and naval officer, or their entry clerks, to verify such statement, and disregard it if false, and the jury are entitled to inquire, in this case, whether the entry clerks in the offices of the collector and naval officer did not compute the number of pounds contained in the invoice by the same standard, and arrive at the same result as did the defendants."

I also charge you in accordance with the sixth proposition on the part of the defendants: "That the equivalent of the pecul of Manila for sugar not being fixed by any law of congress, the jury cannot find a verdict for the government on the first count of the declaration, unless they are satisfied that there was, in the New York custom house, at the time of the importation in controversy, an established rate of transmuting such pecul into pounds, for the estimation of duties on the invoice quantity of Manila sugar, and that such rate was brought to the knowledge of the defendants, and that it was different from 133⅓, and that the defendants used the rate they did, in the entry in question, with intent to defraud the revenue of the United States."

I also charge in accordance with the eighth proposition on the part of the defendants: "That the witness Lydecker, having given testimony on behalf of the United States, as to instructions to the collector of customs for New York, respecting the rate of 139½ for reducing the pecul of Manila for sugar to pounds, for the estimation of duties, the court is bound to instruct the jury, that circulars or instructions issued by the secretary of the treasury in Washington, in 1858, or in any other year, cannot be taken by the jury as establishing a standard or usage in this case, unless the jury shall be satisfied, as matter of fact, upon the whole evidence, that such instructions or decisions were adopted and enforced in said custom house, by the collector thereof, at or about the time of this importation, in estimating duties by the entry clerks, on the presentation of entries for warehouse, and that the adoption and use of the standard of 139½ was brought to the knowledge of the defendants, before the entry in question."

I also charge in accordance with the ninth proposition on behalf of the defendants: "That the jury must return a verdict for the defendants upon the first count of the declaration, unless they shall be satisfied that the defendants knew their rate of transmutation of peculs into pounds, on the original entry, was false, and that the defendants made such transmutation with guilty knowledge at the time that it did not conform to the equivalent of the pecul used by the collector and naval officer in the New York custom house, at that time, for estimating duties on sugars from Manila."

I also charge in accordance with the fifteenth prayer on the part of defendants: "That the provisions of the 71st section of the act of March 2d, 1799, in relation to the burden of proof, do not apply to suits in personam, for the recovery of penalties or forfeitures, but only to suits in rem, on seizures," and, therefore, do not apply to this suit, which is a suit in personam, and not upon a seizure—in other words, that the burden of proof in this case is, as I have charged you, upon the United States—"and the jury, before they can render a verdict for the United States, must find that the government has proved the allegations in the declaration, by a fair preponderance of testimony."

There is but one subject remaining, and that is one upon which I have had, I confess, considerable difficulty This is a suit for the value of the sugar. I have been requested by the counsel for the defendants, in a prayer which I have refused, to charge you, that, if the jury shall find a verdict for the plaintiffs, it must be based upon the value of the sugar at the commencement of the suit. The statute says, that, if the false thing is knowingly done, the goods, or their value, shall be forfeited. This sugar was all taken out of the warehouse, and put into market, in the United States, and sold, to be consumed, in October, 1868; and it seems to me an absurdity, for this court deliberately to authorize a recovery by the United States of the value of that sugar at the time this suit was commenced, on the 8th of January, 1870, when the

sugar probably was obliterated from existence as sugar. If the date of the commencement of the suit be taken, it will not be the value of this sugar that will be taken, but the value of an equal quantity of the same kind of sugar. The statute says that this sugar, or its value, shall be forfeited. I have, therefore, found it impossible to say that the court can take the date of the commencement of this suit, unless it is shown in evidence, that this sugar existed somewhere at the date of the commencement of this suit. The good sense of any statute which declares that the value of a thing shall be forfeited, means its value at a time when it can be seen and handled as a physical thing and a then present value be affixed to it. I have also had some embarrassment as between the two counts of the declaration, but I have arrived at a conclusion satisfactory to my own mind, and which I shall place before you. If you shall conclude, upon the facts and the law, that it is your duty to find a verdict for the government upon the first count, and not upon the second count, you will have one rule of damages for your verdict. If you shall find for the government upon the second count, either with or without finding for it upon the first count, you will have another rule of damages, the amount in the latter case being the larger one of the two. The reason for this is, that, if your verdict shall be upon the first count—the falsity of the statement of the number of pounds in the original warehouse entry—the forfeiture of value which the government is entitled to recover in such case, is a forfeiture of the value as it was on the 10th of October, 1868, before the duties were paid. So that, if the statement of weight in the entry for warehouse was false, in the sense in which I have explained the word "false," and was knowingly so, and it was done with the intent alleged, and the first count is proved, the plaintiffs are entitled to recover the value of the sugar, as such value was on the 10th of October, 1868—that is, its value, duty not paid. Such value can be arrived at in this way, and in this way only, upon the evidence. The net weight of the sugar, taken at 2,231,430 pounds, at the price at which it was sold by the defendants, 11¼ cents currency, per pound, amounts, less a deduction of 2⅓ per cent. discount for cash, to $245,178 37 currency. The duty on the 2,231,430 pounds, at three cents, gold, per pound, amounts in currency, computing gold at 137¾, the rate it was on the 12th of October, 1868, to $92,213 84. Deducting such duty from the sale price, leaves a balance of $152,964 53 currency, which will be the amount of your verdict if you shall find for the plaintiffs upon the first count alone. But, if you shall find that the second count is proved, and that there was the alleged false practice by bribery, then the government is entitled to recover the value of the sugar at the consummation of the transaction by the payment of the duties—that is, the entire $245,178 37, currency. So, if you shall find for the plaintiffs on the first count, without finding for them on the second, your verdict will be for the first amount. If you shall find for them on the second count, either with or without finding for them on the first, you will find for the second or larger amount.

These are all the considerations I deem it necessary to present in submitting the case to you; and I confide it to your hands, satisfied that, from the patient attention you have bestowed upon it, and from your position as men of intelligence, appreciating a case of this kind, you will render a just and a righteous verdict.

THE COURT refused to charge in accordance with the following prayers on the part of the government:

2. "That, under the regulations of the secretary of the treasury, it was the duty of the defendants, in making the entry, to state the quantity of the sugar in the weight of the United States, and that the entry would have been imperfect if it had not contained such statement of weight."

8. "That, if the jury find, that, at and prior to the presentation of the original entry for warehouse, the collector and naval officer reduced the pecul of Manila, upon entries of any description of merchandise from Manila, presented at the custom house in New York, at a fixed rate of 139½ pounds to the pecul, the presumption of law is, that such rate was the rate at which the reduction should have been made on said entry, and the burden of proof lies with the defendants to show that the rate of 133⅓ was the fixed rate, at and prior to the presentation of said entry, for the reduction of the weight of the particular merchandise therein described."

9. "That, if the jury find the established rate of reduction of the pecul of Manila, as applicable to the original warehouse entry in this case, was 139½ pounds per pecul, and that the defendants had presented and passed an entry or entries of sugar at that rate prior to the presentation of the entry above mentioned, it is sufficient evidence that such established rate had been brought to the knowledge of the defendants at the time of presenting said warehouse entry."

THE COURT refused to charge in accordance with the following prayers on the part of the defendants:

7. "The equivalent in pounds of the pecul of Manila for sugar not being fixed by any law of congress, the jury cannot find a verdict for the government on either count of the declaration, unless they are satisfied that there was, in the New York custom house, at or about the time of the importation in controversy, an established rate of transmuting such pecul into pounds, for estimation of duties on the invoice quantity of Manila sugar, and that such rate was brought to the knowledge of these defendants, and that it was different from 133⅓, and that the defendants used the rate they did, on the entry

in question, with intent to defraud the revenue of the United States."

10. "The jury must return a verdict for the defendants upon both counts of the declaration, unless they shall be satisfied that the defendants knew their rate of transmutation of peculs into pounds on the original entry was false, and that the defendants made such transmutation with guilty knowledge at the time that it did not conform to the equivalent of the pecul used by the collector and naval officer in the New York custom house at that time, for estimating duties on sugars from Manila."

11. "The entries for withdrawal of sugars in bond, marked Exhibits 15, 16, 17 and 18, it is admitted by both parties, cover all the sugar embraced in the original warehouse entry, marked Exhibit No. 1. It is also admitted by both parties, that, on such withdrawal entries, the defendants paid three cents per pound duties on 2,139,984 pounds, to wit, $64,199 52, that being the number of pounds and the amount of duty stated by the entry clerks in the collector's and naval offices, on presentation of the original warehouse entry. It is also admitted by both parties, that, when such withdrawal entries were presented and passed by the proper officers of the custom house, the original warehouse entry had not been liquidated, and that the merchandise contained in each withdrawal entry was delivered to the importer under penal bond, as required by the fourth section of the act of congress of May 28th, 1830, and section 229 of the general regulations of the treasury department of 1857. These four withdrawal entries cannot be considered by the jury except upon the single point of inquiry, whether, when the original warehouse entry of the sugars were made at the custom house, there was an intent on the part of the defendants to withdraw the same from warehouse."

12. "Whenever duties are imposed by law on imported merchandise according to its weight, as in the case of the sugars now in controversy, such weight, for custom house purposes, must be ascertained by a weigher employed by the collector, with the approbation of the principal officer of the treasury department (section 21 of 1799), to whom the oath of office required by the revenue laws has been duly administered; and such weigher must in person weigh, and must also make returns of the articles by him weighed, (section 72 of 1799); and, if the weight and return be made by any person other than one thus employed, appointed, and sworn, then it is not the weight or return required by law; and, if the jury shall find, upon the evidence in this case, that the weight and return of the sugars herein, for the purpose of assessing duty thereon, were not made by such a weigher, then they are entitled to throw out of consideration all evidence relating to such weight or return."

13. "For the purposes of the trial of the issues involved in the present case, the original warehouse entry was completed when the permit addressed to the inspector on board the importing vessel, and dated October 12th, 1868, was by the collector and naval officer signed and delivered to the defendants, or their agent; and the jury, in deliberating upon, and returning, a verdict, must reject all evidence of acts claimed by the United States to have been done by the defendants, or their agents, or any one else, subsequent to such delivery of the permit, in respect to weighing the sugars."

If 13 be refused, then 14. "For the purposes of the trial of the issues involved in the present case, the original warehouse entry was completed when the permit addressed to the inspector on board the importing vessel, and dated October 12th, 1868, was, by the collector and naval officer, signed and delivered to the defendants or their agent; and the jury, in deliberating upon and returning a verdict, must reject all evidence of acts claimed by the United States to have been done by the defendants, or their agents, or any one else, subsequent to such delivery of the permit in respect to weighing the sugars, except so far as, in the opinion of the jury, such acts bear upon the intent with which the defendants, on the original warehouse entry, transmuted the invoice number of peculs into pounds; and in no event can the jury take such evidence in respect to weighing into consideration, until they find the rate of 133⅓, adopted by the defendants, was a false rate, according to the standard adopted and used by the collector and naval officer of New York custom house, at that time, for estimating duties on the original warehouse entry."

16. "If the jury shall return a verdict for the plaintiffs, it must be for the value, in gold, of the sugar which arrived in this country and was by the defendants entered at the custom house; and that value must be computed and based on the value thereof in the city of New York, at the date of the commencement of this suit, January 8th, 1870, less the amount of duty paid thereon to the custom house by the defendants."

The jury were discharged, without having been able to agree on a verdict, after having been kept together for nineteen hours.

Case No. 14,501.

UNITED STATES v. BAKER et al.

[5 Blatchf. 6.] [1]

Circuit Court, S. D. New York. Oct. 30, 1861.

CRIMES ON HIGH SEAS—JURISDICTION—DISTRICT WHERE FIRST BROUGHT — ROBBERY — PIRACY — CONFEDERATE PRIVATEER—BELLIGERENT RIGHTS —RECOGNITION.

1. Semble, that, under the fourteenth section of the act of March 3d, 1825, (4 Stat. 118,) which provides that the trial of all offences which shall be committed upon the high seas, or elsewhere, out of the limits of any state or

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

district, shall be in the district where the offender is apprehended, or into which he may be first brought. an offender captured on the high seas by a public armed vessel of the United States, and ordered to New York for trial, and put on board of a vessel destined for Hampton Roads, and taken to Hampton Roads, and there transferred to another vessel by which he is taken to New York, where he is arrested for the offence, is not to be regarded as having been brought into the district in which Hampton Roads is situated.

2. That provision of the fourteenth section is in the alternative, and, under it, an offender may be tried either in the district into which he is first brought, or in the district in which he is apprehended, under lawful authority, for trial for the offence.

3. The third section of the act of May 15th, 1820, (3 Stat. 600,) in regard to robbery on the high seas, applies to all persons, whether citizens or foreigners.

4. The ninth section of the act of April 30th, 1790, (1 Stat. 114,) in regard to piracy or robbery on the high seas, applies only to citizens and not to foreigners.

5. A nation at war may commission private armed vessels to carry on war against its enemy on the high seas, and the commission will afford protection, even in the judicial tribunals of the enemy, against a charge of the crime of robbery or piracy.

6. Such a commission would be a good defence against an indictment under the third section of the act of 1820.

7. The ninth section of the act of 1790 changes that rule, as it respects citizens of the United States who take service under a commission to a private armed vessel from the enemy of their country.

8. The term "robbery," as used in the third section of the act of 1820, means, the felonious taking of the goods or property of another, of any value, from his person or in his presence, against his will, by violence or putting him in fear.

9. A felonious taking means a taking with a wrongful intent to appropriate the goods of another.

10. The taking, to be within said third section, need not be a taking which, if upon the high seas, would amount to piracy according to the law of nations.

11. Piracy according to the law of nations, defined.

12. Until the legislative and executive departments of the United States government recognize the existence of a new foreign government, the courts of the United States cannot do so; and the same doctrine applies to the erection of a new government within the limits and against the authority of the government of the United States.

13. The courts must look to the acts of those departments as evidence on the question of such recognition.

This was an indictment against Thomas Harrison Baker, John Harleston, Charles Sidney Passalaigue, Henry Cashman Howard, Joseph Cruz del Carno, Henry Oman, Patrick Daly, William Charles Clark, Albert Gallatin Ferris, Richard Palmer, John Murphy, Alexander Carter Coid, and Martin Galvin. It was found on the 26th of June, 1861. The defendant Baker was the master, and the other defendants were a part of the officers and crew of a private armed schooner, called the Savannah, and claimed to have acted, in committing the alleged offences, under the authority of the following commission: "Jefferson Davis, President of the Confederate States of America, to All Who Shall See These Presents—Greeting: Know ye, that by virtue of the power vested in me by law, I have commissioned, and do hereby commission, the schooner or vessel called the Savannah, (more particularly described in the schedule hereunto annexed,) whereof T. Harrison Baker is commander, to act as a private armed vessel in the service of the Confederate States, on the high seas, against the United States of America. their ships, vessels, goods and effects, and those of their citizens, during the pendency of the war now existing between the said Confederate States and the said United States. This commission to continue in force until revoked by the president of the Confederate States for the time being. Given under my hand and the seal of the Confederate States, at Montgomery, this eighteenth day of May, A. D. 1861. (L. S.) Jefferson Davis. By the President. R. Toombs, Secretary of State. Schedule of description of the vessel: Name—schooner Savannah. Tonnage—fifty-three $^{41}/_{95}$ tons. Armament —one large pivot gun and small arms. No. of crew—thirty." The substantive offence charged, was the capture, by the Savannah, on the high seas, on the 3d of June, 1861, of the brig Joseph, belonging to citizens of the United States. The indictment alleged, that the Southern district of New-York was the district into which the defendants were brought, and in which they were found, and where they were apprehended, and into which they were first brought for the offence.

William M. Evarts, E. Delafield Smith, Dist. Atty., and Samuel Blatchford, for the United States.

Daniel Lord, James T. Brady, Jeremiah Larocque, Algernon S. Sullivan, Joseph H. Dukes, Isaac Davega, and Maurice Mayer, for prisoners.

Before NELSON, Circuit Justice, and SHIPMAN, District Judge.

NELSON, Circuit Justice, charged the jury as follows:

The first question presented in this case is whether or not the court has jurisdiction of the offence. This depends upon the following clause in the 14th section of the act of congress of March 3d, 1825 [4 Stat. 118], as follows: "And the trial of all offences which shall be committed upon the high seas or elsewhere out of the limits of any state or district, shall be in the district where the offender is apprehended, or into which he may be first brought." The prisoners, who were captured by an armed vessel of the United States, off Charleston, S. C., were ordered by the commander of the fleet to New-York for trial; but the Minnesota, on board of which they were placed, was destined for Hampton Roads, and it became

necessary therefore, that they should be there transferred to another vessel. They were thus transferred to the Harriet Lane, and, after some two days' delay, consumed in the preparation, they were sent on to this port, where they were soon after arrested by the civil authorities. It is insisted, on behalf of the prisoners, that inasmuch as Hampton Roads, to which place the prisoners were taken, and where they were transferred to the Harriet Lane, was within the Eastern district of the state of Virginia, the jurisdiction attached in that district, as that was the first district into which the prisoners were brought. The court is inclined to think that the circumstances under which the Minnesota was taken to Hampton Roads, in connection with the original order by the commander, that the prisoners should be sent to this district for trial, do not make out a bringing into that district, within the meaning of the statute. But we are not disposed to place the decision on this ground. The court is of opinion that the clause conferring jurisdiction is in the alternative; and that jurisdiction may be exercised either in the district in which the prisoners were first brought, or in that in which they were apprehended under lawful authority for the trial of the offence. This brings us to the merits of the case. The indictment under which the prisoners are tried, contains ten counts. The first five are founded upon the third section of the act of congress of May 15th, 1820 [3 Stat. 600], which provides: "That if any person shall, upon the high seas, * * * commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate," and upon conviction shall suffer death. The five several counts charge, in substance, that the prisoners did, upon the high seas, enter in and upon the brig Joseph, the same being an American vessel, and upon the ship's company, naming them, did, then and there piratically, feloniously, and violently make an assault upon them, and put them in personal fear and danger of their lives; and did, then and there, the brig Joseph, her tackle and apparel, her lading (describing it), which were in the custody and possession of the master and crew, from the said master and crew, and from their possession, and in their presence, and against their will, violently, piratically, and feloniously seize, rob, steal, take, and carry away, against the form of the statute, etc. There are some variances in the different counts, but it will not be material to notice them. It will be observed that this provision of the act of congress prescribing the offence applies to all persons, whether citizens or foreigners, making no distinction between them, and is equally applicable, therefore, to all the prisoners at the bar. The remaining five counts are framed under the ninth section of the act of congress of April 30, 1790 [1 Stat. 114], which provides: "That if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high seas, under color of any commission from any foreign prince or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged, and taken to be a pirate, felon, and robber," and on conviction shall suffer death. These five counts charge that the prisoners are all citizens of the United States, and that they committed the acts set forth in the previous five counts in pretence of authority from one Jefferson Davis. As the provision of the act of congress upon which the last five counts are framed is applicable only to citizens, and not to foreigners, but four of the prisoners can be brought within it, as the other eight are admitted to be foreigners. The four are Baker, Howard, Passalaigue, and Harleston. The distinction between the provisions of the third section of the act of 1820 [3 Stat. 600] and the ninth section of 1790 [supra], and between the counts in the indictment founded upon those respective sections, arises out of a familiar principle of international law, and which is that, in a state of war existing between two nations, either may commission private armed vessels to carry on war against the enemy on the high seas, and the commission will afford protection, even in the judicial tribunals of the enemy, against a charge of the crime of robbery or piracy. Such a commission would be a good defence against an indictment under the third section of [the act of] 1820, by force of the above rule of international law. The ninth section of the act of 1790 changes the rule as it respects citizens of the United States who take service under the commission of the private armed vessels of their country's enemies. It declares, as it respects them, the commission shall not be admitted as a defence; and, as this legislation relates only to our own citizens, and prescribes a rule of action for them, and not as it respects the citizens or subjects of other countries, we do not perceive that any exception can be taken to the act as being unconstitutional or for any other reason. But, upon the view we take of the case, it will not be necessary to trouble you with any remarks in respect to this ninth section, and the several counts framed under it, but we shall confine our observations to a consideration of the third section of the act of 1820. There can be no injustice to the prisoners in thus restricting the examination, as any authority for the perpetration of the acts charged in the indictment will be as available to them, in defence to the counts founded upon the act of 1820, as it would be in defence to those founded upon the act of 1790. Nor can there be any injustice to the prosecution, for, unless the crime of robbery, as prescribed in the 3d section of the act of 1820, is established against

the four prisoners, none could be under the ninth section of the act of 1790. The crime in the two acts is the same for all the purposes of this trial. The only difference is the exclusion of a particular defence to charges founded upon the latter. The crime charged is robbery upon an American vessel on the high seas, and hence it is necessary that we should turn our attention to the inquiry,—what constitutes this offence? It has already been determined by the highest authority—the supreme court of the United States—that we must look to the common law for a definition of the term "robbery," as it is to be presumed it was used by congress in the act in that sense, and, taking this rule as our own guide, it will be found that the crime consists in this:—The felonious taking of the goods or property of another of any value from his person, or in his presence, against his will, by violence, or putting him in fear. The taking must be felonious; that is, taking with a wrongful intent to appropriate the goods of another. It need not be a taking which, if upon the high seas, would amount to piracy, according to the law of nations, or what in some of the books is called general piracy or robbery. This is defined to be a forcible depredation upon property on the high seas without lawful authority, done animo furandi; that is, as defined in this connection, in a spirit and intention of universal hostility. A pirate is said to be one who roves the sea in an armed vessel, without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet. For this reason pirates, according to the law of nations, have always been compared to robbers; the only difference being that the sea is the theatre of the operations of one and the land of the other. And, as general robbers and pirates upon the high seas are deemed enemies of the human race,—making war upon all mankind indiscriminately, the crime being one against the universal laws of society,—the vessels of every nation have a right to pursue, seize, and punish them. Now, if it were necessary on the part of the government to bring the crime charged in the present case against the prisoners, within this definition of robbery and piracy, as known to the common law of nations, there would be great difficulty in so doing, upon the evidence, and perhaps upon the counts in the indictment,—certainly upon the evidence. For that shows, if anything, an intent to depredate upon the vessels and property of one nation only,—the United States,—which falls far short of the spirit and intent, as we have seen, that is said to constitute essential elements of the crime

But the robbery charged in this case is that which the act of congress prescribes as a crime, and may be denominated a "statute offence" as contradistinguished from that known to the law of nations. The act, as you have seen, declares the person a pirate, punishable by death, who commits the crime of robbery on the high seas against any ship or vessel, or upon any ship's company, of any ship or vessel, etc., and the interpretation given to these words applies the crime to the case of depredation upon an American vessel or property on the high seas, under circumstances that would constitute robbery, if the offence was committed on land, and which is, according to the language of Blackstone, the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear. The felonious intent which describes the state of mind as an element of the offence is what is called, in technical language, "animo furandi," which means an intent of gaining by another's loss, or to despoil another of his goods lucri causa, for the sake of gain.

Now, if you are satisfied, upon the evidence, that the prisoners have been guilty of this statute offence of robbery upon the high seas, it is your duty to convict them, though it may fall short of the offence as known to the law of nations. We have stated what constitutes the elements of the crime, and it is your province to apply the facts to them, and thus determine whether or not the crime has been committed. That duty belongs to you, and not to the court. We have said that, in a state of war between two nations, the commission to private armed vessels from either of the belligerents affords a defence, according to the law of nations, in the courts of the enemy, against a charge of robbery or piracy on the high seas, of which they might be guilty, in the absence of such authority. And, under this principle, it has been insisted, by the learned counsel for the prisoners, that the commission of the Confederate States by its president, Davis, to the master and crew of the Savannah, which has been given in evidence, affords such defence. In support of this position, it is claimed that the Confederate States have thrown off the power and authority of the general government; have erected a new and independent government in its place; and have maintained it against the whole military and naval power of the former; and that it is, at least, a government de facto, and entitled to the rights and privileges that belong to a sovereign and independent nation. The right to establish such a government, constitutional or otherwise, has been strongly urged; and the laws of nations, and the commentaries of eminent publicists, have been referred to as justifying the secession or revolt of the Confederate States. Great ability and research have been displayed by the learned counsel for the defence on this branch of the case. But the court do not deem it pertinent, or material, to enter into this wide

field of inquiry. This branch of the defence involves considerations that do not belong to the courts of the country. It involves the determination of great public and political questions, which belong to the departments of our goverment that have charge of our foreign relations,—the legislative and executive departments. When those questions are decided by those departments, the courts follow the decision, and, until those departments have recognized the existence of the new government, the courts of the nation cannot. Until this recognition of the new government, the courts are obliged to regard the ancient state of things as remaining unchanged. This has been the uniform course of decision and practice of the courts of the United States. The revolt of the Spanish colonies of South America, and the new government erected on their separation from the mother country, were acknowledged by an act of congress, on the recommendation of the president, in 1822. Prior to this recognition, and during the existence of the civil war between Spain and her colonies, it was the declared policy of our government to treat both parties as belligerents, entitled, equally, to the rights of asylum and hospitality; and to consider them, in respect to the neutral relation and duties of our government, as equally entitled to the sovereign rights of war as against each other. This was also the doctrine of the courts, which they derived from the policy of the government, following the political departments of the government as it respects our relations with new governments erected on the overthrow of old ones. If this is the rule of the federal courts, in the case of a revolt, and erection of a new government, as it respects foreign nations, much more is the same rule applicable when the question arises in respect to a revolt and the erection of a new government within the limits, and against the authority of the government whose laws we are engaged in administering. And, in this connection, it is proper to say that, as the Confederate States must first be recognized by the political departments of the mother government, namely, the legislative and executive departments, in order to be recognized by the courts of the country, we must look to the acts of those departments as evidence of the fact. The act is the act of the nation, through her constitutional public authorities.

These. gentlemen, are all the observations we deem necessary to submit to you. The case is an interesting one, not only in the principles involved, but to the government and the prisoners at the bar. It has been argued with a research and ability in proportion to its magnitude, in behalf of both the prisoners and the government; and we do not doubt that, with the aid of these arguments, and the instructions of the court, you will be enabled to render an intelligent and just verdict in the case.

[2] [The jury retired at twenty minutes after three o'clock. At six o'clock they came into court. Their names were called, and the inquiry made by the clerk whether they had agreed upon their verdict. Their foreman said they had not. One of the prisoners having felt unwell, had been removed from the close air of the court-room, and some little delay occurred until he was brought in. Judge NELSON then said: "We have had a communication from one of the officers in charge of the jury, from the jury, as we understood, though it had no name signed to it. I would inquire whether the note was from the jury?"

[The foreman. "It was."

[NELSON, Circuit Justice. We would prefer that the jurymen, or any of them who may be embarrassed with the difficulties referred to, should himself state the inquiry which he desires to make of the court.

[Mr. Powell, one of the jurors, said that the question was, "whether, if the jury believed that civil war existed, and had been so recognized by the act of our government, or if the jury believe that the intent to commit a robbery did not exist in the minds of the prisoners at the time, it may influence their verdict."

[After consultation with SHIPMAN, District Judge, NELSON, Circuit Justice, said: As it respects the first inquiry of the juror—whether the government has recognized a state of civil war between the Confederate States and itself—the instruction which the court gave the jury was, that this court could not recognize a state of civil war, or a government of the Confederate States, unless the legislative and executive departments of the government had recognized such a state of things, or the president had, or both; and that the act of recognition was a national act, and that we must look to the acts of these departments of the government as the evidence and for the evidence of the recognition of this state of things, and the only evidence. As it respects the other question—whether or not, if the jury were of opinion, on the evidence, that these prisoners did not intend to commit a robbery on the high seas against the property of the United States, they were guilty of the offence charged—that is a mixed question of law and fact. The court explained to you what constitutes the crime of robbery on the high seas, which was the felonious taking of the property of another upon the high seas by force, by violence, or putting them in fear of bodily injury, which, according to the law, is equivalent to actual force; and that the term "felonious," as interpreted by the law and the courts, was the taking with a wrongful intent to despoil the others of their property. These elements constitute the crime of robbery. Now, it is for you to

[2] [From the Report of the Trial of Savannah Privateers, 368 et seq.]

take up the facts and decide whether the evidence in the case brings the prisoners within that definition. The court will not encroach upon your province in these respects, but will confine itself to the definition of the law.

[Another of the jury—George H. Hansell—rose and said: One of the jury, not myself, understood your honor to charge that there must be an intent to take the property of another for your own use.

[NELSON, Circuit Justice. No, I did not give that instruction. The jury may withdraw.

[The jury again retired, and, as there was no probability of an agreement at half-past seven o'clock, the court adjourned to eleven o'clock Thursday morning.] [2]

The jury were discharged, without being able to agree on a verdict.

Case No. 14,502.

UNITED STATES v. BAKER.

[1 Cranch, C. C. 268.] [1]

Circuit Court, District of Columbia. Dec. Term, 1805.

ASSAULT AND BATTERY — RIGHT OF PLAINTIFF'S AGENT TO ENTER DEFENDANT'S HOUSE—LEVY.

1. The officer cannot justify under a fieri facias, without producing it.

2. An agent of the plaintiff has a right to enter the house of the defendant with the officer to show him the defendant's goods to be taken on the fieri facias; and the authority of the agent need not be in writing, but may be proved by the testimony of the agent himself.

This was an indictment against [Samuel] Baker for an assault and battery upon W. Howard, who entered Baker's house with the officer who had an execution against the goods of Baker, at the suit of Barry. Howard accompanied the officer at the request of the plaintiff, and as his agent to show the goods to the officer

THE COURT decided that Howard was a competent witness to prove his own authority as agent of the plaintiff; that it was not necessary that the authority should have been given in writing, and that he had a right to enter the house with the officer, and to remain in the house long enough to show the property, and for the officer to take an inventory. Verdict guilty; fined ten dollars.

Case No. 14,503.

UNITED STATES v. BAKER.

[2 Cranch, C. C. 615.] [1]

Circuit Court, District of Columbia. May Term, 1825.

HUSBAND AND WIFE—DISTRIBUTION.

If a deed of land be set aside, in equity, after the death of the purchaser and of his widow, on account of his fraud, and the purchase-money be decreed to be repaid by the heirs of the vendor to the administrator of the purchaser, to be by him distributed as assets, the widow's second husband is entitled, as distributee, to his deceased wife's third of the purchase-money thus repaid.

This was an action of debt upon the defendant's administration bond, in which Barrett seeks to recover, in right of his deceased wife, (who, before her marriage with him, was the widow of Walter B. Smallwood,) one-third part of $1,330.35, which came to the defendant's hands under the following circumstances: On the 23d of June, 1806, W. B. Smallwood purchased of Addison Murdoch fifty-two acres of land, and paid therefor $1,176.93, and took possession. In 1810 or 1811, Smallwood died, leaving four children and a widow, who became administratrix and guardian of the children. In 1811 or 1812, the widow intermarried with Barrett, the plaintiff. Murdoch having also died, his heir at law, some years after the death of both Murdoch and Smallwood, filed a bill against Smallwood's heirs to set aside the purchase of the land, on the ground of the incapacity of Murdoch to contract. An issue out of chancery was ordered, to ascertain the fact whether the said contract was obtained by fraud on the part of Smallwood. The jury found a verdict for the heirs of Murdoch; Mrs. Barrett, the widow of Smallwood, being then alive. She died on the 8th of May, 1819, before any decree was passed in the cause. In November of the same year, the defendant [J. W. Baker] was appointed administrator de bonis non of Smallwood, and guardian of his children. On the 11th of January, 1822, the court decreed that the purchase should be set aside, and that the purchase-money should be repaid by Murdoch's heirs to Smallwood's administrator, to be by him distributed as assets of Smallwood's estate. There are no debts of Smallwood. A verdict for the plaintiff was rendered, by consent, subject to the opinion of the court, upon the case thus stated.

R. P. Dunlop, for plaintiff, contended that Smallwood's widow was entitled, as distributee, to one-third of the assets of Smallwood's estate, after payment of debts; that upon her death, her husband, Barrett, was, by the act of Maryland, vested with all her personal rights, or choses in action, and as, by the decree of the court, the money refunded by Murdoch's heirs, to Smallwood's administrator, is to be distributed as assets, he is, in right of his wife, entitled to one-third. See Maryland Testamentary Law, 1798, c. 101, subc. 5, §§ 8, 9; 2 Bl. Comm. 435; Whitaker v. Whitaker, 6 Johns. 112, 117.

Mr. Redin, contra, consented, that, in equity, at the time of the death of the wife, this was land, (and not personal estate,) and descended to the heir at law, and that the wife had no right which could survive to her personal representative. She died before the

[2] [From the Report of the Trial of Savannah Privateers, 368 et seq.]

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

land was converted into money. It was no part of her former husband's personal estate. He cited 2 Com. Dig. 617, "Fraud," 3 M, 7; Eastabrook v. Scott, 3 Ves. 461; Watt v. Watt, Id. 244; 1 Fonbl. 139; 2 Com. Dig. 208, "Baron and Feme," E, 2, and 210, E, 3; Co. Litt. 351a; 2 Bl. Comm. 433; Maryland Law, 1798, c. 101, subc. 5, § 8; Garrick v. Camden, 14 Ves. 372; Anderson v. Dawson, 15 Ves. 531; Bailey v. Wright, 18 Ves. 49.

CRANCH, Chief Judge. The question is whether Barrett is entitled to a third of that sum, ($1,330.35,) in right of his late wife, the widow of Smallwood, she being dead at the time it was decreed to be returned for distribution; or whether the children of Smallwood are entitled to the whole. By the terms of the decree, this money is to be distributed as assets of Smallwood's estate. The rights of the distributees of that estate vested at the moment of his death. His widow was then entitled to one-third of his personal estate, after payment of the debts. If she dies before distribution, her administrator (and, by the law of Maryland, her husband stands in the place of her administrator) became entitled to her share of the estate. It is unimportant whether or not the administrator of her husband had collected all the debts due to his estate before her death. It has been said, in argument, that this money was not a part of her husband's estate, either during his or her life, or at the time of his death. This, however, is immaterial, because the court has decreed that it shall be distributed as assets of his estate. And the only question is, how would the assets of his estate now be distributed? Unquestionably, as they would have been on the day of his death, when the rights of the distributees accrued. If any distributee is dead, his or her share goes to the personal representative of such distributee.

We are of opinion that Mr. Barrett is entitled to his wife's share of the money. Judgment for the plaintiff.

Case No. 14,504.

UNITED STATES v. BALE.

[Hoff. Land Cas. 92.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT—NAME OF GRANT—REPORT — EXPEDIENTE—GENUINENESS.

No objection to this claim urged by the United States.

Claim [by the heirs of Edward A. Bale] for four leagues of land [the Rancho Carne Humana] in Napa county, confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

Halleck, Peachy & Billings, for appellee.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

HOFFMAN, District Judge. It appears from the expediente in this case that Edward A. Bale on the 14th of March, 1841, petitioned Governor Alvarado for a tract of land in Sonoma, and appended to his petition a report of the commanding general showing the land to be vacant. The application to the commanding general and his marginal order thereon are found in the expediente, from which it appears that the land asked for was called by the Indians "Huilic Noma." This application is dated September 12, 1840, and the commanding general, by his marginal order, gives permission to the applicant to occupy the land, directing him to petition the political chief for the corresponding title. In the petition to the governor, made in pursuance of this order, the name of the land is not given, and the petitioner promises to present a map of the tract solicited. In the order of concession by the governor, the land is called "Huilic Noma," and the corresponding title is ordered to be issued to the party. In the draft of this title, found in the expediente and dated March 14, 1851, the land is designated by the same name. But in the formal document delivered to the grantee, which bears date on the 23d of June, 1841, the land is called "Carne Humana," and the boundaries are designated with more particularity, and apparently in conformity with the map which accompanies the expediente. The grant does not allude to this map, but it is most probable, as supposed by the board, that the map which the petitioner promised to present had been furnished in the interval between the 14th of May, the date of the order of concession and the draft of the title in the expediente, and the 23d of June, the date on which the formal title was executed to the grantee. There seems no reason to doubt that the land petitioned for and conceded on the 14th of May is the same as that for which the title issued on the 23d of June.

It appears in proof that the grantee occupied the land called "Carne Humana" as early as 1838; that he built a house on it, cultivated a considerable portion of it, and continued to reside on it until his death. His family was living upon it at the time the depositions were taken before the board. It further appears, that judicial possession was given to Bale on the 11th and 12th of September, 1845, with the usual formalities required by the Mexican laws. This fact is established by the evidence of the alcalde, and the colindantes who officiated on the occasion—the records of the proceedings, which had been deposited in the alcalde's office at Sonoma, being shown to have been destroyed at the time the office was taken possession of by the "Bear Flag" party. The genuineness of the signatures to the original document is proved. The claim was confirmed by the board, and has been submitted to us without argument, or the statement of any objection on the part of the United States to its confirmation. We see no reason to doubt its

validity, and think a decree of confirmation must therefore be entered.

The transcript in this case contains several petitions of intervention by different parties, claiming portions of the land originally granted to Bale, under various conveyances. The board, in accordance with its decision in case No. 2 on their docket, have not attempted to adjudicate upon the conflicting titles of these claimants, and have merely affirmed the validity of the original grant, leaving the adverse titles of the heirs and other claimants under the original grant to be litigated before the ordinary tribunals. No appearance in this court has been entered, except on behalf of the original claimants before the board; nor is any objection made to an affirmation of the decree of the board in its present form, except that in this case, as in all cases of claims confirmed by the board, an appeal has been taken on the part of the United States. We think, therefore, that the decree of the board should be affirmed.

Case No. 14,505.

UNITED STATES v. BALES OF TOBACCO.

[See Case No. 15,965.]

Case No. 14,506.

UNITED STATES v. BALLARD.

[13 Int. Rev. Rec. 195.]

District Court, E. D. Michigan. March Term, 1871.

CUSTOMS DUTIES — FRAUDULENT IMPORTATION — STATUTORY OFFENCES—INFORMATION—MOTION IN ARREST OF JUDGMENT.

1. In an indictment or information for a purely statutory offence the averment of the offence in the words of the statute creating it is, as a general rule, sufficient.

2. The tendency of modern legislation and judicial decisions is to discard unnecessary technicalities, and especially in misdemeanors created by statute.

3. The practical construction given to a law by the practice of the court and bar since the enactment of the law, and the form adopted for the enforcement of the penalties provided by that law, are not to be overturned but on the clearest proof that that construction is erroneous and the method of procedure defective.

4. Section 3 of the act of March 3, 1863 (12 Stat. 739), considered and construed.

5. Effect of and construction to be given to general words in statutes following particular, and the purpose of the general words "or otherwise," employed in section 3 of the act of March 3, 1863, declared.

6. The means employed to effect the commission of a statutory offence may or may not be set out in the information, at the option of the pleader.

7. The acts necessary to effect an entry being prescribed by statute, an allegation that an entry was effected is a specific statement of what acts were done, without a specific description of those acts.

8. The property charged in the information to have been entered being a horse, is required by law to be entered at actual cost or market value, and not "upon a classification thereof as to quality or value."

[Cited in U. S. v. Staton, Case No. 16,382.]

9. The allegations of the information as to the nature of the property and the place where and the time when the offence was committed are sufficient to apprise the defendant of what he is called upon to defend, and to plead in bar to a second prosecution for the same offence.

The offence is charged in the information in the following words: "One James Z. Ballard, late of Detroit aforesaid, did knowingly by means of a certain false representation effect an entry into the United States of certain merchandise, to wit, one brown horse, by payment of less than the amount of duty legally due thereon."

The defendant having been convicted, this motion is now made in arrest of judgment for the following reasons: (1) That it is not set forth in the information what the representation was, and that the same was false. (2) That the information does not set forth the facts and circumstances constituting the offence, and especially such statement of facts as, if true, would constitute effecting an entry. (3) "Because it is alleged in said information that the entry was made by payment of a less amount of duty than that legally due upon said horse, whereas the evidence showed that such entry, if coming within the statute within which such information was framed, constituted the offence of entering at a false classification as to value."

A. B. Maynard, U. S. Dist. Atty.
Alfred Russell, for defendant.

LONGYEAR, District Judge. The statute upon which this prosecution is based is section 3 of the act of March 3, 1863 (12 Stat. 739), and is in the following words: "If any person shall, by the exhibition of any false sample, or by means of any false representation or device, or by collusion with any officer of the revenue, or otherwise, knowingly effect or aid in effecting an entry of any goods, wares, or merchandise at less than the true weight or measure thereof, or upon a false classification thereof as to quality or value, or by the payment of less than the amount of duty legally due thereon, such person shall, upon conviction thereof, be fined in any sum not exceeding five thousand dollars, or be imprisoned not exceeding two years, or both, at the discretion of the court."

The offence here created is a misdemeanor. The general rule is, in indictments for misdemeanors created by statute, that it is sufficient to charge the crime in the words of the statute. There is not in such cases that technical nicety required as in cases of felony. U. S. v. Mills, 7 Pet. [32 U. S.] 142; U. S. v. Gooding, 12 Pet. [37 U. S.] 460, 474; U. S. v. Lancaster [Case No. 15,556]; Harrison v. State, 2 Cold. 232; Whart. Cr. Law, § 364; 1 Bish. Cr. Proc. § 359. Such being the gen-

eral rule, if the accused insists on greater particularity, it is for him to show that from the obvious intention of the legislature, or the known principles of law, the case falls within some exception to such general rule. State v. Jones, 33 Vt. 443, 445. Such greater particularity is always required where the offence was known to the common law and it is described in the statute by its common law name merely, but never where the statute is complete of itself, or where by creating it defines the offence. State v. Cook, 38 Vt. 437–439; State v. Ladd, 2 Swan, 228, 229.

With these general rules before us, we will now enter upon the inquiry as to what degree of particularity is required in an indictment or information charging the offence created by the statute above quoted. There has been of late years a growing disposition and inclination on the part of legislatures and courts, both state and federal, to discard all unnecessary technicalities in criminal as well as in civil pleadings. So that now, in all cases of purely statutory offences, where the courts do not consider themselves still bound by some inflexible technical rule such as that which has been applied by a long and uniform line of decisions in England and America to the description of the offence of obtaining money by false pretences, the inquiry is: (1) Is the offence charged the same as the offence created? (2) Is it so charged as to fairly apprise the accused of what he is called upon to defend? (3) Is it so charged that an acquittal or conviction can be pleaded in bar to a second prosecution?

In this connection I cannot forbear quoting the language of Judge Caruthers, in delivering the opinion of the court in the case of State v. Ladd, 2 Swan, 229, above cited. He says: "In times past the adherence to strict and unnecessary technicalities to rescue criminals has been a reproach to the administration of justice, and brought the law into contempt and encouraged crime. Shall we go any further, then, in shielding offenders, when they have, as in this case, upon a fair trial, been pronounced guilty by a jury, by opening another avenue to them for escape, upon what must be regarded as a technicality? We are unwilling to do so, without some positive rule of law constraining us." I adopt the language of Judge Caruthers, in all its parts, as fully applicable to the present case.

There is in this case still another consideration, of great force, which must not be overlooked, but which must be overridden in order to maintain the position of the learned counsel who supports this motion—a consideration which all must concede ought not to be overridden except in obedience to some positive imperative rule. That consideration grows out of the practical construction which has been given to the law in question, and to indictments and informations made under it, by the practice in this court under that law ever since its enactment.

The information in this case, in its description of the offence, is in the exact form adopted at the beginning and ever since used in this court. I should certainly hesitate long, and require the most indubitable proof that the form so adopted and used is clearly and fatally defective, before holding that it is so, and thereby condemn the scores and hundreds that have gone before it as worthless, as so much waste paper, and the numerous judgments based upon them as in fact unauthorized. When we add to this the further recognized fact that this form was adopted and the practice under it established under the administration and direct supervision of a prosecuting officer whose critical and well-defined, and usually correct, just, and liberal views, in regard to the meaning and proper construction of statutes, are well recognized and understood, and whose reputation as a good lawyer, a correct and painstaking pleader, and an able advocate has been well earned, the reasons for requiring the clearest proof that such construction is erroneous become all the more weighty. And when we still add to this the further fact of the acquiescence of the court and the entire bar during all that time, the reasons for sustaining such construction without such clear proof of error become almost irresistible. The weight of the above considerations is not lessened in the least by the fact that the learned counselor who was then the prosecuting officer of the government now makes this motion. What then is the offence created by the statute, and what is a sufficient description of it in the indictment or information?

In order to answer the first branch of this question intelligently, we are to inquire what was the good to be accomplished, and what the evil to be remedied; or in other words, what was the exigency intended to be met by the statute? By certain other acts of congress importers are required to pay a tax or duty to the United States upon goods, wares, and merchandise imported or brought into the United States by them. Upon some kinds the tax is thus levied by weight or measure, and to this end, by other provisions, the importer is required to effect an entry of such goods at not less than their true weight or measure. Upon other kinds of goods such tax is levied according to quality or value, upon a classification, in that regard, fixed by the act itself, and to this end the importer is required to effect an entry of such goods truly according to such classification. Upon other kinds such tax is levied according to actual cost if obtained by purchase, or market value at the place where obtained if obtained otherwise than by purchase, and to that end the importer is required to effect an entry of such goods at not less than actual cost or market value as the case may be, and by payment of the full amount of duty according thereto.

Now, the good to be accomplished by the law in question was the enforcement of the collection of the revenue, as provided by

these several acts; and the evil to be remedied was the violation of these provisions. Hence it is provided by the act in question, that if any person shall knowingly effect or aid in effecting an entry of any goods, wares, or merchandise in any one of these specified ways, viz. at less than the true weight or measure, upon a false classification as to quality or value, or by payment of less than the legal duty, each one of which involves a violation of some one of the acts before mentioned, he shall be punished as prescribed. The elements of which the offence thus created is composed are: (1) The effecting, or aiding in effecting, an entry in violation of the customs laws in some one or more of the particulars specified; and (2) that the party thus effecting or aiding in effecting such entry knew that it was so done in violation of law. And this is all there is of the offence.

It is contended, however, that there is still another element of the offence, growing out of the means by which it is committed, as specified in the section quoted, and that, therefore, such means should be specifically set out in the indictment or information, and that a general statement, in the language of the statute, that the act was done by the exhibition of a false sample, or (as in this case) by means of a false representation or device, or by collusion with an officer of the revenue, without setting out what the sample exhibited was, and wherein it was false, or what the representation or device was, and wherein it was false, or in what particular acts the collusion consisted, is not sufficient. This argument is founded upon the preliminary clauses of the section quoted, viz.: "If any person shall, by the exhibition of any false sample, or by means of any false representation or device, or by collusion with any officer of the revenue, or otherwise, knowingly effect," etc. But for the concluding clause, "or otherwise," the conclusion contended for, that the means adopted to commit the offence constitutes one of its elements, would seem to be inevitable. But the use of those words, in my opinion, defeats the conclusion. They render that unlimited and general which by the preceding clauses, without those words, would be limited and specific. That which is thus rendered unlimited and general relates to the means or manner by or in which the offence is committed, and the effect is to make the sense of the section as if it read as follows: "If any person shall knowingly effect or aid in effecting an entry of any goods, wares, or merchandise, at less than the true weight or measure thereof, or upon a false classification thereof as to quality or value, or by the payment of less than the amount of duty legally due thereon, whether by the exhibition of any false sample, by means of any false representation or device, by collusion with any officer of the revenue, or by any other means, or in any manner whatsoever, he shall on conviction be punished," etc. These specific clauses were probably inserted there to make it clear that although the exhibition of a false sample with fraudulent intent, a false representation or device with like intent, and collusion with an officer of the revenue with the same intent, may each constitute a crime in and of itself when unaccompanied by the consummation of the ultimate act intended to be done, yet that when those acts result in effecting a false entry, as specified that then such previous acts shall be considered as merged in the false entry, and that alone shall constitute the offence; and then the words "or otherwise" are inserted to show clearly that what precedes was not intended to limit or in any manner qualify the offence intended to be created and defined, viz., "knowingly effecting or aiding to effect an entry of goods, wares, and merchandise," in the manner specified. The facts answering to these preliminary clauses of the section, therefore, may or may not be alleged in the indictment or information, at the option of the pleader. It does not follow, however, that when alleged they may be treated as surplusage. But as that question is not involved, we will not digress to discuss it here.

I hold, therefore, that the information is not defective for the reason that it does not allege what the supposed pretence was, and that it was false. I think it might be shown, however, that even if the false pretence, etc., constitutes an element of the offence, the description of the offence in the words of the statute would, under the rules laid down in the commencement of this opinion, be good; that the rule which has obtained in regard to indictments for obtaining money, etc., by false pretences, upon which great reliance has been placed at the bar in support of the motion, is an exception to the general rule; and that even that exception has grown up in consequence of a long line of decisions begun in England, and followed in this country, based upon some peculiar ideas as to that particular offence, which decisions however might not be now made, in the more enlightened views of courts of the present day, if the question were a new one. See U. S. v. Gooding, 12 Wheat. [25 U. S.] 460, 474; Pet. Cond. R. 572, 583, 584; U. S. v. Armstrong, 5 Phila. 273, 277 [Case No. 14,468]; U. S. v. Batchelder [Case No. 14,490]. But in view of the conclusion already arrived at as to what constitutes the offence, an extended discussion of this branch of the question is unnecessary.

The second ground of motion is, in brief, that the information does not contain such statement of facts as, if true, would constitute effecting an entry.

Case No. 14,507.

UNITED STATES v. BALLARD.

[3 McLean, 469.] [1]

Circuit Court, D. Michigan. Oct. Term, 1844.

LIMITATION OF ACTIONS—CRIMINAL PROSECUTIONS—SECOND INDICTMENT—PERJURY.

1. The thirty-second section of the act of congress of April 30, 1790 [1 Stat. 119], applies to offences created after, as well as before, the act. [Cited in U. S. v. Six Fermenting Tubs, Case No. 16,296.]

2. The indictment, or information, must be found within the limitation of the statute.

3. An indictment within the two years, on which a nolle prosequi was entered, cannot save the statute.

4. A second indictment has no connection with the first.

5. In no sense can the second be considered as an amendment of the first.

Mr. Bates, Dist. Atty., for the United States.

Walker & Douglass, for defendant.

OPINION OF THE COURT. This is an indictment for perjury, charged to have been committed 26th February, 1842, in the oath made by the defendant to his schedule in bankruptcy, filed on that day. The indictment was found the 18th October, 1844, two years and seven months and some days, after the perjury is charged to have been committed. A previous indictment, charging the same offence, was found February 1, 1844, on which a nolle prosequi was entered. The facts, as above related, are submitted by the counsel; and a question is raised, whether the limitation of the statute had not run, before the pending indictment was found. The act of April 30, 1790, thirty-second section, provides: "Nor shall any person be prosecuted or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine and forfeiture aforesaid." This limitation extends as well to offences created after, as before the act. Adams v. Wood, 2 Cranch [6 U. S.] 336; Jones v. U. S., 7 How. [48 U. S.] 681.

Looking only at the second indictment, there would seem to be no doubt that the statute bars the prosecution, as more than two years had elapsed, after the offence was committed, before the indictment was found. But it is insisted, that the first indictment being found within the two years and the second being found shortly after the abandonment of the first, prevent the bar under the statute.

The first indictment had no connection with the second. In no sense can the second be considered as an amendment of the first. When a nolle prosequi was entered upon the first indictment, the prosecution was at an end; and the second indictment must be considered as the commencement of a new prosecution. The statute does not refer to the exhibition of the charge, but to the indictment or information. The charge, therefore, must be sanctioned by the grand jury, in one of the forms designated, within two years after the offence has been committed. This not having been done in the present case, the act must be held to bar the prosecution.

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

Case No. 14,508.

UNITED STATES v. The BALTIC.

[The case reported under the above title in 7 Int. Rev. Rec. 77, is the same as Case No. 821.]

Case No. 14,509.

UNITED STATES v. BALTIMORE & O. R. CO.

[8 Int. Rev. Rec. 148; 7 Am. Law Reg. (N. S.) 757; 10 Leg. & Ins. Rep. 377.]

Circuit Court, D. West Virginia. Aug., 1868.

INTERNAL REVENUE—FAILURE TO AFFIX STAMPS—BILLS OF LADING—CORPORATIONS—CRIMINAL LIABILITY.

1. By the act of congress of 1864 [13 Stat. 14], receipts for goods delivered to a common carrier for transportation, being in effect inland bills of lading, were not subject to stamp duty.

2. A corporation is liable to indictment for the act of its officer or employee, in issuing papers which the law requires to be stamped, without the proper stamps, with intent to evade the provisions of the act of congress.

These were indictments numbered from 1 to 54, inclusive, for breaches of the revenue laws of the United States. Fifty of these indictments were for issuing receipts for goods delivered to the defendant at their depot in Parkersburg, to be transported by them as a common carrier, to different points upon their road; and the remaining four for issuing receipts for moneys paid for tolls and transportation upon the road, without having United States revenue stamps affixed and cancelled. To all of the indictments the defendant demurred.

George H. Lee, in support of the demurrer.

(1) As to the receipts for freight, in question, at the times they were issued, in 1865 and 1866, upon the true construction of the revenue laws of the United States then in force, such receipts being in legal effect inland bills of lading, were not subject to stamp duty.

(2) As to both classes of receipts, to constitute the offence under the act of congress of unlawfully issuing papers required to be stamped without having the proper stamps affixed, the party issuing must have done so with the unlawful intent to evade the provisions of the act and to defraud the revenue, and such intent on the part of the platform-clerk or agent issuing the receipts for the company, if it existed, could not be imputed to a corporation having no sentient or visible

tangible being, and existing only in contemplation of law; but the clerk, or agent himself only, and not the corporation as such, could be held criminally responsible for the unlawful act.

Mr. Smith, Dist. Atty., contra.

By direction of the court the argument was confined, at this stage of the case, to the first point.

CHASE, Circuit Justice of the United States, after consultation, stated his opinion to be, that at the time the freight receipts in question were issued they were not subject to stamp duty under the acts of congress then in force, and that the demurrers to the indictments upon them would have to be sustained.

JACKSON, District Judge, stated that his first impression was that the terms of the act of 1864 were sufficiently comprehensive to embrace receipts for goods delivered to a common carrier for transportation, and to subject them to stamp duty; but that since he had heard the argument of the counsel, and had come to construe the act of 1864, in connection with the several other acts of congress in pari materia, his views had undergone a change, and if the question were now to be decided, he should not dissent from the opinion of the chief justice to sustain the demurrers. He added, however, that if the counsel so desired, division of opinion between the judges might be entered pro forma upon the record, so that the cases might be taken to the supreme court of the United States.

CHASE, Circuit Justice, said that upon the second point made by Mr. Lee for the demurrer, both the district judge and himself were inclined to think the demurrer could not be sustained, but that they were willing to hear argument upon it if necessary, or desired.

Upon this intimation of opinion, however, the cases were settled by counsel.

Case No. 14,510.

UNITED STATES v BALTIMORE & O. R. CO.

[1 Hughes, 138.] [1]

District Court, D. West Virginia. Nov., 1875.

GRANTS—RAILROAD CONCESSION—RIGHT OF WAY OVER GOVERNMENT LANDS—CONTRACT—LICENSE—REVOCATION—EQUITABLE ESTOPPEL.

1. Under the act of March 3, 1819 [3 Stat. 520], authorizing the secretary of war to sell "such military sites belonging to the United States as may have been found or become useless for military purposes," and the act of 28th April, 1828 [4 Stat. 264], authorizing the president to "sell forts, arsenals, dockyards, lighthouses, or any property held by the United States for like purposes," the secretary of war had authority to execute the agreement it made with the Baltimore & Ohio Railroad Company on the 5th November, 1838, conceding to the company "authority to construct their railroad along and over their property" at Harper's Ferry, Virginia.

2. The grant by congress to the president, of a right to dispose of the full title in fee in real property, implies the grant of all minor powers, and these powers may be exercised by the secretary of war as agent of the president.

3. Where, under a contract perpetual in its purport, a license to use property for specific purposes is not specially restricted, and is coupled with an interest which was necessary to the possession and enjoyment of the rights acquired under the permission, the license is not revocable as long as the interest exists; and though the fee simple remains in the grantor, the right to use is paramount to the fee, and the doctrine of equitable estoppel applies against the grantor.

[Cited in brief in Hillsdale College v. Rideout, 82 Mich. 95, 46 N. W. 373.]

In equity.

JACKSON, District Judge. The bill filed in this cause seeks, first, to cancel an agreement in writing, entered into November 5, 1838, between Joel R. Poinsett, then secretary of war of the United States, and Louis McLane, then president of the Baltimore & Ohio Railroad Company, under which agreement the railroad company claims title to so much of a tract of land known as the "Harper's Ferry Property," as is used and occupied for the purposes of its road; secondly, to remove a cloud upon the title of the government to the property, growing out of a claim of title derived from one Patrick Byrne to that portion of it occupied by the defendant. It is conceded that the United States derived title to the Harper's Ferry tract through sundry conveyances made in 1796, and afterwards, "to George Washington, president of the United States, and his successors in office;" that by virtue of the conveyances so made, the government of the United States became seized and possessed of this tract of land, and continued to hold possession of it (except that portion occupied by the railroad company) from 1796 until the 30th of November, 1869, when it was sold by the government to Francis C. Adams. That shortly after the government acquired the property, she established upon it a national armory, which was used for the manufacture of arms and munitions of war until the armory was destroyed, in the year 1861. This being the condition of the property in the year 1838, the railroad company applied, through its president, Louis McLane, to the government of the United States for permission to occupy a portion of the tract for a right of way across it for railroad purposes, which resulted in the agreement of November 5, 1838, between Joel R. Poinsett, then secretary of war, on behalf of the government of the United States, and Louis McLane, on behalf of the railroad company.

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

By the terms of that agreement, "authority was conceded by the government to the railroad company to construct their railroad along and over the property of the United States." It is claimed by the defendant, the railroad company, that under and by virtue of this agreement, it has an easement in the property occupied by it so long as it is used for railroad purposes. But if it should be mistaken in this position, the company claims title to the land in controversy under a deed from Patrick Byrne, who claimed it under a grant from the state of Maryland, whose jurisdiction extended to the south bank of the Potomac river.

With reference to the second position of the defendant, which I propose to consider first, it is alleged that the railroad tracks, and, in fact, all the ground used for railroad purposes, is a "fill," built by the company in the river, and upon what is claimed to be its bed at the date of the agreement between the government and the railroad company, within the territory of Maryland, and, consequently, covered by the Byrne title. However this fact may be, it is not deemed to be a matter of importance in this case, as the defendant first took possession of the property in controversy, claiming it under the agreement of November 5, 1838; and so far as the question of possession arises between the United States and the defendant, it is a matter of no moment whether the United States had a good title, or whether the secretary of war had authority to execute the agreement. By the express terms of the agreement, the defendant was to build a sustaining wall parallel to the then existing wall built by the government, between it and the river in some places, and within the river at others, for the purpose of making the "fill" upon which the railroad track was to be built. Thus it appears that the defendant, under an express provision in this agreement, was to build a wall and make the necessary fill, deriving its authority for so doing from the government alone. If stronger evidence was required to establish the intention and understanding of the parties at the time the agreement was entered into, none could be brought. At that time no one questioned the right of the government to the property, and being a riparian owner, she was entitled to any accretions, whether the result of the action of the water, or the result of labor and skill applied and used to confine the river to what appeared to be its natural channel, so far as it would not interrupt the flow of water or obstruct navigation. The government had a clear right to authorize, as she did, the erection of the wall, not only for the purposes of a railroad bed, but to furnish a bank for the river, so as to prevent its encroaching further upon the main land. This view of the case explains clearly the conduct of the parties at the time, and tends to establish the fact, that the river at the date of the agreement had by its wash encroached on the main land, some distance beyond its original limits. But that fact did not alter the boundary line between the states, and hence both parties must have regarded the property as within the jurisdiction of Virginia when the agreement was made; otherwise, it would not have been entered into with its existing terms and conditions.

But suppose at the time the agreement was entered into, the title of Patrick Byrne covered the land in controversy. Would that fact alter the legal relations between the parties in this case? I think not. The defendant did not acquire the title of Byrne until September, 1841, long after the agreement made with the United States under which they took possession of the disputed property. When the deed of Byrne was executed, it passed nothing, because he was out of possession of the property intended to be conveyed, and the possession of it was had under a claim of title adverse to him. If, however, it had passed any title, the defendant took it in subordination to the title of the government. At the time of the execution of this deed, the defendant was a tenant under the United States, and was bound by every obligation, both legal and moral, to protect the title of its landlord until it should restore the possession of the property to it. True, it might disclaim the tenancy by actual notice, or by such notorious acts as would be equivalent to such notice. It is not, however, pretended that any such disclaimer was ever made in the case. On the contrary, the defendant, in its answer, claims right to the possession and use of the property under the agreement made with the secretary of war, November 5, 1838. Holding this relation to the United States, it cannot shelter itself behind the Byrne or any outstanding title, but must stand or fall with the title it acquired from the United States.

This brings me to consider the first ground of defence set up by the defendant in answer to the bill of the complainants, to wit, the validity of its title under the United States. It is not questioned, and in fact it cannot be denied, that if the claim of the United States covered the land in controversy, her title is good. That being conceded, the next question that presents itself for consideration is, has the defendant an inchoate or perfect title from the United States? The consideration of this question involves the authority of the secretary of war to make the agreement he did of November 5, 1838, which the complainants in this action very gravely question, and insist that the action of the secretary of war is without color of authority, and absolutely void or voidable. Congress, by an act passed and approved by the president at an early date, established a national armory upon this property at Harper's Ferry, by which it became dedicated to military purposes. From the time of its dedication to the date of the agreement be-

tween the secretary of war and the railroad company, it was alone used as a site for military purposes. During that period, arms and munitions of war were there manufactured under the direction of the war department. This property, as well as all military property belonging to the United States, is and always has been under the general management of the secretary of war. With the knowledge of this fact, congress, by an act passed March 3, 1819, invested the secretary of war with authority to make sale of "such military sites belonging to the United States as may have been found or become useless for military purposes." As far back as the 6th day of May, 1836, construction was given to this act by Mr. B. F. Butler, then attorney general of the United States, in which opinion he held that the secretary of war was authorized to make sale of any "military sites" belonging to the government at the date of the act, which were no longer needed for military purposes. 3 Op. Atty. Gen. p. 108. The government seems to have adopted this construction, and its correctness does not appear to have been since questioned. In the case of U. S. v. Chicago, 7 How. [48 U. S.] 188, the supreme court of the United States refer to this act, and concede the power of the secretary of war to sell what was then known as Fort Dearborn, or any portion of that property, under it. It will be seen that the power claimed for the secretary of war under this act is sustained not only by precedent in the department, but by judicial authority.

But it is claimed that the act applies only to military sites, such as public forts and dockyards, and not to a property used for the purpose of manufacturing arms and munitions of war. It must be borne in mind, however, that congress, in establishing the public armory at Harper's Ferry, fixed its location and dedicated it to military purposes. That it was a military site, used for military purposes, seems to me not to admit of a doubt. But precedent is not wanting for this position. The view of the question is sustained by Mr. Crittenden, when attorney general of the United States, in discussing the power of the secretary of war under this statute, in regard to the property now in question. 5 Op. Atty. Gen. p. 550. Under this opinion of the attorney general, the secretary of war laid out a large portion of the public property at Harper's Ferry, not needed for military purposes, into town lots, streets and alleys, and the lots were sold to parties who took possession under the title thus derived from the government, and they are so held to this day. So far as it now appears, no question has been raised as to the power he exercised upon that occasion. The government having in all its branches acquiesced in this action of the war department, she should not be permitted to change her position with reference to this property, but her rights should be determined according to the construction heretofore given the act, which seems to me not only to be warranted by its terms, but does no violence to the language employed to express its object.

I have thus far examined the act of 1819, and the powers of the secretary of war under it. The defendant, however, does not rely alone upon it for its defence, but seeks to protect itself under the act of 1828. This act authorizes the president to "sell forts, arsenals, dockyards, lighthouses, or any property held by the United States for like purposes," when no longer needed for the purposes for which they were used. Under this statute the power to sell is expressly conferred upon the president. It is claimed, however, that this agreement was the act of the secretary of war, and not of the president, and therefore not within the words of the statute, and, as a consequence, is not binding on the United States. It is now well settled, that "the president speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." This property belonged, as I have before said, to the war department, and was under the immediate control of the secretary of war. He was, in the making of this agreement, but the agent of the president, and I feel justified in presuming that it was done under his direction, and with his assent, and is therefore, in contemplation of law, the act of the president. Wilcox v. Jackson, 13 Pet. [38 U. S.] 498.

I, therefore, conclude that by both the acts of 1819 and 1828, the secretary of war was authorized to sell any property belonging to his department not longer needed by the government. It is suggested, however, that although the power be conceded, he did not exercise the right conferred by the statute, but instead of selling the property, he "granted permission to the railroad company to run their road through the lands belonging to the United States." It is sufficient to say in reply to this position, that the secretary of war is by law invested with the power to look after and take care of all public property belonging to his department, and so to use and manage it as will be best for the public interests. Whilst he could not sell, or by any act of his part with the legal title to any property belonging to the United States, except under authority derived from congress, yet, as incident to the power of his office, and in the exercise of a discretion with which all heads of departments are vested, he would have the right to lease property not longer needed for public purposes, not only for the preservation of it, but, if practicable, to render it productive of revenue to the government, until it could be disposed of in pursuance of law. Being invested with authority to dispose of it by grant in fee, all minor powers over the property are necessarily implied.

This conclusion brings me to notice briefly the rights acquired by the defendant under this agreement. Under the permission grant-

ed in this agreement, the railroad company entered upon and took possession of the disputed property, and constructed their line of railway across it. The license granted was for an indefinite period, no time being fixed when the permission to use the lands for the purpose specified in the agreement was to terminate. Up to this time it has never been revoked, nor has any notice been given by the government of its intention or even its desire to revoke it, until the institution of this suit. The defendant accepted this license upon the terms indicated. It built and constructed its railroad under this authority. It was the extension of a great national highway, and as we now know, second to none in magnitude and importance in this or any other country. It must have been apparent to both the contracting parties that an enterprise at that time so stupendous in its character as the construction of a railroad from Baltimore to the Ohio river, was to be permanent and lasting. A right thus acquired, under a written license not specially restricted, is commensurate with the thing of which the license is an accessory. That it was so understood by the secretary of war is shown by the fact that he expressly provided in his agreement with the defendant that "the said company shall allow the United States to construct and keep up forever a depot, with suitable tracks, switches, and turnabouts, to be connected with said road." Here there is a reservation of a right forever upon the part of the agent of the government, clearly indicating that he understood that the defendant was to use and enjoy the license thus granted as long as it should see proper to do so. The inference is clear to my mind that it was the intention of the secretary of war to dedicate the property granted under this license to this specific use, which was a public one. It was for a great national highway. Having so donated and declared the purposes and object of the donation, it became dedicated to the specific purposes indicated. By this act upon the part of the United States, through their agent, the defendant, as well as the public through it, has acquired an easement in the property, so long as it continues to use it for the purposes granted, which is said "to be a liberty, privilege, or advantage which one may have in the lands of another without profit." The owner of the fee, whoever he may be, cannot revoke the license granted. The fee will remain in the original owner, or his grantees, but the right of the defendant to the use is paramount to the title of the owner of the fee, and does not require the fee for its protection. Trustees of M. E. Church v. Mayor, etc., of Hoboken, 33 N. J. Law, 13; Wilson v. Sexon, 27 Iowa, 15.

And here the doctrine of equitable estoppel may be justly applied. Under the permission given, the defendant built its railroad over the land of the complainants, with their knowledge and assent, which depends for its value on remaining in its present position. Acting in good faith, it was influenced to make large expenditures both of time and money in its construction. The plaintiffs were influenced in granting the license by the benefits to be derived from the construction of the road in furnishing them with better facilities of transportation at reduced rates. It was simply the advantage of a railroad for transportation over the old wagon-roads, which, in the light of subsequent events, proved to be of incalculable benefit to the property. The benefits thus derived, whilst they may not amount to a valuable consideration, were the inducements that operated upon the complainants to grant the license. It was a power coupled with an interest, which was both necessary to the possession and enjoyment of the rights acquired under the permission, and is not revocable as long as the interest exists. Were it otherwise, a revocation of the power would follow, and the defendant would be constrained to remove its railroad at a great loss. Such a result would work gross injustice to the defendant, and would allow the complainants to take advantage of their own wrong. It is here that equity interposes her power to estop the complainant from disturbing the defendant in the rights acquired by it under the agreement, otherwise it would have no remedy. It is now the settled doctrine that "equity will execute every agreement, for the breach of which damages may be recovered, when an action for damages would be an inadequate remedy." In this case no adequate compensation could be made the defendant for the damages it would sustain by the revocation of its license and the loss of rights acquired under it. The complainant having without objection permitted the defendant to construct over their lands a public railroad, "cannot, after the road is completed, or large expenditures have been made thereon, upon the faith of their apparent acquiescence, reclaim the land or enjoin its use by the railroad company." Goodin v. Cincinnati & W. Canal Co., 18 Ohio St. 169; Cumberland Val. R. Co. v. McLanahan, 59 Pa. St. 24, 31. And this doctrine is reaffirmed in 21 Ohio St. 553, in which case the learned court declare that "it is the dictate of natural justice that he who, having a right or interest, by his conduct influences another to act on the faith of its non-existence, or that it will not be asserted, shall not be allowed afterwards to maintain it to his prejudice." Out of this just principle has grown the equitable doctrine of estoppel in pais, so well stated and strongly approved by Fonblanque in his treatise on Equity (volume 1, c. 3, § 4); by Chancellor Kent in Wendell v. Van Rensselaer, 1 Johns. Ch. 344; by Lord Macclesfield in the leading case of Savage v. Foster, 9 Mod. 35.

In the case under consideration, no one can question the fact that the defendant was influenced in the course it pursued by the conduct of the government through its of-

ficer, the secretary of war. The company entered upon the premises under its agreement with the government, and remained in the peaceable possession and the quiet enjoyment of them for a period of upwards of thirty years. During all this time not the slightest intimation was ever given to it of any claim whatever upon the part of the government to the disputed premises. I therefore conclude that, upon every principle, both legal and equitable, the complainants cannot and ought not to be permitted at this late day to disturb the defendant in the possession of the premises under the agreement of 1838. Nor do I think a right of compensation exists in this case. No actual consideration is expressed in the agreement, and the omission to do so implies that both parties understood that none was demanded. It is manifest that the secretary of war required no consideration, for the reason that he looked to the additional facilities of transportation the construction of the railroad would furnish, as well as to the enhanced value of the residue of the property consequent upon its construction. It seems to me, therefore, that every consideration of justice between the parties requires me to treat and hold the license in this case as an executed contract giving an absolute right. I am therefore of the opinion that, upon any view of the case presented by the pleadings, the bill should be dismissed for the reasons assigned.

Case No. 14,511.

UNITED STATES v. BALTIMORE & O. R. CO.

[13 Int. Rev. Rec. 117.]

Circuit Court, D. Maryland. 1871.[1]

INCOME TAX — LIABILITY OF CITY — LOAN IN AID OF RAILROAD.

[1. Where a railroad company agrees to pay the interest on bonds issued by a city for the purpose of raising funds for a loan to the company, and makes a mortgage to the city to secure performance of its agreement, the bonds so issued binding the city alone, the interest paid by the company belongs to the city, and is not subject to the 5 per cent. income tax imposed by the internal revenue act.]

[2. The income of a corporation is not liable to the 5 per cent. tax provided by the internal revenue act of 1864.]

[3. The federal government has no power to tax agencies employed by a municipal corporation in the exercise of its legitimate powers.]

[4. An advance of money by a city to aid in the construction of a railroad to that city is the exercise of a legitimate municipal power.]

At law.

John H. B. Latrobe, for defendant.
A. Stirling, Jr., U. S. Atty.

GILES, District Judge. The United States v. The Baltimore and Ohio Railroad Company. Action of assumpsit for the taxes claimed to be due to the United States under the 122d section of the act of 1864 [13 Stat. 284], amended by the act of 1866 [14 Stat. 98]. Plea, non-assumpsit and issue. This case is tried before the court without a jury by virtue of the 4th section of the act of congress passed March 3, 1865 [13 Stat. 483]; and it is submitted upon the following statement of facts: (1) That the mayor and city council of Baltimore, having full authority from the legislature for the purpose, passed the ordinance No. 5, approved December 27, 1853, entitled "An ordinance to aid the Baltimore and Ohio Railroad Company, by a loan to the amount of five millions of dollars, to complete their road to the city of Wheeling, to fund their debts, and especially to lay a track as far as Piedmont, 218 miles distant from the city of Baltimore." [Baltimore Ordinances 1853–54, p. 9.] (2) That the said ordinance may be read in evidence on the trial in any stage of the above cause from the printed ordinances of the city aforesaid as well as the act of the legislature of Maryland confirming it. (3) That in pursuance of the provisions of said ordinances the bonds of said city therein authorized were prepared, issued and paid, and the proceeds paid as required, less the ten per cent. provided as a sinking fund by the terms of the ordinance. (4) That the said company executed the mortgage required by said ordinance. (5) That the said company paid the interest on said bonds, as provided by said ordinance, regularly until the 1st of July, 1862. (6) That after the day last aforesaid, the company in paying the interest aforesaid, according to the tenor of their obligations in that regard, deducted the internal revenue tax imposed by the act of congress relating thereto—or claimed to be imposed—the said city, by its register, always contending that the United States had no right to collect the tax, and bringing the action against the said company for the amount so retained, which suit was ultimately taken, by writ of error, to the supreme court United States on the first Monday in December, 1867. Pending said suit, the said city always insisted that the deduction aforesaid was unauthorized by law, and awaited the decision of the supreme court aforesaid. (7) That no payment of the amounts deducted as aforesaid has been made either to the said city or the United States since January, 1864. (8) It is admitted that the city, in paying its interest on the bonds aforesaid, has paid it to holders in full, without reservation or deduction on account of the internal revenue tax. (10) It is admitted that the said city has notified the said company not to pay the amount claimed in this suit, and has appeared by its counsel to contest the same: (The assessments made by the city were admitted, also the form of the bond issued by the mayor and council.) (11) It is admitted that during the time mentioned in the above statement the mayor and city council of Baltimore held

[1] [Affirmed in 17 Wall. (84 U. S.) 322.]

large amounts of stock in the Baltimore and Ohio Railroad Company. (12) It is also admitted that all laws and ordinances in that connection may be read from the volumes in which they are contained. And the claim is made by the United States for a tax of five per centum upon the quarterly interest of $75,000, which was due and owing by the defendant to the city of Baltimore under the provisions and by the terms of the mortgage of the 16th of February, 1854, for eight quarterly payments—due 1st of October, 1868, 1st of January, 1st April, 1st July and 1st October, 1869, and 1st January, 1st April, and 1st July, 1870, making the whole tax claimed $30,000.

The first question to settle is the true construction of the 122d section of the internal revenue act. If this section stood alone, an argument of some force might be drawn from it that congress intended to impose a tax of five per centum upon all interest and dividends on bonds or shares, without reference to the parties to whom the same are payable. But that section does not stand alone. That the 122d section of the act of 1864 imposes no special tax upon the companies therein enumerated, but was simply a mode of collecting the income tax on income derived from interest, etc., on railroad bonds and other securities, was held by the court in the case of Jackson v. Northern Cent. R. Co. [Case No. 7,142], and which decision was affirmed by the supreme court. See 7 Wall. [74 U. S.] 269. The same construction was put on this section by the supreme court in the case of Haight v. Pittsburgh, Ft. W. & C. R. Co., 6 Wall. [73 U. S.] 17. These decisions settle the question of the construction of this section in the act of 1866, which differs from the law of 1864 only in extending its provisions to interest and dividends due to aliens.

We then look to the next question: Who are to be regarded as the parties to whom this interest belongs under the circumstances attending the contraction of the five million loan by the city to this defendant? Is it the city of Baltimore or the holders of the bonds or certificates of debt which issued and on which it borrowed the money to make the said loan to the defendant? Now the mortgage is made to the said city, and the obligation under it is to pay to the said city the interest on the loan quarterly, and the principal at the time therein mentioned. And although the mortgage refers to the bonds or certificates issued by the said city by virtue of the provisions of the ordinance of December session, 1853, it refers to them only to fix the dates of the payment of the principal and interest of the loan intended to be secured thereby. The bonds or certificates are the bonds of the city alone, and bind only it; they refer on their face to the purpose for which they are issued, but it is only in reciting the ordinance which authorized their issue. There is no privity of contract between this defendant and the holders of these bonds or certificates. They might possibly, in equity, if the city were insolvent, be subrogated to the rights of the city under said mortgage, as their money went to create the said loan. But at law they would have no rights. I thought differently when I decided the case of the city v. this defendant, but the point was not important in that case, and was not relied upon, so far as I recollect, by either party.

Having, therefore, arrived at the conclusion that to judge of the validity of the tax claimed in this suit we must regard alone the city of Baltimore and its immunities as a municipal corporation, let us first see if congress has imposed any tax upon the resources or income of this city. It will be seen on examining sections 116–118 that the tax of five per cent. is levied only on the gains, profits, and income of every person residing in the United States, or of any citizen of the United States residing abroad, and also by the 122d section, "of any person, including non-residents, whether citizens or aliens." It is true that by the 49th section of said act the provisions made for the delivery of returns, lists, statements, and valuations, etc., shall be held and taken to apply to all persons, associations, corporations, or companies liable to pay duty or tax. These six words, "liable to pay duty or tax," qualify the section. This tax on incomes seems to be levied alone on the income of persons, and not on the income of corporations, no matter what their character. This appears to me to be clear from an examination of other sections of this act. See, for instance, the language of the 103d section: "That every person, firm, company, or corporation," etc.; also similar language in sections 107–109; also the language of section 11, "any person, partnership, firm, association, or corporation," etc. Corporations are taxed by a tax of two and a half per cent. on their gross receipts; and as their profits and income would be divided between persons, their stockholders, congress was content to impose the tax upon the dividend or interest when set apart to such, and to provide by sections 120–122 a safe mode of collecting the same.

I might, therefore, rest this case here; but as the further question has been ably argued by the learned counsel engaged in this trial, and is presented by the second prayer of the defendant, I shall now examine it. That is, has the general government the authority to tax the income and resources of the city of Baltimore? The constitution of the United States says: "The congress shall have power to collect taxes, duties, imports and excises, to pay the debts and provide for the common defence and general welfare of the United States." But while this grant in the constitution is so broad, it must be admitted that there are some subjects withdrawn from its operation by the very character of our

government. As the supreme court in the case of Veazie Bank v. Fenno, 8 Wall. [75 U. S.] 547, says: "It may be admitted that the reserved rights of the states, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government are not proper subjects of the taxing power of congress." And the city of Baltimore, a municipal corporation, in the exercise of its legitimate powers, possesses the same immunity which belongs to the state. "For," says the supreme court, in the case of State v. Baltimore & O. R. Co., 3 How. [44 U. S.] 550, "the several counties are nothing more than certain portions of territory into which the state is divided for the more convenient exercise of the powers of government. They form together one political body, in which the sovereignty resides." In the case of Bank of Commerce v. New York City, 2 Black [67 U. S.] 634, Judge Nelson, towards the close of his able opinion, says: "In our complex system of government it is sometimes difficult to fix the true boundary between the two systems, state and federal." The chief justice, in McCulloh v. Maryland [4 Wheat. (17 U. S.) 316], endeavored to fix this boundary upon the subject of taxation. He observed: "If we measure the power of taxation residing in the state by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property unimpaired, which leaves to a state a command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the state and safe for the Union." He remarks again: "Each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised."

With this rule so clearly enunciated by this great judge, we have only to ascertain if the advance of money by the city to aid in the construction of a railroad to bring trade and commerce to its borders from the once distant West was the exercise of a legitimate power by this municipal corporation. The act of the legislature of this state, passed March 1, 1854, undertook to impart this power to the city. Was it a power which the state possessed, and which it could impart to its creature—the corporation of Baltimore? It is a power which has too long and too often been exercised in this country to be now called in question, and it has been recognized and sanctioned by the supreme court in two cases,—Gelpecke v. City of Dubuque, 1 Wall. [68 U. S.] 202; and Rogers v. City of Burlington, 3 Wall. [70 U. S.] 664. The court says in the last case "that a railroad is nothing more than an improved highway, and that it is as competent for the legislature to authorize a municipal corporation to furnish material aid in the construction of a railroad connected with the same as to construct a highway."

This settles the question, and removes beyond the power of federal taxation the means employed by the city to carry this object into effect. The debt and interest, therefore, which this defendant owes the city under the said mortgage cannot be taxed by the general government. But this does not remove the interest which the city pays to individuals on the bonds issued under the provisions of the above-mentioned ordinance from taxation as income in the hands of the several holders. The city not being compelled or authorized to withhold the tax from the accruing interest, the holders of said bonds were required by the 117th section of the internal revenue act to include the same in their several returns of income, and by the 116th section to pay a tax of five per cent. on the same. There is no evidence in the case whether the said tax was so paid, but I have every reason to believe that it was, as the obligation to pay it was so clear. To permit it to be recovered now in this suit would be to enforce the payment of a double tax, which would be most unjust, and a result never intended by congress. I therefore reject the prayer offered by the counsel for plaintiff, and grant the first and second prayers offered by counsel for the defendant. I have not carefully considered the proposition of the defendant's third prayer, as it did not become necessary in the view I took of the case; but I am inclined to the opinion that there is no such limitation in the government as it seeks to maintain, and I therefore reject it.

[The cause was carried to the supreme court by writ of error, and the judgment above was affirmed. 17 Wall. (84 U. S.) 322.]

Case No. 14,512.

UNITED STATES v. BANCROFT.

Circuit Court, S. D. New York.

[Affirming Case No. 14,513. Nowhere reported; opinion not now accessible.]

Case No. 14,513.

UNITED STATES ex rel. HYDE v. BANCROFT.

[6 Ben. 392; [1] 8 N. B. R. 24.]

District Court, S. D. New York. March, 1873.[2]

VIOLATION OF INJUNCTION — DAMAGES — ATTACHMENT—BANKRUPTCY.

1. In a bankruptcy proceeding, an injunction was issued, on a special petition of the petitioning creditors, enjoining a firm, of which B. was a member, and a firm, of which S. was a member, from prosecuting suits commenced by such firms respectively against the bankrupts, in Illinois, in each of which suits attachments had been issued, under which property of the bankrupts had been attached. The injunction was personally served on B. and on S. After such service, the proceedings under the attachments were continued to judgment, and the property was sold under execution. Proceedings were taken to punish both B. and S. for contempt in violating the injunction. S. set up, in defence, that the proceedings had been carried on by assignees of his firm, the assignment being made by a member of his firm then in Illinois, and who was not served with the injunction. B. set up that the further proceedings in his suit had been conducted by assignees of his firm, the assignment having been made by one D., a clerk of B.'s firm: *Held*, that it was competent for this court to restrain these attaching creditors from further proceeding against the property which they had attached as the property of the bankrupts.

[Cited in Re Duncan, Case No. 4,131; Re Irving, Id. 7,073.]

2. Both B. and S. had violated the injunction of the court by the further proceedings in the attachment suits.

3. Each of them, to purge his contempt, must show that he endeavored to stop the suit of his firm in Illinois, or that the claim had been, in fact, assigned before the injunction was served, neither of which things had been shown.

4. A fine to the amount of the value of the attached property, with interest, and the expenses of the contempt proceedings, including a proper counsel fee, must be imposed on each of them.

[Cited in Re Ulrich, Case No. 14,328.]

[Contempt proceedings by the United States ex rel. Leonard C. Hyde, assignee, against Edward W. Bancroft and Michael Steiner, for violation of an injunction.]

A. R. Dyett, for relator.

R. A. Pryor, for Steiner.

J. Sterling Smith, for Bancroft.

BLATCHFORD, District Judge. The violations of the injunction by both of the respondents are satisfactorily proved. The injunction of the 3d of April, 1869, which was served on each of them, restrained their respective firms from further proceedings in the actions brought in Illinois by their respective firms against the bankrupts, and wherein the property assigned by the bankrupts to Kaufman had been attached, so far as regarded proceedings against such property. This injunction was issued after the adjudication in bankruptcy, and it was entirely competent for the court to restrain these attaching creditors from further proceeding against the attached property, which, by attaching it, they recognized as the property of the bankrupts, and which by reason of the adjudication, this court had the authority to control. The creditors' petition for adjudication was filed on the 18th of March, 1869. The order of adjudication was entered on the 27th of March, 1869. The attachments were levied in January and February, 1869. They were, therefore, dissolved by the bankruptcy proceedings. Having authority, by virtue of the adjudication, to issue a warrant to its messenger, to take possession of all the estate of the bankrupts, and, among other property, of the property so attached as the property of the bankrupts, and to which the firms of the respondents made no claim except by virtue of the dissolved attachments, this court necessarily had the incidental and ancillary authority to enjoin these respondents and their firms from further proceeding against the attached property in the suits such firms had brought. The authority is derivable from the power given by the first section of the bankruptcy act [of 1867 (14 Stat. 517)], to collect and dispose of the assets, as well as from the power given to the court by the judiciary act [1 Stat. 73.] to issue all writs necessary for the exercise of its jurisdiction. This injunction was issued on a special petition to that effect, presented by the petitioning creditors after adjudication, and before the appointment of an assignee; and the court, having jurisdiction of the res, had authority to issue an injunction to restrain interference with such res.

The records of the court in Illinois show violations of this injunction by both of the parties. The record shows, that, on the 8th of June, 1869, Steiner's firm, by its attorneys, the same who had brought the suit and issued the attachment, entered a judgment in the suit against the bankrupts by default, after publication of notice, and caused a writ of inquiry to be issued and executed; that, on the 9th of June, 1869, a judgment was entered in the suit, that Steiner's firm recover of the attached property $3,416 35, and costs, and that a special execution issue to the sheriff for the sale of the attached property; that, on the 25th of June, 1869, by direction of the plaintiffs' attorneys, an execution was issued, which recited the issuing and levying of the attachment on property specified in the execution, and the entry of the judgment against the property, and the order of sale, and directed the sheriff to make the amount of the judgment and costs, $3,445 85, out of such property; that the sheriff sold the attached property for $1,548-05; and that, on the 21st of July, 1869, the said attorneys received from the sheriff thereon $1,451 28 "for assignees of plaintiffs' claim," as expressed in the receipt, the receipt being signed by them as "attorneys for assignees." Prior to the date of this receipt, the record makes no mention of any assign-

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

[2] [Affirmed by the circuit court. Case unreported.]

ment, and such attorneys, prior to such date, appear as the attorneys for Steiner's firm, as plaintiffs.

This record makes out a case against Steiner of a violation of the injunction. It is suggested, that, before the injunction was served, Steiner had heard that the claim had been assigned by his firm, acting through his partner, in Illinois. If the claim was, in good faith, and in fact, assigned before the injunction was served, Steiner might, perhaps, not be responsible for the use of his name, by the assignee, to continue the prosecution of the suit. But not a particle of legal evidence is produced to show that any such assignment was ever made. The assignment is said to have been made by the partner in Illinois, to one of the plaintiffs' attorneys. But neither of those persons is produced to testify. The injunction, on its face, advised Steiner of the suit, and where it was brought, and by whom, and against whom, and what property had been attached in it. In violation of the injunction, Steiner's firm continued the proceedings against the property, and caused it to be sold, so that the assignee in bankruptcy was deprived of it. The proceedings in the suit were not resumed until two months after the service of the injunction. The only excuse Steiner gives is, that, having heard, before the injunction was served on him, that the claim had been assigned, he thought that he had no further interest in it. He handed the injunction to his lawyer, but did not advise his partner in Illinois of its service. It is not shown that he asked, or received, any advice from his lawyer in the premises. It was his duty, as a member of his firm, to have stopped the proceedings in the suit. On the facts of the case, he is as much responsible for their continuance, and for violating the injunction, as if he had personally directed that they should be continued, notwithstanding the service of the injunction. If this were not so, injunctions served on plaintiffs in suits, to restrain their prosecution, could easily be violated with impunity, by simple abstinence on the part of the plaintiffs from communicating knowledge of the injunctions to the attorneys prosecuting the suits. In the present case, Steiner, to purge his contempt, must show that he endeavored to stop the suit, or that the claim had, in fact, been assigned before the injunction was served. Neither of these things is shown.

The record of the court in Illinois shows, that, on the 8th of June, 1869, Bancroft's firm, by its attorney, the same who had brought the suit and issued the attachment, entered a judgment in the suit against the bankrupts, by default, after publication of notice, and caused a writ of inquiry to be issued and executed; that, on the 9th of June, 1869, a judgment was entered in the suit, that Bancroft's firm recover, of the attached property, $1,051 95, and costs, and that a special execution issue to the sheriff for the sale of the attached property; that, on the 28th of June, 1869, by direction of the plaintiffs' attorney, an execution was issued, which recited the issuing and levying of the attachment on property specified in the execution, and the entry of the judgment against the property, and the order of sale, and directed the sheriff to make the amount of the judgment and costs, $1,080 50, out of such property; that the sheriff sold the attached property for $1,051 95; and that, on the 21st of July, 1869, a person named Green, the same who was one of the plaintiffs' attorneys in the Steiner suit, and is said to have been the assignee of the Steiner claim, received from the sheriff thereon $962 20, under an order from the attorney for the plaintiffs, which directed the sheriff to pay such money to Green, "taking his receipt for me, as attorney for W. M. Ross, assignee," such receipt being given by Green, and being signed in the name of such attorney, as "attorney for W. M. Ross, assignee, by N. W. Green." Prior to the date of this receipt, the record makes no mention of any assignment, and such attorney, prior to such date, appears as the attorney for Bancroft's firm, as plaintiffs.

It appears, that, on the 26th of May, 1869, one Dunn, a clerk in Bancroft's firm, acting for it, assigned the claim to Ross, and notified the plaintiffs' attorney in the suit that he would thereafter receive his instructions from Ross. The injunction, on its face, advised Bancroft of the suit, and where it was brought, and by whom, and against whom, and what property had been attached in it. Bancroft's only excuse is, that he had, before the service of the injunction, put the matter of the collection of the claim into the charge of Dunn; and that, when the injunction was served, he sent it to the department in which Dunn was employed, "intending and supposing that it would be obeyed." He does not appear to have given any instructions to stop the suit. On the 14th of August, 1869, and not before, his firm received from Ross $885, and entered it on their books, and balanced and closed their account against the bankrupts. A more gross violation of an injunction than this cannot well be conceived. The party receives the injunction, gives no direction to stop the proceedings, permits the claim to be assigned, permits the attorney to be notified to receive instructions from the assignee, permits the suit to proceed and the property to be sold, permits the assignee to receive the proceeds, and, after that, permits the assignee to pay over a sum which is received in full satisfaction of the original claim, and of the assignment, and is within $77 20 of the entire proceeds. A person served with an injunction owes a different duty from this to the court whose process he thus tramples upon. It was Bancroft's duty to have stopped the proceedings in the suit at once and forever. Instead of that, he went on with them, and

profited by them, in as distinct a manner as if the subterfuge of a nominal assignment to Ross had not been resorted to. He was ordered, by the injunction, to refrain from further proceedings under the attachment. This required him affirmatively to take steps adequate to prevent such proceedings. It was in his power to do so. The injunction did not require him merely to abstain from taking affirmative personal steps to go on with the proceedings. It is a grave error to suppose that, if he personally took no steps to go on, he could refrain from taking any reasonably adequate measures to stop the proceedings, and leave it in the power of his employees to go on in his name, and yet escape the consequences of disobeying the injunction.

The evidence shows the value of the attached goods sold in the Steiner case to have been, at the time of the sale, $6,691 93. A fine of that amount, with interest thereon from July 21st, 1869, must be imposed on Steiner. The value of the attached goods sold in the Bancroft case is shown to have been, at the time of sale, $2,218. A fine of that amount, with interest thereon from the same date, must be imposed on Bancroft. In addition, the expenses of this contempt proceeding, including a proper counsel fee, to be ascertained by the clerk, on a reference, must be paid by them, as a fine.

Case No. 14,514.

UNITED STATES v. BANK OF ALEXANDRIA.

[1 Cranch, C. C. 7.] [1]

Circuit Court, District of Columbia. April Term, 1801.

MANDAMUS—ADEQUATE LEGAL REMEDY—COMPLAINANT'S RIGHT.

If the right of the party applying for a mandamus be not clear, or if he have an adequate legal remedy, equivalent to a specific remedy, the court will not grant the mandamus.

On the first day of this term, the president and directors of the Marine Insurance Company obtained a rule on the president and directors of the Bank of Alexandria, to show cause on the sixth day of this term why a mandamus should not issue commanding the president and directors of the Bank of Alexandria to admit the president and directors of the insurance company to subscribe for twenty-five of the unsubscribed shares of the augmented capital stock of the bank.

Mr. Simms, for the bank, showed, for cause, that the bank did not think it expedient that the new shares should be filled; that the bank is not compellable to open their books now for subscriptions; that the bank has no right to open them. By the act of incorporation of the bank, November 23, 1792, the stock was to consist of 750 shares of 200 dollars each, to be paid, ten dollars in specie on each share at the time of subscribing, forty dollars within fifteen days, twenty-five dollars in thirty days, fifty dollars in sixty days, and the remaining seventy-five dollars in one hundred and twenty days, after the election of the directors. On the 7th of December, 1792, the subscription was opened, and filled the same day. On the 27th of January, 1793, the first directors were chosen. On the 5th of December, 1795, the act passed for augmenting the capital stock, by which three hundred and fifty thousand dollars were to be subscribed in shares of two hundred dollars each; the books were to be kept open thirty days, or until the whole shares should be filled; and if, at the end of the thirty days, a greater number of shares should be subscribed for than the act allowed, the surplus should be averaged and deducted from the subscriptions, pro rata, so that each subscriber should retain at least one share. The whole number of new shares was to be 1,750. The books were kept open one hundred and twenty days after the expiration of the first thirty, and were again opened and kept open until 7th April, 1797; 554 shares were subscribed in the thirty days and 296 shares were subscribed after the thirty days. The payments were to be made in the same number of days from the time of opening the subscription as are limited in the first act, after the time of election of the directors. Perhaps they had a right to keep the subscription open until the last payment, but not longer. Co. Litt. 381, as to the construction of statutes; 4 Bac. Abr. 645, 652. The inconvenience of the construction contended for, would be very great, as every new subscription requires a settlement of the affairs of the bank, because a new subscriber is not entitled to any part of the profits arising before he subscribed.

Mr. Chapin, cashier of the bank, testified that he received orders from the president of the bank not to receive any more subscriptions, but did not recollect when he received those orders. It was while Mr. Herbert was president. On the second opening of the books, subscribers paid by instalments; afterwards they paid the money down.

E. J. Lee, C. Lee, and Mr. Mason, in support of the rule. A mandamus is the proper remedy. No suit at law could place the insurance company in the situation of stockholders of the bank. It issues to any corporation requiring them to do some particular thing therein specified which appertains to their office and duty. 3 Bl. Comm. 110. The insurance company have a right to be stockholders; it is a function, and attended with emoluments. No specific legal remedy exists. Rex v. Barker, 3 Burrows, 1265. It lies to admit a person into a company of merchants. Rex v. Turkey Co., 2 Burrows, 999. It has been said that the act for aug-

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

mentation could not be carried into effect because the payments were to be made in a limited time after the opening of the books; but that difficulty is avoided by the payment of the whole subscription at the time of subscribing, and in this case the insurance company tendered the whole payment at once. As to the inconvenience to the bank, it may be said that the inconvenience to the public from the want of a larger capital stock in the bank, is as great or greater than that which the bank would sustain by being obliged to settle their accounts, &c. The bank has no discretionary right to refuse. The words of the act are imperative. The books shall be kept open thirty days, or until the whole number of shares is filled. The bank officers cannot say that they had a discretionary right to close at the end of thirty days, or to keep the books open as long after as they pleased, and then close before the whole shares were filled. They have given a construction to the act by keeping the books open after the thirty days, and are therefore obliged to continue them open until the whole number is complete. The bank has accepted the act, and is therefore liable to any inconveniences which may result. Buller, N. P. 199. It is a writ of right, and cannot be refused. It is to compel an obedience to its charter. It issues to private corporations, as well as to those who are concerned in the administration of public justice, as in the case of Rex v. Turkey Co. That corporation had no judicial powers. In Rex v. Blooer, 2 Burrows, 1043, a mandamus was ordered to a pensioner; and in Rex v. Askew, 4 Burrows, 2186, it was directed to the college of physicians to admit a person to practise physic. By the preamble of the act of 1792, the bank appears to have been instituted for the benefit of the public, and not of the individual stockholders. By first section, the books shall be kept open. The same reasons are given in the preamble to the second act. The books must be kept open thirty days to prevent monopoly, and if the shares are not all filled in the thirty days, they must be kept open until they are all filled. There can be no doubt of the power of this court to grant the mandamus. The subscription is to be neither more nor less than three hundred and fifty thousand dollars, and the act says the subscription shall be taken. The expression, the subscription "shall be kept open thirty days, or until," &c., means that it shall be kept open thirty days at all events, and if the whole shares are not taken up in that time it shall be kept open until they are. The public have a right to insist that the stock should be augmented, if subscribers offer. The third section of the second act, which says the payments shall be made according to the first act, cannot be carried into operation. The act must therefore be taken as if no such section had been inserted; and in such case the bank, under its authority to make by-laws and regulations, might have ordered the mode of payment. Unless the subscriptions are now opened, the capital can never be augmented, because congress have pledged themselves to the Bank of the United States.

Mr. Swann, contrà. A mandamus will not lie but where the government, or the public, or the administration of justice, is concerned. The cases in 3 Bac. Abr. 530, are all upon the ground of the applicant being a public officer. So is the case in 6 Mod. 18; Ld. Raym. 540, 560. In Jac. Dict. tit. "Corporation," a corporation is distinguished from a body politic. There are public corporations and private corporations. A private corporation is like a private individual, and liable to process as a natural person. This is not a public concern. The people of Virginia were not interested in it. The case of Rex v. Blooer concerned the religion of the country. The case in 3 Burrows, 1650, concerned education, which is a public concern. In the case in 4 Burrows, 2188, the college of physicians had power to hold a court. A mandamus will never be granted where there is another specific remedy. 3 Bl. Comm. 110; 1 Wils. 12, 21, 76, 125, 206, 283, 305; 2 Strange, 1082; Rex v. Bishop of Chester, 1 Term R. 396, 404. The bank is a private corporation; the remedy is by a bill in chancery, or by an action on the case. Rex v. Bank of England, 2 Doug. 523. The court will not grant a mandamus if the right of the applicant is not clear, and if he has another remedy equivalent to a specific remedy. The words of the two laws are different. The first law is imperative: the books shall be kept open until the whole number of shares shall be subscribed. The second law says thirty days, or until the whole number shall be subscribed, thereby leaving it discretionary with the bank.

C. Lee, in reply. This is a public institution, because all persons have a right to subscribe as long as a share remains unsubscribed for. Buller, N. P. 149, tit. "Mandamus." There is no distinction between a public and a private corporation. In the Case of the Turkey Company, there was nothing said of a power to hold a court. It makes no difference. 1 Lev. 123; 1 Keb. 625, 629. In the case in Strange the court granted the mandamus, although a quare impedit would lie. In 1 Term R. 404, Buller, J., says it must be a legal as well as a specific remedy which will prevent a mandamus. The courts are bound to see that corporations properly exercise the powers vested in them by their charters. A court of law will not send an applicant to a court of chancery when it is confessed that a court of law is competent to give a remedy. Besides, here is no contract on which to ground a suit in chancery. In the case in Douglas, the right of the applicant was not clear, and that is the ground of the judgment of the court. The court only exercised its discre-

tion. The application for the mandamus rests on two grounds: (1) Whether the right of the applicants to be stockholders is clear. (2) Whether this is the proper remedy.

KILTY, Chief Judge. I shall not go at large into the reasons which influence me as to the first question, because it may hereafter be a subject of discussion. But my present impressions are, that the right is sufficiently clear. With regard to the second point, I feel some difficulty to decide. An action on the case may possibly afford a remedy, but it is by no means clear that it will afford a specific remedy equivalent to the one now sought for, or commensurate with the right of the applicants. Under this doubt, when I consider that a denial at this time will oblige the claimants to resort to a remedy that may not be effectual, and that by granting the mandamus nisi and de bene esse, open to all objections on the return, the bank will not be concluded. My opinion is, that the rule should be made absolute for a mandamus to admit the Marine Insurance Company to subscribe the twenty-five shares prayed for, or to show the reasons why they are not admitted. This is also on the ground of the facts being by proof and admission sufficiently before the court.

MARSHALL, Circuit Judge, was of opinion that the rule ought to be discharged, without costs.

CRANCH, Circuit Judge. It does not appear to me that the right of the insurance company is sufficiently clear; and if they have the right, they have a legal remedy by action on the case adequate to a specific remedy; for if, on a trial at law, they establish their right, a jury will give them damages, which will enable them to purchase the shares at market; and the bank will be obliged to open their books again, or suffer the constant inconvenience of paying damages and costs to every person who wishes to become a subscriber. I am therefore for discharging the rule, but without costs.

In consequence of this opinion of the court, the bank opened their books for subscription.

Case No. 14,515.

UNITED STATES v. BANK OF ARKANSAS.

[1 Hempst. 460.] [1]

Circuit Court, D. Arkansas. May, 1846.

MARSHAL—SALE AFTER REMOVAL—REAL ESTATE—NOTICE—DEPUTY.

1. The removal of a marshal before he has sold real estate on execution in his hands, destroys his right to proceed; and a sale of land, after such removal, is null and void, and will be set aside on motion.

2. Such removal would not affect his right to sell personal property in his possession, and for which he is answerable.

3. When an appointee has received a commission from the president, taken the oath of office, and given the requisite bond, the present incumbent is superseded, and his removal is complete.

4. Notice is not necessary to effect such removal.

[Cited in Westberg v. City of Kansas, 64 Mo. 493.]

5. Different modes of removing an officer stated.

6. Notice to a deputy marshal who performs an act, is equivalent to notice to the marshal himself.

7. Notice to an agent is notice to his principal.

Motion to quash sales of real estate on execution, determined before the Hon. BENJAMIN JOHNSON, District Judge, holding the circuit court; the Hon. PETER V. DANIEL, absent.

S. H. Hempstead, U. S. Dist. Atty.

Lemuel R. Lincoln and Williamson S. Oldham, for the bank.

OPINION OF THE COURT. A judgment having been rendered in this case in favor of the plaintiff, an execution was issued on the 17th May, 1845, and placed in the hands of Henry M. Rector, then United States marshal for the district of Arkansas. On the 23d May, 1845, the president of the United States, by letters patent, appointed Elias Rector marshal, who executed the requisite bond, and took the oath of office on the 30th June following. Between the 8th and 30th days of June, 1845, Nathaniel T. Gaines, as deputy marshal under Henry M. Rector, turned over sundry writs and executions to Elias Rector; during which time Henry M. Rector was absent from the state of Arkansas. Deputy Marshal Gaines having previously levied on real estate belonging to the defendant, and duly advertised the same, proceeded to sell it on the 25th July and 2d and 18th of August, 1845.

On these facts a motion has been made by the defendant to set aside those sales, on the ground that the removal of Henry M. Rector deprived him eo instanti of all right to sell the real estate thus levied on by him. The 28th section of the judicial act of the 24th September, 1789 (1 Stat. 87), provides, that "every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power, notwithstanding, to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office." The 3d section of the act of the 7th May, 1800 (2 Stat. 61), provides, that "where a marshal shall take in execution any lands, tenements, or hereditaments, and shall die or be removed from office, or the term of his commission expire before sale, or other final disposition made of the same, in every such case, the like process shall issue to the

[1] [Reported by Samuel H. Hempstead, Esq.]

succeeding marshal, and the same proceedings shall be had as if such former marshal had not died or been removed, or the term of his commission had not expired." The intention of this act is plain. If a marshal be removed before he has actually sold land, he cannot proceed to do so; but a new writ must issue to his successor. As to personal property in his possession, and for which he is answerable, the case would be different.

But here the inquiry arises, when shall he be said to be removed from office? There are various modes of effecting it. It may be made by a notification, by order of the president, that an officer is removed. In such a case, the removal would be complete on the reception of the notice. A removal may also be effected by a new appointment, operating as a revocation of the commission of the present incumbent. Hennen's Case, 13 Pet. [38 U. S.] 230, 261. In this mode the president does not remove the old marshal instantly, and then proceed to make a new appointment, but leaves him to discharge the duties of his office until certain acts are performed by the new appointee, and then the removal is complete, and the predecessor gives place to the successor. This is the usual practice of the president in removing federal officers, adopted doubtless with a view of preventing any thing like an interregnum in offices in which the public is deeply concerned. What are these acts? The new marshal must receive a commission from the president, take the oath of office, and give the requisite bond. 1 Stat. 87. He is then, and not until then, marshal of the district, qualified to act in that capacity, and the removal of the old marshal is then effected. In other words, it may fairly be presumed that the president has removed the present incumbent from office when a new one, capable of discharging the same duties, has been appointed. The office is then filled, the newly appointed person becomes an efficient officer, and is legally entitled to act; and this, it seems to me, is the true point of time from which the removal is to be dated. Johnston v. Wilson, 2 N. H. 202; People v. Carrique, 2 Hill, 95, 101.

In Bowerbank v. Morris [Case No. 1,726], it was held that a removal by a new appointment was not complete until the old marshal received notice of such appointment, and all acts done by him before such notice were good. Even admitting this to be a sound construction of the acts of congress alluded to, I am clearly of opinion that the late marshal received notice of the new appointment before the sales in question were made. Those sales, as stated, were made by Deputy Gaines, and it appears in evidence that he received notice from Elias Rector of his appointment previous to that time. Notice to the deputy marshal who made the sales is certainly equivalent to notice to the marshal himself. Notice to the deputy who performs the act is, in legal contemplation, notice to the principal. 9 Serg. & R. 390; 6 Cow. 467; 4 Bibb, 53; 6 Ala. 314; 3 Starkie, Ev. 1013; 1 Ld. Raym. 190; 10 Johns. 478; 12 Mass. 163. But I do not consider notice essential to render the removal complete; and this position is sustained by an express decision of Judge McLean, in the case of Overton v. Gorham [Case No. 10,626]. He there says: "Notice to the late marshal of his removal was not necessary, for his functions were terminated by the act of removal." In this case, Elias Rector took the oath of office and executed the bond required by law on the 30th June, 1845; and as the sales in question were made subsequent to that period, they are consequently null and void, and must be set aside. Ordered accordingly.

NOTE. In Doolittle's Lessee v. Bryan, 14 How. [55 U. S.] 563, it was held that a sale of land by a marshal, after he is removed from office and a new marshal appointed and qualified, is not void. It was said that the act of 1789 was not expressly or by implication repealed by the act of 1800, and that the latter was only intended to give cumulative rights and powers for the benefit of suitors. That being the case, it follows that the old marshal may sell lands where the process comes to his hands before his removal, and the sale will be good. Under this decision, it is clear that the above sales made by Marshal Henry M. Rector were valid, and should not have been set aside, although the decision of Judge Johnson is sustained by the very respectable authority which he cited, and on which he relied.

Case No. 14,516.

UNITED STATES v. BARKER et al.

[5 Mason, 404.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1829.

SEAMEN — INDICTMENT FOR REVOLT — PORT OF DESTINATION—OF DISCHARGE.

1. If the crew combine together not to do duty, it is an endeavour to make a revolt within the crimes act of 1790, c. 9 (36,) § 12 [1 Story's Laws, 85; 1 Stat. 115], although no orders are actually given afterwards.

[Cited in U. S. v. Nye, Case No. 15,906.]

2. If the shipping articles are, to the final port of discharge, the voyage is not ended until the cargo is wholly unladen. The owner may order the vessel from port to port until the whole is discharged.

[Cited in The William Jarvis, Case No. 17,697.]

3. Port of destination and port of discharge are not equivalent words. Some cargo must be unladen to make the port of destination the port of discharge, or an actual termination of the voyage there.

Indictment for an endeavour to make a revolt on board the brig Apthorp, at Nantasket Roads in Boston harbour. Plea, "Not guilty."

At the trial it appeared, that George Barker was the mate of the ship, and the other defendants were of the crew. They had signed the shipping articles in Charleston, South Carolina, for a voyage "to two or three ports of discharge and lading in Europe, and back to a final port of discharge in the United

[1] [Reported by William P. Mason Esq.]

States." Michael C. Bowden was master for the voyage. The vessel went to her ports in Europe, took in a cargo of salt at St. Ubes, and came back to Boston as her port of destination. Before her arrival the owners in Boston had directed a letter to the master, ordering him not to come into Boston harbour, but to proceed to Alexandria in the District of Columbia, and there land his cargo. The letter was dated several days before the arrival of the brig, and was delivered to a pilot, who delivered it to the master, while the brig was at sea, three miles out beyond the Boston light-house. The master was at this time quite ill, having spit blood; and he concluded to go into Nantasket Roads and procure, with the consent of the owners, a new master for the voyage to Alexandria. He accordingly anchored the brig in Nantasket Roads, went on shore, and with the consent of the owners he was discharged, and a new master appointed. He came on board with the new master, explained to the mate and crew the situation of the brig, and his orders, and showed them, that, by their shipping paper, they were bound to go the voyage to Alexandria, as the voyage was to the final port of discharge. The mate at first expressed himself doubtingly whether to go or not, but finally refused; and the crew, notwithstanding every solicitation, refused to go the voyage. No actual orders were given to go to sea, although the brig was then ready, and the new master had all his clothes and papers and trunk on board. There was no actual proof, that the mate acted in concert with the crew, or that the latter acted by a previous combination. Some of them pleaded ill health, and were discharged; and new hands were shipped in their stead. The others separated themselves and remained together, until they were removed on shore under a warrant, and when brought before a magistrate they all refused to go on board again, though he explained to them their obligations. A new crew was then shipped, and the brig went to Alexandria with her cargo.

S. D. Parker, for defendants, argued, that there was no crime in the transaction, there being no intention to do wrong, and the offence resulting from an incorrect understanding of the law as to what was meant by a "final port of discharge." They knew that the vessel was bound from St. Ubes to Boston, which port they entered, and supposed that port must be the end of the voyage, and it appeared, that one man, shipping for Boston only, without signing the papers, was here discharged. Mr. Parker contended also, that there was no offence, because there was no disobedience of an actual command, it appearing from the evidence, that the question was put to them hypothetically, as, if you are ordered, &c., by the new captain, will you obey? The answer was in the negative; but as no such command was given, there was no disobedience. The government had proved no combination among the men to resist a lawful command, it appearing that each man, separately questioned, answered for himself, declining to proceed on the new voyage, but obedient to all orders, and uniformly civil in his replies. It appeared, that two men were here discharged, being unwell, and that some of the others had families, and all friends, in this neighbourhood. If discharged at Alexandria, they would be at the expense of returning to this port.

Mr. Dunlap, Dist. Atty., cited 1 W. Bl. 392; 1 Strange, 144; showing, that the actual fact of a conspiracy was not necessary to be proved to constitute a conspiracy, which might be inferred from circumstances. He argued, that a similar determination, expressed by all the men, and persisted in by them, amounted to a conspiracy, which was of an illegal character and came within the statute. That the crew had no right to infer, that Boston would be the final port of discharge, from the fact, that the vessel cleared at her last port for Boston, but that the owners possessed the right to order a vessel to any port whatever: that from the insertion of the words final port of discharge, the men must have considered it not only possible, but exceedingly probable, that the vessel would proceed to some other port. That the men did not refuse to go the voyage so much as to obey the new master, and that the form of an order was unnecessary after a positive refusal to obey such order if given. From the nature of the circumstances there must have been a combination among the men, which was also evident from the result.

STORY, Circuit Justice, in summing up the evidence, said: As to the first point, we are of opinion, that the shipping articles extended to the voyage to Alexandria. The fact, that the destination was, by the original instructions of the owner, to Boston, does not necessarily make it the port of discharge. "Port of destination" and "port of discharge" are not equivalent phrases. To constitute a port of destination a port of discharge, some goods must be unladen there, or some act done to terminate the voyage there. But, here, the words are "final port of discharge," so that the owner had a right to order the ship from port to port, until there was a final discharge of the whole cargo. We think, that the owner before the arrival of the brig and after, had a right to elect another port for the discharge of the cargo; and here he was guilty of no delay, and the arrival at Boston was against his orders. Under such circumstances there is no pretence to say, that Boston was any port of discharge at all, much less a final port of discharge. This construction is, as far as we know, the same, which has been uniformly put upon these words, both in shipping articles and policies of insurance.

As to the other point, we do not think, that

actual disobedience to some order given is necessary to constitute the offence of an endeavour to make a revolt. If the crew have combined together to disobey orders and to do no duty, the offence is complete by such combination, although no orders have been subsequently given. But a simple refusal, by one or more, to do duty, does not amount to the offence, unless it is done by a common combination, or to effect a common purpose. In short, the parties must act together, and with the intention of mutual encouragement and support.

Verdict, "Not guilty."

Case No. 14,517.

UNITED STATES v. BARKER.

[1 Paine, 156.] [1]

Circuit Court, D. New York. Sept. Term, 1816.

PARTIES—PARTY IN INTEREST—UNITED STATES—ENDORSER ON BILL—NOTICE OF PROTEST—RECOVERY—DAMAGES—SET-OFF.

1. A bill of exchange endorsed to the treasurer of the United States, may be declared on in the name of the United States, and an averment that it was endorsed immediately to them will be good.

2. Inconvenience of allowing agents of the United States to sue in their own names. Danger of set-off in such cases.

3. An act of congress is not necessary to enable the United States to sue. They can, like individuals, sue in their own names, unless a different mode is prescribed by law.

[Cited in U. S. v. Shaw, 39 Fed. 436.]

4. Where the endorsee of a bill of exchange, whether as agent or owner, returns it after protest to the last endorser, the latter may sue upon it in his own name, and at the trial strike out the last endorsement although it be in full. And prior blank endorsements may be filled up at the trial so as to correspond with the declaration. And where both these were omitted to be done, the court on error, refused to reverse the judgment, considering it an objection of form, and cured by the thirty-second section of the judiciary act [1 Stat. 91]

[Cited in Conant v. Wills, Case No. 3,087.]

[Cited in Squier v. Stockton, 5 La. Ann. 120; Bank of America v. Senior, 11 R. I. 376; Austin v. Birchard, 31 Vt. 591.]

5. Time of presentment for acceptance between New York and Liverpool. The mere lapse of three months before presentment, not evidence of delay, especially during war.

6. Whether due notice of protest was given, there being no dispute about facts, is a question of law.

7. Whether 20 per cent. damages, can be recovered in an action for the non-acceptance, but not the non-payment of a bill? Quere.

8. But where the action was commenced on the non-acceptance of the bill, and after its non-payment, but before notice of non-payment had been received, and a count on the protest for non-payment was inserted in the declaration; the 20 per cent. damages were held recoverable.

9. A citizen of the United States may lawfully, during a war with a foreign country, draw a bill on one of its subjects—such an act not leading to any injurious intercourse nor amounting to a trading with the enemy.

[Cited in Haggard v. Conkwright, 7 Bush, 16. Questioned in Woods v. Wilder, 43 N. Y. 169.]

10. Whether the United States are bound by a statute of set-off of the state in which the suit is brought? Quere.

11. The fourth section of the "act for the more effectual settlement of accounts between the United States and receivers of public money," embraces suits between the United States and any individuals, whatever may be the cause of action. The subjects of the act are not all comprehended in the title.

12. A set-off, therefore, in a suit by the United States on a bill of exchange against a private individual, where the course required by this act had not been pursued, was rejected.

13. The holder of a bill is entitled to recover at the rate of exchange, at the time of notice of the protest's being given. This is the settled law in New York. Advantages of the rule of liquidation at the par of exchange.

[Cited in Weed v. Miller, Case No. 17,346.]

14. As the plaintiff in an action on a bill has a right to recover gold or silver, the measure of damages must be the value of the bill, at the time of notice of protest in gold or silver, and not in a depreciated or fluctuating currency.

[Error to the district court of the United States for the Southern district of New York.

[This was an action by the United States upon a certain bill of exchange against Jacob Barker. There was a judgment in the district court in favor of the United States.]

T. A. Emmet, J. O. Hoffman, and J. Wells, for the United States.

R. Tillotson and D. A. & C. Baldwin, for defendants.

LIVINGSTON, Circuit Justice. This is a writ of error to the district court of this district, on exceptions taken at the trial of the cause by the counsel for the plaintiff in error. [Case unreported.]

The first objection to a recovery, by the defendants in error, was an alleged variance between the bill of exchange declared upon, and the one given in evidence. The bill of exchange declared on, is stated to have been dated the 2d day of July, 1814, and to have been drawn by the plaintiff in error, on Thomas R. Hazard & Co. residing at Liverpool, in the United Kingdom of Great Britain and Ireland; by which bill the said Thomas R. Hazard & Co. were requested to pay, sixty days after sight, to Hallack & Barker, or order, in London, twenty-five hundred pounds sterling. This bill is further stated to have been endorsed by them to Robert Bowne, and by him to Howland & Grinnell, and by the endorsees last named, to the United States. The bill produced on the trial, agreed with the one declared on in date, sum, and address, and the variance, if any, was in the manner of its endorsements. By the declaration it would appear, as if the endorsements were regularly filled up with the names of the several endorsees, and that the endorsement to the defendants in error, was immediately to the United States; whereas

[1] [Reported by Elijah Paine, Jr., Esq.]

all the endorsements previous to that, to the defendants in error, were in blank, and the endorsement on which this action is brought, was to Thomas T. Tucker, treasurer to the United States, and not directly to the United States.

If the United States were at all entitled to bring an action in their own name on this bill, it is contended that this could be done only by declaring according to the truth of the case, that the bill was endorsed to Mr. Tucker, and then averring that he was their agent and treasurer; and that the endorsement to him was for the use and benefit of the United States. These averments being of matter in pais, it was said, that they were of the proper province of the jury, and could only be dispensed with, where the necessary operation, or implication of law, justified a different course, which was not the case here. If it be admitted, as it must be, that where such legal intendment exists, a party may declare according to it, it is not very easy to conceive of a case, where such intendment can be stronger than in the case before the court. It is found that Mr. Tucker is treasurer of the United States; the endorsement to him is in that capacity; and when he endorsed it to the Barings, he again makes use of his official style. Nor is this all; but it appears that the bill, by an endorsement on it, before it was sent from the United States, was registered by the proper officer of the treasury department, which cannot be supposed to be done in any case in which the instrument does not belong to the government. Mr. Tucker, after such an act, could never have claimed any right to this bill. And we cannot think of any motive, which could induce a prudent man to have pursued that course with a bill belonging to himself, or any other person, even if the regulation of the department had admitted of it. But it is supposed, that before any such intendment can be made, it must appear that Mr. Tucker must have acted under some law, and that his conduct throughout comported with his duties, as prescribed by such law, and by the rules of the treasury. It is sufficient for the purpose, that he is treasurer, and appeared to have acted in that capacity, and in conjunction with another officer of that department. The court, therefore, will presume, as a jury must have done, until the contrary were shown, that in relation to this transaction he transgressed no law, and that every thing by him was regularly and correctly performed, upon the evidence apparent upon the bill itself; and no other was offered to the jury, although nothing prevented the plaintiff from introducing other testimony to this point. It was more a question of law than of fact, whether the bill belonged to the United States; and the district judge did no more than his duty, in telling the jury that the evidence was sufficient to establish that fact.

But supposing the bill to be the property of the United States; still it is insisted, that the action should have been in the name of Mr. Tucker, their trustee, and not in the name of the cestui que trust; and much was said to show the hardship of unnecessarily exposing a party to a suit in the name of the United States, who paid no costs, and sued under several other advantages which were not common to other plaintiffs. No case has been cited to show that where a bill is endorsed to the known agent of another, for the use of the principal, as is the necessary intendment here, that an action may not be maintained in the name of such principal; but were that the case, I should say that the government ought to form an exception to the rule, and that an action might be brought in every case in the name of the United States, where it appeared on the face of the instrument, that they alone were interested in the subject matter of the controversy. This certainly is not carrying prerogative (if it deserve that name) too far. There is a fitness, that the public by its own officers, should conduct all actions in which they are interested; and the inconveniences to which individuals may be exposed in this way are but light, when weighed with those which would result from their agents always bringing actions in their own names. They might employ whom they pleased, and by negligence or otherwise, the rights of the public be jeopardized. Set-offs too might be interposed against the individual who was plaintiff, unless the court, to prevent them, would take notice of the beneficial interest of the public; and if they could do this to prevent a set-off, which courts of law have done, why not do it at once, by permitting an action to be instituted in the name of the United States? Some doubt was hinted, as to the right of the United States to sue in any case without an act of congress for the purpose. The technical difficulties which exist in England, against a civil action in the name of the king, (if it be a fact that he cannot sue in his own courts,) are not in the way of an action on the part of the United States in their courts. Judicial proceedings are not before the people of the United States, nor does the process run in their name. The court therefore has no doubt, that in all cases of contract with the United States, an action may be brought in their name, unless a different mode of bringing it be prescribed by law, which is not pretended to be the case here.

If any further evidence were required, than what appears on the bill itself, of its being the property of the United States, it may be found in the notice accompanying the plea of the plaintiff; for it is there stated, that it was agreed between him and the secretary of the treasury of the United States, that the said bill should be paid in London in the month of December following its date. The court does not rely on any usage in disposing of this part of the case, because none was proved at the trial; but the course which has

been adopted in this case of endorsing the bill to the treasurer is so convenient, that it may fairly be presumed to have been coeval with the establishment of the government. If endorsed immediately to the United States, it will at once be seen, how difficult its negotiation will afterwards become; for although, in that case, they might sue in their own name, it would not be very easy to endorse it to any other person, by which its negotiability would be altogether interrupted.

It is next said by the counsel of the plaintiff in error, that admitting that an endorsement to Mr. Tucker, the treasurer of the United States, might have passed such an interest to the United States, as to have enabled them to sue in their own name; yet, as all the endorsements prior to the one to him were in blank, neither the United States nor their treasurer showed any title to the bill; and it was also said, that, in as much as it appeared that Mr. Tucker has endorsed the bill to the order of Messrs. Baring Brothers & Co., the title, if ever in him, had passed away by this last endorsement, and was at the time of trial in the gentlemen last named —they not having endorsed it back to the United States. The court will dispose of these two objections together, as nearly the same answer will serve for both of them. The mere returning of this bill, with the protests for non-acceptance and non-payment by the Messrs. Barings, to the treasurer of the United States, is strong presumptive proof that the former acted merely as agents of the latter, or as bankers of the United States. Where that is not the case, it is usual, not to send the bill back to the last endorser, but to some third person, who may apply for payment to such endorser, as well as to every other party to the bill. But be this so, or not, if the holder of a bill, whether as agent or creditor of the remitter, will send it back to the latter, the court entertains no doubt, that the party to whom it has been thus sent back, and who may have previously endorsed it, may not only sue in his own name, but may at the trial strike out his own subsequent endorsement, and fill up all the preceding blank endorsements, so as to make them correspond with the title set forth in his declaration. Why this was not done I know not; but as it might have been done, and would be permitted on a future trial, almost as a matter of course, this court does not think it necessary or proper on that ground to reverse the judgment of the district court. It is considered rather as an objection of form, and cured by the thirty-second section of the judiciary act. Whether the Messrs. Barings might have urged any objection on the trial to striking out the endorsement to them, it becomes unnecessary to inquire. The court is to decide on the evidence which was given, and not on that which might have been given, unless such evidence had been rejected. It is on this evidence that the court is of opinion, that the endorsement to those gentlemen, although in full, might have been obliterated if necessary on the trial; although it would perhaps be more reasonable and the better course always to presume, that the actual holder of a bill was its proprietor, unless the contrary were shown, without requiring of him to strike out any subsequent endorsement—as a bill seldom gets into the hands of a prior endorser, until all the subsequent ones are satisfied; and it may be necessary in some cases to prove, that the bill has belonged to some other person, whose name may be upon it, for the holder to avail himself of a promise made to such party, which may more easily be done where the endorsement is suffered to remain in its original shape, than after an obliteration takes place.

Another objection made at the trial, and which arose out of the evidence of the plaintiffs below, was the unreasonable delay which it was said had taken place, in presenting the bill for acceptance, and in giving notice of its protest for non-acceptance, and non-payment. The bill appears to have been presented for acceptance on the 3d day of October, 1814, which was three months after its date, and was protested on that day for non-acceptance. The court is of opinion that the presentation was in time. Even if war had not then existed between the two countries, I am not prepared to say, that this would not be deemed a timely presentation of the bill, without other circumstances appearing, than the mere fact that it was not presented until after the lapse of three months. Vessels not unfrequently have passages of that length; but when it is considered, that the bill was drawn in time of war, which renders any intercourse precarious and not of very frequent occurrence, it would be too much for any court to say, that the delay here complained of shall destroy the right of the United States to recover on this bill. Notice of the protest for non-acceptance was given to the drawer on the 12th December, 1814, but a little more than two months after date of the protest. The court is of opinion that this was also using due diligence; and that even in time of peace, no laches could have been imputed on this account to the holders of the bill. On the 5th December, 1814, a protest was made at Liverpool for non-payment of the bill, of which the plaintiff in error had notice on the 22d day of May following, after a lapse of a period of upwards of five months. This is prima facie so great a delay, that it is said, that unless the defendants in error can account for it, it must be fatal to their claim; for the damages of twenty per cent. at least; and it is further said, that the arrival of the British sloop of war Favourite, on the 12th of February, 1815, was a matter of so much notoriety, that this court can take notice of it, although no evidence was given of it at the trial. Admitting this fact to be properly before the court, it proves only that a single vessel had been des-

patched from England by way of Falmouth, nine or ten days after a treaty of peace had been signed at Ghent; but, whether the agents of the United States knew that such a vessel was to be despatched in time to write by her, does not appear. They may very well, considering the haste in which she was despatched, and the distance from London of the port from which she sailed, have known nothing of the intention of government to send the Favourite to this country. It is not stated, or proved, that any other vessel arrived from England, until the one by which the protest for non-payment came, When it is considered that the treaty of Ghent was not ratified until the latter end of February, and that it would not be known in England until some time in April, before which time no vessel could with prudence sail from that country for the United States; this court cannot say that the notice of non-payment is liable to the objection made to it at the trial; and is further of opinion that this question, there being no dispute about facts, was properly a matter of law; and that the district court did right in considering it in that light, and in instructing the jury, that the defendants in error had a right to recover, notwithstanding the alleged negligence on their part.

We may as well here dispose of some other exceptions, which have some connexion with the three just decided. It has been urged, that the twenty per cent. damages cannot be recovered, where the action is brought on a protest for non-acceptance, and before notice to the drawer of a protest for non-payment. It is not very necessary to inquire, as was done at the bar, whence the custom arose in this state, of allowing the holder of a bill of exchange, when returned under protest, not only the amount of the bill, but twenty per cent. damages, as a compensation for his disappointment. Whether it be a badge of colonial submission, or whether it has arisen out of a want of confidence which our merchants have in each other, it is now settled law, which nothing but an act of the legislature can alter; nor is it in the recollection of the court, that it has ever heard it complained of. Nor is it necessary to decide, whether on a mere protest for non-acceptance, these damages are recoverable, although it is part of the drawer's contract, that the bill shall be accepted; and its negotiability and use to the holder is greatly impaired by a refusal to accept; and as no reason can be assigned, why there should be two actions, when one will answer, it might not be difficult to argue in favour of those decisions which have determined this point against the plaintiff in error. But without laying any great stress on these decisions, it is admitted, that in this case a right of action ensued, on notice of the protest for non-acceptance. And the action was accordingly commenced, shortly after the notice was given; but not until after a protest for non-payment was made in England, although not notified to the drawer here. The declaration contains a count on the last protest; and under this count, as well as the one for non-acceptance, a general verdict was taken, which included twenty per cent. for damages. This, in the opinion of the court, was correct; for, as the action was rightly commenced, it was not improper to admit evidence of the protest for non-payment, although notice of it were not given until after the commencement of the action, in order to destroy every presumption that might have been raised of the bill's having been honoured at maturity. Where the right to recover damages is perfect at the time of trial, a plaintiff should be permitted to show it, provided the action, which is conceded to have been the case here, was not prematurely brought. The opinion of the court then, is, not only that the damages were recoverable on this state of things, but that a verdict was properly taken on both counts.

Another objection taken at the trial, which was also overruled, arose out of the supposed illegality of the transaction. The United States and Great Britain being then at war, it was unlawful for the plaintiff in error, in the opinion of his counsel, or for any other citizen of the United States, to draw a bill of exchange on any subject of Great Britain, or other person residing within the British dominions. In support of this opinion, Bynkershoeck and other writers on national law have been referred to as establishing the doctrine, that every species of intercourse or communication, whether direct or indirect, whether commercial or of any other character, whether personal or by letter, is strictly inhibited between subjects of belligerent nations, unless under the immediate license of their respective governments; and much has been said to show the extreme danger of permitting, during such a state of things, any kind of correspondence which is not sanctioned by necessity, or cannot be excused on the plea of humanity. As it regards Bynkershoeck, it is manifest, that when laying down the rule on this subject, he confines it, however general his language may be in other respects, or whatever his reasoning may be upon it, to an intercourse strictly commercial. "From the very nature of war," says he, "it cannot be doubted, that commerce between enemies must cease." This is also the meaning of other elementary writers; and it is a proposition which no court can have any disposition to quarrel with. Such a state of things must necessarily ensue upon every declaration of war. But if the dicta or reasoning of some writers, who suppose they have done nothing more than to follow the authors just referred to, are to be my guides on this occasion, it would be impossible to make any kind of communication, or have any intercourse or dealing with an enemy, however innocent in its nature, or however free from danger to the state, an exception to

the very broad rule which they have been pleased to prescribe. But without denying that a war brings all the subjects of the parties to it into a state of hostility with each other, or that they are bound to assist their respective governments, and to defeat by all lawful means in their power, the projects of the public enemy; it will not, I trust, be deemed disrespectful to those who may maintain a contrary opinion, if I cannot think it at all necessary, in order to ensure a performance of those duties, to include within this interdiction a transaction like the one now before the court, or to advance a single step further in this matter, than adjudged cases oblige me to do. Not entertaining the same apprehensions on this subject, under which some appear to have delivered their sentiments, and having no solicitude to add unnecessarily to the evils of war, I may probably regard as perfectly innocent, what others will consider as a flagrant violation of duty. I do not, therefore, subscribe to the doctrine; and never shall, until the legislature or the supreme court of the United States shall make it my duty to do so—that no kind of intercourse whatever, between enemies, is permitted.

The practice of the civilized world might safely be relied on as repugnant to the proposition, which, to the extent now contended for, was never heard of until the late war. In the present state of commerce, it is scarcely possible for a war to break out between two nations trading with each other, without the subjects of the one being more or less indebted to those of the other. Nay, it may often be necessary for the subjects of the one to remit monies to those of the other, as the best and safest way of disposing of funds which they may have abroad, and which may arise from their commerce with neutral nations. These are negotiations with which it is beneath the dignity of government to interfere. The pressure of war on the individuals of both countries is thereby, in some degree, taken off, and their governments, instead of being injured by such an innocent interchange of good offices, are enabled to prosecute the war with more vigour, without being exposed to the clamour and ill will of a large body of citizens who always suffer so much by the loss of trade. In the first case, that is, of a war's finding the subjects of the parties mutually indebted to each other, what has been done, not in one or two solitary cases, but by every merchant of this or any other country? Has it ever before occurred to any one of this numerous class of citizens, however scrupulous in other respects of violating any law of the land, that any criminality or responsibility attached by drawing a bill on his enemy for a debt due to him at the time of the war's breaking out, or contracted pending hostilities? It is difficult to perceive how such an act can add to the resources or increase the comforts of an enemy. If the bill be in favour of a neutral or a citizen of the United States, the money will probably be withdrawn from the enemy's country altogether; and, if in favour of a subject of the enemy, it will but take the money out of the hands of one British subject and place it with another; and if neither be done, the money will always remain at the disposal of the party remitting, and cannot, without a violation of good faith, be added to the resources of government.

But be this as it may, the universal usage on this subject, and the entire absence of any adjudged cases, are at least primâ facie evidence of its legality. The practice of our own merchants during the late war, it is well known, was in conformity with it; for scarcely a vessel sailed from the United States during that period for any port of Europe, that was not almost loaded with bills of exchange on British houses; and although many of these were inspected by the marshal of the district, yet, we do not hear that he ever thought of stopping them in transitu, or of complaining to the executive, or to a grand jury of those who had drawn them; nor did the legislature, although every member of congress must have known of a practice which no one took any pains to conceal, ever interfere to prevent it, or lay it under any restraint whatever. To me, the fear of opening a door for intelligence to the enemy, if any intercourse of this kind be tolerated, appears perfectly chimerical. A bill may be drawn with, or without a letter of advice. In the latter case, it will hardly be pretended that the bill itself will be made the vehicle of improper intelligence. If a letter accompany the bill, it is just as liable to come to the knowledge of government or to fall into the hands of its agents as any other letter; and the same caution would be used in writing it. Persons disposed to give information to an enemy and willing to incur the hazard of it, will seldom be at a loss for opportunities. So innocent was this conduct thought during the late war, that bills on London were not only publicly sold in our cities, but cartels were probably sometimes permitted to go principally for the purpose of giving our merchants an opportunity of writing to their English correspondents, and of drawing on them for monies in their hands, or of making remittances for the payment of debts due by them, or of sending them bills on other parts of Europe to be collected for their use. If the inhibition of intercourse in time of war be as universal as is now pretended, the voluntary payment of a debt to an enemy must be a crime. Nor can a father who may have a son with the enemy, write him the most innocent letter on family affairs without subjecting himself to a public prosecution; for it will be idle to brand such conduct as criminal, unless the parties be liable to punishment in this way.

The court has indeed been referred to the

Black Book of the Admiralty, which is alleged to be as ancient as the reign of Edward III., to show that acts of this kind are in truth indictable offences, inasmuch as one of its articles directs the grand inquests to inquire of all "those who intercommune with, sell to, or buy of any enemy without special license of the king, or of his admiral." I will not deny the existence of this article, nor that it may be near five hundred years old; but as no presentment or indictment can be produced against any person during the lapse of so many centuries for drawing a bill of exchange on an enemy, or for remitting him money in payment of a debt, or for the bare remittance of money, in any other way, for the benefit of the party remitting, notwithstanding the numerous and long wars in which England has been engaged, during that period, it may very safely be concluded that such an intercourse, if it can be called by that name, common as it must have been in many of them, was never considered as the intercommunion or intercourse to be inquired of under this article; or if it was, that it has been disregarded for so many ages, and has become so obsolete that nothing but an act of the legislature can ever revive it on this side of the Atlantic.

The drawing of a bill of exchange has been called trading with an enemy. This court does not consider it in that light within the meaning of any one of the cases cited. It is easy to see that a trade properly so called, it permitted, may very well be the occasion of considerable injury to the state. It may be the means of supplying its enemy with articles of the first necessity, and might lead to personal intercourse and communications highly important, without a possibility of detection. No such danger can be apprehended from a letter covering a bill of exchange, so long as the writer of it continues at the distance of three thousand miles and more from the person to whom it is addressed. If it be unlawful to sell a bill of exchange drawn on an enemy, it is strange that in the treaty of London, commonly called Mr. Jay's treaty, the contracting parties should have thought it necessary to engage, not to sequester in the event of a war, the debts due by individuals of one nation to individuals of the other. These were neither to be destroyed nor impaired on account of national difference and discontents. If no man can take a bill of exchange in time of war, without the risk of losing his money for the illegality of the transaction, it would amount to a sequestration during hostilities, of all the funds of an American citizen in the country of the belligerent; and that without any act, on the part of the enemy's government to produce such a state of things. It is a matter of notoriety, that in conformity with the practice here stated, British subjects interested in the public debts of the United States, regularly received the interest on their stock, during the last war, which it is presumed was regularly remitted to them; which could only have been done by means of bills of exchange, without its ever being imagined that such remittance was illegal.

The opinion of the court then is, that the plaintiff, by drawing the bill in question, violated neither the laws of nations, nor any municipal regulation of his own country;—that he did an act perfectly innocent, if not meritorious, and which has too long received the sanction of public opinion and general usage, to render it necessary or proper to be checked by the interposition of a court of justice, which could not be done, without sacrificing the interests of our innocent and unsuspecting merchants, to gratify the cupidity of those who may since have been advised that the transaction was unlawful, and may be desirous of taking advantage of it. It would require the very grave consideration of a much higher tribunal than this, to decide that such conduct is illegal, and that the persons the least guilty of those concerned, if there be any guilt at all in it, shall lose the money which he has paid for the bill, while the party who drew the bill shall not only escape punishment, but retain, without any accountability to any one, all that he may have received for it. A single judge would ponder long before he would introduce a rule so inequitable; especially, if in his own opinion, this usage were not only lawful, but harmless, and attended with no public danger whatever, and could not be suppressed without increasing in a very great and unnecessary degree, the inconveniences consequent on a war, which, even in modern times, are sufficiently extensive. If, however, the practice be liable to all the mischiefs which have been stated, it is much better, considering its inveteracy and universality, that the legislature should put a stop to it in future wars, by a positive declaration of its will on the subject, than that a court should interfere in the way now proposed, which would in fact be punishing the innocent instead of the guilty, and that too, by a judgment, which would probably be regarded by the whole body of American merchants in the light of an ex-post facto law.

But if the act of the plaintiff in drawing this bill, was really a violation of the laws of nations, what is to be its consequence? It is conceded that he cannot be punished by indictment, or in any other way, which generally follows on every offence however small. If then, he can escape punishment, one would think that he ought to be satisfied; but he asks to be remunerated at the hands of the court, by being permitted to retain all that has been received for this bill, although it is admitted that the United States have paid the full value expressed on the face of it, and that it has been returned under protest for non-payment, for want of funds in the hands of the drawee. Were the conduct of the plaintiff in error as illegal as his counsel have

represented it to be, a court would hesitate, methinks, before it would apply to his case the rule of potior est conditio defendentis. This is a new mode of enforcing national law; and this case might without difficulty, were it necessary, be distinguished from the cases in which common law courts will give no remedy for monies which have been paid, as the consideration of a contract to perform something contrary to law, although the party neglects to do what he had engaged to do. No case has been cited to show that a violation of the law of nations has ever been punished (if the expression may be allowed,) in this way; but it is unnecessary to examine this question any further, or to give any opinion on it, after the one that has been already expressed in favour of the transaction.

I have not thought it worth while to take any notice of the agency of the government, or of the executive in this business; not supposing any such agency, interest, or license, essential to give it validity. Nor has it been thought necessary to impeach or call in question the motives of the plaintiff in error. He has himself stated that he has been driven to this defence, by ill usage on the part of some of the officers of government. With this the court has nothing to do. Whatever be his motives, or whatever may have forced him to a defence, for which he has thought it necessary to offer an apology, it was the duty of the court to ascertain what the law was, apart from considerations of this kind; and if it had been satisfied that it was as it has been laid down by his counsel, a different opinion would of course have been delivered.

But it is time to proceed to the next exception. The plaintiff in error offered to give in evidence as a set-off, that the United States were indebted to him as follows: That he was on the 31st day of August, 1814, the holder of one million of dollars of their stock, created and issued under the loan of five millions of dollars contracted for by him with the secretary of the treasury, on the 2d day of May, in the same year, being part of the twenty-five millions of dollars, which the president of the United States was authorized to borrow by an act of congress passed the 24th day of March, 1814 [3 Stat. 111]; and that as holder thereof on the said 31st day of August, he was entitled to receive, and ought to have received from the United States, one hundred thousand dollars in the like stock of the United States for the additional or supplementary stocks due to him as such holder, pursuant to the aforesaid contracts made with him; and that the United States have neglected and refused to issue and to deliver the said stock to him; but did on the 30th November, 1814, issue and deliver the same to other persons unknown to him, who were alleged to be the holders of the stock on that day—whereby he had sustained damages to the amount of one hundred thousand dollars, which he claims to set off as damages for a breach of the said contract, or as so much money had and received by the United States to his use, or as so much money lent by him to them.

This evidence was overruled by the district judge, whose opinion on that point was also excepted to. It has been made a question whether the plaintiff's right to the set-off here offered, is to be tested by the act of the legislature of the state of New York on this subject, or by the law of congress providing for "the more effectual settlement of accounts between the United States and receivers of public money." If the act of this state be our guide, it is insisted that the one which passed in 1813, is sufficiently comprehensive to include every species of set-off, arising out of any contract or demand which the defendant may have on the plaintiff, however contingent, or unliquidated, or difficult of adjustment such demand may be. Whether this act be liable, in consequence of a little alteration in its phraseology, to this mischievous construction, which is at war with all the decisions which have been made on the English act, which authorizes a set-off, and on a former law of this state; this court does not think it necessary, at present, to decide; nor whether the United States, although not named therein, are bound by it; because it is of opinion that the act of congress applies to the case before it, although the title of this act would seem to restrain it to suits against receivers of public monies, and the three first sections apply to them exclusively. But that class of debtors being provided for and disposed of in those sections, the fourth is sufficiently extensive to embrace every suit between the United States and individuals—no matter what may be the cause of action, or whether he were a receiver of public money or not. The fifth section also comprehends every person indebted to the United States, and the sixth provides that writs of execution upon any judgment in favour of the United States may run into any other state, as well as into the one in which the judgment was obtained. The whole act therefore cannot well be restrained to suits against public officers; and as the language of the fourth section is broad enough to embrace suits against any individual; and as it is as reasonable that persons in the situation of the plaintiff in error should present their claim to the accounting officers of the treasury, as those who are described in the three first sections, I see no reason for excepting him from its operation.

There is nothing unreasonable in the requisitions of this act. The accounting officers of the treasury are indifferent between the United States and the party claimant, and if dissatisfied with their decisions, he can then submit his case to a court of law. The district court therefore committed no error in overruling this evidence; and if so, it was also right in not permitting the plaintiff in error, for the purpose of getting rid of the exchange and damages, to give evidence that the United States

were indebted to him in August, 1814, in stock to a much greater amount than would have met the aforesaid bill of exchange, of which he demanded payment, and which was neglected or refused until the 30th November, 1814, when so much was paid to him as would have enabled him, if it had been paid in August, to have remitted a sufficient sum to England to pay the said bill. This would have amounted to a set-off pro tanto, and is liable to the same difficulty as the set-off which was attempted against the whole demand.

As the case of the plaintiff in error is considered by this court within the act of congress last mentioned, by which he is deprived of the set-off he attempted to make; it is but reasonable that he should be subject to pay the same rate of interest which that act prescribes, which is six per cent. per annum.

One exception more remains to be noticed. The plaintiff in error offered evidence to prove, that at the time when notice was given to him of the protest of the bill for non-acceptance, and also of its protest for non-payment, bills of exchange on England could be and were bought and sold in New York for specie at fifteen per cent. below par, although it was admitted that they could be bought at both of the last mentioned periods in the city of New York, and were bought and sold at par for current bank paper of the said city: and it was insisted by him that the rate at which they were bought and sold in specie, was the proper rule for the assessment of damages. This evidence was not admitted; and the judge directed the jury that the United States were entitled to recover the amount of the said bill, according to the rate at which bills of exchange on England were then bought and sold in New York in current bank paper of the said city which was at par, or the face of the bill; and that the jury should disregard the rate of exchange in the said city in specie. To this opinion the counsel for the plaintiff in error excepted.

The court for the correction of errors of the state of New York, having decided that the holder of a bill of exchange is entitled to recover at the rate of exchange at the time of notice of the protest's being given,—this must be considered as the law of the land; and it is hardly necessary for this court to examine whether the decision be correct or not, or whether a better rule might not have been adopted. The only proper inquiry now to be made is, whether this rule has been observed on the present occasion; for let any rule whatever be prescribed, it will not always produce equality or justice between the parties. Considering how long a settlement at par had been practiced on, at least in all the courts of this state, I can discover no very good reason for substituting in its place, the one which has now become law. The present one is more uncertain, liable to rather more difficulty in its application, and proceeds on a supposition which will not in all cases be true,—that the holder of a bill of exchange will always want another bill to replace the one which has been protested. One advantage of settling at the par of exchange, is, that the purchaser of a bill can always know beforehand exactly what he is to receive if it be dishonoured, and contracts of that kind will savour less of gambling than they now do; but after all, it is of more importance, that some certain rule be laid down, by which an adjustment is to take place, than that it should be the best rule which could have been possibly devised, about which there will always exist a difference of opinion.

Without pursuing then any further, the speculations which were indulged in at the bar, on this part of the case, this court will proceed to inquire whether, keeping in view the measure of damages introduced by the court of errors, the exception now under consideration was well taken. This involves the question, how the rate of exchange in the present case was to be ascertained? Was it to be by the standard of the bank paper then current in this city; or by that of specie? This being an action in which the United States have a right to recover gold and silver, and to receive nothing else in payment, unless it be as has been suggested, treasury notes, it would seem almost necessarily to follow, that in settling so important a question as that of the rate of exchange, no other medium but that of the precious metals could be resorted to, without the most serious injustice to the plaintiff in error. To say because bills are selling for depreciated paper not recognised as a legal currency at one hundred per cent. advance, that twice the amount of the bill shall be recovered to enable the plaintiff in such an action to buy another bill of the same amount with the first, and then to compel the defendant to pay that sum in specie, which will buy a bill of more than double the amount of the one protested, is a course of proceeding not entitled to much favour. The past moderation and forbearance of government towards its debtors, have been referred to as furnishing evidence that the plaintiff in error will not be required to pay any thing but bank paper, or treasury notes. What the government may do, can be no rule of decision. The court can only know what they have a right to do, and decide accordingly.

As to the right of paying in treasury notes, the court cannot know that this will be any relief to the party—their value being altogether fluctuating and contingent. As an article of commerce, they may be worth more or less than specie, when the plaintiff in error is called on for payment. Nor can this court take notice of bank paper being in fact current by common consent, and answering all the purposes of life. It can only take notice of the law, which compelled no man to take it for a debt, and it can notice another

fact, not only because of its notoriety, but because of its appearing on the record, that at the time we are speaking of, this paper had undergone a very great depreciation; owing no doubt, in part, to a refusal of the banks to pay specie for their bills. But it is supposed that the difference between bank paper and specie was occasioned by an appreciation of the latter, and not by a depreciation of the former. It is needless to pursue this inquiry, because it is enough for the purpose of the plaintiff in error that a difference in fact existed, and that bills of exchange could be bought on better terms for gold and silver than for paper. This being the case, and specie being the only known legal tender for a debt, it is the opinion of this court that the district court erred in rejecting the testimony which was offered to show that bills on London could be bought at the times referred to at fifteen per cent. discount in specie. This testimony should have been received, and been the basis of the assessment of damages, and not the par of exchange, merely because bills were bought at that value if paid for in a depreciated and dishonoured currency: for this error the judgment of the district court is reversed, and a venire facias de novo awarded.

Case No. 14,518.

UNITED STATES v. BARKER.

[2 Paine, 340.] [1]

Circuit Court, S. D. New York. 1823.

BILL OF EXCHANGE—NOTICE OF DISHONOR—WHEN TO BE GIVEN—DISCHARGE OF ENDORSER.

1. Where the United States were the holders of a bill of exchange, and their agent in New York was directed by a letter from the secretary of the treasury, dated at Washington, Dec. 7, 1814, enclosing the protest for non-acceptance, with directions to give notice thereof to the drawer and endorsers residing in New York, and the agent received the letter on Saturday the 10th of Dec., between 11 and 12 o'clock, and notice of the dishonor of the bill was given by him on Monday the 12th; it was held, that the drawer was discharged by the negligence of the holders.

2. The rule that each party has an entire day after that on which he is informed of the dishonor of a bill, to give notice to the party to whom he looks for payment, applies to a party who has an interest in the bill, and not to an agent employed by such party to give the notice.

[Error to the district court of the United States for the Southern district of New York.]

THOMPSON, Circuit Justice. This case comes up by writ of error to the district court for the Southern district of New York, and the only question raised and argued was, whether due notice of the non-acceptance of the bill in question was given to the defendant, the drawer [Jacob Barker].[2] The letter of the secretary of the treasury addressed to Flewelling, inclosing the protest for non-acceptance, with directions to give notice thereof to the drawer and endorsers, was dated on the 7th of December, 1814, at the city of Washington; and if put into the mail of the next day, (the 8th,) would, according to the course of the mail, arrive here on the 10th. And for the purpose of the question now before the court, it must be taken for granted that the letter containing the protest, and directing notice to be given to the drawer and endorsers, was received by Flewelling on the 10th of December, between eleven and twelve o'clock. But the notice of the dishonor of the bill was not given until the 12th.

I do not understand any objection to have been made to the regularity of the notice of non-payment, nor is it necessary to notice that point here.

This case is not distinguishable in any respect as to facts from that of U. S. v. Bar-

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] The notice of non-payment must contain the exact amount, and must be directed on its face to the person sought to be charged; it is not sufficient to have it directed correctly on the outside. Remer v. Downer, 23 Wend. 620. See further report of this case, 25 Wend. 277. Service of notice of protest cannot be made through the mail, where the party giving it and the one to whom it is sent reside in the same village. Sheldon v. Benham, 4 Hill, 129; Ransom v. Mack, 2 Hill, 587; Cayuga County Bank v. Bennett, 5 Hill, 236. It is a sufficient compliance with the statute (2 Rev. St. p. 212, § 46, note e) to state in the certificate of the notary that notice was served, &c., by putting the same in the post-office, without mentioning by whom the service was made. Ketchum v. Barber, 4 Hill, 224. Nor need the certificate now (Sess. Laws 1835, p. 152) mention the reputed place of residence of the party notified, nor the post-office nearest to it. Id. Where a notice of protest was sent per mail to a town designated by the agent who procured the discount of a note at a bank, in answer to an inquiry made by a cashier at the time of the discount, such notice was held sufficient, although there happened to be four post-offices in the town, and the post-office of the name or the town was nine miles distant from the residence of the endorser, while another post-office in the same town was kept at the very place where he resided. Catskill Bank v. Stall, 15 Wend. 364. Notice of non-payment must be served on each of several endorsers, if they are not partners. Willis v. Green, 5 Hill, 232. See Bank of Chenango v. Root, 4 Cow. 126. If one of such endorsers die before the note falls due, it seems no recovery can be had against the survivor, without allowing that the estate of the co-endorser was served with notice. Id. But, where the surviving endorser, after the note fell due, took from the maker a bond and warrant of attorney to secure his liability on the note, and subsequently collected a part of the amount; held, an admission of his liability, and that proper steps had been taken by the holder to charge him. Id. It is not necessary to the support of an action against an endorser of a bill of exchange, that notice of non-acceptance should be accompanied with a copy of the bill and protest; notice alone is sufficient. Wells v. Whitehead, 15 Wend. 527. A defendant is not allowed to object to want of diligence in giving notice of non-acceptance, in respect to the place to which the notice is directed, when sent by mail, if the

ker (decided at the last term of the supreme court) 12 Wheat. [25 U. S.] 559. And the law of that case must of course apply to and govern this. A question, however, growing out of those facts, has been made here, which does not seem to have attracted the attention of the counsel or the court, according to the report of that case. It appears that the 10th of December, when the letter of the secretary of treasury was received here by Flewelling, was on Saturday, and that notice was given on Monday, (the 12th,) and this, it has been argued, was all that the law required of the holder.

This question does not appear to have been made in that case on the trial in the court below; and I have no recollection of its having been at all started on the argument in the supreme court. If it had been, the opinion of the court would, doubtless, have been expressed upon it. And it is hardly to be presumed that if this circumstance would have furnished an excuse for the delay in giving notice, it would have escaped the notice of the bar and of the bench. But if this should be considered a new point, undecided by that case, it would not, I think, affect the question; the notice was still too late—it should have been given on Saturday—the letter was received here early enough on that day by the agent, to enable him to have given the notice within the usual business hours, without any extraordinary diligence. Mr. Flewelling could not, in any sense, be considered the holder of this bill, or having any interest in it; he was the mere private agent of the plaintiffs, who must be deemed the holders, and chargeable with all the legal consequences resulting from the negligence of their agents.

A notice put into the mail at Washington, directed to the defendant at New York, would have been sufficient: and all that could have been required of the plaintiff; they were not bound to employ an agent here to serve the notice. And had notice been sent by the mail directly to defendant, it would, doubtless, have been received by him on Saturday. The delay, therefore, in bringing the notice home to the defendant, is attributable to the plaintiffs. Although notice by the mail would have been sufficient, the plaintiffs were not

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evidence of diligence is prima facie sufficient, and there be no proof, on his part, that the notice was sent to a wrong place. Id. Where a note was payable after ten days' notice, and notice was given, and before the expiration of the ten days the endorser of the note promised to pay it; held, that the endorser was estopped from alleging want of demand, and notice of non-payment. Leonard v. Gary, 10 Wend. 504. A notice of protest to an endorser, that the note of A. B. endorsed by him is protested for non-payment, is sufficient to put him on inquiry; and the jury are authorized to find a verdict against him, if they are satisfied the endorser was not misled by the notice. Bank of Rochester v. Gould, 9 Wend. 279. It is sufficient evidence of demand of payment, and of refusal to pay a note payable at a particular place, if the note be left there, and no funds are provided to take it up. Nichols v. Goldsmith, 7 Wend. 160. The memorandum of a deceased cashier of a bank, who frequently notified endorsers of non-payment of notes in the name of the acting notary of the bank, that on a certain day he sent notice by mail to an endorser, was held to be competent, and prima facie sufficient evidence to charge the endorser. Id. Notice of protest sent to a town where a note bore date, where the officers of the bank were told by the person who presented it for discount, the endorser resided, and where he did reside until within a few weeks before the date of the note, is sufficient to charge the endorser. Bank of Utica v. Davidson, 5 Wend. 587. Where an endorser resided in one town within two and a half miles of a post-office, and carried on business in another town where there was also a post-office, at the distance of four and a half miles from his residence, and he received letters and kept a postage account at the latter office; held, that notice of protest of a note might be sent to either place. Bank of Geneva v. Howlett, 4 Wend. 328. A mistake in the name of the post-office to which a notice of protest is directed, does not render the notice inoperative, where it appears that the post-office is as well known by one name as the other. Id. Where a notice of protest has been directed to an endorser at a wrong place, the question whether due diligence was previously used in endeavoring to ascertain his residence, belongs to the court as matter of law, and not to the jury, provided there be no dispute about the facts. Spencer v. Bank of Salina, 3 Hill, 520; Ireland v. Kip, Anth. N. P. 195, 10 Johns. 490, 11 Johns. 231. Where a notary, who had thus misdirected notice to an endorser, testified that he previously made ineffectual inquiry of persons in the bar-room of an hotel, and of others whom he either met at the post-office or in the street, but was unable to give the names of any of them; held, not evidence of due diligence, especially as it appeared that a more thorough inquiry would have proved effectual. Spencer v. Bank of Salina, 3 Hill, 520. The question as to the extent of the inquiry requisite in such cases, discussed and considered. Id. The holder of a dishonored note is excused from giving notice of non-payment to the endorser on the 4th of July. Cuyler v. Stevens, 4 Wend. 566. Notice of non-payment may be either verbal or in writing. Id. In an action against the drawers of a bill, dishonored by the drawees, but accepted by third persons supra protest for the honor of the drawers, payment must be demanded of the drawees, and notice of non-payment given. Schofield v. Bayard, 3 Wend. 488. Where information of the dishonor of a bill is sent to an agent who is not a party to the bill, for the purpose of collection, with a request to give notice to the drawers, and he omits to give such notice until the next day after receiving such information, the drawers are discharged; being a mere agent, he should have given immediate notice. Sewall v. Russell, Id. 276. Notice of non-acceptance of a bill cannot be given by a stranger: it must be by a party to it, or by one who, on the bill being returned to him, would have a right of action upon it. Chanoine v. Fowler, Id. 173. The holder of a note, who receives and endorses it for the sake of collection only, although a mere agent, is to be considered as the real holder, for the purpose of receiving and transmitting notices. Ogden v. Dobbin, 2 Hall, 112. When a note has been presented for payment, and it is refused, the holder acts with reasonable diligence if he gives notice by the regular course of mail, to the endorser from whom he received it, that he may transmit notice to his immediate endorser, who may take the same as to the prior endorsers, and so on. Id. An action does not lie against a notary for the omission of notice of protest to an endorser, where the holder may resort to other grounds for fixing the endorser independent of the notice, and wilfully or negligently omits to avail himself of such facts. Franklin v. Smith, 21 Wend. 624. It seems, however, that in such

bound to adopt that mode, but might cause it to be given by a private hand; but the rule seems to be well settled in England, that when such course is adopted, the holder is bound to see that it reaches the party on the same day that it would have arrived by the post. Chit. 402, 288, and note; 6 East, 3.

The rule which we find laid down in the books, that each party has an entire day after that on which he is informed of the dishonor of a bill, to give notice to the party to whom he looks for payment, must be a party to the bill, and who has an interest in it, and cannot apply to an agent employed by such party to give the notice. If Flewelling had been a party to this bill, he might, according to this rule, have had until Monday the 12th to give the notice; but the plaintiffs could not claim a day for their agent to give this notice, after it arrived here. Such a rule might lead to great delay and abuse by employing a number of agents in succession to give such notice, if each one was entitled to a day for that purpose.

This rule in England seems to have received some modification, with respect to bankers employed to collect bills. In Haynes v. Birks, 3 Bos. & P. 599, it was said, that as soon as a banker is informed of the non-payment of a bill, it becomes his business to acquaint his principal of that circumstance, and that if a bill be returned to a banker, he is bound to give notice to his principal that very day, if he can do so by using ordinary diligence. But by subsequent cases the rule seems now to be otherwise, and a banker is considered a distinct holder, though he is possessed of the bill merely to receive payment for a customer. But it may be inferred from what fell from Lord Ellenborough in one of the cases, that it is the custom of bankers to present the bills as distinct customers, and not as mere agents identified with their customers. 2 Taunt. 388; 15 East, 291. This cannot, however, affect the question in this case, for there is no pretence that Flewelling was, in point of fact, or that he professed to be, anything more than a mere agent, acting for and in the name of the plaintiffs.

The judgment of the court below must, therefore, be affirmed.[3]

[See Case No. 14,519.]

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case, the holder of the note should not only be well apprized of the existence of the facts to which resort might be had to sustain the action against the endorser, but that he should have some intimation that the validity of the notice would be questioned. Id. Notice of non-payment sent per mail to the place designated by the drawer of an accommodation bill of exchange, for whose benefit the bill was discounted, as the residence of the endorser is sufficient to charge the endorser, although he in fact reside in another town, and receives his papers at a post-office in still another town. Bank of Utica v. Bender, 21 Wend. 643. All that can be required of the holder of paper in such case is, reasonable diligence in making inquiry as to the residence of the endorser; and the holder in this case having received information from an individual in whom the endorser reposed so much confidence as to become his surety for the payment of a debt, it was held that he had done all that could be demanded of him. Id. What is reasonable diligence in cases of this kind. Id. A., residing at New York, having ordered goods of B., residing at Birmingham, in England, sent to B., on account of the goods, a bill drawn by C. in New York, upon D. in London, payable to the order of B., at sixty days sight, but not endorsed by A. B. placed the bill in the hands of his bankers at Birmingham for collection, who transmitted the same to their correspondents in London, by whom the bill was presented for acceptance to D., who refused to accept; but no notice of the non-acceptance was given to B. until the day of payment, when the bill was presented for payment and dishonored. B. transmitted the bill to A., requested payment of the amount, and apprized him of the circumstances in relation to the bill. A. refused payment, returned the bill, and insisted he was discharged from liability to make payment, in consequence of not having had due notice of the non-acceptance. In assumpsit by B. against A., to recover the amount of the bill, for which A. was in advance at the drawing of the same, it was held, on a case made, containing the above facts, that A. not having endorsed the bill, was not entitled to notice of dishonor, and remained liable to B. for the amount of the goods; that C., the drawer, not having funds in the hands of D., and the circumstances not being such as to induce a reasonable expectation that the bill would be accepted, was likewise not entitled to notice; that the bill was not received as an absolute payment, and that B., in relation to it, stood in the character of agent to A., and having placed it, according to the ordinary course of business, in the hands of bankers for collection, and having apprized A. of the non-acceptance and non-payment as soon as he received notice himself, was not chargeable with a want of diligence or fidelity, in the discharge of his trust as an agent; that whatever might be the effect of the laches of the bankers, in an action against them by B., or by A., had he endorsed the bill, such laches had no bearing upon the rights of B.; and, therefore, that B. was entitled to judgment. Wart v. Smith, 1 Wend. 219. Notice of non-payment of a bill of exchange, &c., must generally be given by an endorser to the endorser next before him, by the next post after he has himself received notice of the dishonor, and so on to the drawer. Mead v. Engs, 5 Cow. 303. Notice in such cases need not be on the same day, but may be on the next. Howard v. Ives, 1 Hill, 263. One dealing in bills or notes is not bound to watch the post-office constantly for the purpose of receiving and transmitting notices. Mead v. Engs, 5 Cow. 303. Reasonable diligence and attention is all the law exacts. Id. Accordingly, where R., residing at Bristol, Rhode Island, October 21st, sent notice of non-payment of an inland bill to S., his immediate endorser, at Providence, by the post which reached that place on the same day at 5 p. m., and S. received the notice on the morning of the 22d, and put a notice in the post-office in the afternoon of the same day, for his endorser at New York, although a mail had previously left Providence at 1 p. m. of the same day for New York; and this letter was post-marked the 23d, and was taken by the post of that day, in the morning, and reached the endorser at New York, in the due course of mail, there being no laches imputed after this; held, that the drawer was not discharged. Id. Where a notary at New York, ignorant of the residence of an endorser, sent a notice of protest for him to K. & D. at Albany, by whom it was received in due course of mail, and then deposited in the post-office, directed to the endorser at his place of residence; held, sufficient to charge the endorser, there being no pretence that it was too late. Safford v. Wyckoff, 1 Hill, 11.

[3] See U. S. v. Barker [Case No. 14,517]; Clement's Ex'rs v. Dickey [Id. 2,883].

Case No. 14,519.

UNITED STATES v. BARKER.

[1 U. S. Law J. 1.]

District Court, S. D. New York. June, 1822.

BILLS OF EXCHANGE — TIME FOR PRESENTMENT — PROTEST AND NOTICE.

[1. A bill of exchange, payable at sight, must be presented within a reasonable time. Due diligence must be used, but there is no necessity for such dispatch in forwarding a bill for acceptance as in giving notice of dishonor; and in the case of a foreign bill it is not necessary to send it by the first vessel that sails for the country where the drawee resides.]

[2. In determining whether a bill purchased by the government has been forwarded by it for acceptance, and whether notices of dishonor have been transmitted by it in proper time, some allowance may be made for the situation of the capital, and some indulgence extended to the useful and proper forms, if not to the supercilious ceremonies of public officers.]

[3. In giving notice of dishonor due diligence must not only have been used, but must be affirmatively shown to have been used.]

[4. It is now settled that after the facts of time, distance of the parties, course of the post, etc., are found by the jury, it is the province of the court to determine whether due diligence has been used in giving notice of dishonor.]

[5. Where there was a delay of nine days between the protest of a bill for nonacceptance and the first attempt to transmit notice thereof from England to America, *held*, that such delay ought to have been explained, and, in the absence of an explanation, was fatal.]

[6. If there is a regular post between two countries, which is the proper channel for transmitting notice of dishonor, it must be proved not only that notice was put in that course of transmission, but that it was done in time for the next practicable post. Mere belief of a witness that this was done is not sufficient evidence thereof.]

[7. A notice through the post office is only effectual where there is a regular post. Where it is known to have ceased, or where it is notoriously interrupted by reason of war or otherwise, the post is not the proper legal medium for transmitting notice. The fact of the existence of war between the two countries does not obviate the necessity for at least making an attempt to give notice by means of a licensed vessel, etc., or by transmission through another country with which both belligerents are at peace.]

[8. Whenever the holder of a bill becomes aware of its dishonor, he is bound to transmit notice thereof, even though the protest has not yet been received by him. If the protest is received, it is proper to forward it, but notice may be given without it.]

[9. Where a protest for nonacceptance and a protest for nonpayment were both received at the same time, *held*, that transmission of notice of the nonpayment alone was not sufficient. A protest for nonpayment can never supply the place of a protest for nonacceptance, where the bill has been presented.]

[10. Where notices of dishonor of a bill of exchange were in the hands of the secretary of the treasury on the 7th, and he wrote a letter, inclosing the notices, on the 8th, which could only be placed in the mail of the 9th, *held*, that this was sufficient, in view of the delays incident to governmental business, but that transmission by the mail of the 10th would have been too late.]

[11. Where notices of dishonor are transmitted through agents, the time for giving notice cannot be extended by giving an additional day to each agent. The notice must be transmitted within the time allowed to the principal.]

C. Baldwin and R. Tillotson, Dist. Atty., for United States.

T. A. Emmet, J. Wells, and J. O. Hoffman, for defendant.

VAN NESS, District Judge. This suit is brought on a bill of exchange for £5,000 sterling, dated 7th Mo. 30th, 1814, sold by the defendant to the plaintiffs. It was drawn on Thomas R. Hazard & Co., of Liverpool, and made payable to John Slidell; by him endorsed to Thomas T. Tucker, treasurer of the U. S., and by him endorsed, as treasurer, and the contents ordered to be paid to Messrs. Barings Brothers & Co. This bill among others, was purchased in New York, by Samuel Flewwelling, by order of the secretary of the treasury, to whom it was transmitted by Mr. Flewwelling. It was registered in the treasury department, on the 8th of August, 1814, and forwarded to Messrs. Barings & Co., London, in September, 1814. It was presented for acceptance, and protested for non-acceptance, the 28th November, 1814. It was presented for payment, and protested for non-payment, on the 30th January, 1815. Notice of the protest for non-acceptance was received at Washington on the 7th May, 1815. But no notice of the non-acceptance of the bill was ever given to the drawer, either by the agents in England, or by the treasury of the United States. The secretary of the treasury was also in possession of the notice and the protest for non-payment on the 7th May. How or when it was received, we are left to conjecture. Throughout the argument, however, it has been taken for granted that it arrived by the same conveyance which brought the notice of non-acceptance. The notice and protests for non-payment were forwarded to Mr. Flewwelling, of this place, in a letter from the secretary of the treasury, dated the 8th May, 1815; and the notice served here, through the agency of a notary public, on the 12th.

On these facts, a defence has been set up, consisting of several points. The objections to the form of the declaration are overruled, and the testimony of Mr. Jones, and the written memorandum of Mr Bleecker, as far as they are material to the issue, are deemed admissible. The discussion of the points presenting these objections will be found in the opinion I have in part prepared in this case. With a view, however, to its present decision, I propose now to state the result of my deliberations on the 2d, 5th, and 6th points, which were made by the defendant's counsel, and are as follows: 2d. "There was an unreasonable delay in forwarding the bills to England for acceptance." 5th. "No notice was ever given the defendant of the protest of the bill for non-acceptance, nor is the omission to do so legally accounted for." 6th. "Notice was not given to the defendant of the protest for non-payment, the evidence of Mr. Tillon

respecting Mr. Bleecker being inadmissible, and if it was admissible, still due diligence was not used in giving such notice."

In the investigation of this case, I have felt myself oppressed, not more by its importance, than by the variety and extent of the decisions and legal learning, by which the law that governs it has been developed and its principles enforced. The rules contended for, in this case, seemed to me rigorous, and I entered upon the examination with a disposition to mitigate their severity, as far as that could be legally and safely done. But whether the rigor, with which they have been uniformly applied, be wise or expedient, is a question not now to be determined. Whatever they are, they must receive a fair and legitimate application. They rest upon the experience of too many years, and upon decisions too numerous and grave, to be now disturbed. The law relative to bills of exchange, has progressively varied with the increase of commerce. The extent to which these instruments have been used, and the infinite variety of purposes, real and fictitious, to which they have been applied, has rendered it necessary and important, that the law regulating their use should be established and defined with all practicable precision, and that the rules, fixing the liabilities of the respective parties, should be inflexibly enforced. Although this mercantile invention of modern times (for it is comparatively modern) is attended with peculiar convenience, it is also subject to rigid and established disadvantages. Of these, all parties who deal in instruments of this sort are presumed to be apprized, and to acquiesce in the inconveniences and hazards connected with the transaction.

The general rules, by which the holder of a bill should be governed, are these. They have been collected with some care, and, though concisely, are, as I conceive, now correctly stated:

1st. When a bill is drawn, payable at sight, or a certain number of days thereafter, it is necessary, to present it for acceptance, that the time of payment may be fixed.

2dly. When it is presented, and acceptance refused, notice of the dishonor must be given to all the parties to whom the holder means to look for payment.

3dly. That notice, if the parties reside in the same place, must be given, at farthest, by the expiration of the day succeeding the dishonor.

4th. If elsewhere, though within the same country, by the next post, unless some peculiar difficulty or inconvenience should interpose; and, in that case, it may be given by the second post. If there be no post, then by the next ordinary conveyance. Whatever may be the difficulty that intervenes and produces delay, whether sudden illness, death, or other accident, the notice must be given as soon as possible after the impediment is removed.

5th. If the party to whom notice is to be given, resides in a foreign country, it may be sent by the post, if there be one; if not by the ordinary mode of conveyance, or by the first ship, bound to the place to which it is to be sent. In every case, due diligence is to be used. What shall be deemed due diligence, must necessarily depend upon the circumstances of every case.

The first point I propose to examine is, whether the bill in question was presented for acceptance in due time. Bills payable after sight must necessarily always be presented for acceptance; but when, is a question left very loose by the cases, and from the nature of it, the time cannot be fixed or prescribed with much precision. The only rule which can be laid down is that due diligence must be used. It may, in some instances, be useful and important to the drawer, that the bill should be presented as soon as possible. He may entertain doubts as to the safety of his funds in the hands of the drawee, and may wish to withdraw them without delay. In this view of the subject, and in the protection of the interest of the drawer, neither the payee nor any subsequent holder is authorized by the law merchant to lock up a bill, payable after sight, or to keep it quietly in his possession, for any great length of time. I cannot, however, accede to the suggestion that it is necessary, if it be a foreign bill, to send it by the first vessel that sails for the country on which it is drawn. There is not so much necessity for dispatch in forwarding a bill for acceptance, as in giving notice of its dishonor. Yet the drawer and the parties have a right to require that it should be presented within a reasonable time.

A distinction is taken in the books, between bills put in circulation, and such as continue to be held by the payee, or original endorsee. If the bill be sent into circulation, it is said that it may be kept out, and the day of payment thus postponed, for an indefinite period. If not, that it must be presented with due diligence for acceptance. I must confess that this appears to me an arbitrary distinction, the reason and justice of which I do not fully comprehend. The policy of it probably is to advance the general interest of trade by encouraging the negotiability of these instruments, and promoting the transfer of this fictitious sort of capital. But it is incompatible with the reasons, and subversive of the principle upon which diligence is demanded of the original holder. The rule on this point, as far as it is settled by the English courts, may be found in Muilman v. D'Equino, 2 H. Bl. 565; Goupy v. Harden, 7 Taunt. 159, 162; Fry v. Hill, Id. 397. In the first case, Buller says: "The only rule I know of which can be applied to the case of bills of exchange, is, that due diligence must be used. Due diligence is the only thing to be looked at, whether the bill be foreign or inland; or whether it be payable at sight, or at so many days after, or any other manner.

But I think a rule may be thus far laid down as to laches with regard to bills payable at sight, or a certain time after sight, namely, that they ought to be put in circulation; and, if a bill drawn at three days after sight, were kept out in that way for a year, I cannot say that there would be laches; but if, instead of putting it in circulation, the holder were to lock it up for any length of time, I should say that he would be guilty of laches; but, further than this, no rule can be laid down." The bill was not put in circulation, nor, as I conceive, was it locked up for any length of time.

There are many circumstances connected with the movements and negotiations of the government which must necessarily be productive of delay. Some allowance must be made for the interior situation of the capital, and some indulgence extended to the useful and proper forms, if not to the supercilious ceremonies of public officers. Bills for the government must be bought at a remote commercial city; transmitted to Washington; registered according to form and custom, at the treasury; sent again to a seaport, and forwarded thence through the medium of an agent. These various processes consume some time.

There are some incidents, too, peculiar to this case. We know historically, that our public functionaries, and their offices, were somewhat deranged during the time this bill was in their possession; it was brought here the 30th of July, passed through all the requisite formalities, and dispatched for England, as Mr. Jones states, in August or September. Amidst the untoward events of that memorable period, and the admitted interruption in the intercourse between this country and England, a liberal time shall be allowed for the transmission of the bill; and I am of opinion, under all the circumstances of the case, that there has been due and reasonable diligence in presenting it for acceptance.

I have already stated the general rules to be observed in giving notice of the dishonor of a bill. They afford some explanation of the sense in which the terms "due diligence" are used in their application to different cases. They mean according to the circumstances, the next day, the next port, or the next ship, bound for the place to which the notice is to be sent. But, in all cases, due diligence in giving notice must not only be used, but must be proved to have been used. Whether it be sent in one way or another, or at what time, if the want of it be set up, are facts which must be proved, that the court may be enabled to determine, whether the notice has been given in a reasonable time. For it is now settled, although once much disputed, that the facts of time, distance of the parties, course of the post, &c., being found by the jury, it is the province of the court to determine whether due diligence has been used in giving notice.

When this cause was first brought before me, in 1816 [case unreported], the plaintiffs relied for their recovery on their protest and notice of nonpayment alone. It being a bill payable sixty days after sight, and a presentation for acceptance indispensable, I decided that the presentment be shown, and if acceptance had been refused, that the protests and due notice of the dishonor should be proved, or its omission legally explained and accounted for. Although it was made in the hurry and progress of the trial, I am, on a full examination of the case, well satisfied with that decision. It put an end to the further progress of the cause on the testimony then produced. With a view, however, to preserve the remedy of the United States, and to enable them, if possible, to supply the evidence I had pronounced indispensable, I gave it a direction which afforded them an opportunity to apply for a commission to examine the agents of the United States, in London. It was issued, and has been duly executed and returned. In order to apply the rules I have laid down, to the case as now before me, it is necesssary to examine the testimony which has been obtained.

The bill, it appears, was presented for acceptance, and protested for non-acceptance, on the 28th November, 1814. In the answer of Swinton Cotthnut Holland, Esquire, to the fourth interrogatory propounded to him, the measures taken to transmit the protests and notice of non-acceptance to the treasurer of the United States, are thus stated: "The protests, for the non-acceptance of the said bills, were all forwarded to the treasurer of the United States, enclosed in one letter to him, dated the 9th day of December, 1814, and sent, as he, this deponent, believes, through the medium of the post office, but by what vessel, they have no memorandum." This, in the first place, discloses a delay of eleven days, between the protest of the bill and the first attempt to transmit notice of that fact. Between two and three were employed in its transmission from Liverpool to London, leaving still eight. Although this, itself, under special circumstances, and an extraordinary state of things, might not be fatal; yet it is a delay that ought to have been explained. Upon general principles, whenever the law imposes a duty, its omission or nonperformance is necessarily open to animadversion. The law relating to bills of exchange is composed of arbitrary, positive and rigid rules, and a departure from their injunctions must always be explained. It is settled law, laid down by the elementary writers, and maintained by the decisions of the courts, "that in the case of a foreign bill notice should be given on the day of the refusal to accept, if any post or ordinary conveyance sets out that day, and if not, by the next earliest ordinary conveyance." Chit. Bills, 291; Leftley v. Mills, 4 Term R. 174; Ld. Raym. 743; Coleman v. Sayer, 2 Strange, 828; Mar. 97; Muilman v. D'Equino, 2 H.

Bl. 565. Hence, after so material a delay, it would seem necessary to show that the next post or ordinary conveyance was not lost.

It is, perhaps, not very important, though, in a minute examination of the evidence, it may be worthy of remark, that the letter in which the protests are alleged to have been forwarded, is said to have been "dated" on the 9th of December. When it was written, which may have been at a period long subsequent, is not stated. I am very far from intending to impute to these respectable agents any unworthy evasion of this sort, and I only notice the circumstance to show the general want of accuracy and precision which pervades the evidence before me. The protests were forwarded, as the deponent states, in a letter of that date; "and sent, as he believes, through the medium of the post office, but by what vessel, they have no memorandum." Nothing, in all the law relative to bills of exchange, is better settled, or more firmly established, than that, if the post be relied on as the mode of conveyance, the sending must be strictly and affirmatively proved. The sending must not only be thus proved, but the time when. How else can it be determined whether due notice was given? If the party to be charged is legally entitled to notice by the next post, or next ordinary conveyance, how can we ascertain whether the law has been satisfied, unless the time when, and the manner in which it was sent, be shown? I hold it now too clear to admit of either doubt or argument, that the holder must show notice was sent in proper time, and in a proper manner. It was once holden, to be sure, that delay in giving notice did not discharge the party insisting on it, unless he could prove that he had sustained damage by the laches of the holder. Mogadore v. Holt, 1 Show. 318; Butler v. Play, 1 Mod. 27; 12 Mod. 15; Sarsefield v. Witherly, Comb. 152; Bickerdike v. Bollman, 1 Term R. 406; Vin. Abr. tit. "Bills of Exchange," Poth, pl. 157, 8; Postl. Dict. tit. "Bills of Exchange," 16, 17; Whitfield v. Savage, 2 Bos. & P. 280, 281. But that doctrine was definitely overruled in the case of Dennis v. Morrice, 3 Esp. 158. Such damages are to be presumed, unless it be shown that the drawer has no effects in the hands of the drawee. In all other cases, it lies upon the plaintiffs to prove that due notice was given. In the language of a high authority, "The holder must prove that notice was given, in due time, to the party he sues, and it cannot be left to inference without positive proof. This, therefore, is one of the most important branches of the law respecting bills."

That the time when the notice was sent must be proved with precision, if it be material, to show the fact of due diligence, is, independent of the nature of the transaction, very clearly set forth in the case of Lawson v. Sherwood [Chit. Bills, 959], in which the witness stated: "That either two or three days after the dishonor of the bill, notice was given by letter to the defendant, notice in two days being in time, but on the third too late." Per Lord Ellenborough: "The witness says two or three days, the third would be too late. It lies upon the plaintiff to show that notice was given in due time, and I cannot go on probable evidence, without positive proof of the fact, nor can I infer due notice from the non-production of the letter. The onus probandi lies upon the plaintiff, and since he has not proved due notice, he must be non-suited."

Admitting, then, for a moment, that there was a regular post between that country and this, and that, in this case, the post office was the proper channel through which to transmit the notice, it ought to have been clearly and explicitly proved, not only that it was put in that course of transmission, but that it was done in time for the next practicable post; or, in other words, within the time required in the case of bills of exchange. The belief merely of the witness can in no case be received as evidence of these facts. So rigid and inflexible is the rule of law on this point that in the most approved work, and highest authority, we have on this subject, it is laid down that, "when notice is to be sent from London, by the general post, the letter containing it should be put into the post office in Lombard street or at a receiving house, and that the delivery to a bell-man in the street is not sufficient; and that this should, in all cases, be done by a person who will afterwards be competent to prove it."

I am clear that the general belief of the witness, unexplained and unsupported by a disclosure of the circumstances on which it is founded, that the letter in question was "sent through the medium of the post office," must be rejected as totally insufficient. It is the more incompetent, as the time when it was sent is, in no way, indicated. It may have been weeks, or months, after the date. Many mails may have been lost, and many vessels may have intermediately sailed for the United States. We have nothing by which to judge of the fact of due diligence. The proof that the protest and notice were put in the post office having, in my judgment, totally failed, it seems unnecessary to pursue this branch of the subject farther. But the question whether the post office was in this case, the proper repository for these documents, deserves a moment's consideration.

It has been earnestly contended that it was; and the argument, to be useful or effectual, must be understood to mean that, whether in peace or in war, whether the post has notoriously ceased or been interrupted, whether, in point of fact, there be a regular post or not, yet notice of the dishonor of a bill may be placed in the post office. I do not so understand the law. On the contrary, I am clearly of opinion that, in each of the cases I have enumerated, the notice would be insufficient, and the party for whom it was intended discharged from his liability. A no-

tice through the post office is only effectual where there is a regular post. Where it is known to have ceased, or where it is notoriously interrupted, the post office is not, I conceive, the proper or legal medium, through which the party may attempt to convey it.

But there was war, it is said, between the two nations; no intercourse was allowed, and, therefore, no notice could be given. If so, all would be well. The law requires no impossibilities. It only requires due and reasonable diligence. If, when the communication by mail was known to be suspended or interrupted, a reasonable effort had been made to forward the notice, though unsuccessful, and that fact had been made to appear, it would have operated in excuse of the omission. But it is not attempted to be shown, nor even pretended, that a licensed vessel or any other opportunity was sought for. We all know that cartels occasionally passed between the two countries, and it appears to me that the expedient of sending the dispatch through a neutral country might rationally have presented itself to the minds of the agents. It was known that the communication between England and France, and France and America, was easy, constant, and rapid. Any expenses that might have been incurred by a resort to unusual means could have been recovered in this action, because recourse to unusual means, when the ordinary mode of conveyance fails, is most clearly and obviously required. Peace was made between the two countries on the 28th December. The Favorite left England with the treaty the 2d January; yet it is not pretended that duplicate notices were sent by that conveyance or by any other, although the intercourse was restored so soon after the dishonor of all these bills.

These remarks have been made more to meet some of the arguments thrown out on the trial of this cause, than to show a want of diligence in the agents of the United States; for there is no adequate evidence to prove that they had recourse to any means, either ordinary or extraordinary, to transmit the protest and notice. Their vague and general belief, I have already said, is incompetent to establish legally the fact that they were sent through the medium of the post office. It is not alleged, nor even suggested, that other means were attempted. Under what views of their duty they acted, it is impossible to determine, and useless to inquire, —certainly none that we are able to draw from the proceedings in the legal tribunals of their country.

As no justification or excuse for the omission to give due notice of the non-acceptance of this bill can be derived from the proceedings in England, it may be proper to consider the reasons assigned for not transmitting it, when it ultimately reached the treasury of the United States. Mr. Jones, in his deposition, states that advice of the non-acceptance of this bill reached Washington the 7th May, 1815, more than five months after it had been protested, and that notice was not and could not be given to the drawer, because the protest was not received. This was the unfortunate error; for it is clear that the protest was not necessary to enable him to give the notice; and it is equally clear that it was his duty to do so, whether the protest was received or not. Whenever the fact of dishonor of a bill becomes known to the holder, he is bound to communicate it, with due diligence, to the parties to whom he means to resort for payment. If the protest be received, it is proper to forward it, but the notice may be given without it.

It appears that notice of the protest for non-acceptance, and the protest for non-payment, were received simultaneously; and it is contended, that the latter superseded the necessity of giving notice of the former. I cannot conceive where that inference is drawn, or how that result can follow. A protest for non-payment can never supply the place of a protest for non-acceptance, where the bill has been presented. But a protest for non-acceptance supersedes the necessity of a protest for non-payment, and a notice of the second dishonor is perfectly gratuitous. But notice of the first dishonor must invariably be given. Accident and many circumstances may excuse delay in giving it, but nothing can excuse a total omission, if received. It is of importance often to the parties, to know that the regular steps were taken previous to the protest for non-payment. That the notice of non-acceptance was received late, forms no excuse for withholding it still longer; for no party can do more than give it, when received, and, although there may have been antecedent laches, he is not to assume the province of deciding on their effect. If he does, he hazards his remedy, and must submit to the legal consequences of his presumption. Whether we look at the proceedings of the agents in England, or of the principals at Washington, there has been an irregularity and want of diligence, in giving notice of the presentment and protest for non-acceptance of this bill, that must, in my judgment, upon the evidence as it now stands, preclude a recovery upon it.

This is perhaps all that this court is at present required to decide; but as the notice of the protest for non-payment forms an important feature in this case, and has been relied on, at one time, exclusively, to maintain the action, and its regularity throughout contended for, it is worthy of some attention. It appears that the government, or rather the treasury, was also, on the 7th of May, in possession of a letter giving advice of the protest of this bill for non-payment. How or when it was received, we are left to conjecture. It is contended by the plaintiff's counsel that the notice of non-payment ought to have been sent by the next day's mail, which was not done; as the letter of the secretary, directing Mr. Flewwelling to cause no-

tice to be given, is dated on the 8th, and it is known that the mail closes too early in the morning to take a letter dated on the same day. I think, however, it would be holding the government to too rigid a rule, to require its officers to send notices to the post office the same day it is received, or even by sunrise the next. If, therefore, the letter written by the secretary on the 8th had been sent by the mail of the 9th, and notice given immediately on its receipt here, there would have been, in my opinion, due diligence in giving notice of non-payment. As the dilatory forms of public officers would probably entitle the government to indulgence, until the departure of the second mail after the notice of the protest was received, yet a farther delay would be inevitably fatal, unless a proper and sufficient cause for the omission were shown. That it should have been sent by the next mail after its receipt, is the general rule. And, in a transaction that occurred between individuals in the District of Columbia, the supreme court of the United States have so decided. In the case of Lenox v. Roberts, 2 Wheat. [15 U. S.] 373, the chief justice says: "Notice of the default of the maker should be put in the post office early enough to be sent by the mail of the succeeding day." In the absence of all proof, as to the time when the secretary's letter was dispatched, and of its receipt in New York, and presuming that the notary here did his duty, by giving notice the day he received orders to do so, it would seem that the letter in question did not leave Washington till the morning of the 10th, which was too late. The mail which left Washington on that day, in its ordinary course, it is admitted, must have arrived here early in the morning of the 12th. Mr. Flewwelling swore that, in that case, he must have received the notice by half past ten o'clock: that he handed it to the notary without delay, with instructions to give the notices immediately. From the testimony of Mr. Flewwelling, it is evident that he was duly impressed with the importance of the transaction; that he lost no time himself; and that he urged the notary to diligence and promptitude. From all these circumstances, it is fair to infer that the notice was given here the day that it was received.

It must be remarked in this place, as was done, on high authority, when treating of the notice of non-acceptance, that as to the notice of the dishonor of a bill, the court is not to be left to draw inferences, or to weigh probabilities. Due notice must be proved. The notice was received by the secretary as early as the 7th. It was forwarded, as is admitted, on the 9th or on the 10th. The 9th was, perhaps, the time; the 10th certainly too late. This is in all respects, within the case of Lawson v. Sherwood, Chit. Bills, 959, and 1 Starkie, 314; and shows conclusively that it was indispensably necessary for the plaintiffs to furnish proof of the day on which the notice left Washington. It is laid down by Lord Ellenborough, in the case of Langdon v. Hulls, Chit. Bills, 697, and 5 Esp. 156: "That notice of the dishonor of bill, by letter, was certainly good evidence, and had been so decided; but that there were other circumstances, besides the mere fact of notice, which were necessary to give effect to it, so as to entitle the plaintiffs to recover. These were the date, and the time when it was sent, which were material, for notice of the dishonor was not sufficient, unless given in the time required in the case of bills of exchange." If, then, the 10th was too late, it ought in some way to have been shown that it was sent before. It is not on the defendant to prove the negative, and show that it was not sent before the 10th. The court cannot infer that it was sent in time, from the simple circumstances of the date of the letter, and it is very obviously the duty of the plaintiff to prove it. This has not been done; and if the case turned upon this single point, I do not see how it could be sustained. All that is proved, in the case before me, is, that the secretary was in possession of the notice on the 7th; that he wrote a letter to Mr. Flewwelling dated on the 8th, directing notice to be given here; and that notice was so given on the 12th, being five days after it is known to have been in the possession of the secretary. In the absence of all explanation, the sufficiency and regularity of this notice may well be questioned.

It has been contended that the notary here was entitled to a day to give the notice. It might be entitled to very grave consideration in this case, if it were proved that he took a day; but it is not. When the question was first raised, I was disposed to acquiesce in the suggestion. I was led into the opinion by the general rule which entitles each party to a day to give notice to the one before him. The rule, however, I am well persuaded, is, and must be confined to the parties to the bill. Each party has from one day to the next to give notice, but he cannot multiply the days, or extend the time by the employment of an agent. If he could, it would render the time for giving notice perfectly indefinite, and lead to great irregularity and inconvenience. The case of Bancroft v. Hall [Holt, N. P. 476], clearly shows, that notice given through the medium of an agent, must be within the time allowed the principal. The circumstances being known, the time is fixed within which the notice must be given, either by the principal or his agent. Here two agents were employed: 1st, Mr. Flewwelling; and 2d, Mr. Bleecher; incurring hazards and delays at every step. Every danger would have been avoided, if the secretary had sent one of his clerks, in due season, with notices to the post office in Washington. They would have been perfectly sufficient and effectual.

If, then, the agent is bound to serve the notice within the time allowed the principal,

or on some other day, the ordinary conveyance would have brought it, and if due notice must be proved, there are two defective links in the chain of this testimony, relative to the notice of non-payment: 1st, As to the time the letter was sent from Washington; and, 2d, as to the day on which the notice was received and served here. If five days between the reception of the notice at Washington, and the service here, be too much, and strict proof of due notice be necessary, the plaintiffs have failed to make it out, or to explain the delay.

All the subordinate points presented by the case will be found discussed in their proper place, and will be furnished to those interested in the result.

[See Case No. 14,519.]

Case No. 14,520.

UNITED STATES v. BARKER.

[4 Wash C. C. 464.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1824.[2]

EVIDENCE—BILLS OF EXCHANGE—NOTICE OF PROTEST—WHEN AND HOW TO BE GIVEN—EXCUSE FOR NOT GIVING.

1. The letters of an agent to his principal, can not be read in evidence against a third person.

2. The holder of a protested bill of exchange is bound to give notice to the person he means to look to, by the earliest practicable post after the bill is dishonoured, when the parties do not live in the same town

[Cited in U. S. v. Bank of the Metropolis, 15 Pet. (40 U. S.) 393.]

3. The letter giving the notice should be put into the post office early enough to be sent by the mail of the succeeding day. This must be done by the agent in the first instance where the business is managed by an agent, and the same diligence is required of the payee.

[Cited in Lawson v. Farmers' Bank, 1 Ohio St. 214. Cited in brief in Renshaw v. Triplett, 23 Mo. 218.]

4. If the notice is to be sent across the sea, it should be by the first regular conveyance. Quære, in time of war between the country of the drawer and drawee, what is the rule as to sending notice by the agent of the payee to the drawer.

5. When a bill must be presented for acceptance, and even if it be not necessary to present it, yet it is presented and dishonoured; notice of the refusal to accept, or of the protest for non-acceptance, must be given without waiting the maturity of the bill.

6. What constitutes negligence generally, is not giving notice: and particularly where the United States are the holders of the bill.

[Cited in U. S. v. Nashville, C. & St. L. R. Co., 118 U. S. 122, 6 Sup. Ct. 1008.]

[Cited in Reeside v. Knox, 2 Whart. (Pa.) 234.]

7. If the holder has any legal excuse for not having given notice, according to the strict rules of law, it lies on him to prove it. He cannot excuse himself by supposed obstacles.

8. Legal notice is given to the party in person, only by leaving a written notice at his place of residence; and this must be proved by him who asserts it.

The jury were sworn to try four actions, on four different bills of exchange, drawn in New York, on Liverpool and London, by Jacob Barker, indorsed by the defendant's intestate, [A. Barker,] and purchased in New York by the treasurer of the United States for the use of the United States. Two of the bills were dated the 30th of July, 1814, one for £8,046. 6s. 5d. sterling, and the other for £10,000 sterling. They were protested for non-acceptance on the 25th of November in the same year, and for non-payment on the 27th of January, 1815. The first notice which the government had of their dishonour, was received on the 7th of May, 1815, by a letter from the Messrs. Baring, the agents of the United States, dated the 9th of December, 1814, covering the protests for non-payment. On the 8th of May, 1815, a letter was written by the secretary of the treasury to Mr. Flewellin in New York, covering the protests for non-payment, and directing him to employ a notary to give notice of the protest to the drawer and indorsers. The other two bills, one for £4,139. 13s. 5d. sterling, and the other for £3,000 sterling, bear date the 24th of June and 2d of July, 1814, and were protested for non-acceptance on the 3d of October, and for non-payment on the 7th of December in the same year. On the 7th of December, 1814, a letter was written by the secretary of the treasury to the same gentleman, Mr. Flewellin, in New York, covering the protests for non-acceptance, and directing him to employ a notary to give notice of the protests to the drawer and indorsers. It was proved by the deposition of Flewellin, that he received the above communications and protests in the months of December, 1814, and May, 1815, respectively, but that he could not recollect the precise days on which they were received; that he is confident he delivered the protests to the notary, Mr. Bleeker, within an hour after the letters were received, and gave directions to notify the drawer and indorser immediately of the dishonour of the bills. It was further proved, that the mail, which left Washington on the 7th of December, 1814, would, according to the regular course, arrive in New York between nine and ten on the morning of the third day afterwards, that is to say, on the 9th, and that the mail of the 8th of May, would arrive between the same hours on the 10th. The letters from Messrs. Baring to the government, respecting these bills and protests, were offered to be read by the district attorney, which was objected to by the counsel for the defendant.

C. J. Ingersoll, for plaintiffs.

Mr. Hopkins, Mr. Binney, and J. Sergeant, for defendant.

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[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervison of Richard Peters, Jr., Esq.]

[2] [Affirmed in 2 Wheat. (15 U. S.) 395.]

WASHINGTON, Circuit Justice. The letters of the agent of the United States, cannot be given in evidence against a third person. His deposition might have been taken.

The district attorney, having proved the death of Bleeker the notary, offered in evidence a paper found in his desk after his death, by a clerk of his, in whose custody the papers had been since his death, in which entries were made in the hand writing of the deceased in relation to these bills and some others, to the following effect, viz: "Notified A. Barker, that Jacob Barker's bill for £10,000 sterling, drawn on Thomas R. Hazard & Co., indorsed by him, had been dishonoured and returned protested for non-payment, and that the holders look to him for payment." A similar entry is made as to the other bill for £8,046. 6s. 5d. sterling, and on the margin, opposite to each entry, are the figures "12th of May, 1815." Similar entries are made as to the two other bills, except that the protest is stated to be for non-acceptance, and the figures opposite to them in the margin are "12th December, 1814." The competency of the evidence was asserted upon the authority of Nichols v. Webb, 8 Wheat. [21 U. S.] 326. It was denied that the above case sanctioned the admission of this evidence, since that proceeded upon the fact proved by a witness, the daughter of the notary, that he was in the regular habit of giving notices of protests of bills of exchange and notes, of which he kept a regular record, from which the copy of the entry in question was taken. That does not appear to have been the habit of Mr. Bleeker. On the contrary, it is proved by a witness that no entries of notices of protests of foreign bills are to be found on his books. The counsel cited also 2 Strange, 1129; 4 Camp. 192.

It was at length agreed by the counsel, that for the purpose of obtaining the opinion of the court upon the merits of the causes, and of presenting to the revision of the supreme court all the questions involved in them, the paper should be read, with liberty to either party, against whom the court should hereafter decide as to the competency of the evidence, to take a bill of exceptions, in like manner as if the opinion were now delivered.

For the defendant, it was insisted, that the United States could not recover, on the ground of laches in the following particulars: (1) In their English agents, in not forwarding notice to the government, of the dishonour of these bills by the first ship. The protests of the two smaller bills for non-acceptance were made on the 3d of October, and from the date of the letter from the secretary to Flewellin inclosing them, they either were not received by the government until about the 7th of December, or if received earlier the giving of the notice was delayed by the government, in either of which cases, the plaintiffs cannot recover. It lies upon them to prove that due diligence was used. (2) The two large bills were protested for non-acceptance on the 25th and 28th of November, 1814, and yet notice thereof was not received at the treasury department until the 7th of May, 1815. And even then notice of those protests was not given to Flewellin, the agent in New York, but only notice of the protests for non-payment. (3) No notice of the protests for non-acceptance of these large bills was given to the indorser at any time. All the decisions in England and in this country, except in Pennsylvania, show that the omission to give notice of the protest for non-acceptance by the first practicable mail, or, if beyond sea, by the first regular ship, is fatal to the recovery by the holder. Chit. 256; 2 Camp. 459; 5 Burrows, 2670; 4 Mass. 341; 7 Mass. 449; 1 Bay, 177; 11 Johns. 187; 3 Johns. 204; 2 Johns. Cas. 1. The only case which has decided otherwise is Read v. Adams, 6 Serg. & R. 356. But it is the law merchant of New York which must govern these cases. (4) Admitting the copy of the memorandum of Bleeker as competent to prove when the notices were given in New York, they were too late on the 12th of December and the 12th of May, as the date of the secretary's letter covering the protests of the two smaller bills proves that he was informed of their dishonour on the 7th of that month, and it is proved that the government had notice of the dishonour of the two larger bills as early as the 7th of May, 1815, and yet notice to the indorser, even of the protest for non-payment, was not given till the twelfth, whereas it ought to have been on the ninth, or at farthest on the tenth. Cases cited to establish the general principles above laid down: 1 Starkie, 310; Chit. 400, 402, 285, 287; 20 Johns. 382, 383; U. S. v. Barker [Case No. 14,519]; Elford v. Teed, 1 Maule & S. 28; Tindal v. Brown, 1 Term R. 167; Peake, N. P. 186; 6 East, 3; Lenox v. Roberts, 2 Wheat. [15 U. S. 373]; 3 Bos. & P. 601; 2 Phil. Ev. 35. Lastly, the memorandum made by Bleeker, though it should be evidence that the indorser was notified, does not prove, with sufficient certainty, that he was notified on the 12th, or that he was legally notified; which, as he lived in New York, could only be by personal notice, or by leaving a written notice at his place of abode.

The authority of the cases cited by the defendant's counsel was not denied by the district attorney; but he submitted to the court, whether those rules of law which affect the obligation of contracts in transactions between man and man, on the ground of negligence by the party claiming their fulfilment, are applicable to the government of the United States? He denied that the charges of negligence were made out. As to the want of due diligence imputed to the agents of the United States in England, it

is a sufficient answer that, for some time after these bills were protested, war was raging between Great Britain and the United States, and consequently there could not exist any regular communication between the two nations. And in respect to the alleged negligence at Washington, it ought at least to be proved in a case of the United States, and is not to be presumed. The secretary of the treasury, in conducting a transaction like the present, is placed in a different situation from private persons. He is governed by certain forms, from which individuals are exempt. He does business only during office hours, when his clerks are about him to register his acts. All this requires time, and it would be the application of a reasonable qualification of the general rules, in regard to notice, to lay it down that in these cases they were in time. As to the argument that notice of the protest for non-acceptance must be given, he relied upon the cases of Read v. Adams, 6 Serg. & R. 356; Brown v. Barry, 3 Dall. [3 U. S.] 365; Clark v. Russel, Id. 415.

WASHINGTON, Circuit Justice, after stating the case as above [charged the jury]: The contract which the drawer and endorser of a bill of exchange enter into is of a qualified character. They agree to pay the bill, in case it should be dishonoured, provided due diligence is used by the holder, or by his agent, in presenting the bill for acceptance and payment, where presentation for acceptance is necessary; and, in case the bill be dishonoured, in giving notice of that fact to the person he looks to for payment. This notice must be given by the earliest practicable post, after the bill is dishonoured, where the parties do not live in the same town; that is to say, the letter giving the notice, (for it may be sent by a private conveyance, provided no time is lost thereby), should be put into the office early enough to be sent by the mail of the succeeding day. This must be done by the agent in the first instance, where an agent is employed to manage the business, and the same diligence is required of the holder, after he receives notice from the agent that the bill is dishonoured. This strictness may be dispensed with under particular circumstances; but then the existence of those circumstances must be proved by the plaintiff. If the want of due diligence be imputable to the agent, the principal must suffer the consequence of it, as much so as if he himself had been in default. If the notice is to be sent across sea, it ought to be sent by the first regular conveyance.

But here a question arises, which has never been decided that we know of, and which we think is attended with considerable difficulty. Can it be said legally, or in point of fact affirmed, that there is a regular conveyance, or any conveyance at all which the law will notice, between two countries at war with each other? If not, is it necessary for the holder to prove that the notice was sent by the first vessel that sailed with his knowledge, or with that of his agent? For the purpose of spreading this question on the record, and for no other reason, we shall instruct you that such proof ought to be given by the plaintiffs. The law merchant, as settled by judicial decisions in England, and in New York, requires that, in all cases of bills which must be presented for acceptance, due notice of the protest, in case acceptance is refused, must be given, without waiting for the maturity of the bill, and a demand of payment; such too is the rule in Massachusetts and South Carolina. And the rule is the same in England, even in cases of bills which need not be presented for acceptance, if in fact they be presented, and acceptance be refused. It is supposed that the cases of Brown v. Barry, 3 Dall. [3 U. S.] 365, and Clark v. Russel, Id. 415, have established a different rule as the law merchant of the United States. We do not so understand those cases. In both of them, the action was brought upon the protest for non-payment, and the objection was, that the plaintiff could not recover without showing a protest for non-acceptance. The supreme court merely decided that the custom of merchants in the United States does not ordinarily require, to recover on a protest for non-payment of a bill, that a protest for non-acceptance should be produced, though the bills were not accepted. Thus deciding, in effect, either that a protest for non-acceptance need not be made of a bill payable after sight, any more than of one payable after date; or that such protest need not be given in evidence, where the declaration is upon a protest for non-payment. Whether these decisions would now be upheld by the same court may at least be questioned. Few reports of the decisions of the state courts were published when those cases came before the supreme court of the United States, and the law merchant respecting bills was certainly not as well understood, and the custom, as established in this country, as well known as at the present day. It would not do to speak of the custom in the United States now as the court then spoke, in the face of so many cases decided in the most commercial cities of the United States. Be this as it may, the necessity of giving due notice of the dishonour of a bill which has been refused acceptance, is not, in our opinion, dispensed with in those cases. That question did not arise in the courts below, and was not presented to the view of the supreme court. We think it safest therefore to follow the course of decisions in England upon this point, and particularly those of New York, where the bills were drawn, and where the drawer and indorsers resided.

But even if notice of the non-acceptance of the two large bills had been given, as it was of the two smaller ones, we should be of

opinion that it was too late. On the 7th of May, the secretary had notice of their dishonour, and on the next day he addressed a letter to the agent of the United States in New York, enclosed the protests for nonpayment, and directed notice to be given to the drawer and indorsers. Had the holder been a private individual the letter giving the notice ought to have been put into the post office, so as to have gone in the mail of the next day. Admit that, regarding the office hours of business of the public departments, the same strictness ought not to be required of the United States, still the letter of the 8th ought to have gone in the mail of the 9th, in which case it would have arrived in New York about half past nine in the morning of the 11th, on which day the notice ought to have been given. As to the other two bills, the letter to the agent in New York was written on the 7th of December, and consequently might have been put into the office so as to have been mailed on the 8th, in which case it would have arrived in New York on the morning of the 10th. One thing is clear upon the evidence now before you. Either the letters were not put into the office at Washington in due time, or the agent in New York was guilty of inexcusable negligence in giving the notices; and in either case the United States cannot recover. If any circumstance occurred, at either end of the line, to excuse this apparent negligence, it was the business of the plaintiffs to prove it; none such can or ought to be presumed by the jury.

As to the paper containing memoranda found in Bleeker's desk, after his death, the competency of which, as evidence, is hereafter to be decided; the question which it gives rise to is, not whether notice of the dishonour of these bills was given to the indorser, but whether it was given in a legal manner? If, as is proved and agreed on both sides, the indorser lived in the city of New York, the service of legal notice would have been on his person, or by leaving a written notice at his place of residence. But does this memorandum state that it was given in either of those ways? It may have been given by putting a letter into the post office, which would not have been sufficient; or a written notice might have been put into the hands of some third person to deliver to the indorser, or to leave at his house, who neglected to do either. You ought to be satisfied that the party was notified in the mode the law merchant requires.

Upon the whole, we are of opinion that due notice of the dishonour of these bills was not given, and that the plaintiffs are not entitled to verdicts.

Verdict for defendant.

The charge of the court in this case being excepted to, the case was taken by writ of error to the supreme court, and, in February, 1827, affirmed. [2 Wheat. (15 U. S.) 395.]

Case No. 14,521.

UNITED STATES v. BARLOW.

[1 Cranch, C. C. 94.] [1]

Circuit Court, District of Columbia. Nov. Term, 1802.

LARCENY—OWNERSHIP OF GOODS—INDICTMENT—CONFESSION—OFFERING BRIBE.

1. On a trial for larceny, of the goods of T. Lee, evidence that the goods were the property of a deceased person in the possession and management of T. Lee, will support the indictment.

2. The jury must believe or reject the whole of the prisoner's confession. But the offer of a bribe by the prisoner to the officer, to permit him to escape, is evidence independent of the confession.

Indictment for stealing a horse, the property of Col. Thomas Lee. It was objected, on the trial, that the property was not in Thomas Lee, but belonged to the estate of Calvin Washington, deceased. But it being proved that Thomas Lee had the possession and management of that estate,

THE COURT held that the property was well laid, and proved as laid. The confession of the prisoner being given in evidence, THE COURT instructed the jury that they must believe or reject the whole. CRANCH, Circuit Judge, doubted.

In the same conversation, the prisoner offered the witness a watch, and a deed of his house, if he would suffer him to escape.

THE COURT instructed the jury that this offer of the watch and deed was a separate fact, not depending on the confession before alluded to, and therefore good evidence by itself. KILTY, Chief Judge, doubting.

Case No. 14,522.

UNITED STATES v. BARNABO.

[14 Blatchf. 74.] [2]

Circuit Court, S. D. New York. Dec. 29, 1876.

VOTERS—RIGHT TO REGISTER—CONVICTION OF COUNTERFEITING—INDICTMENT.

1. The laws of the state of New York do not deprive of the right of suffrage a person who has been convicted in a court of the United States of the offence of uttering a counterfeited security of the United States, such offence being created by section 5431, Rev. St. U. S.

2. An indictment will not lie, in a United States court in New York, against a person for having fraudulently registered at a registry of voters in New York, for an election for representatives in congress, when he was disqualified as a voter by reason of having been convicted of a felony, where the conviction set forth is for having committed the offence created by section 5431, Rev. St. U. S., of uttering a counterfeited security of the United States.

[This was an indictment against Joseph Barnabo. Heard on demurrer.]

Benjamin B. Foster, Asst. Dist. Atty.

Ambrose H. Purdy, for defendant.

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

[2] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

BENEDICT, District Judge. The accused is charged with having fraudulently registered at a registry of voters for an election for representatives in congress, he being at the time disqualified as a voter by reason of having been convicted of a felony. The conviction set forth is a conviction of uttering a counterfeited security of the United States, the offence being created by section 5431, Rev. St. U. S. A demurrer to the indictment presents the question whether the laws of the state of New York deprive of the right of suffrage a person who has been convicted, in a court of the United States, of an offence against the United States, of the character described in section 5431 of the United States Revised Statutes. The question is new in this court, and I have not been referred to any case where the question has arisen in the courts of the state. In order to a proper understanding of the statutory provisions in the laws of the state of New York, bearing upon the question, mention must be made of the following provisions in those laws. According to the provisions of section 25 of the act of April 17th, 1822, no person was allowed to vote who had been "convicted of any infamous crime." In 1823, the second constitution of the state took effect, and gave authority to pass laws "excluding from the right of suffrage persons who have been, or may be, convicted of infamous crimes." In 1828, the Revised Statutes of the state (1 Rev. St. 127, § 3) excluded from the right of suffrage every person "convicted within this state of an infamous crime," "unless he shall have been pardoned by the executive, and, by the terms of such pardon, restored to all the rights of a citizen." In order to prevent infractions of this law, further provision was then made (1 Rev. St. 135, § 21) that, "if any person so convicted shall vote at any such election, unless he shall have been pardoned and restored to all the rights of a citizen, he shall be deemed guilty of a misdemeanor," &c. An original note of the revisers to chapter 6, tit. 4, art. 2, § 10, says: "The act of 1822, § 25, provides, that no person who has been convicted of an infamous crime shall be permitted to vote, but it does not point out any mode in which a challenge for that cause shall be determined. Parol evidence of the fact of conviction ought not to be received, nor ought the oath of the person challenged to be demanded. The revisers have therefore, in the above section, required the production of the record; though it is worthy of consideration whether such a regulation would not make the exclusion, to all practical purposes, a nullity. Perhaps a list of the convicts might be annually furnished to the town clerks, and be made evidence in cases of this sort." On the 5th of April, 1842, a substitute for chapter 6, pt. 1, Rev. St., was enacted, in which it was provided, (title 1, § 3,) that "no person who shall have been convicted of an infamous crime deemed by the laws of this state a felony, at any time previous to an election, shall be permitted to vote thereat, unless he shall have been pardoned before or after his term of imprisonment has expired, and restored by pardon to all the rights of a citizen." This provision is still in force, and the question in hand depends upon the effect to be given to this statute of the state.

It will be noticed that the language of the original act of 1822 is sufficiently broad to cover all convictions of any infamous crime, wherever had. The Revised Statutes added, in express terms, the limitation, that the conviction must have occurred "within this state," and, by implication, the further limitation, that it must be a conviction in the courts of the state. This implication appears to arise out of the exception as to persons "pardoned by the executive, and, by the terms of such pardon, restored to all the rights of a citizen." The executive of the state only can be referred to here, as no pardon issued by the president of the United States would, by its terms, restore a person to the rights of a citizen of the state of New York. It would appear, therefore, proper to construe the statute as referring to those crimes only that can be pardoned by the governor of the state. Furthermore, such appears to have been the understanding of the statute by the revisers themselves, as their note above referred to shows. For, the remedy proposed by them in the note, while sufficient, if only convictions in the courts of the state are within the scope of the statute, is wholly insufficient if the statute includes convictions in the courts of the United States. The limitation which thus appears in the Revised Statutes is more plainly seen in the enactment of 1842, for, while, in that act, the exception as to persons pardoned is substantially the same as before, the disqualifying clause requires not only that the conviction shall be of an infamous crime, but that it shall be of a crime "deemed by the laws of this state a felony." This statute requires not only that the crime be of the class of infamous crimes, but, also, that it be such a crime as, by the laws of the state, is declared to be a felony. The courts of the United States take cognizance only of statutory offences against the United States, created by the laws of the United States, and I doubt whether it can be said that any mere statutory offence, created by a law of the United States, is "deemed by the laws of the state a felony." It has been contended that the word "deemed," as it is used, shows an intention to include all crimes presenting the feature designated by the laws of the state as the characteristic of a felony, namely, a liability to be punished by death or by imprisonment in a state prison, (2 Rev. St. 702, § 30,) and hence it is concluded, that, inasmuch as the accused, upon his conviction under section 5431, became liable to imprisonment in a state prison, he is within the scope of the disqualifying statute. Here this difficulty arises, that, while the laws of the

state are framed with the intent that the mode of punishment liable to be inflicted shall determine the character of the offence, as a felony or otherwise, the laws of the United States are not so framed. By the laws of the United States, upon conviction for any offence, where the sentence imposed is an imprisonment for a period of more than one year, the sentence may be directed to be executed in a state prison. Section 5541, Rev. St. U. S. And there are offences against the United States made, by express terms, misdemeanors, although punishable by hard labor in a state prison. It would, therefore, result, that a conviction for any offence against the United States, where imprisonment for a period of more than one year can be inflicted, would have the effect to disqualify the person convicted.

The better solution of the question is to be found in other provisions of the statutes of the state, now to be mentioned. On the 14th of May, 1872, was passed an act, entitled, "An act in relation to elections in the city and county of New York, and to provide for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage therein." In section 33 is found adopted the suggestion originally made by the revisers, in their note above referred to. By this section, obviously for the purpose of providing means of proving such convictions as work the disqualification of a voter, it is required, that the clerks of the courts of oyer and terminer and general and special sessions shall file with the chief of the bureau of elections a certified record of all convictions for offences punishable by death or imprisonment in a state prison. Here, the remedy provided by the law affords a statutory indication that the disqualifying provision is understood as applying only to cases of conviction in a court of the state. Furthermore, section 76 of the act of 1872—plainly inserted for a better enforcement of the disqualifying provision—declares, that, "if any person who shall have been convicted of bribery, felony, or other infamous crime, under the laws of this state, shall thereafter vote, * * * he shall, upon conviction thereof, be adjudged guilty of a felony," &c. This section throws light upon the language of the disqualifying provision it was intended to enforce, and shows plainly that only convictions arising under the laws of the state are intended to work the disqualification of a voter. I, therefore, conclude, from an examination of the statutes of the state appertaining to this subject, that these statutes do not deprive of the right of suffrage a person who has been convicted, in the courts of the United States, of a mere statutory offence against the United States.

This conclusion is strengthened by the construction put, by the courts of the state, upon the provision respecting the disqualification of witnesses, contained in the laws of the state, where the language used is broader than that used in respect to voters. The provision in respect to witnesses is, that no person sentenced upon a conviction for felony, shall be competent to testify in any proceeding, &c., unless he be pardoned by the governor, &c. 2 Rev. St. 701, § 23. In Cole v. Cole, 50 How. Pr. 59, 66, it is intimated, that a conviction in another state would not, probably, render the testimony of a witness inadmissible, by virtue of this statute; and this has been expressly ruled on several occasions at nisi prius, as I am informed. The cases are not reported. See, also, Com. v. Green, 17 Mass. 515; Com. v. Hall, 4 Allen, 305.

It is proper to add, that the precise question in hand appears to have been presented to the attorney-general of the state, and the opinion expressed by that officer is in harmony with the conclusion I have reached. See Opinions of Attorneys-General of the State, page 413, and again on page 524, where the attorney-general says: "I am of the opinion that a conviction for crime, in order to disqualify an elector, must be had under the jurisdiction of, and in, the courts of this state, and that a conviction under the federal laws and in the federal courts does not work such disqualification." In accordance with these views the demurrer is sustained, and the accused must be discharged.

Case No. 14,523.

UNITED STATES v. BARNES.

[6 Ben. 183.] [1]

District Court, S. D. New York. Oct., 1872.

FORFEITURE—IMPORT ACTS—FALSE PAPER—ENTRY AND INVOICE.

1. If an importer, on entering goods at the custom house, takes the oath that the invoice of the goods, "contains a just and faithful account of the actual cost" of the goods, and is "in all respects true," when the cost stated in the invoice is not the actual cost, the oath is a false paper, and the importer knowingly makes the entry by means of a false paper, and the goods or their value are forfeited.

2. An invoice which states the cost of the goods falsely, is a false invoice, within the meaning of the act of March 3d, 1863 (12 Stat. 738), even though the cost is not required to be stated in the invoice because the goods are not subject to ad valorem duty.

This was an action brought against the defendant [Harvey Barnes] to recover the value of certain sugars imported by him, on the alleged ground that he had made the entry by means of false papers, and thereby had forfeited the value of the goods to the United States. On a trial before a jury a verdict was found in favor of the United States. The defendant made a motion for a new trial.

William Stanley, for the United States.
Stephen P. Nash, for defendant.

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

BLATCHFORD, District Judge. The oath taken by the defendant, on making the entry, was, "that the invoice which I now produce contains a just and faithful account of the actual cost of the said goods, wares and merchandise," and that such invoice is "in all respects true." Evidence was given on the trial, to show that the invoice did not contain a just and faithful account of the actual cost of the sugars embraced in it, and that the invoice was untrue in respect to the cost of such sugars, and gave the cost at less than it really was, and was, therefore, not in all respects true. The jury, under the charge given, could not have found a verdict for the United States, unless they were satisfied, from the evidence, affirmatively, that the invoice gave the cost of the sugars as less than it really was. As the defendant, in the oath, stated that the invoice contained the actual cost of the sugars, and as it must be held, on the finding of the jury, that the cost stated in the invoice was less than the actual cost, it follows that, when the defendant swore that the cost stated was the actual cost, he swore to what he did not know, and could not have known, to be true. If he did not know it to be true, his oath was false, and the paper was a false paper. He knowingly made the entry by means of a false paper. The statute (Act March 3d, 1863, § 1; 12 Stat. 738) provides, that no goods shall be admitted to entry, unless the owner or consignee, or the agent of one of them, at the time of making the entry, verifies the invoice, by his oath or affirmation certifying that the invoice is in all respects true. The oath is a paper required on making the entry. It is a paper by means of which the entry is made. It is a paper other than the invoice, and other than the certificate of the consul. If not true, the oath is a false paper. If the oath states that the invoice is in all respects true, when the invoice is not in all respects true, the oath is a false paper. If the oath states that the invoice contains a just and faithful account of the actual cost of the goods embraced in it, when such cost is, in fact, stated therein at less than such actual cost, the oath is a false paper. If the owner states, in the oath, that the invoice is in all respects true, when, in fact, the invoice states the cost of the goods embraced in it at less than their actual cost, he states what is not true, and what he does not know and cannot know to be true, and makes such statement knowingly, knowing that he does not know the invoice to be in all respects true, and knowing that he does not know that the cost stated in the invoice is the actual cost. He, therefore, knowingly makes the entry by means of a false paper, and under the provision of the statute, the goods or their value are forfeited.

On this view, if, as the jury must have found, under the charge of the court, and as was shown by the evidence, the cost of the sugars was greater than the cost stated in the invoice, the defendant could, under no circumstances, be entitled to a verdict. Even if the court erred in the portions of its charge to the jury which are excepted to, and erred in refusing to charge in particulars requested by the defendant, the defendant was not legally harmed or prejudiced by any such error. Barth v. Clise, 12 Wall. [79 U. S.] 401.

I do not mean, however, to concede that there was any such error, or that an invoice stating the cost of the goods embraced in it at less than their actual cost is not "a false invoice" within the meaning of the act of 1863, even though the cost was not required to be stated in the invoice because the goods were not subject to ad valorem duty.

I see no error in the remark of the court to the jury, that the course of the government in not seizing the sugars after they had passed into the hands of bona fide purchasers, and in resorting to a suit to recover their value, was proper and just action, under the law and the circumstances of this case.

Nor do I see any error in the charge of the court, to the effect that, in view of the state of the evidence, as given by the government, in regard to the quality and value, and what must have been the cost, of the sugars in Demerara at the date of the invoice, it was incumbent on the defendant to produce evidence from Demerara as to such cost, and that the fact that he did not produce such evidence was in itself negative evidence, as strong as affirmative evidence on the part of the government, that the cost was below the invoice.

The observations made by the court as to the power of the secretary of the treasury to remit forfeitures, appear, by the bill of exceptions, to have been made, as stated at the time by the court, in view of remarks that had been made by the counsel for the defendant. It must be assumed, from the record, that those remarks were made in the hearing of the jury, and that they were such as to justify the observations of the court. If it were not so, the record should show it.

In the view first above stated, as to the effect of the oath of the defendant as to the absolute truth of the invoice, all consideration of the question as to knowledge by the defendant, at the time he made the entry, that the invoice was false in respect to prices, and that the cost of the sugars was greater than that stated in the invoice, was and is unimportant. It was sufficient that he swore that the invoice was true, when it was not true, and he did not know, and could not have known, that it was true. The statute makes such absolute affirmative oath of verity, to be made by the owner or the consignee, or the agent of one of them, a condition precedent to the admission of the goods to entry, and whoever makes such oath must be held to it, and if he swears that the invoice is true, when it is not true, he must abide the consequences. The fifth count of the declaration is founded on the oath, and avers, that the

defendant, as owner, consignee, or agent of the goods, made an entry of them by means of a false and fraudulent practice or appliance, in that he swore, in the oath which he made, that the invoice presented contained a just and faithful account of the actual cost of the goods, whereas, in fact, the invoice did not contain a just and faithful account of the actual cost of the goods, but, on the contrary, contained a false account thereof, and that such oath was made with the intent on the part of the defendant to defraud the government of some part of the duties justly and legally due on the goods. This count is sufficient to sustain the verdict, on the facts. The allegation that the false oath was made by the defendant with intent to defraud the government, is equivalent to the allegation that the defendant "knowingly" made the entry by means of a false oath, as a false and fraudulent practice. Such intent, in regard to the false oath, necessarily imports that there was knowledge that the oath was false.

There are, in the record, two exceptions to the admission of evidence, but neither of them was urged on the motion for a new trial, and I perceive no error in admitting the evidence excepted to.

The views above stated cover all the exceptions urged on the motion for a new trial. If any legally prejudicial error was committed by the court at the trial, it was one of which the government had a right to complain, as the facts warranted a charge such as is hereinbefore indicated, and which would have been one on which the defendant never could properly have been entitled to a verdict, and on which no other verdict could properly have been given than one in favor of the United States.

The motion for a new trial is denied.

UNITED STATES (BARNES v.). See Case No. 16,929.

Case No. 14,524.

UNITED STATES v. BARNEY et al.

[5 Blatchf. 294;[1] 3 Int. Rev. Rec. 46.]

Circuit Court, S. D. New York. Feb. 6, 1866.

FEDERAL COURTS—CRIMINAL JURISDICTION—FORGERY—BOND—PRECINCTS OF CUSTOM HOUSE.

1. The federal courts cannot resort to the common law as a source of criminal jurisdiction, and cannot try any offences except such as are in some form prohibited by the constitution or by act of congress.

[Cited in U. S. v. Coppersmith, 4 Fed. 205.]

2. The crime of forgery, denounced in the first and second causes of the 1st section of the act of March 3d, 1823 (3 Stat. 771), is confined to instruments designed to obtain money from the United States.

[Cited in U. S. v. Lawrence, Case No. 15,572; U. S. v. Albert, 45 Fed. 556; U. S. v. Moore, 60 Fed. 739.]

3. An indictment for uttering, within the precincts of the custom house in the city of New York, a false and fraudulent bond purporting to be given to the United States under the 61st section of the internal revenue act of June 30, 1864 (13 Stat. 245), relating to the exportation of distilled spirits, cannot be sustained under the said 1st section of the act of March 3d, 1823.

4. Nor can an indictment for forging such bond within such precincts, be sustained under the 3d section of the act of March 3d, 1825 (4 Stat. 115). That act is confined to offences committed in places, the sites whereof had been ceded to, and were under the jurisdiction of, the United States, at the time of its enactment. The case of U. S. v. Paul, 6 Pet. [31 U. S.] 141, cited and applied.

[Cited in Fitch v. Newberry, 1 Doug. (Mich.) 1.]

This was a motion to quash an indictment [against William Chase Barney, Bentham Fabian, and Reginald Chauncey].

Samuel G. Courtney, Dist. Atty., and John Sedgwick, for the United States.

Benedict, Burr & Benedict and Benjamin F. Tracy, for defendant Barney.

Edwin James Dunphy, for other defendants.

SHIPMAN, District Judge. The defendants stand indicted for the crime of forging and uttering a certain false and fraudulent bond, within the precincts of the custom house in the city of New York. The bond purports to be given to the United States in pursuance of regulations established by the secretary of the treasury, under the authority of that part of the 61st section of the internal revenue act, approved June 30th, 1864 (13 Stat. 245), which relates to the exportation of distilled spirits, &c. The amount of the bond is $5,234. The conditions relate to the exportation of a quantity of alcohol, alleged therein to be about to be exported from New York to Havre, and require that certificates, and other proofs required by the treasury regulations, of the landing of the article at the latter port, shall be produced to the proper officer, within one year from the date of the bond, and that the article shall not be relanded at any port or place within the United States. The bond is to be void on the performance of the conditions, otherwise, to remain in force. The government claims to have conclusive proof that the bond was forged and fraudulent, and that it was made and uttered by the defendants for the purpose of defrauding the United States. The grand jury have indicted them, and now, before plea, they move to quash the indictment, upon various grounds.

In order to properly notice the questions raised, it will be well here to refer to the two principal features of the indictment, and the particular laws upon which it is founded. The indictment has two counts; the first for forging the bond, and the second for uttering it. The first count is founded upon the 3d section of the crimes act of March 3d, 1825 (4 Stat. 115), in connection with a certain law, or laws, of the state of New York,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

which were in force in that state at the date of the passage of that act. The second count is founded upon the 1st section of the act of March 3d, 1823 (3 Stat. 771). This section relates, among other things, to the forging, false making and uttering of certain instruments, with intent to defraud the United States. It will be more convenient to first consider the points raised on the motion touching the second count.

It is insisted that the 1st section of the act of 1823 has no relation whatever to the forgery, or uttering, of a forged instrument of the character of the one in question. If this point is well taken, then the second count charges no offence punishable by the courts of the United States, and must, therefore, fall. It is now settled law, universally acted upon by those courts, that they cannot resort to the common law as a source of criminal jurisdiction. However that body of jurisprudence may furnish the federal courts with rules of procedure, definition, and construction, those tribunals have no power to try any offences, except such as are, in some form, prohibited by the constitution, or by act of congress.

The section upon which the second count is founded, is in the following words: "If any person or persons shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited, or willingly aid or assist in the false making, altering, forging or counterfeiting, any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving, or of enabling any other person or persons, either directly or indirectly, to obtain or receive, from the United States, or any of their officers or agents, any sum, or sums of money, or shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, or other writing as aforesaid, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, or shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, every such person shall be deemed and adjudged guilty of felony, and, being thereof duly convicted, shall be sentenced to be imprisoned and kept at hard labor, for a period not less than one year nor more than ten years, or shall be imprisoned not exceeding five years, and fined not exceeding one thousand dollars." This section may be properly divided into three parts. The first refers to the false making, forging, or altering of any writing, for the purpose of obtaining any money of the United States; the second, to the uttering of any such false, forged, or altered writing, with intent to defraud the United States; and the third, to the presentation at, or transmission to, any office or officer of the United States, of any false, forged, or altered writing, in support of, or in relation to, any account or claim, with intent to defraud the United States. The first branch does not count in express words upon a guilty knowledge, or an intent to defraud the United States, in the forger, for the very obvious reason, that the fabrication of the instrument for the purpose of obtaining money of the United States necessarily implies both. No person could do the act prohibited without both a guilty knowledge and an intent to defraud the government. The second branch of the section expressly counts upon both a guilty knowledge and a guilty intent to defraud the United States, because, one might possibly utter as true, by passing to another, an instrument which had been originally framed to procure money from the government, knowing its character, with a guilty intent to defraud the person to whom it was passed. The circumstances might be such as to exclude the idea that the passer had any intent or expectation that the United States would be defrauded, but only that the individual receiving the false writing would be cheated. This might occur when the false writing had already been rejected by the government, or where the money sought to be obtained had already been paid. This guilty intent would be reached by the state law. The object of this, as well as of many of the criminal statutes of the United States, is to punish frauds on the government, and not frauds on individuals. But if, with knowledge of the false character of the writing, a person should utter it, with intent to defraud the government, then, and not until then, all the elements of a crime against the United States would be embraced in the act of uttering. It became necessary, therefore, in framing the act, to supply, by express words, the indispensable features of the crime of uttering, which that of forging necessarily implied. This explains the reason why the phraseology of the second part of the section is more full, in descriptive terms, than that of the first part. The terms "for the purpose of obtaining or receiving * * * any sum or sums of money," are descriptive of the character of the instrument, as well as of the intent of the fabricator. The tenor of the instrument and its relation to the end in view, must be, in some degree, in harmony with the object which the offender seeks to attain. This is the class of writings with which the first clause of the section deals. It is against the uttering of such writings that the second clause is levelled. The first clause punishes the forging or altering of the same kind of instruments in respect of which the second clause punishes the uttering. Otherwise, the word

"such," in the statute, has no meaning. That it does, however, have a meaning, and was not a clerical error, or a word loosely and inaptly thrown in, is evident on inspecting the third clause of the section. In that clause, the word "such," is dropped, and the transmission of "any" writing in support of, or in relation to, any claim or account, with intent to defraud the United States, knowing the false and forged character of the writing, is made an offence. It makes no difference whether the account or claim is against the United States, or in its favor, and against an individual. The forged or false paper may be for the enhancement or support of a claim against the government, or it may be for the reduction or extinguishment of a claim in its favor against an individual. In either case, if the paper is transmitted with a guilty knowledge and intent, the crime is of the same grade, and liable to the same penalty as an original forgery. The object of the offender might be, not to obtain money, but to avoid the payment of money—acts which, in a highly penal statute, require to be distinguished by plain and unambiguous terms. The word "such" was, therefore, dropped in the third clause of the act, because its use would carry with it the words of the first clause "for the purpose of obtaining or receiving * * * from the United States * * * any sum or sums of money," and thus greatly narrow the scope of the third clause, thereby necessarily leaving unpunished a large class of offences which might be committed by those who were indebted to the government, and who should seek to evade payment by false and forged writings. This would have excluded from the operation of the statute all offences arising out of the transmission of false papers in support of, or in relation to, any claims for land or other property than money. It may be asked —why did not congress provide, in this same act, against the forgery of all this latter class of instruments? It is not easy to answer this question, unless the answer is found in the fact, that the transmission of false papers relating to accounts and claims, where no money was to be obtained, would be more readily detected and proved than the forgery of the same writings. But, whether this query can be answered satisfactorily or not, it is clear, that the crime of forgery is, in this section, confined to instruments designed to obtain money from the United States. This is virtually conceded by the fact, that the indictment in the present case was not placed upon the third branch of the section. Apart, however, from all these considerations, the plainest rules of construction show, that the use of the word "such," in the second clause, and its omission in the third, was intended to make the first and second clauses operate on the same class of writings, and on no others. From these views, it follows, therefore, that the second count describes no offence which this court is authorized to punish.

We will now consider the first count of the indictment. This is founded on the 3d section of the act of March 3d, 1825, which provides, "that, if any offence shall be committed in any of the places aforesaid, the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon conviction in any court of the United States having cognizance thereof, be liable to, and receive, the same punishment as the laws of the state in which such fort, dock yard, navy yard, arsenal, armory or magazine, or other place ceded as aforesaid, is situated, provide for the like offence when committed within the body of any county of such state." The terms "in any of the places aforesaid," and "ceded as aforesaid," refer to the 1st and 2d sections of the same act, which provide for the punishment of specific offences against the laws of the United States, when committed in any place or needful building of the United States, the site whereof is ceded to and under the jurisdiction of the United States. A question arising under this 3d section came before the supreme court of the United States, in the case of U. S. v. Paul, 6 Pet. [31 U. S.] 141. The court held, in that case, that the words "the same punishment as the laws of the state in which such fort, &c., ceded as aforesaid, is situated," are to be limited to the laws of the several states in force at the time of the enactment of the statute. Whatever might be the opinion of this court, if the question were now a new one, it is bound by the judgment of the supreme court already cited. That court limited the clause quoted above to the present tense, and confined it to the date of the act. The clause describing the places upon which the law is to operate is also, and emphatically, in the present tense, and, after the most careful consideration, I have been unable to find any rule of construction or reason, which would authorize this court to extend the act, in its reference to places, beyond its scope as applied to the state laws. To do so, would produce singular results. The site of the New York custom house was not ceded to the United States till 1865. Between the passage of the act, to wit, March 3d, 1825, and the date of such cession in 1865, many criminal statutes of New York, which were in force at the first named date, were repealed, and, among them, the very act relied on in this case. This latter act was repealed in 1829. To hold that the act of congress, so far as it refers to places, includes places thereafter to be ceded, and to restrict the words, "laws of the state * * * provide," to such laws as were in force at the passage of the act, would in effect decide that the act of cession by the state of New York, in 1865, operated, proprio vigore, to revive and put in force highly penal statutes of the state, which had long been repealed. I cannot bring my mind to believe that either con-

gress, or the legislature of the state of New York, contemplated any such result. Consequences so surprising and so remote might, and, I think, would arise, that they could not fairly be presumed to have been within the contemplation of either party. If every new deed of cession of a building site to the United States is to revive a criminal code which has been defunct for forty years, strange results might follow. Whipping and the pillory would, in some cases, have to be inflicted, for they were the penalties denounced by some of the state laws in force in 1825, for offences for which the laws of the United States provide no punishment. The United States have only abolished these barbarous relics of a barbarous age in cases where their infliction was provided for by acts of congress. Indeed, I should hesitate long, before deciding that congress intended that the courts should resort to the repealed laws of any state, as a source of criminal jurisdiction.

I have not come to these conclusions without careful consideration. If it is said, that this construction of the 3d section of the act of 1825 is unfortunate, inasmuch as there are many places and buildings, belonging to the United States, the sites whereof have been ceded since the act went into operation, and that, therefore, offences may be committed within such places which cannot be punished under any existing law of the United States, the answer is, that the responsibility for this difficulty does not rest with the judicial department of the government. Courts cannot make, but can only expound and enforce the law. But, a mere glance at the history of the government will show, that this act must, of necessity, be limited in its operation. It cannot extend to states admitted into the Union since March 3d, 1825, because there were no "laws of the state" in force at that time. The state which was not in existence on the 3d of March, 1825, could have no laws upon which this act was to operate. I assume, of course, that the word "state," as used in the 3d section of that act, refers only to a state of the United States; for, if it should be assumed that it was used in a more comprehensive sense, and included any state or body politic which might be thereafter admitted to the Union, then, in case the act should be held to apply to building sites or places ceded to the United States since March 3d, 1825, the federal courts in Florida, Texas, California, and the states carved out of the Louisiana purchase since that date, might have to resort to laws in force in 1825, which were of Spanish, Mexican, or French origin. This would occur, unless they resorted to territorial laws then in force; but, if none were in force, and the old laws of foreign origin still lingered, they would have to enforce such punishments as those latter laws provide.

It follows, therefore, that, inasmuch as the supreme court have declared that the 3d section of the act of 1825 restricts the courts to the laws of the states then in force, the operation of the act must also be restricted to the places which had been ceded at or before that time. This is the logical result of the doctrine laid down in U. S. v. Paul, already cited, and, so long as that case stands, is the only one which can be reached without producing a most singular and incongruous state of things, which, I think, it is not too much to say, congress never intended.

The case of U. S. v. Davis [Case No. 14,930], has been relied on as establishing a precedent for punishing offences not expressly prohibited by act of congress, in places the site whereof has been ceded since March 3d, 1825. But the case of U. S. v. Paul was subsequent. Besides, the point was not raised in the case of U. S. v. Davis [supra], and, therefore, that case is not entitled to very great weight in determining the present motion.

There were several other questions discussed on the argument. One was, whether the 3d section of the act of March 3d, 1825, was not intended only to supply penalties in cases where congress had prohibited acts, but had omitted to prescribe punishment. Another question was, whether the term "laws of the state," referred only to the statute laws, or embraced also the common law, so far as it was in force in the state. Another point was, whether the court could, in any event, resort, for jurisdiction, to a state law after it was repealed. Some of these questions are by no means free from difficulty, but the conclusion to which I have come renders their consideration unnecessary here.

I regret that I am compelled to announce this result. The crime charged in the indictment is a grave one, and I understand that one of the defendants is accused of having committed the act while in the employ of the government in an official position, the duties of which embraced the supervision of bonds of the character of the one alleged to be fraudulent. I regret that the charge cannot be investigated in this court, and the defendants be acquitted if found innocent, and, if guilty, be properly punished. But I am satisfied that this court has no power to try the case, on this indictment, and must, therefore, grant the motion that the indictment be quashed.

Case No. 14,525.

UNITED STATES v. BARNEY.

[3 Hughes, 545;[1] 3 Hall, Law J. 128; 2 Wheel. Cr. Cas. 513.]

District Court, D. Maryland.[2]

OBSTRUCTING CARRIAGE OF MAIL—LIEN ON HORSES—UNITED STATES.

1. The United States government cannot be sued.

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

[2] [The date of this decision is not given. It was first published in 1810.]

2. The lien of a private citizen against horses for their liverage cannot be enforced in a manner to stop the passage of the United States mail in a stage-coach drawn by the horses.

[Cited in U. S. v. Wilder, Case No. 16,694; U. S. v Sears, 55 Fed. 270.]

[Cited in Briggs v. Lightboats, 11 Allen, 182.]

WINCHESTER, District Judge. The indictment in this case, which charges the defendant with having wilfully obstructed the passage of the public mail at Susquehanna river, is founded on the act of congress of March, 1799 [1 Stat. 733]. The defendant sets up as a defence and justification of this obstruction of the mail, that he had fed the horses employed in carrying the mail for a considerable time, and that a sum of money was due to him for food furnished at and before the time of their arrest and detention.

On this state of facts two questions have been agitated: (1) Whether the right of an innkeeper to detain a horse for his food extends to horses owned by individuals and employed in the transportation of the public mail; and (2) whether such right extends to horses belonging to the United States, employed in that service.

The first question involves the consideration of principles of some extent, and to decide correctly on the second it may be necessary to state them generally. Lien is generally defined to be a tie, hold, or security upon goods or other things which a man has in his custody till he is paid what is due to him. From this definition it is apparent that there can be no lien where the property is annihilated, or the possession parted with voluntarily and without fraud. 2 Vern. 117; 1 Atk. 234. The claim of a lien otherwise well founded cannot be supported if there is (1) a particular agreement made and relied on (Sayer, 224; 2 R. A. 92); or, (2) where the particular transaction shows that there was no intention that there should be a lien, but some other security is looked to and relied upon (4 Burrows, 2223).

If, therefore, in this case, the agreement between the defendant and the public agent actually was that he should be paid for feeding the public horses on as low terms as any other person on the road would supply them, he could not justify detaining the horses; for the particular agreement thus made, and under which the food was furnished, is the foundation of the remedy of the defendant, and it can be pursued in no other manner than upon that agreement. Or, if there was no particular agreement, this case is such, that between the defendant and a private owner of horses and carriages employed in transporting the mail, I incline to think it could not legally be presumed a lien was ever intended or contemplated. A carrier of the mail is bound not to delay its delivery, and under severe penalties, and it can scarcely be supposed that he would expose himself to the penalty for such delay by leaving his horses subject to the arrest of every innkeeper on the road for their food, or that in such case the innkeeper could look to any other security than the personal credit of the owner of the horses for reimbursement. But the law on such a case could be only declared on facts admitted by the parties or found by the jury, and is not now before the court.

The great question in this case rests on a discrimination between the property of the government and individuals. To the government is granted by the constitution the general power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States; to raise and support armies; to provide and maintain a navy; to establish post-offices and post-roads; and to make all laws which shall be necessary and proper for carrying these and all other constitutional powers into effect. The public money can never be drawn out of the treasury unless by consent of the legislature; but whenever a debt is contracted in the establishment of a post-office, or road, or in the support of an army, or in the provision for raising or supporting a navy, or any other measure of general welfare, the public faith and credit is pledged for its payment. On the public faith and credit advances are made to the government, relying on the constitutional mode of reimbursement. If it were otherwise, what dreadful consequences would not result? A ship-carpenter might libel public ships, a quartermaster retain the supplies of the army, or an innkeeper stop the progress of an army for food to horses of a baggage-wagon. Every man must surely deprecate a state of society where no immunity to the government shall be afforded by the constitution against such evils. Happily we are not so exposed. Congress only has the power, and it is bound by the most sacred of moral obligation and duty to provide for the payment of the public debts. No other remedy exists for a creditor of the government than an application to congress for payment. A lien cannot be permitted to exist against the government; for liens are only known or admitted in cases where the relation of debtor and creditor exists so as to maintain a suit at law for the debt or duty which gives rise to a lien, in case the pledge be destroyed or the possession thereof lost. As in the case of a carrier of the mail, he cannot sue for the hire nor retain the mail, because he cannot sue. Yet the carrier of private property may sue or retain, because the government is not answerable. Justice is the same whether due from one to a million or a million to one man; but the mode of obtaining that justice must vary.

An individual may sue and be sued. The United States cannot be sued. Suability is incompatible with the idea of sovereign power. The adversary proceedings of a court of judicature can never be admitted against an independent government or the public stock

or property. The ties of faith, public character, and constitutional duty are the sure pledges of public integrity, and to them the public creditors must, and I trust with confidence may, look for justice. They must not measure it out for themselves. I have stated these principles to show that by law the defendant could not justify stopping the mail on principles of common law, as they apply to individuals and to the government. There are, however, considerations arising from the act of congress which are conclusive to my mind. The statute is a general prohibitory act. The common law, if opposed, must give way to it, and the court is bound to decide according to the correct construction of that law. That the act is constitutional is not, nor, indeed, can be questioned. It has introduced no exception. Whether the acts which it prohibits to be done were lawful or unlawful before the operation of that law, or independent of it, might or might not be justified, is not material. This law does not allow any justification of a wilful and voluntary act of obstruction to the passage of the mail. If, therefore, courts or juries were to introduce exceptions not found in the law itself, by admitting justifications for the breach of the act, which justifications the act does not allow to be made, it would be an assumption of legislative power. Many exceptions might be introduced, and perhaps with propriety. For instance, a stolen horse found in the mail-stage. The owner cannot seize him. The driver being in debt, or even committing an offence, can only be arrested in such way as does not obstruct the passage of the mail.

These examples are as strong as any which are likely to occur, but even these are not excepted by the statute, and probably considerations of the extreme importance to the government and individuals of the regular transmission of public dispatches and private communications may have excluded these exceptions. But whatever may have been the policy which led to the adoption of the law, which the court will not inquire into, it totally prohibits any obstruction to the passage of the mail.

It is the duty of the court to expound and execute the law, and therefore I am of opinion and decide that the defendant is not justifiable.

Case No. 14,526.

UNITED STATES v. BARNHARDT.

[20 Int. Rev. Rec. 137.]

District Court, N. D. Ohio. 1874.

INTERNAL REVENUE—LIQUOR—SALE WITHOUT LICENSE—INTENT TO DEFRAUD.

On motion for a new trial, held, that a single sale of spirituous liquor makes a retail dealer therein under the law; (2) that where license or payment of tax is relied upon in defence, it must be shown by the defendant, and the government is not bound to show want of license or payment; (3) that intent to defraud the government need not be proven to convict. A new trial is therefore refused.

Geo. Willey, U. S. Atty.

S. E. Adams and C. M. Safford, for defendant.

Case No. 14,527.

UNITED STATES v. BARR.

[4 Sawy. 254; 9 Chi. Leg. News, 308; 15 Alb. Law J. 472; 23 Int. Rev. Rec. 193.] [1]

District Court, D. Oregon. May 18, 1877.

CRIMINAL LAW—REPEAL OF STATUTE—PRIOR VIOLATION—HAVING POSSESSION OF COUNTERFEIT COIN.

1. Under section 13 of the Revised Statutes, the repeal of an act defining a crime and its punishment does not prevent the prosecution and conviction of a party for the prior violation thereof.

[Cited in U. S. v. Van Vliet, 23 Fed. 35.]

[Cited in Cincinnati, S. & C. R. Co. v. Belt, 35 Ohio St. 481.]

2. A statute is repealed by the enactment of another repugnant to it, or one covering the whole subject of the former.

[Cited in U. S. v. Nelson, 29 Fed. 206; U. S. v. Warwick, 51 Fed. 281.]

[Cited in People v. McNulty, 93 Cal. 437, 26 Pac. 579, and 29 Pac. 63; Cortesy v. Territory (N. M.) 32 Pac. 505.]

Indictment [against Hugh A. Barr] for having counterfeit coin in possession, knowing the same to be false. Motion in arrest of judgment.

Rufus Mallory, for the United States.

William H. Effinger, for defendant.

DEADY, District Judge. By the indictment in this case the defendant is accused on January 8, 1877 (1) of having in his possession one hundred pieces of counterfeit coin made in the resemblance of American silver half-dollars; knowing the same to be false and counterfeit; (2) of uttering and passing such coin; and (3) of attempting to utter and pass the same with like knowledge, contrary to section 5457 of the Revised Statutes.

On the trial the jury found the defendant guilty of the first charge, and the district attorney then dismissed the indictment as to the second and third.

A motion is now made in arrest of judgment, because it appears that on January 16, 1877, said section 5457 was amended so as to provide that the having of counterfeit coin in possession with knowledge of its character is not a crime, unless such possession is also accompanied "with an intent to defraud."

The motion is based upon the well known rule announced in The General Pinkney, 5 Cranch [9 U. S.] 283, by Chief Justice Mar-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 15 Alb. Law J. 472, contains only a partial report.]

shall: "That after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." And again stated by Mr. Justice Field in U. S. v. Tyner, 11 Wall. [78 U. S.] 95: "There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at that time in existence." To the same effect see U. S. v. Mann [Case No. 15,718]; Anon. [Id. 475]; Norris v. Crocker, 13 How. [54 U. S.] 440; Insurance Co. v. Ritchie, 5 Wall. [72 U. S.] 544; Ex parte McCardle, 7 Wall. [74 U. S.] 514; U. S. v. Six Fermenting Tubs [Case No. 16,296]; U. S. v. Finlay [Id. 15,099].

The section in force when the act which is charged in this indictment as a crime was committed having been superseded by the amended one of January 16, 1877 [19 Stat. 223], no prosecution can be maintained against the defendant on account of it, unless the statute has specially so provided. The mere fact of having counterfeited coin in possession, although with a knowledge of its character, is no longer a crime. It must be accompanied with an actual intent to defraud. It is admitted that no provision has been made by the act amending section 5457 for the prosecution of crimes committed under it. But section 13 of the Revised Statutes contains a general rule on the subject which meets and covers the case at every point. It provides: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." The "liability" of the defendant for the act charged in the indictment consisted in his being bound or subject to punishment for it, as provided in said section 5457; and this liability was "incurred," met with, or run against, when such act was committed, namely: January 8, 1877. Section 13, supra, declares that the substitution or repeal of section 5457 shall not have the effect to "extinguish" this liability, which is equivalent to declaring what the same section further on specifically provides, that said section 5457 shall, for the purposes of this prosecution, be considered still in force.

Counsel for the defendant makes the point that the act of January 16, 1877, which provides that section 5457 of the Revised Statutes "be and the same is hereby amended so as to read as follows," does not repeal said section 5457, and, therefore, the case is not within the saving power of section 13, supra. True, the word "repeal" is not used in the act, but the declaration that a particular section of a statute "is hereby amended so as to read as follows"—followed by such section as amended, whether by addition or omission, has become the recognized and proper legislative formula for substituting one section for another; and any substitution of one provision of a statute for another, whether directly, as here, or by implication, as on account of the repugnancy between them, is so far a repeal of the latter.

The rule on this subject is expressed by Mr. Justice Field in U. S. v. Tyner, supra, as follows: "When there are two acts upon the same subject, the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates, to the extent of the repugnancy, as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing it was intended as a substitute for the first act, it will operate as a repeal of that act." Norris v. Crocker, supra.

The provision in the amended section 5457, defining the crime of having counterfeit coin in possession, is certainly repugnant to that in the old one, because it requires that such possession shall be accompanied with intent to defraud. Therefore, the old section is, so far as the crime in this case is concerned, repealed. Again, the new section covers the whole subject of the old, with the addition of this provision, thereby plainly showing that it was intended as a substitute for the latter, and therefore it operates as a repeal of the whole thereof. Besides, this argument proves too much; for if section 5457 has not been repealed by the act of January 16, 1877, it is still in force, and there is no cause to arrest a judgment upon the verdict of guilty in this case under it.

This section 13 is a salutary provision, and if it, or something like it, had always been incorporated in the statutes of the states and the United States, it would have prevented many a lame and impotent conclusion in criminal cases, in which the defendant escaped punishment because the legislature, in the hurry and confusion of amending and enacting statutes, had forgotten to insert a clause to save offenses and liabilities already committed or incurred from the effect of express or implied repeals.

But the wisdom of this change of the law concerning the crime of having counterfeit coin in possession, is more than questionable. It will operate principally to protect counterfeiters and utterers of counterfeit coin in the making and circulation of false money as true. The possession of counterfeit coin in any considerable quantity, with the knowledge of its character, is almost incompatible with innocence, and in any case is dangerous to the community. Such possession may be innocent, but it is not likely, and it can scarcely be useful except in the commission of a crime. Upon this ground

it ought to be prohibited and punished, like the sale of unlabeled poisons and the transport and custody of inflammable and explosive substances, except under conditions and precautions prescribed by law. It is sufficient if a party charged with such possession is allowed to prove that it was innocent, by showing that it was had without intention to injure or defraud any one.

The motion is disallowed.

[Defendant was then sentenced to two years' imprisonment in the penitentiary of Oregon.] [2]

Case No. 14,528.

UNITED STATES v. BARROWCLIFF.

[3 Ben. 519.] [1]

District Court, N. D. New York. Nov., 1869.

INTERNAL REVENUE — TOBACCO MANUFACTURER'S BOND—SURETY—LACHES.

1. It is no defence to an action by the government, upon a bond given by a tobacco manufacturer, to recover an amount of duties, that the government seized the manufacturer's goods as forfeited, instead of distraining upon them for the tax.

2. Laches is not to be imputed to the government in such a case.

[This was an action by the United States against H. M. Barrowcliff. On motion for a new trial.]

BENEDICT, District Judge. This was an action upon a tobacco manufacturer's bond, in which a verdict was rendered in favor of the government for the amount of tax unpaid.

A motion for a new trial is now made, upon the ground that the court erred in refusing to permit the defendants to show that, on the 23d day of May, the collector seized as forfeited and took from the possession of the defendant, Barrowcliff, the manufacturer, some $20,000 worth of manufactured and raw tobacco.

The proposition, upon which the objection to the exclusion of the evidence in regard to the tobacco which was forfeited is based, appears to be this, that the collector had power under section 83 and section 84 of the revenue act (13 Stat. 259), to distrain upon this tobacco which was forfeited, and so collect the tax, but did not do so, and that there was therefore laches, which discharged the surety upon the bond in suit.

The proposition is unsound. Laches is not to be imputed to the government in such a case; and, assuming that there was neglect on the part of the collector in omitting to distrain, it would have no effect to work a discharge of the surety.

But I do not conceive that there was any neglect. Under the facts, both courses lay open to the government—to collect the tax by suing the bond, and by seizing the tobacco to punish the frauds with which the manufacturer was charged in the information.

It was entirely competent, therefore, if indeed, it was not required by duty, for the officers of the government to adopt both proceedings, as otherwise no punishment for the fraud could be inflicted.

I certainly know of no principle upon which the government could be held bound to waive its rights of forfeiture which had attached by reason of the frauds, in order to save sureties from a liability upon their bond which they knowingly assumed. The motion must be denied.

[2] [From 9 Chi. Leg. News, 308.]

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

Case No. 14,529.

UNITED STATES v. BARROWS et al.

[1 Abb. U. S. 351; [1] 10 Int. Rev. Rec. 86; 7 Phila. 609; 3 Pittsb. Rep. 151; 26 Leg. Int. 276; 1 Chi. Leg. News, 409; 16 Pittsb. Leg. J. 124.]

District Court, W. D. Pennsylvania. May Term, 1869.

INTERNAL REVENUE—TREASURY REGULATIONS.

1. A regulation of the treasury department, made in pursuance of an act of congress, becomes a part of the law, and is of the same force as if incorporated in the body of the act itself.

2. Under the internal revenue laws of July 13, 1866, § 94 [14 Stat. 128], and March 3, 1865, § 61 [13 Stat. 472], when oil is transported from one district to another, under a transportation bond, the duty is assessed and paid on any deficiency or reduction of the number of gallons received at the warehouse, from the number of gallons as stated in the bond at the place of shipment, less the per centum for leakage allowed by the treasury department. And this is so, although there has been an absolute loss by solar heat, or the action of the elements.

3. The law has provided a rule regulating the allowance for leakage, from which, however great the hardship, it is not the province of the courts to depart.

Mr. Schoyer, Jr., for defendants.
Mr. Carnahan, U. S. Dist. Atty.

McCANDLESS, District Judge. This is a case stated upon an oil transportation bond. On June 30, 1866, the defendants shipped by railroad from the Twentieth district of Pennsylvania to the Fifth district of New Jersey, ten hundred and eighty barrels, containing forty-five thousand three hundred and twenty-four gallons of refined oil, in good packages, and under legal permits and certificates from the proper authorities. Under like authority the oil was removed from the Fifth district of New Jersey to the bonded warehouse of Reynolds, Pratt & Co., in the Second district of New York, without inspection and gauging in the New Jersey district, with the same effect as if the Second district of New York had been the destination set forth in the permit and bond under which such transportation was made.

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

The oil was properly gauged and inspected in the bonded warehouse of Reynolds, Pratt & Co., on July 30, 1866. By this inspection there was found to be a loss of six thousand two hundred and sixty-four gallons. For the tax of twenty cents per gallon upon this quantity so lost, this action is instituted; the tax upon the residue of the forty-five thousand three hundred and twenty-four gallons having been properly settled and accounted for. The effect of continued extremely hot weather upon oil barrels, exposed for the length of time ordinarily required in transit from the Twentieth district of Pennsylvania to the Second district of New York, is to decompose their lining and open their seams. From the last of June to the close of July, 1866, the weather continued excessively hot. The loss of so much of the six thousand two hundred and sixty-four gallons as exceeds the quantity allowed for leakage, by the regulations of the department at Washington, arose from the effect of solar heat upon the barrels containing it.

The amount of actual leakage on oil removed in bond at the time of this loss, allowed by the regulations in pursuance of section 61 of the act of June 30, 1864, was not to exceed three and one-half per cent. on any distance exceeding five hundred miles. The distance from the Twentieth district of Pennsylvania to the Second district of New York is in excess of five hundred miles.

It is not disputed that an allowance of one thousand five hundred and eighty-six gallons, or three and one-half per cent. on forty-five thousand three hundred and twenty-four gallons, should be made for leakage; but it is claimed that there should be a deduction for the remaining four thousand six hundred and seventy-eight gallons, because the loss was occasioned by the effect of solar heat upon the article transported.

This is the question for our decision, and I have given to it all the consideration which the multiplicity of my judicial engagements and the demands upon my time would permit

Congress wisely encouraged the exportation of oil, for it has become an important element in regulating the balance of trade between the United States and foreign nations. Oil exported was exempt from taxation. If for sale or consumption in the United States it was subject to a tax of twenty cents per gallon, to be assessed and collected, and paid by the producer or manufacturer thereof, as is provided by section 61 of the act of July 13, 1866. By this section, as amended by the act of March 3, 1865, the oil may be removed, without the payment of the duty, under such rules and regulations, and upon the execution of such transportation bonds, or other security, as the secretary of the treasury may prescribe. Upon such removal, it must be transferred to a bonded warehouse, where it is again inspected and gauged, and "the duty shall be assessed and paid on any deficiency or reduction of the number of proof gallons (beyond such allowance for leakage as may be established by the regulations of the commissioner of internal revenue), received at the warehouses from the number of proof gallons as stated in the bond given at the place of shipment." Here, then, is a plain rule of computation, and the per centum of deduction being fixed by a regulation of the department, in conformity to an act of congress, becomes a part of the law, and of as binding force as if incorporated in the body of the act itself.

It is contended by defendants' counsel, in an argument of much ability, that the tax is upon the consumption. It is not upon the consumption, but upon the manufactured article. The government is not to ascertain whether it has been consumed, but whether it has been exported. If so, it is free. If not, it is subject to the tax of twenty cents per gallon. Fixing a maximum per centage for leakage was designed to prevent the possibility of frauds, by the withdrawal or abstraction of any portion of the oil during its period of transit. Such being the rule prescribed by competent authority, courts have no right to depart from it, even in case of absolute loss by the action of the elements. The government is not an insurer. The owner insures, and must take the responsibility. The simple inquiry is, has he complied with the condition of his bond? Has he produced to the collector of the Twentieth district of the state of Pennsylvania a certificate showing that such merchandise has been duly placed in the warehouse designated, from which it cannot be removed except for exportation, or upon payment of the tax, or has he paid the duties required by law?

It is wholly unnecessary to enter into a discussion as to the effect of solar heat upon refined oil, or as to the penetrating and permeating qualities of the liquid itself. It was precisely because of the operation of this agency that a rule was necessary to fix the allowance. In some cases there would be no leakage at all; in some, less than three and a half per cent.; in a majority of cases, about three and a half per cent., and in some cases much more. On what principle is a rule of law governing this subject to be relaxed and set aside, because there was extraordinary warm weather in June or July of a particular year? As was ably argued by the counsel for the government, the leakage in this case happened in the ordinary way, was produced by the ordinary causes, with the difference, that one cause, solar heat, was operating with more than ordinary power. The result was leakage, and the law, and the regulations of the department, do not authorize a distribution of leakage into ordinary and extraordinary as respects an abatement of taxes. The law calls the loss thus produced leakage, and has provided a rule regulating the allowance, from which, however great the hardship, it is not our

province to depart. Any other construction would not only open a wide door to fraud, but would practically nullify the regulation itself.

It follows that the defendants have no lawful claim to, or deduction for, the four thousand six hundred and seventy-eight gallons, by reason of its loss, caused by solar heat, and judgment must be rendered for the United States, for the sum of nine hundred and thirty-five dollars and sixty cents, with costs of suit. Judgment accordingly.

Case No. 14,530.

UNITED STATES v. BARRY.

[4 Cranch, C. C. 606.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

LARCENY — INDICTMENT — BANK NOTE — AMOUNT AND VALUE—COIN.

An indictment under the penitentiary act of the District of Columbia, for stealing a bank-note, must state the amount, as well as value of the note. "One hundred silver coins of the value of seventy-five dollars," is a sufficient description of the money stolen.

[Cited in Arnold v. State, 52 Ind. 285.]

The prisoner [Richard Barry] was convicted under the 9th section of the penitentiary act of March 2, 1831, of stealing "one bank-note of the value of twenty dollars; and one hundred silver coins of the value of seventy-five dollars." By that section of the act, it is enacted, "that every person convicted of feloniously stealing, taking, and carrying away any goods or chattels, or other personal property of the value of five dollars or upwards; or any bank-note, promissory note, or any other instrument of writing for the payment or delivery of money, or other valuable thing, to the amount of five dollars, or upwards, shall be sentenced to suffer imprisonment and labor," &c.

Mr. Hoban, for prisoner, moved in arrest of judgment: (1) That although the value of the bank-note is averred in the indictment, yet the amount of money thereby promised is not. It must appear to be a note for the payment of five dollars or upwards, in order to justify a sentence to the penitentiary. (2) That the expression "silver coins" is of too general import to support an indictment.

Mr. Hoban cited Rex v. Craven, 2 East, P. C. 601; Rex v. Milnes, Id. 602; Stewart's Case, 4 Serg. & R. 194.

Mr. Key, contra, cited 3 Chit. Cr. Law, 947, 973, 974a; 2 East, P. C. 497; 1 Chit. 235-237; Leigh's Case, 1 Leach, Crown Cas. 52; Grimes' Case, 2 East, P. C. 647.

THE COURT (nem. con.) was of opinion that the amount as well as value of the note ought to have been averred; but that the description, "one hundred silver coins of the value of seventy-five dollars," was sufficiently certain, and therefore refused to arrest the judgment.

The prisoner was sentenced to the penitentiary for three years.

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

Case No. 14,531.

UNITED STATES v. BARTLE.

[1 Cranch, C. C. 236.] [1]

Circuit Court, District of Columbia. June Term, 1805.

ASSAULT AND BATTERY—EVIDENCE IN MITIGATION —MOLITER MANUS.

1. In Virginia, upon the plea of not guilty to an indictment for assault and battery, evidence may be given to the jury in mitigation of the fine which they are to assess.

2. The carpenter and bricklayer who are building a house have a right to remove, gently, all persons who come into the building without authority, if they will not depart upon request.

Indictment for assault and battery on George Coryell.

C. Lee, for defendant [Samuel Bartle], asked the witness, Preston, whether he had heard Coryell use threats to break up and injure Bartle, or any prior quarrel, in order to discredit the witness Coryell, and to mitigate the fine, which, by the law of Virginia, is to be assessed by the jury.

Mr. Jones, the district attorney, objected, that it was not a justification, nor could be given in evidence in mitigation of the fine.

But THE COURT permitted the question to be asked.

THE COURT, at the request of the defendant's counsel, instructed the jury that if they should be of opinion, from the evidence, that Coryell, without right, came into the building on which Bartle was doing the carpenters' work, and upon being requested, refused to go out of the building, then Bartle had a right gently to put him out; and that if Bartle, under such circumstances, did gently put Coryell out, without any unnecessary violence, he was not guilty of an assault in so doing.

Mr. Jones moved the court to instruct the jury, that if Bartle came into the apartment where Coryell was, for the sole purpose of turning him out of the building, it was an assault.

But THE COURT (nem. con.) refused to give the instruction as prayed.

THE COURT was further of opinion that it was not necessary to prove that Coryell was interrupting the business, or impeded it any way, but that the possession was in the carpenter and bricklayer, and either of them had a right to order away all persons having no right to enter the building; and if they refused to depart, had a right to put them out without using any unnecessary violence.

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

Case No. 14,532.

UNITED STATES v. BARTLETT.

[2 Ware (Dav. 9) 17.] [1]

District Court, D. Maine. Dec. Term, 1839.

FISHERIES—BOUNTY—IMPROVIDENT PAYMENT—ACTION TO RECOVER—ENROLLMENT—OATH OF OWNER.

1. The enrollment of a vessel by a collector, without the oath of one of the owners having been previously taken and subscribed in conformity with an act of congress of Feb. 18, 1793, § 2 [1 Stat. 305], is void, and does not confer on her the rights and privileges of a vessel of the United States.

[Cited in The Henry, Case No. 6,373.]

2. A vessel thus enrolled is not entitled to claim the fishing bounty under the act of July 29, 1813, § 5 [3 Stat. 51].

3. If the bounty has been improvidently paid to a vessel so enrolled by the collector, it may be recovered back by the United States in an action for money had and received.

4. Money paid by an agent under a mistake of the legal obligation of his principal, may, it seems, be recovered back by the principal in an action for money had and received.

[Cited in People v. Fields, 58 N. Y. 505.]

This was an action of assumpsit, brought by the United States to recover back the amount of a fishing bounty, paid to the defendants, as owners of the schooner Gleaner, for the fishing season of 1834. The jury returned a special verdict. The verdict finds that the vessel was employed during four months, in the fishing season of that year, in the cod fisheries, and if, on the facts agreed upon by the parties, and to be taken as part of the finding of the jury, the court is of the opinion that she was a vessel duly qualified, according to law, to carry on the fishing business, then the jury find that the defendants never promised; but if, in the opinion of the court, she was not duly qualified as aforesaid, then the jury find that they did promise in manner and form as the plaintiffs have declared, and assess damages in the sum of $294.91. The agreed facts, which are to be taken as part of the finding of the jury, are in substance as follows: The schooner was enrolled at Thomaston, in the district of Waldoborough, on the 17th of May, 1834, and was then owned and continued to be owned during the whole of that year, by Elbridge G. Wellington, of Boston, in the district of Massachusetts, and George Bartlett and Knott Bartlett, both of St. George, in Maine district. The oath of ownership was not taken and subscribed by either of the owners during the year, but the oath touching the ownership was taken by John Bickman, the master, and the jury further found that enrollments in that office were occasionally made, as a matter of convenience, on the oath of the master only. The same day on which the enrollment was made, the deputy collector granted a license to the vessel to be employed in the cod fishery that season; and the license bond was given in the usual form by said Bickman. This license was surrendered by Bickman, August 29th of that year, and a new license taken out for the mackerel fishery, which was, October 24th, surrendered by Bickman, and another license taken out for the cod fishery. In each case the license bond was given by Bickman, the master. The last license was surrendered Nov. 24, 1834. The jury further found, that no agreement was made in writing between the skipper and the fishermen, except a blank agreement in print, which was signed by the fishermen, but not filled up. But it was proved by parol, if competent to be so proved, that a verbal agreement was made between the skipper and the crew, by which each man was to receive an equal share of the fish taken, in lieu of wages; and it was further proved, that in the fishing business it was frequently the case, that is, half the time or more, that the shipping paper was brought in not filled up, or was not filled up until the time was completed; and that no objection had been made on that account to the payment of the bounty. The bounty was paid to George Bartlett, Jan. 1, 1835.

Mr. Howard, for the United States, cited Act 1813, c. 34, §§ 5, 8 [2 Story's Laws, 1352, 1353; 3 Stat. 51, 52, c. 35]; Act 1819, c. 212 [3 Story's Laws, 1742; 3 Stat. 520]; Act 1793, c. 52, §§ 1, 2 [1 Story's Laws, 285; 1 Stat. 305, c. 8]; Act 1792, c. 45, § 4 [1 Story's Laws, 269; 1 Stat. 289, c. 1]; Act 1791, c. 102 [1 Story's Laws, 204; 1 Stat. 222]; U. S. v. Rogers [Case No. 16,189]; Johnson v. U. S. [Id. 7,419]; U. S. v. Hoar [Id. 15,373]; U. S. v. Lyman [Id. 15,647].

Fessenden & Deblois, for defendants, cited The Vrow Elizabeth, 5 C. Rob. Adm. 2; The Santissima Trinidad, 7 Wheat. [20 U. S.] 283; Act 1792, c. 45, § 5 [supra]; Act 1793, c. 52 [supra]; The Two Friends [Case No. 14,289]; Ohl v. Eagle Ins. Co. [Id. 10,472]; Heath v. Hubbard, 4 East, 110; Ratchford v. Meadows, 3 Esp. 69; Abb. Shipp. 67; U. S. v. Hathaway [Case No. 15,326]; Tappan v. U. S. [Id. 13,749]; Child v. Schoemaker [Id. 2,681]; [Wickham v. Blight, Id. 17,611]; Ketland v. Lebering [Id. 7,744]; The Harvey, 2 Hagg. Adm. 79.

WARE, District Judge. This suit is brought by the United States to recover back the amount of a fishing bounty alleged to have been unduly paid to the defendants on the schooner Gleaner, for the fishing season of 1834. The language of the act granting the bounty is, that from and after the last of December, 1814, there shall be paid, on the last of December, annually, to the owner of every vessel, that shall be duly qualified, agreeably to law, for carrying on the bank and other cod fisheries, and that shall have been actually employed therein at sea for the term of four months, at least, of the fishing season next preceding, for each and every ton of such vessel's burden, etc., a sum fixed by the law, provided that the allowance to

[1] [Reported by Edward Daveis, Esq.]

no vessel for a single season shall exceed $272, which is enlarged by the act of 1819, c. 212, to $360. Act 1813, c. 34, § 5; 2 Story's Laws, 1352 [3 Stat. 51].

The title of any vessel to claim the bounty, depends, therefore, upon two facts: First, on her being duly qualified, according to law, for carrying on the fisheries; and secondly, on her actual employment in the business for four months during the fishing season. The fact of her actual employment is found by the jury, but whether she was duly qualified or not the jury say that they are not advised, and they find the facts specially touching this point, and refer the question of law arising from them to the judgment of the court. The facts being found, the decision of the question depends on the proper construction of the license and registry acts. The act of Feb. 18, 1793, § 1, commonly called the "License Act," provides that vessels enrolled and licensed in pursuance of that act, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships and vessels employed in the coasting trade and fisheries." The second section provides, "that in order to the enrollment of any ship or vessel, she shall possess the same qualifications, and the same requisites, in all respects, shall be complied with, as are made necessary for registering ships or vessels by the act of December 31, 1792, and the same duties and authorities are given and imposed on the officers in relation to such enrollments, and the same proceedings shall be had in similar cases, touching such enrollments; and the ships or vessels so enrolled, with the masters or owners, shall be subject to the same requisites as are provided for vessels registered by virtue of that act." To determine, then, whether a vessel has been duly enrolled, so as to secure to her the privileges of an American vessel, it is necessary to examine the registry act. The provisions of that act, the non-compliance with which is supposed to vitiate the papers of this vessel, are found in the fourth section. That requires, "that in order to the registry of any ship or vessel, an oath or affirmation shall be taken and subscribed by the owner, or one of the owners, before the officer authorized to make the registry, declaring, according to his best knowledge and belief, the name of the ship or vessel, her burden, the time and place when and where she was built, etc., and enumerating all the particulars required by the second section of the act to entitle a vessel to be registered, and then provides that in case any of the matters of fact in the oath, which shall be within the knowledge of the person swearing, shall not be true, that there shall be a forfeiture of the ship, her tackle, etc., or of her value, to be recovered of the person by whom the oath is taken." And there is also a provision that if the master is within the district, he shall make oath to his own citizenship. In this case no oath was taken by either of the owners, but the vessel was enrolled on that of the master alone, in swearing to the same facts, which should be verified by the oath of an owner. It is very certain that the words of the law give no authority to the officer to grant a certificate of enrollment under such circumstances. The act expressly says, that in order to the registry of a ship, and the same is required for an enrollment, an oath shall be taken by the owner or one of the owners. The oath of the master is not required, except as to his own citizenship; and that may be dispensed with, provided he is not within the district, and that of the owner substituted in its stead. But no authority is given to the officer to substitute the oath of the master for that of the owner. It is clear, then, unless the construction of the act can be maintained, which will presently be considered, that the enrollment of the vessel was an improvident and unauthorized act. But it is also clear that the enrollment was not procured by any fraud or deceit, for the certificate on its face shows who the owners were.

Does an enrollment thus made by the proper officer, without any imputation of fraud or deceit on the part of the owners, but without a compliance with the requisites prescribed by the statute, clothe the vessel with the rights and privileges of a vessel of the United States? It is contended that it does; that the act of the officer, the only authorized agent of the plaintiffs, in a case free from fraud or collusion, is binding on the United States; and that papers thus obtained are conclusive evidence that the vessel is entitled to the privileges which the papers purport to grant.

The effect of this decision, it is plain, will be to render the provisions of the act, so far as the consideration of them is involved in the present controversy, merely directory. Such a construction appears to me to be wholly inadmissible. The first section of the act provides that vessels which shall be enrolled in pursuance of this act, and no others, shall be deemed ships or vessels of the United States, and entitled to the privileges of vessels employed in the coasting trade and fisheries. A vessel enrolled in pursuance of the act, is one enrolled in conformity with its directions and requirements. These are enumerated in the first eight sections of the registry act, and the ninth provides that, "the several matters hereintofore required having been complied with," the collector shall grant the certificate. It seems, at the first view, that the collector is not authorized to grant the certificate without a compliance with all the requirements of the act. Still, though the first section of the act declares that no other vessels than those enrolled in pursuance of the act, shall be entitled to the privileges of enrolled vessels, and the ninth section apparently exacts a compliance with all the requirements, previously to the issuing of the certificate, it may, perhaps, appear, on a critical examination of the act, that an omission

to comply with some of its directions, previous to the enrollment, will not absolutely vitiate and render void the ship's papers. This is, however, a question which it is not necessary to decide in the present case. And should it be conceded that some of the clauses in the first eight sections are essentially directory to the officers, a strict compliance with which is not absolutely indispensable to the validity of the ship's papers, it appears to me that the provisions of the fourth section cannot be admitted to be of that character. That section requires, in order to the registry of a ship, that an oath shall be taken and subscribed by the owner or one of the owners, verifying the matters therein stated. The matters of fact included in the oath, besides several others, are all those enumerated in the second section, as being essential to entitle a vessel to be registered, and it is provided that if any of the matters of fact, within the knowledge of the person swearing, are not true, there shall be a forfeiture of the vessel, in respect to which the oath is taken, or of her value, to be recovered of the person by whom the oath or affirmation is made. Besides, some of the facts, required to be sworn to, are of a nature not to be known by any but the owners; as whether any foreigner has a secret interest in the vessel, by way of trust or confidence. If the master's oath may be substituted for that of the owners, he can only swear according to his knowledge and belief. A secret trust may exist in a foreigner, without his knowing it; and the only way, in which that can be effectually guarded against, is by requiring the oath of the owners. It would be an entirely unjustifiable construction of this section, to hold it to be merely directory to the officer, as to the manner in which he is to execute his duty; and that it may be neglected by the owner, without any peril to his interest, provided the officer chooses from any cause to grant a certificate without requiring the oath, or to accept that of the master instead of the owners. But if any doubt could be raised as to the proper construction of this section of the act standing by itself, it would be removed by the fifth section. That requires, when papers are granted on the oath of one of the owners, that the other owners shall, within three months after, transmit to the collector, who granted the papers, a similar oath, or the papers shall be forfeit and void. If an oath of an owner can be dispensed with in the first instance, and valid papers granted without it, there would seem to be little reason in rendering them void, on a neglect by the other part-owners to transmit a similar oath.

But it is said, that while the license act requires the same qualifications of the vessel, and makes the same requisites necessary for the enrollment, as for the registry, of a vessel, it nowhere denounces the same penalties and forfeitures. This is true; but if the construction, now given to the act, be correct, this does not reach the difficulty of the defense of this action. This is not a suit for a penalty, but to recover back of the owner a sum of money alleged to have been unduly paid. The question is not whether the vessel has forfeited the privileges of an enrolled vessel, but whether, under this enrollment, she can have acquired them.

Another ground of argument urged in the defense is, that the enrollment having been regularly made, by the proper officer, without any imputation of fraud on the part of the owners, the certificate is conclusive proof that the vessel is entitled to the privileges which it purports to grant, and that the act of the officer, being the authorized agent of the plaintiffs, is conclusive upon them. It is true that in some cases a ship's papers are conclusive, and a party is not at liberty to contradict them. They are conclusive, in questions of prize, against the claimants, to show the national character of the ship. 5 C. Rob. Adm. 2; The Santissima Trinidad, 7 Wheat. [20 U. S.] 283. They are conclusive, also, against the insured, in a suit on the policy, to prove the ownership to be as the papers represent it. Ohl v. Eagle Ins. Co. [Cases Nos. 10,472, 10,473]. A party will not be permitted to deny the verity of documentary evidence, which he has himself procured, and the benefit and protection of which he has enjoyed. But in neither of these cases would the opposite party be concluded by the ship's papers. They would be allowed to disprove their truth by every species of legal evidence. If the grant of this certificate had been the personal act of the plaintiffs, certainly they would not easily be allowed to deny its validity, issued as it was with a full knowledge of the facts. But it is no otherwise their act than as it was done through the instrumentality of their agent. The law of agency is well settled. The act of the agent is not considered as the act of the principal, except when it is within the limits of his authority. If he transcends his authority or violates his instructions, the principal may repudiate the act as void, unless, from the course of dealing, those who treat with the agent are justified in inferring that he is clothed with larger powers or intrusted with a wider discretion. But in this case the authority of the agent and his instructions are found in the public laws, which the defendants, like all other persons, are bound to know. There is, therefore, no pretense for saying, that the act of the agent is binding on the principal, unless it is fairly within the limits of his authority. So that we are brought back to the question, whether the officer was authorized to make the enrollment without the oath of one of the owners, or, in other words, whether the provisions of the fourth section of the registry act are merely directory to the officer, to regulate his discretion in the execution of his trust, or whether a compliance with them is an indispensable prerequisite to the validity of the enrollment.

Another point of the defense, strongly insisted upon at the hearing, turns rather upon the form of the action. This is an action for money had and received, which, it is argued, is a strictly equitable action, and lies only when a party has received money, which, ex æquo et bono, he ought to refund; that when a party is, by the general principles of equity and good conscience, entitled to retain the money, it cannot be recovered in this form of action, though the party might not have been able, upon the strict principles of law, to prevail in a direct suit for it. Now it is said that this money was paid upon a contract, or quasi contract, between the parties; that the plaintiffs, by the law of 1813, promised to the owners of any duly qualified fishing vessel, that should be employed in the fisheries during four months of the fishing season, a certain sum of money; that the bounty constitutes one of the substantial inducements to the fishermen to engage in the business; that the object of the law is, to encourage the fisheries, as a nursery of seamen, for the general interest of the country, and to promote the navigating interest, by furnishing employment for American shipping; that this vessel, being American built and owned, and having been actually employed the time required, by American seamen, the public policy and objects of the law are satisfied. The terms of the contract having been substantially complied with on the part of the defendants, equity, it is said, will relieve them from an inadvertent omission to comply with conditions, that are merely formal and do not enter into the essence of the consideration.

The first difficulty, which this argument has to encounter, is that it assumes as a fact, that this vessel possessed all the intrinsic qualities which entitled her to be enrolled as an American vessel. This may be true, but it is a fact not found by the jury, and cannot be presumed by the court. The question is, what judgment shall be rendered on this verdict; and upon this question the court can look to no other facts, than what are apparent upon its face. If the fact, then, were as the argument assumes it to be, it ought to have been specially found by the jury. But supposing this difficulty overcome, it would not, in my opinion, relieve the defendant's case. If the construction which has been given to the law is correct. that is, if the oath of the owner is an indispensable prerequisite to the validity of the enrollment, then no bounty was due. A vessel with papers which are void, is like a vessel without papers. She is entitled to none of the privileges of an American ship, wherever she may have been built, or however owned and navigated. In the eye of the law she is considered as a foreign vessel, and can claim only the privileges of a foreign vessel. And such a vessel can, under no circumstances, entitle herself to the fishing bounty. The payment was, therefore, clearly made under a mistake, and the action for money had and received is the appropriate action to recover back money so paid. It may, however, be objected, that if it was paid by mistake, it was a mistake of law and not of fact; and that money paid under a mistake of law, merely, is not subject to repetition. The principle, when stated in general terms, and as a universal proposition, is not, perhaps, entirely free from difficulty. In the civil law, opinions of great authority are ranged on opposite sides of the question. The framers of the French code, with all the authorities of the civilians before them, decided against the principle, and allow money paid under a mistake of law to be recovered, when the payment is supported by no moral or honorary obligation, and can be ascribed to no other cause but a mistake by the party of his legal obligation. Code Civile, .1377; Toullier, Code Civile Francais, vol. 6, No. 75; Ib. vol. 11, No. 63. In the common law, the authorities are not entirely agreed, though the preponderance of authority is against the recovery back of money in such a case. 1 Story, Eq. 121, note 2. But however it may be when the money is paid by the supposed debtor, no case, that I am aware of, has gone so far as to decide that an unauthorized payment by an agent, from an erroneous opinion of the legal obligation of his principal, shall be binding on the principal, and that he cannot recover back money thus unduly paid. See Story, Ag. § 435; Elliot v. Swartwout, 10 Pet. [35 U. S.] 153.

Upon the whole, my opinion is, that the enrollment of the vessel by the officer, without the oath of one of the owners previously taken and subscribed in conformity with the directions of the act of December 31, 1792 (section 4), was void, and did not confer on the vessel the privileges of a vessel of the United States, and consequently she could not be entitled to the fishing bounty; and that the bounty, having been improvidently paid, may be recovered back by the plaintiffs, in an action for money had and received. Judgment must, therefore, be entered for the plaintiffs for the sum found by the jury. This view of the case being decisive, renders it unnecessary to consider the other question arising on the verdict.

Case No. 14,533.

UNITED STATES v. BARTON.

[1 Cranch, C. C. 132.] [1]

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

WITNESS—COMPETENCY—MANUMITTED SLAVES.

Manumitted slaves are good witnesses for or against a free mulatto in Washington county.

[Cited in U. S v. Mullany, Case No. 15,832.]

Indictment for stealing a handkerchief. Upon the prisoner being brought to the bar, he appeared to be a mulatto.

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

Two black witnesses, manumitted, were produced by the United States. Objection overruled and witnesses admitted, after reading the acts of assembly of Maryland, 1717, c. 13, and 1796, c. 77.

Barton was indicted as a freeman.

Case No. 14,534.

UNITED STATES v. BARTON.

[Gilp. 439.] [1]

District Court, E. D. Pennsylvania. Nov. 29, 1833.

PERJURY—OATH TAKEN BY DEPUTY COLLECTOR—AUTHORITY TO TAKE.

1. Where an oath, required to be administered by a collector of the customs, is falsely taken before a legal deputy of the collector, acting under the provisions of, and in the cases required by the act of March 2, 1799 [1 Stat. 644], it may be sufficient ground for an indictment for perjury.

[Cited in Spring v. Russell, Case No. 13,261.]

2. Under the provisions of the act of March 3, 1817 [3 Stat. 396], the deputy collector is not a mere agent, but is a permanent officer of the customs, and may exercise and perform the functions, powers and duties of the collector.

[Cited in Schmaire v. Maxwell, Case No. 12,460; Falleck v. Barney, Id. 4,625; Platt v. Beach, Id. 11,215; Fifty Thousand Cigars, Id. 4,782; Chadwick v. U. S., 3 Fed. 753; Frelinghuysen v. Baldwin, 12 Fed. 397.]

3. Where in acts subsequent to that of March 3, 1817, the collector of the customs may administer an oath or perform any other act, it was unnecessary to authorise the deputy collector, for that follows of course.

On the 13th November, 1833, a warrant was issued by Judge HOPKINSON for the arrest of Henry Barton, charged on oath with swearing falsely, in a case where an oath was required from him, as the consignee of certain goods, wares and merchandise imported into the port of Philadelphia from a foreign place. On the 29th November, the defendant was brought up for hearing, and the following facts were given in evidence. On the 9th July, 1832, the ship Arab, Capt. Ball, arrived at this port, having on board, among other things, two casks of hardware, consigned to the defendant. On the 18th August following, he entered these goods at the custom house, and at the time of entry produced an invoice of them, which was marked at the time by the appraisers, and identified on this hearing. Annexed to the entry was the following oath of the defendant, made pursuant to the provisions of the fourth section of the act of 1st March, 1823. "I, Henry Barton, do solemnly and truly swear, that the entry now delivered by me to the collector of Philadelphia, contains a just and true account of all the goods, wares and merchandise imported by or consigned to me, in the ship Arab, whereof Ball is master, from Liverpool; that the invoice which I now produce contains a just and faithful account of the actual cost of the said goods, wares and merchandise, of all charges thereon, including charges of purchasing, carriages, bleaching, drying, dressing, putting up, and no other discount, drawback or bounty but such as has been actually allowed on the same; and that I do not know nor believe in the existence of any invoice or bill of lading other than those now produced by me, and that they are in the state in which I actually received them. And I do further solemnly and truly swear, that I have not, in the said entry or invoice, concealed or suppressed any thing whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise; and that if, at any time hereafter, I discover any error in the said invoice, or in the account now produced of the said goods, wares and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district. So help me God. (Signed) Henry Barton. Sworn this 18th August, 1832, before me, J. K., Dy. Collector." Mr. John Kern, the deputy collector of the port of Philadelphia, testified, that this oath was administered by him to the defendant at the custom house, at the time of entry, and marked by him with his initials at the same time. Evidence was then produced, on the part of the United States, to show that the invoice, exhibited by the defendant and left at the custom house, was not in fact the original invoice received with the goods, nor one containing a just and faithful account of their actual cost; that it was made up here, after the arrival of the goods, by a person in the employment, and with the knowledge of the defendant; and that although the list of the articles was copied from the original received from Liverpool, yet the prices annexed were considerably altered.

Mr. Meredith, for defendant.

Reserving for another stage of this case, all remarks on the sufficiency of the testimony and the truth of the allegations, there is yet a fatal objection to these proceedings against the defendant. On legal grounds, he cannot be held to bail to answer this charge, for no evidence has been given of an offence punishable by the statutes of the United States. It is unnecessary to say that Henry Barton cannot be prosecuted here for perjury at common law; an indictment against him can only be sustained, if he has violated the provisions of an act of congress. This, however, he has not done. The fourth section of the act of March 1, 1823 [3 Story's Laws, 1882; 3 Stat. 730], provides, "that in all cases where goods, wares or merchandise shall have been imported into the United States, and shall be entered by invoice, one of the following oaths, according to the nature of the case, shall be administered by the collector of the port, at the time of entry, to the owner, importer, consignee or agent, in lieu of the oath now prescribed by law in such case." The form of an oath, similar to that taken by the

[1] [Reported by Henry D. Gilpin, Esq.]

defendant, is then given. In this case the oath was administered by the deputy collector, an officer in whom no such power is any where vested. The power is limited expressly to the collector. The various laws referring to the appointment and duties of the deputy, never confer this upon him. The twenty-second section of the act of March 2, 1799 [1 Story's Laws, 592; 1 Stat. 644], authorises the collector to exercise the duties of his office by deputy "when sick or necessarily absent." If even this provision could extend to duties designated by future laws, yet here no such necessity or absence has been shown; on the contrary, it has been the usual practice for the deputy collector always to administer these oaths. The ninety-fifth section of the same law is only applicable to similar cases of necessity or absence. The seventh section of the act of March 3, 1817 [3 Story's Laws, 1650; 3 Stat. 397], which authorises the appointment of deputy collectors, gives them no authority to administer oaths, though it recognises them as officers of the customs. When the act of March 2, 1821 [3 Story's Laws, 1811; 3 Stat. 616], was passed, which does authorise deputy collectors to administer an oath verifying a manifest, it expressly confined the power to deputy collectors residing in districts adjacent to the boundary lines of the United States; it confers no such authority on deputies residing in sea-ports. Finally; when the act of March 1, 1823, is passed, although the deputy collector has become a legal and recognised officer of the customs, this important duty is intrusted to the collector alone. The courts cannot intrust it to any other officer than the law has seen fit to do. Of course, they cannot make an act criminal which was never contemplated, much less forbidden by any statute.

Mr. Gilpin, U. S. Dist. Atty.

The act of congress of March 1, 1823, requires every importer or consignee to enter his goods and to produce, at the time of entry, the original invoice received by him. The law evidently refers to and contemplates the exhibition of an invoice received from abroad with the goods. To verify it as such an instrument, it obliges the importer to swear, at the time, that it is the only invoice received by him, and that it contains a just and faithful account of the cost of his goods: to make this obligation more explicit, it sets forth in words the exact oath which is to be taken. The eighteenth section of the act of April 30, 1790 [1 Story's Laws, 87; 1 Stat. 116], declares that if any person shall wilfully and corruptly commit perjury, in any deposition taken pursuant to the laws of the United States, he shall, on conviction, be punished; and the thirteenth section of the act of March 3, 1825 [3 Story's Laws, 2002; 4 Stat. 118], which more particularly prescribes and defines offences against the United States, declares that if any person, in any case, matter, hearing or other proceeding, when an oath or affirmation shall be required to be taken or administered, under or by any law of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly swear or affirm falsely, he shall be deemed guilty of perjury, and on conviction be punished accordingly. In this case the facts have been established beyond contradiction. An entry was made at the custom house by the defendant; he produced at the time a certain invoice; he subscribed and swore to a declaration, in the very words required by the law, that the invoice in question was the original one received by him; and it has been proved that it was not that instrument, but one made for the occasion by a person in his employment and with his knowledge. To meet this state of the law and facts, one ground alone is taken on behalf of the defendant, which is, that he is not guilty of perjury, because the oath taken by him was not administered by the collector; and that a deputy collector has no authority to administer it. To this it is replied, in the first place that the facts proved are sufficient to hold the defendant to bail; and that the objection will come up properly on his indictment, not on his arrest. But in the next place, the offence, as proved, is clearly a case of perjury; it is a false oath knowingly taken in a matter arising under a law of the United States. By the ninety-fifth section of the act of March 2, 1799, it is expressly declared that "all matters directed to be done by the collector may be done by the person authorised to act in his stead." And by the seventh section of the act of March 3, 1817, which is made perpetual by the fourth section of the act of May 6, 1822 [3 Story's Laws, 1848; 3 Stat. 681], deputy collectors are expressly declared to be officers of the customs; not mere deputies, to act in cases of necessity or absence, but permanent officers, authorised at all times "to act in the stead of the collector," as they might occasionally and incidentally do, under the old law. Now the power to administer this oath is no more a power specially given to the collector than all his other powers; consequently it falls within the duty of his deputy, as much as they do. In exercising it he executes a legal authority, and the act becomes in all respects a matter arising under a law of the United States.

Mr. Scott, for defendant, in reply.

The United States are bound to establish that an oath was taken by the defendant; that it was false in fact; and that it was administered by a person who had a right to administer it. Every circumstance and fact necessary to give authority to such person, must be shown in this stage of the cause; otherwise there is not even a prima facie case against the defendant, or any just ground for holding him to bail. The oath that was administered, and which is exhibited in evidence, is wrong in point of form. It appears

on its face to be taken before the deputy collector, when that prescribed and set out in the act of congress, is to be taken before the collector himself. The governing law on the subject, is the original act of March 2, 1799, which, in its twenty-first section, points out with great precision the duties and powers of the collector, and in that which follows, those of his deputy in case of his absence or sickness. In the thirtieth and thirty-sixth sections it gives the forms of oaths to be taken in certain cases; it prescribes the collector as the officer by whom they are to be administered; and it designates him, or a judge of the United States, or a judge of some state court of record, as the person, before whom an importer is to verify his entries. It is thus apparent that the law regarded this power as one of peculiar trust; not such as falls within the province of an ordinary deputy; not one belonging as a matter of course to every officer of the customs. In 1821, by the first section of the act of March 2d, a deputy collector is, for the first time, authorized to administer such an oath; but it is limited to the exigency of the case, it is confined to deputies along the Canada frontier, who must be numerous, and of necessity exercise this power to prevent extensive frauds. The express authority thus given in a particular case, is a proof that it was not considered as implied by or incidental to the office, as previously constituted. Thus, then, the law stood in 1823, when the oath alleged to be violated by the defendant was prescribed; at this time deputies were in existence; they were officers known to the law; a power of administering oaths had been conferred on them in a special case; yet in a law very elaborately drawn up it is not again extended to them; such an omission would restrain any general power if it had been given before; but when, as we have seen, it was not previously conferred, the present want of it is conclusive proof that there was no intention to authorize it by implication.

HOPKINSON, District Judge. By the twenty-second section of the act of March 2, 1799 (1 Story's Laws, 592 [1 Stat. 644]), the collector, in cases of occasional and necessary absence, or of sickness, and not otherwise, may exercise and perform his functions, powers and duties by deputy, duly constituted under his hand and seal; and he is to be answerable for the acts of this deputy. This deputy is not a permanent officer; his appointment is for the necessity or occasion which called for it, and terminates with it. He is the mere personal substitute of the collector; appointed by him, in the cases authorized by the law. The nature and manner of the appointment shows this: and it is made more manifest by what follows; that, in case of the disability or death of the collector, his duties and authorities shall devolve upon his deputy, "if any there be at the time;" which implies, that there was no such permanent office or officer as a deputy. Under this law, the question would arise, whether as there were cases and circumstances in which a deputy of the collector might perform his functions, including the administering of an oath, it would not be enough, on this hearing, to show that the person who administered the oath, was the deputy of the collector, and refer it to the evidence to be produced at the trial, whether the facts existed which gave him authority to do so.

This case, however, stands on other, perhaps on stronger ground. By the seventh section of the act of March 3, 1817 (3 Story's Laws, 1650 [3 Stat. 397]), every collector "shall have authority, with the approbation of the secretary of the treasury, to employ, within his district, such number of proper persons, as deputy collectors of the customs, as he shall judge necessary, who are hereby declared to be officers of the customs." The deputy, then, is no longer a mere agent or substitute of the collector, to be appointed from time to time, as the necessity may arise, from the absence, sickness or disability of the collector, but he is a constituted, a permanent officer of the customs, to be appointed with the approbation of the secretary of the treasury. What, then, are his powers? Generally speaking, a deputy, without any limitation of his authority, would have the authority of the principal. When the law creating the appointment and office has imposed no restrictions, we can put none: we must suppose that, as the permanent deputy is the substitute for the temporary officer authorised by the law of 1799, he must have the same powers and duties; that is, he may exercise and perform the functions, powers and duties of the collector.

The suggestion that authority to appoint deputies is given only to the collectors of districts adjoining the Canada frontier, has no support, either from the words of the law, its obvious policy, or the practice under it. The act declares that "every collector of the customs" shall have this authority; and every collector has used and exercised it from the passage of the law. When, in subsequent acts of congress, it is declared, that the collector may administer an oath, or perform any other act or duty, it was unnecessary to add, "or the deputy collector," for that followed of course, if the construction now given to the act of 1817, is correct. If, on the trial, it shall be thought advisable to give this question a more thorough examination, an opportunity will be afforded to do so.

Ordered, that the defendant, Henry Barton, enter into a recognizance, with sufficient sureties, in the sum of one thousand dollars, conditioned for his appearance at next April sessions of the circuit court of the United States.

Case No. 14,535.

UNITED STATES v. BASCADORE.

[2 Cranch. C. C. 25.] [1]

Circuit Court, District of Columbia. July Term, 1811.

CHEATING AT CARDS—FINE AND IMPRISONMENT.

Indictment for cheating at cards. Verdict, guilty. The jury assessed the fine at five times the value of the loss, viz., 37½ dollars.

THE COURT added six months' imprisonment, under the acts of assembly of Virginia of December 8, 1792, § 9, and of December 1, 1789, § 2, pp. 47, 176.

Case No. 14,536.

UNITED STATES v. BASCADORE.

[2 Cranch, C. C. 30.] [1]

Circuit Court, District of Columbia. Nov. Term, 1811.

CRIMINAL LAW—EVIDENCE—CONFESSION.

The confession of a prisoner, taken upon oath, cannot be used against him upon his trial.

Indictment for burglary.

The attorney for the United States, offered to prove by Mr. Faw, a justice of the peace, that the prisoner sent for him to come to the gaol, where the prisoner confessed the fact and named his associates. This confession was taken upon oath, as it charged the accomplices.

THE COURT, (nem. con.) upon the authority of McNally, p. 47, rule 12, rejected the testimony, no goods having been found in consequence of the confession. The statute of Phillip and Mary does not say whether the confession should be upon oath or not. From the silence of the act in that respect the judges have drawn the inference that the confession is not to be upon oath; and it is said that policy forbids the using of such declarations against the prisoner.

Case No. 14,537.

UNITED STATES v. BASS.

[Brunner, Col. Cas. 418; [2] 4 City H. Rec. 161.]

Circuit Court, D. New York. 1819.

PIRACY—FOREIGN COMMISSION AS A DEFENSE.

It is a sufficient defense to an indictment for piracy that the defendant, an American citizen, show a commission from a foreign government, though issued in blank, and afterwards filled up by the person intr isted with it.

The prisoner was indicted under the eighth section of the act of congress, passed in 1790 (1 Gord. Dig. p. 62 [1 Stat. 113]), for that he, being a citizen of the United States, to wit, of Richmond, in the state of Virginia, on the 15th day of June, 1818, with force and arms, upon the high seas, to wit, off the Peak of Pico, out of the jurisdiction of any particular state, then being on board a certain schooner or vessel then belonging and appertaining to a certain citizen or citizens of the United States to the jurors unknown, did piratically and feloniously set upon, attack, board, break, and enter a certain merchant ship or vessel called the San Joao Baptista, a ship of certain persons to the jurors unknown, and did assault certain mariners, whose names are to the jurors unknown, and did put them in corporal fear and danger of their lives, and the said vessel, her tackle, apparel, and funiture, of the value of twenty thousand dollars, a quantity of sugar in boxes, of the value of twenty thousand dollars, and a quantity of coffee in bags, of the value of one thousand dollars, being on board said vessel, the goods and chattels of persons unknown, in the care and possession of said mariners, did piratically and feloniously steal, take, and carry away, against the peace, etc., and contrary to the form of the statute.

Mr. Tillotson, Dist. Atty., and Hoffman, Bunner, and Stoughton, for the United States.

D. B. Ogden and J. K. Scott, for prisoner.

Mr. Tillotson opened the case on behalf of the United States.

Joseph Smith, a witness on behalf of the prosecution testified, that in the month of April, 1818, he was at the five islands in the West Indies, which islands are dependent on St. Bartholomews. The witness, in the capacity of a clerk, was on board a vessel called the Republicana, commanded by Captain Chase; and a schooner under American colors, then without a name, commanded by the prisoner, arrived there, and after lying there a few days, the prisoner came in company with Captain Mason on board the Republicana, and Mason applied to Captain Chase for a copy of the commission of Artegas, under which the Republicana sailed. By the direction of Chase the witness made a copy of the commission, and signed it with the name of Artegas, but did not affix a seal like that on the original. This copy was delivered by Captain Chase to Mason, and an agreement was then made between them, but not in presence of the prisoner, that Mason should allow Chase ten per cent on all captures which might be made. The witness sailed from the five islands in the Republicana to St. Barts; and, in the month of October or November following, saw the prisoner there, who came as a passenger in the American brig Edward from Baltimore. The witness having heard from Captain Chase and Captain Clement Catherel, who, on the decease of Chase, took command of the Republicana, that the prisoner had refused to pay the ten per cent, had a conversation with him on the subject, when he did not deny the agreement, but said that Captain Mason would not pay the ten per cent, and that it was all privateering. The prisoner admitted to the witness that he commanded the Constantia, that he had been on a cruise two months,

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

[2] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

and had, under the commission and colors of Artegas, captured the San Joao Baptista, a Portuguese ship. The witness understood from the crew that the vessel which came to the five islands under American colors was called the Constantia.

John I. Sickels, on being sworn, testified, that at the office of Mr. Stoughton, in which the witness was a clerk, the prisoner, about the time he was arrested and brought before Judge Livingston, admitted to the witness that he, the prisoner, was an American citizen, of Richmond, Virginia; that in June, 1818, he commanded the Constantia, which he purchased as a prize in the West Indies for six hundred dollars; and that he captured the Joao Baptista and sent her into St. Barts as a Portuguese vessel, and not as a prize.

The prosecution having rested, the counsel for the prisoner submitted to the court whether the cause ought to go to the jury; inasmuch as the only evidence against the prisoner, relative to his capturing the vessel, was derived from his confession which taken together amounts to this, that he captured her under a good commission. The confession cannot be separated, but must be taken together.

The counsel for the prosecution contended that the facts in the case, independent of the confession, fully supported the proposition that he captured the vessel under the commission forged by Smith; and that although the rule relative to a confession was that the whole should be heard, yet the whole is not to be believed. The court decided that there was sufficient testimony adduced to warrant the prosecution in resting the case.

The counsel for the prisoner hereupon opened the defense and produced a commission to the prisoner as a lieutenant in the navy of Artegas, dated 15th November, 1817; and also a commission for his vessel, the Constantia, together with instructions, purporting to have been signed by Artegas, and sealed. These were dated in April, 1818.

Adam Pond, on being sworn as a witness for the prisoner, testified that he was acquainted with the signature and seal of Artegas, and was fully confident, though he did not see the commissions executed by that chief, that they were of his seal and signature. In the month of January, 1818, the witness was at the office of Mr. Halsey, the American consul at Buenos Ayres, and saw these commissions, signed and sealed, pass through his hands and his office, as the agent of the government of Artegas. The witness then commanded a Buenos Ayres vessel, and that government was at war with Artegas. In the month of February the witness, having received the commissions from Halsey, with the name of the vessel, the Constantia, filled in, and the name of the captain and number of guns left blank, but with directions from him to fill them as occasion should require, proceeded from Buenos Ayres in a vessel called the Serapo, and arrived at the five islands in April; and on the first or second of May, delivered the commissions to the prisoner, who agreed to allow the witness twelve and a half per cent on all captures made by the schooner, which he said he had then lately purchased. Previous to the arrival of the witness, the prisoner had procured a copy of a commission from Captain Chase, under which he was about to sail; but the witness having a genuine commission, the prisoner received it; and on his arrival at St. Barts, the witness saw the same commission on board of his vessel.

The counsel for the defendant here rested, and the counsel for the prosecution submitted to the court whether an American citizen has a right to enter into the service of a foreign power, and make captures on the high seas of vessels belonging to another power, at amity with the United States. And, also, whether this government of Artegas, a government of but a day, could, consistent with the laws of nations, issue blank commissions under the agency of a consul of the United States at Buenos Ayres.

LIVINGSTON, Circuit Justice, in the decision of the court, said, that he was aware that many abuses have existed and still do exist in relation to captures made of Spanish and Portuguese vessels, by color of authority emanating from the governments of the independent provinces in South America. With regard to the question whether an American citizen could enter into foreign service, and make captures of vessels belonging to a power at amity with the United States, it was sufficient to say that this has not been prohibited by any act of congress. And with regard to the question relative to the sufficiency of blank commissions, it was well known that Mr. Genet, while minister from the French republic to the government of the United States, pursued the same practice, to a considerable extent. Here the principal question is, whether this commission, so put on board this vessel by an agent of the Artegas government, is to be considered a nullity. In the opinion of the court, in a case of life or death, this commission is sufficient to exculpate the prisoner from the charge laid in the indictment.

The jury immediately acquitted the prisoner.

Case No. 14,538.

UNITED STATES v. BASSETT.

[Hoff. Land Cas. 112.] [1]

District Court, N. D. California. Dec. Term, 1855.[2]

MEXICAN LAND GRANT—GENERAL GRANT.

The validity of claims under the Sutter general title, affirmed in Hensley's Case, No. 33.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[2] [Reversed in 21 How. (62 U. S.) 412.]

[This was a petition by Nathaniel Bassett, claiming the Rancho Los Coluses, for a confirmation of his claim.]

Claim for four leagues of land in Butte county, confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

E. O. Crosby, for appellees.

HOFFMAN, District Judge. The original grantee in this case was one of those who petitioned Governor Micheltorena in 1844, and whose lands were granted in the general grant dated December 22d, 1844. The validity of this grant has been already passed upon by this court in the case of U. S. v. Hensley [1 Black, 35], and as the grantee in this case is proved to have been one of those whose petition was favorably reported on by General Sutter, and to whom the latter caused to be delivered a copy of the general grant, the claim clearly falls within the principles decided in that case. The grantee is also shown to have occupied and cultivated his land in 1844 under the provisional order or permission granted by the governor. No objection is made to the confirmation of this claim on the part of the United States. It was unanimously confirmed by the board, and we see no reason for reversing their decision. A decree of confirmation must therefore be entered.

[Upon an appeal to the supreme court, the above decree was reversed, and the cause was remanded to this court, with directions to dismiss the petition. 21 How. (62 U. S.) 412.]

Case No. 14,539.

UNITED STATES v. BASSETT.

[2 Story, 389;[1] 6 Law Rep. 201.]

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

STATUTES — INTERPRETATION — CLERK OF COURT — COMPENSATION — CLERK OF DISTRICT AND OF CIRCUIT COURT.

1. Statutes are to be interpreted so as to give effect to all the words therein, if such an interpretation be reasonable, and be neither repugnant to the provisions nor inconsistent with the objects of the statute; but the rule is otherwise, if such an interpretation require the introduction of new provisions and clauses to render it sensible or practicable.

[Cited in Braithwaite v. Cameron (Okl.) 38 Pac. 1086; Chadwick v. Earhart, 11 Or. 389, 4 Pac. 1181; Clay v. Pennoyer Creek Imp. Co., 34 Mich. 211; Emery v. Hobson, 63 Me. 36; State v. Baker, 25 Fla. 598, 6 South. 447; U. S. v. Averill, 4 Utah, 416, 7 Pac. 530.]

2. By the act of congress of May 18, 1842, c. 29 [5 Stat. 475], where the offices of clerk of the district court and of the circuit court are held by the same person, he is entitled to a compensation not exceeding thirty-five hundred dollars as district clerk, and also to a compensation not exceeding twenty-five hundred dollars as circuit clerk, per annum.

[1] [Reported by William W. Story, Esq.]

3. But the fees of the two offices are to be kept distinct, and if the fees of either do not amount to the maximum fixed by the act, the deficiency should be placed to the account of the clerk, and cannot be made up from any excess in the fees of the other court.

4. Thus, where the two offices are held by one person, and his fees as district clerk amount to more than thirty-five hundred dollars, and his fees as circuit clerk to less than twenty-five hundred dollars, he is entitled to the first mentioned sum as district clerk, and to the actual fees as circuit clerk, and no more.

This was an amicable suit, brought by the United States, to recover a balance, supposed to be due to the plaintiffs from [Francis Bassett] the defendant, as clerk of the district and circuit courts of the United States for the Massachusetts district, upon his return, made to the secretary of the treasury, on January 1st, 1843, pursuant to the act of congress, passed May, 1842, making appropriations for the civil and diplomatic expenditures of government for the year 1842.

The return of the defendant to the treasury department was as follows:

Account of Fees Received and of Amounts Paid for Clerk Hire by the Clerk of the District and Circuit Courts of the United States, Massachusetts District, from July 1st, 1842, to January 1st, 1843.

District Court—June Term, 1842.		
Per diem 18 days	90 00	
49 Admiralty cases	218 00	
13 Common law cases	24 50	
3 Criminal examinations	20 00	
Copy-rights	97 50	
Miscellaneous matters	13 00	
		$ 463 00
September Term, 1842.		
Per diem 20 days	100 00	
52 Admiralty cases	217 00	
11 Common law cases	48 00	
Copy-rights	99 50	
Miscellaneous matters	16 00	
		480 50
December Term, 1842.		
Per diem 15 days	75 00	
39 Admiralty cases	159 00	
11 Common law cases	31 00	
5 Criminal cases	60 00	
Copy-rights	60 00	
Miscellaneous	35 00	
		420 00
Circuit Court—May Term, 1842.		
Per diem 7 days	35 00	
5 Cases in equity	73 00	
5 Cases at common law	24 90	
Miscellaneous	25 00	
		157 90
October Term, 1842.		
Per diem	110 00	
29 Cases in equity	102 54	
40 Cases at common law	96 00	
10 Criminal cases	120 00	
Miscellaneous	73 00	
		501 54
Fees received in bankrupt cases		7,118 00
		$9,140 94
Amount paid for clerk hire as by schedule marked "A," annexed	2,985 08	
Maximum compensation to clerk	3,000 00	
		5,985 08
Balance on hand		$3,155 86

Schedule A.

Amounts Paid for Clerk Hire from July 1st, 1842, to January 1st. 1843.

Paid to James B. Robb	750 00
Paid to Elisha Bassett	500 00
Paid to H. A. Frost	300 00
Paid to F. Warren	300 60
Paid to Henry F. Starkey	300 00
Paid to T. M. H. Lyon	290 70
Paid to James Amos	277 93
Paid to James Boyle	266 45
	$2,985 08

Upon this return the first auditor of the treasury reported as follows:

Treasury Department,
First Auditor's Office, 2d June, 1843.

I have examined and adjusted an account of official receipts and expenditures of Francis Bassett, clerk of the district and circuit courts of the United States for the district of Massachusetts, commencing July 1st, and ending December 31st, 1842, under the civil and diplomatic appropriations act of 18th May, 1842, and find that he is charged as follows:

To amount of fees received by him during said period	$9,140 94
	$9,140 94

I alsc find that he is entitled to the following credits, viz ·

By amount of compensation to his deputies	2,985 08
By maximum compensations for the half year	1,750 00
And that the balance due to the United States on the 1st day of January, 1843, amounted to	4,405 86
	$9,140 94

I nave alsɔ examined and adjusted an account of the said Francis Bassett, and find that he is chargeable as follows:

To balance of his account ending 31st December, 1842	4,405 86
	$4,405 86

I also find him entitled to credit—

By amount of warrant No. 1811 in favor of the treasurer, dated June 1st, 1843	3,155 86
And that the balance due to the United States amounts to	1,250 00
	$4,405 86

It was agreed by the parties that a default or nonsuit should be entered, upon the construction of the act relating to the fees and emoluments of the clerks of the courts of the United States.

Mr. Dexter, U. S. Dist. Atty.

It is a sound and useful rule of construction, that an instrument or statute shall be so interpreted, if possible, that effect may be given to all its parts. It is plain, that upon the construction contended for by the defendant, the words "or in case both of the said clerkships shall be held by the same person, of the said offices," are entirely superfluous and ineffectual; for without them, it is clear that the incumbent of both offices would be entitled to the salary of both, they being made distinct offices by the act of February 28, 1839 [5 Stat. 321], which authorized the circuit courts to appoint their own clerks, until which time the district court clerk was, by virtue of the judiciary act of 1789 [1 Stat. 73], clerk also of the circuit court. It is then to be inquired, for what purpose were the words inserted in the act of 1842, which are quoted above. And it is difficult to conjecture any purpose except that of diminishing the fees of the offices when so held together. Extra-judicially, it could hardly be doubted, that the intention of the framer or amender of the act was to say, that when both offices were held by the same person, the incumbent should be paid only for one. But we are not allowed to conjecture the meaning of the legislature; we must find it in their language. Yet we must be careful not to be found hærentes in cortice by a too rigid construction of that language. Being satisfied, that something was intended, we are bound to find it if we can; and the obscurity or deficiency of the language is much relieved, when there seems but one purpose, that could have existed in the mind of the legislature, although the purpose be very feebly expressed. Transposition of words frequently assists us in such a case. Now, suppose these perplexing words, instead of having been obviously interpolated into the middle of a sentence by some reformer of supposed abuses, had been removed to the end of it, and inserted by way of proviso, thus—"Provided, however, that in case both of the said clerkships shall be held by the same person, he shall not be allowed to retain of the fees and emoluments of the said offices, for his own personal compensation, a sum exceeding three thousand five hundred dollars per year, for any such district clerk, *or a sum exceeding two thousand five hundred dollars per year for any such circuit clerk.*" In such case it would be plain, that the last clause (italicised) would be superfluous, yet, being in the disjunctive with the preceding clause, by the word "or," only one of the two salaries could be claimed; and where either of two may be claimed, of course the larger is due. Now the words are not altered by the above transposition, and it is not perceived that the sense is varied by the change of collocation. It will be remarked, that the salaries are provided not for such district clerkship and circuit clerkship, but for such district and such circuit clerks. If the legislature had intended that the incumbent of both offices should have both salaries, why did they not use the word "clerkship," in which case the meaning would have been clear? And, on the other hand, by the use of the words "such district clerk" and "such circuit clerk," taken in connection with the preceding clause, respecting both "clerkships" being held by the same person, was it not intended to designate a person? And if it be the same person that holds both offices, does it not compel him to elect to take the $3,500 as "such district clerk," "or" the $2,500 as "such

circuit clerk?" But it is significantly asked, "if the clerk is entitled to but one of these salaries, which shall he take? Why should he have the $3,500 rather than the $2,500 only?" But the question certainly exhibits very strongly the unskilfulness of the draftsman of the act. But I have already anticipated the answer—that having a right of election in such case, he would be entitled to the larger amount. But another answer has been suggested, namely: that he would take the larger salary as that of the "district clerk," because the person holding both offices is emphatically the "district clerk," being the only clerk of the district; whereas when the offices are separate, there is a clerk of the circuit court for the district, and a clerk of the district court, but no one is the clerk of the district. It will be observed, that in the act these officers are first named as clerks of the respective courts, but are last named as the district clerk and the circuit clerk. It is not pretended that this reasoning can be entirely satisfactory. It cannot be denied that it is highly verbal and perhaps hypercritical; but it is presented as the answer to verbal difficulties suggested by the defendant. It proceeds upon the supposition that congress meant something by these words, and that the only meaning they could have, is to restrict the salary of an incumbent of both offices. And, from the whole tenor of this section, it appears that retrenchment and restriction and security from large compensations to officers were its objects. But if the court should think otherwise, yet, upon the point of the amount to be retained by the defendant, as clerk of the circuit court, it is apparent, from the statement of the case, that he cannot charge his maximum of $1,250, because so much has not been received by him as clerk of the circuit court, during the six months; to make it up he must take about $590 from the fees in bankruptcy accruing in the district court, as only about $30 of bankrupt fees accrued in the circuit court, and all other fees there were but $659.44. The deficiency will perhaps be made up to the defendant in the accounts of the next six months.

Mr. Bassett, pro se, answered as follows:

The offices of district clerk and circuit clerk are distinct, the power of appointment to each being given by law to the respective courts, and a maximum compensation is affixed to each. Although both clerkships may be held by the same person, and this seems to have been contemplated by the act of 1842, it is provided, when this is the case, that the fees and emoluments of the said offices shall, up to the maximum of each, be paid to such district clerk, and such circuit clerk. This, it is believed, is the fair and only true interpretation of the act. Any other construction given to it would be arbitrary, for the person holding both offices might, with as much propriety, be limited to the maximum compensation of circuit clerk, as to that of the district clerk. But there is no limitation to either, by express words, or by construction in the act. The language is "out of the fees and emoluments of the said offices, a sum not exceeding $3,500 to such district clerk, or a sum not exceeding $2,500 to such circuit clerk." Now if any limitation or restriction to one of the maximums had been intended, the language would have been, "and when the said clerkships shall be held by the same person, no such district and circuit clerk shall receive a sum exceeding $3,500." But it is said by the district attorney, that a statute should be so interpreted, if possible, that effect may be given to all its parts, and that the words, "or in case both the said clerkships shall be held by the same person," are entirely superfluous and ineffectual, for without them it is clear, that the incumbent of both offices would be entitled to the salary of both; and, therefore, the words must be construed to diminish the fees of the officers when so held by the same person. Can such an inference be drawn from any rule of construction? On the contrary, if the incumbent is entitled to both salaries, is it not because he holds both offices? And, if so, is it less clear and certain that he is entitled to both salaries, when the reason or foundation of his claim, (namely, that he holds both offices,) is stated in express words? Moreover, as the offices may be held by different persons, without the words, "when both clerkships shall be held by the same person, the said offices," &c. the intent of the act, that both salaries should be received by the same person, would not be so clear and certain; for it might be argued, that the provision for the circuit clerk was intended for that office alone, and not when both clerkships were held by the same person. The words, therefore, have a meaning and are not superfluous. In answer to the suggestion, that congress intended to diminish the fees of the offices, it is sufficient to reply, that such an intent is not expressed. The intent of congress, perhaps, can best be inferred from the cause which produced the act. By the act of May, 1841, the fees and emoluments of clerks of courts were limited to $4,500, and afterwards the bankrupt law was passed, which greatly increased the business and emoluments of the office. By the appropriation act of 1842, the clerks are required to include, in their semi-annual returns, all fees arising under the bankrupt act. This clause relating to fees in cases of bankruptcy, is not in the act of 1841, because when that act was passed, the bankrupt law did not exist. Now, it can hardly be supposed, that it was the intent of congress to lessen the maximum of clerk fees, when the business and emoluments of the office and the labor and responsibility had been quadrupled by cases in bankruptcy. If, therefore, by any rule of construction, it were allowable to infer the meaning

and intent of an act from the circumstances under which it was passed, the construction of the act of 1842, contended for by the defendant, is in accordance with the spirit as well as the letter of the act. The act of 1842 does not specify to which clerkship, the fees and emoluments received or payable under the bankrupt act, shall belong, when both clerkships are held by the same person; but the language is "out of the fees and emoluments of the said offices, such district clerk shall receive a sum not exceeding $3,500, and such circuit clerk a sum not exceeding $2,500"; and as the maximum compensation was undoubtedly fixed with reference to the fees in bankruptcy, and the fees and emoluments arising under the bankrupt act, are, by the words of the act of 1842, to be distinguished from any other service, it would seem to follow that the clerk is entitled to receive out of the fees and emoluments of the said offices the maximum compensation of six thousand dollars.

STORY, Circuit Justice. This is an amicable action, and turns altogether as to its merits upon the construction of a clause (No. 167) in the general appropriation act of May 18, 1842 (chapter 29). That clause, after appropriating the sum of $375,000 for defraying the expenses of the courts of the United States for the year 1842, &c., proceeds as follows: "Provided, however, that every district attorney, clerk of a district court, clerk of a circuit court, and marshal of the United States, shall, until otherwise directed by law, upon the first days of January and July in each year, commencing with the first day of July next, or within thirty days from and after the days specified, make to the secretary of the treasury, in such form as he shall prescribe, a return in writing, embracing all the fees and emoluments of their respective offices, of every name and character, distinguishing the fees and emoluments received or payable under the bankrupt act, from those received or payable for any other service; and in the case of a marshal, further distinguishing the fees and emoluments received or payable for services by himself personally rendered, from those received or payable for services rendered by a deputy; and also distinguishing the fees and emoluments so received or payable for services rendered by each deputy, by name and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive; and also embracing all the necessary office expenses of such officer, together with the vouchers for the payment of the same, for the half year ending on the said first day of January or July, as the case may be; which return shall be, in all cases, verified by the oath of the officer making the same. And no district attorney shall be allowed by the said secretary of the treasury, to retain of the fees and emoluments of his said office, for his own personal compensation, over and above his necessary office expenses, the necessary clerk hire included, to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding six thousand dollars per year, and at and after that rate, for such time as he shall hold the office; and no clerk of a district court, or clerk of a circuit court, shall be allowed by the said secretary, to retain of the fees or emoluments of his said office, or, in case both of the said clerkships shall be held by the same person, of the said offices, for his own personal compensation, over and above the necessary expenses of his office, and necessary clerk hire included, also to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding three thousand five hundred dollars per year, for any such district clerk, or a sum exceeding twenty-five hundred dollars per year for any such circuit clerk, or at and after that rate, for such time as he shall hold the office; and no marshal shall be allowed by the said secretary, to retain of the fees and emoluments of his said office, for his own personal compensation, over and above a proper allowance to his deputies, which shall in no case exceed three fourths of the fees and emoluments received as payable for the services rendered by the deputy to whom the allowance is made, and may be reduced below that rate by the said secretary of the treasury, whenever the return shall show that rate of allowance to be unreasonable, and over and above the necessary office expenses of the said marshal, the necessary clerk hire included, also to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding six thousand dollars per year, or at and after that rate, for such time as he shall hold the office; and every such officer, shall, with each such return made by him, pay into the treasury of the United States, or deposit to the credit of the treasurer thereof, as he may be directed by the secretary of the treasury, any surplus of the fees and emoluments of his office, which his half-yearly return so made as aforesaid shall show to exist over and above the compensation and allowances hereinbefore authorized to be retained and paid by him." Mr. Bassett is, and for many years has been, the clerk of the district court of Massachusetts, and, until the year 1839, was under the judiciary act of 1789 (chapter 20, § 7), virtute officii, also clerk of the circuit court of that district. This regulation was applicable to all the circuit courts, excepting that held in the district of North Carolina, under the act of 29th of April, 1802 (chapter 31, § 8), where the circuit court had authority to appoint its own clerk, and excepting also the circuit courts of the Seventh circuit, created by the act of February 24, 1807 (chapter 71 [2 Stat. c. 16], § 3), which had also authority to appoint their own clerks. It was, in part, to cure this anomaly, and to

introduce a uniformity of regulation, as to the appointment of clerks of the circuit courts, as well as to prevent some practical inconveniences in the appointments, which had arisen in some of the circuits, that the act of February 28, 1839 (chapter 36), was passed, which (section 3) gave to all the circuit courts of the United States the appointment of their own clerks, and in case of a disagreement between the judges, gave the appointment to the presiding judge of the court. Under this act, Mr. Bassett was appointed clerk of the circuit court; and now holds the offices of clerk of the district court, and also of clerk of the circuit court of Massachusetts.

Under these circumstances, the question arises, whether Mr. Bassett is entitled, upon the true interpretation of the clause, above stated, of the act of 1842 (chapter 29), to the compensation not exceeding $3,500, as district clerk, and also to the compensation not exceeding $2,500 as circuit clerk, per annum, or to one only of these compensations; and if to one only, to which. The language of the clause, bearing upon this point is, that "no clerk of a district court, or clerk of a circuit court, shall be allowed by the secretary to retain of the fees and emoluments of his said office, or in case both of the said clerkships shall be held by the same person, of the said offices, for his own personal compensation, over and above the necessary expenses of his office, and necessary clerk hire included, &c. a sum exceeding $3,500 per year, for any such district clerk, or a sum exceeding $2,500 per year, for any such circuit clerk, or at and after that rate, for such time as he shall hold the office." It is plain from this language, that where the offices of district clerk and circuit clerk are held by different persons, each of them respectively is entitled to the prescribed compensation affixed to the office held by him. In such a case, it is equally plain, that the compensation is allowed for the duties and services performed in his office, and not as a mere gratuity. If this be the true interpretation of the clause in such a case, what ground is there to suppose that the like interpretation should not prevail, where both offices are held by one and the same person? The duties and services, to be performed in each office, are and must be the same, whether they are held by the same person, or by different persons. It would be to impute a most extraordinary intention to the legislature to presume, that it intended to apportion the compensation in the inverse ratio of the duties and services performed; or that it meant, if both offices were held by the same person, that the whole duties and services, performed in one, should be gratuitously performed, without any compensation whatsoever, although the compensation allowed for the duties and services, performed in the other, is strictly founded upon a quantum meruit, and merely a requital therefor. Such a mode of legislation, so little supported by principles of justice or equity, ought certainly not to be adopted, unless the legislature has spoken in the most clear and unambiguous terms. If there be any ground for real substantial doubt, as to the correctness of such an interpretation, that alone would seem to repel it; for it is not in matters of doubt to be admitted that the legislature requires duties and services from a public officer, and yet intends to take from him the compensation, which it has itself deemed a fit compensation therefor, under ordinary circumstances. Besides; the act itself is restrictive of the right of the officers to all the fees and emoluments of their office, generally allowed by law, cutting down and limiting the compensation to a fixed maximum, and appropriating the residue to the public treasury. Now, in such cases, the general rule of interpretation is to give effect to the restriction and limitation, only so far as the legislature has clearly and positively spoken, since it is in derogation of private rights otherwise vested in the incumbent in office. We cannot, and we ought not, in such a case, to say, "Voluit, sed non dixit;" for the intention can be fitly gathered only from the words; and therefore it is but just to say, "Non voluit, quia non dixit."

But it is said that it is the duty of the court to give effect to all the words used by the legislature, if it can be reasonably done; and that in the present case, unless the construction contended for by the government prevails, no effect whatsoever is, or can be given to the words, "or, in case both of the said clerkships shall be held by the same person of the said offices;" for the interpretation of the other language would be the same, if they were struck out of the act. Certainly, we are to give effect to all the words of a statute, if by a reasonable interpretation that can fairly be done, and it involves no repugnancy to other provisions, and is not inconsistent with the apparent objects of the statute. But then, the qualifications of the rule are most material to be observed. The interpretation must in itself be reasonable. It must not be such as apparently was not, or could not be, within the legislative intendment. It must be such, as will promote, and not such, as will defeat or interfere with the policy, upon which the statute purports to be founded. A fortiori, such an interpretation is not to be adopted to give effect to particular words, which will require, on the part of the court, the introduction of new provisions and auxiliary clauses, which the statute neither points out, nor even hints at, and yet which are indispensable to make such interpretation sensible or practicable. Take, for example, the very case before the court. Suppose the construction of the act, contended for on the part of the government, were adopted by the court; what compensation is Mr. Bassett to receive? That of district clerk, or that of circuit clerk? The statute

has not spoken upon that point; and that very circumstance strongly shows, that the case could not have been within the contemplation of the legislature. But it is said, that Mr. Bassett has the right of election, and may say, whether he will receive the less or the larger compensation. Where does he get his right of election? It is not conferred upon him by the act. It is not even alluded to. If he should insist upon receiving the larger compensation, what is there to prevent the government from insisting, that he is entitled only to the smaller compensation? The right of election is just as much given by the statute to the government, as to Mr. Bassett. In the struggle for it, there is quite as much ground to assert the right of the government to exercise the privilege of an election as for Mr. Bassett to assert the like privilege. Each has an equal interest in the choice. In truth, the statute confers it on neither. It is silent as to the possible existence of any case for an election, and that silence is of itself very expressive that no such case was contemplated. It would scarcely be credible, that the legislature should contemplate a case where both offices were held by the same person, and intend only a single compensation for the duties attached to both, and yet should not have said what that compensation should be, or have provided for an election. Now, I confess myself not bold enough to insert in this statute, a clause giving the right of election either to the clerk or to the government. I find no warranty for it in the words or the objects of the statute; and to place it there, would, in my judgment, be to make a new enactment, and not to construe the existing language of the act.

But then, as to the point of the objection, that otherwise the words above recited have no distinct and emphatic effect, and that the act will read just the same without them; what is the amount of the objection? It is nothing more than that the legislature has used superfluous language; that it has used words which might have been spared, and are either unnecessary or tautological. Now, I believe, that there are very few acts of legislation in the statute book, either of the state or of the national government, or of the British parliament, which do not fall within the same predicament, and are not open to the same objection, or, if you please, to the same reproach. The truth is, that it arises sometimes from loose and inaccurate habits of composition of the draftsman, sometimes from hasty and unrevised legislation, but more frequently from abundant, and, perhaps, over-anxious caution. Even our constitutions of government, if nicely scrutinized, cannot escape this reproach, if reproach it can properly deserve to be called. Mr. Madison has somewhere remarked, that the constitution of the United States contains numerous tautological expressions, which convey no additional or distinct meaning from the context. The very first power given to the congress of the United States by the constitution, the power "to lay and collect taxes, duties, imposts, and excises," is open to this very suggestion. Are not duties, imposts and excises, in reality taxes? Are not these words sometimes used to express the same thing? Imposts are but external taxes or duties; excises are but internal taxes and duties. No one, however, can reasonably doubt, but these words were all used in the constitution from abundant caution, to avoid a doubt or to prevent a cavil, as each of these words is sometimes used in a broad and general sense, and sometimes in a more narrow and restricted sense. The objection, therefore, is not of itself a just ground to alter the interpretation of any clause of an act, otherwise sensible and satisfactory, in order to escape the imputation of being unnecessary. Assuming it to be unnecessary, it by no means follows, that it is, therefore, to have some new meaning given to it, or that it may not justly be presumed to be used ex majori cautela. In the present case, I have no doubt, that the clause was introduced into the act, ex majori cautela. The legislature knew, that in some of the circuits the district clerk was not the circuit clerk, and that in all the circuit courts it was competent for the court to make a separate and distinct appointment. It meant to provide, therefore, for both classes of cases; and to apply the same rule of compensation, whether both offices were held by the same person, or not. It might have been a matter of some doubt (I do not say of well-founded doubt), whether the limitation of the compensation applied to any cases, except where both offices were held by different persons. It was, therefore, a matter very fit to be provided for by express legislation; and the very words are inserted, which should be, to meet such a case.

But, in my judgment, there was a far better and more important reason for the insertion of the words. It might have been a matter of some doubt, if the words had not been inserted, whether a clerk, holding both offices, was entitled to the maximum compensation provided for each; or whether it was a casus omissus in the act, and open, therefore, to opposite constructions. For this purpose, the legislature studiously inserted the words, and by them established, that the same rule should apply to all cases, whether both offices were held by the same person, or each by a different person. And it appears to me, with great deference and respect for those, who entertain a different opinion, that this is the plain and rational, and natural, I had almost said, the necessary construction of the words of the clause. If we read the words in their proper order and connection, reddendo singula singulis, it will be found, that there is no difficulty in ascertaining this to be the true meaning. "No clerk of a district court, or clerk of a circuit court, in case both of said clerkships shall be held by the same person shall be allowed by the secretary to

retain of the fees and emoluments of the said offices, for his own personal compensation, a sum exceeding $3,500 per year, for any such district clerk, or a sum exceeding $2,500 per year, for any such circuit clerk." Now, here, I have added nothing to the words of the clause, and omitted nothing applicable to the case put, but I have read the words as they must be read, to give them any sense; and yet, unless I labor under a grievous mistake, the words admit of no other construction or interpretation, than that the clerk shall receive the distinct compensation provided for the clerk of each court, that is, that he shall receive not exceeding $6,000 in all, and not exceeding in any case, the prescribed compensation given to the clerk of each court. If the legislature had intended to restrict the compensation to that given to one of the clerkships, in case both were held by the same person, the natural language would have been, where both of the offices were held by the same person, that he should receive of the fees and emoluments of the said offices, a sum not exceeding $3,500 (or some other fixed sum) for both. The actual language used, is far different. It contains no alternatives of compensation, and no restriction to the fees and emoluments of one office, excluding any for the other.

There is another question, which is incidentally brought to the notice of the court, and results from the semi-annual return of the clerk in the case. The clerk therein claims the sum of $3,000 as his semi-annual compensation, as clerk of both courts, not distinguishing between the fees belonging to him, as clerk of the district court, and those belonging to him, as clerk of the circuit court, and placing all the fees in bankruptcy in one aggregate sum, as if the cases were pending in both courts. In this respect his return is certainly erroneous. He is entitled to all the fees and emoluments, belonging to him, as clerk of the circuit court, including the fees in cases of bankruptcy, adjourned into the circuit court, and not exceeding for the half year, the maximum of $1,250; and to the fees and emoluments belonging to him as clerk of the district court, including the fees in the cases in bankruptcy, pending in the district court, not exceeding for the half year the sum of $1,750. It is suggested, that the fees in cases in bankruptcy, pending in the circuit court, during this half year, were about thirty dollars only; the other fees and emoluments in the circuit court, during the same period, appear by the return to be $669.44, only; so that they do not reach the maximum, charged in the return. This is an error; and it should be reformed, so as to make the return stand consistently with the act.

The judgment must, therefore, be entered for the United States, for the amount, which is due to the treasury, according to this opinion; and it can be readily adjusted between the parties.

Case No. 14,540.

UNITED STATES v. BATCHELDER.

[9 Int. Rev. Rec. 97; 16 Pittsb. Leg. J. 310.] District Court, N. D. New York. 1868.

PENAL ACTION—DECLARATION—PLEADING STATUTE—MOTION IN ARREST OF JUDGMENT.

1. In an action of debt on a penal statute the existence of the statute on which based, must be made in the declaration by direct allegation, as matter of fact. The mere assertion of a conclusion of law, as that by force of a statute, an action has accrued is insufficient.

2. A motion in arrest of judgment based on the ground that a declaration was so defective allowed, and judgment arrested.

[Cited in U. S. v. Seventy-Six Thousand One Hundred and Twenty-Five Cigars, 18 Fed. 151.]

At law.

HALL, District Judge. This is an action of debt upon a penal statute. The declaration is in the following words and figures:

"Northern District of New York, ss.: The United States of America, plaintiffs in this suit, by William Dorsheimer, their attorney, complain of Jeremiah C. Batchelder, defendant herein, being in custody, &c., of a plea that he render to the said plaintiffs the sum of nine thousand and seventy-eight dollars and fifty-seven cents, which to them he owes and from them unjustly detains. For that, whereas, heretofore, to wit, on the 17th day of April, 1867, at Ogdensburgh, in the county of Saint Lawrence, in the Northern district of New York, the said defendant was the owner of certain goods, wares and merchandise, to wit, forty-seven cattle and one hundred and thirty-four live hogs, of great value, to wit, of the value of nine thousand and seventy-eight dollars and fifty-seven cents, the growth and produce of some foreign place or country, to wit, of the produce of Canada, which said goods, wares and merchandise were subject to duties upon the importation thereof. Second. And also for that, he, the said defendant, brought and imported the said goods, wares and merchandise, cattle and live hogs, from a foreign port or place, to wit, from Toronto, in a foreign territory adjacent to the United States, to wit, the province of Canada aforesaid, into the United States of America, to wit, at Ogdensburgh, in the district of Oswegatchie, in the Northern district of New York, and within the jurisdiction of this court, and did upon such importation make entry of the same at the office of the collector of customs, at the said port of Ogdensburgh, and upon said entry, (with design to evade the duties upon the said cattle and live hogs, or some part thereof,) the said defendant did exhibit to and leave with the said collector of customs, a certain false and fraudulent invoice thereof, wherein he, the said defendant, did not invoice the said cattle and live hogs at the actual cost thereof, at the place of exportation, to wit, at Toronto, aforesaid, but did falsely and fraudulently invoice the said cattle and live hogs as of a less price

and value than the true value of the said cattle and live hogs, and as of a less price and value than the actual cost thereof at the place of exportation thereof, with design to evade the duties upon the said cattle or live hogs or some part thereof. Whereby and by force of the statute in such case made and provided, an action hath accrued to the said plaintiffs, to demand and have of and from the said defendant, the said sum of nine thousand and seventy-eight dollars and fifty-seven cents, the said sum above demanded. Yet the said defendant, although often requested so to do, has not paid to the said plaintiffs the said sum of nine thousand and seventy-eight dollars and fifty-seven cents, or any part thereof, but to pay the same or any part thereof, has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the plaintiffs of nine thousand and seventy-eight dollars and fifty-seven cents, and therefore they bring suit, &c."

The defendant pleaded nil debet, and the case was tried at the present term, upon these pleadings. A verdict for the United States having been rendered, the counsel for the defendant moved in arrest of judgment upon the ground that the declaration was, for various reasons, fatally defective in substance.

Upon the trial, and also upon the argument of the motion in arrest, the attorney of the United States based his claim to a forfeiture upon the first section of the act of March 3, 1863 ([12 Stat. 742], 12 Lit. & B. St. U. S. p. 738); but since the argument he has, by his written points and argument, insisted that the declaration is founded upon the 66th section of the custom act of 1799 [1 Stat. 677], and is sufficient under that section.

That the declaration is fatally defective as a declaration under the act of 1863, is too clear and obvious to require argument. In its form and substance it approaches much more nearly to a proper declaration under the 66th section of the act of 1799, but it is clearly insufficient to authorize a judgment upon the verdict under the provisions of that section.

It will not be necessary to notice all the defects apparent upon the face of the declaration, or to consider the objections argued on the motion in arrest, in the precise form and order in which they were presented by the defendant's counsel. The section of the act of 1799, now relied upon by the attorney of the United States, provides "that if any goods, wares or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, wares or merchandise, or the value thereof, to be recovered of the person making the entry shall be forfeited." It is apparent that the invoice referred to in this section must be the invoice upon which the entry is made, and after a careful comparison of the language of these provisions, with the allegations of the declaration, and a careful consideration of the cases of Goodwin v. U. S. [Case No. 5,554]; U. S. v. 28 Packages of Pins [Id. 16,561]; U. S. v. Riddle, 5 Cranch [9 U. S.] 311; and U. S. v. Three Parcels of Embroidery [Case No. 16,512],—I am of the opinion that the declaration in this case is fatally defective, because it does not allege that the defendant made the entry according to or upon the false invoice, and that upon that invoice and entry, the cattle and hogs so entered were not invoiced and entered according to the actual cost of the goods, and that the same were so entered upon such invoice below the actual cost thereof, with the design, &c. There is no allegation that the cattle and hogs were, in fact, entered at less than their actual cost, or even that they were entered upon such false and fraudulent invoice, or at the price, or rate, or sum stated therein—the allegation being simply that the defendant upon such entry exhibited and left with the collector, a certain false and fraudulent invoice, "wherein" (that is, in such invoice, not in the entry) "he, the said defendant, did not invoice," &c., "but did" (that is, in such invoice) "falsely and fraudulently invoice," &c. This is a fatal defect not cured by the verdict. Again, it is clearly a fatal defect, and one not cured by the verdict, that the acts done by the defendant are not alleged to have been done contrary to the form of the statute in such case made and provided, and that there are no equivalent words showing that the acts complained of, were contrary to a statute on which the action was based. That one of those is necessary in a case like the present, is shown by a great number of cases of undoubted authority, only a few of which need be cited. Jones v. Van Zandt [Case No. 7,502]; U. S. v. Babson [Id. 14,489]; The Nancy [Id. 10,008]; Cross v. U. S. [Id. 3,434]; Sears v U. S. [Id. 12,592]; Smith v. U. S. [Id. 13,122]; Kenrick v. U. S. [Id. 7,713]; 3 Barn. & C. 186; 2 East, 333; Willes, 599; 1 Maule & S. 500; 5 Pick. 168; 9 Pick. 162; 13 Pick. 94. See, also, Chit. Pl. 373; Esp. Pen. Act. 107, etc. Indeed, so clear did this appear upon the argument, that the district attorney then conceded that the declaration was fatally defective for this cause, unless it could be considered as a defect in form only, and cured by the verdict; and he asked to be allowed to amend it in that respect, but he has since, in his written points, referred to the case of People v. Barton, 6 Cow. 290, which he now insists decides that the declaration is not defective by reason of the omission referred to. This case, even if it were such as the district attorney seems to suppose, would not be sufficient to shake the authority of the opposing cases. But the case standing alone, would not sustain this declaration. The learned judge who delivered the opinion of the court in that case, expressly sanctioned the doctrine "that in all actions founded upon a statute, it is neces-

sary, in some manner, to show that the offence on which you proceed, is an offence against the statute," and then proceeded to show that the rule had been followed in that case. Indeed the declaration in that case, first recited the provisions of the statute on which the action was based, and then alleged the facts which brought the case within its provisions, and this was clearly sufficient. In the present case there is nothing of the kind, the only reference to a statute being the statement of the conclusion of law insisted upon by the pleader, and in which it is stated "whereby and by force of the statute in such case made and provided, an action hath accrued," &c., and the authorities are distinct and full to the point, that is not sufficient. See cases and authorities above cited, and The Nancy [Case No. 10,008], and cases there cited.

It is entirely clear that the required statements of the existence of a statute on which the action is based, must be made by a direct allegation, as matter-of-fact, and that the mere assertion of a conclusion of law (that by force of a statute an action has accrued) is insufficient.

The objections being well taken, the judgment must be arrested, and I shall not, therefore, discuss other questions which might be raised upon this very informal and defective pleading.

After verdict I have felt authorized to consider this declaration as containing a single count, instead of two counts, and to waive entirely the consideration of the question whether the omission to state any time when the material facts in reference to the invoice and entry occurred is fatal after verdict (U. S. v. Bowman [Case No. 14,631]); or whether it should not have appeared by a statement of the time when the entry was made that the statute of limitations had not run upon the claim of the United States (Whart. Cr. Law, §§ 445, 449, 3043, 3045). Nor have I considered it necessary to inquire, as the objection was not raised by demurrer, or otherwise, whether it was necessary to allege in the declaration that the property entered had not been seized, as was done in Cross v. U. S. [Case No. 3,434]; Sears v. U. S. [Id. 12,592]; and see particularly Smith v. U. S. [Id. 13,122].

Judgment arrested.

[Subsequently, an amended declaration, containing three counts, was filed and allowed. Case No. 14,541.]

Case No. 14,541.

UNITED STATES v. BATCHELDER.

[9 Int. Rev. Rec. 98.]

District Court, N. D. New York. Nov. 20, 1868.

PLEADING AT LAW—AMENDMENT—WHEN ALLOWED—CARELESSNESS OF COUNSEL.

1. The power to allow amendments of defective pleadings rests in the discretion of the court, to be exercised in view of the interests of the public and suitors, and all the circumstances of the cause.

2. Carelessness of counsel in preparation of case and pleadings severely animadverted upon.

HALL, District Judge. This is a motion for leave to amend the plaintiff's declaration, in a suit brought to recover the value of certain property imported from Canada, and alleged to have been entered below its actual cost, upon a false invoice. Upon an examination of the papers in the case, it appears that the declaration was filed on the 2d day of August, 1867, and that the plea of the defendant was filed upon the 23d day of the same month. This declaration contains a single count, which, as it now appears, was drawn by the district attorney's third assistant from a precedent in the district attorney's office. This precedent had, probably, been prepared by or for some former incumbent of that office, in a case of forfeiture in rem, arising out the general customs act of 1799 [1 Stat. 627]. The case was tried under the declaration at the last August term [case unreported], the district attorney throughout the trial, and during the argument upon the motion in arrest of judgment [Case No. 14,540], made after a verdict for the United States, founding his right to the judgment upon the ground that the United States were entitled to recover under the act of March 3, 1863 [12 Stat. 742]; and it was not until some days after the argument of the motion in arrest that the district attorney took the ground that the declaration was framed upon the act of 1799, and that the declaration and verdict entitled the United States to judgment for the forfeiture imposed by the last mentioned statute.

It was quite obvious, on the argument of the motion in arrest, that the declaration was insufficient to sustain an action under the act of 1863. An informal motion for leave to amend the declaration, in case it should be held insufficient, was then made by the district attorney; and, after the argument, the counsel for the defendant presented, in opposition to the motion, an affidavit of the defendant, sworn before a master in chancery in Vermont, in which the defendant denied any intention to defraud the revenue, and alleged that he supposed he had a right to enter the property as he did, at its actual value, though less than its actual cost. The declaration was decided to be insufficient to authorize a judgment therein, under either of the acts above referred to, and the court declined to grant leave to amend the declaration upon such informal and irregular application. Notice of an application for leave to amend was then given by the district attorney; and the question of amendment is now regularly before the court upon the affidavits and papers presented by the counsel for the respective parties, and the papers upon the files of the court. The declaration which the district attorney now seeks to file as an amended declaration contains three distinct

counts; one being a count under the act of 1799, and two being counts founded on the act of 1863.

The affidavits presented by the district attorney upon this motion, furnish but little, if any, excuse for the negligence or want of skill which led to the defects of the original declaration, or for the still grosser negligence which led to the trial of the case, more than a year after the declaration was filed, upon the statute of 1863, and a declaration which was obviously insufficient under such statute. It is shown that the declaration was prepared by the third assistant district attorney, who deposes that he does not particularly remember the circumstances under which it was prepared, but supposes, that in drawing it, he followed the form which was in use in the office of the district attorney, and which, he supposed, had been approved by the court; that on examining the original declaration he finds interlineations in the hand-writing of James H. Murray, a clerk in the district attorney's office; that on the day the declaration was filed, he, the deponent, was absent from Buffalo, and that from these circumstances he presumes that the declaration filed was merely a rough draft, and that it was not presented to the district attorney for his signature, but was signed by the deponent, and filed by said Murray in the absence of the deponent. Some other circumstances are stated, but they are not deemed important, and there is nothing in the papers to show that the declaration, or a copy of it, was ever examined by the district attorney, before he commenced the trial of the cause.

On the part of the defendant an affidavit is produced showing that the sums which he has paid, or become liable to pay as costs, fees, and expenses of counsel, &c., in carrying on the defence, in this case, amount to $791.19, and that he has also spent eighteen days' time, and $125 additional in money, in making his defence. All this is, of course, in addition to the very large expenses, reaching probably nearly $500, which have been incurred by the United States; and if the amendment be allowed very large additional expenses to the United States and to the defendant will necessarily be incurred. In the present confused and uncertain state of the law relating to importations from Canada, it is, perhaps, doubtful whether any judgment for the United States which might be entered in this court, would not be reversed by the circuit court, in case the learned judge who presides in that court shall adhere to the opinions delivered by him in the case of U. S. v. Smith [Case No. 16,319], and the case of U. S. v. Nolton [Id. 15,897], decided by him in 1866 or 1867. Although my own opinion is that the facts proved upon the former trial were sufficient to maintain the action if the declaration had been properly drawn, yet, in view of the cases just referred to, it is very doubtful whether the presiding judge of the circuit court would concur in that opinion. Besides, a different state of facts may be shown upon any future trial, for the defendant was not sworn when the case was tried, and it is by no means certain, that in the final result, the verdict of the jury may not be against the United States upon the questions of fact, even if the judgment of the circuit court would be in favor of the defendant upon the questions of law involved in the controversy. It is, therefore, exceedingly difficult to determine what disposition should be made of the present motion, or, if granted, what terms should be imposed as a condition of the amendment.

It is quite probable, if not entirely certain that the further prosecution of the suit is sought in the interest of the informer and revenue officers, more than of the United States, and I see no reason why these informers and revenue officers should not be required to take some of the risks which are imposed upon private parties in ordinary civil causes, and should not have the same terms imposed as the conditions of an amendment in this case (if an amendment be granted), as would be imposed in an ordinary civil suit, between private parties. The right of the court to grant an amendment is not doubted, although in penal actions, and in proceedings to enforce a forfeiture, amendments are not allowed with as much liberality as in ordinary civil actions. All such amendments rest entirely in the discretion of the court, and in the exercise of such discretion the interests of the public, the general convenience and interests of suitors, and even the convenience of the court are properly taken into consideration, as well as the character and degree of the negligence which has produced the necessity for amendment. It can hardly be doubted that in such a case as the present, in which more than $9,000 was claimed as a penalty or forfeiture, an ordinarily careful pleader would have made himself acquainted with the proofs and facts of the case, and the laws applicable thereto, and would have originally drawn a declaration containing three counts, at least, and presenting the case substantially as it is now desired to present it by an amended declaration. It is equally certain that a careful lawyer would have made himself acquainted with the facts, proofs, pleadings and law of his case before he ventured to move its trial, and the application for leave to amend in this case, does not commend itself strongly to the favorable consideration of the court; but as the proof on the trial was very strong, if not entirely conclusive against the defendant, the motion for leave to amend will not be wholly denied upon the ground that its necessity could have been prevented by the exercise of only ordinary care and skill.

The other considerations which should influence the court in the exercise of its discretion, as well as the terms to be imposed if an amendment be allowed, present questions

in respect to which there can be no precedents to control that discretion, nor any precise rule of action adopted. It is of great importance to private suitors, to the government, and to all parties prosecuted for a violation of the laws of the United States, that the accuracy and legal form of pleadings should be preserved, and that a substantial compliance with the established rules of pleading and proceeding should be required and rigorously enforced. Every succeeding relaxation of these rules has a tendency to produce grosser carelessness, and as an inevitable consequence, to multiply the irregularities and defects which not unfrequently produce unnecessary delays and grievous expense, if not gross injustice. Such negligence also tends to bring numerous and embarrassing questions before the court, and what is worse, to the commencement, without proper examination, of unjust and oppressive prosecutions, burdensome, if not ruinous to the parties prosecuted and enormously expensive to the government. That the labors of the judges and the judicial expenses of the government in this judicial district (both of which are already appalling), are greatly and unnecessarily increased, are not, perhaps, the most serious evils which want of care in the preparation of pleadings and the management of causes unnecessarily produces, for the same cause has made it necessary that the decision of important questions, involving large amounts of property or important personal rights, be greatly delayed, or else made without that examination and reflection which their proper disposition requires. The pleadings and other papers in many important cases in the courts of the United States in this district are now so carelessly drawn, and causes are so imperfectly prepared for trial, both by the district attorney and his assistants, and by private counsel, that it cannot be doubted that the expenses of the district are thereby greatly increased, and the evil is increasing with frightful rapidity. Under such circumstances great care should be taken to prevent, rather than encourage the growing disposition of the practitioners of the court to forego the necessary labor of the proper preparation of their cases; and amendments should not be granted in ordinary cases, except on such terms as shall secure a party who is without fault from loss, occasioned solely by the gross negligence and fault of his adversary. When suits are prosecuted to enforce a forfeiture, mainly for the benefit of an informer and a seizing officer, and when the defendants, even if successful, must ordinarily litigate at their own expense (because the United States pays no costs, and the proper remedy against the informer and seizing officer cannot ordinarily be enforced), there would seem to be less reason for liberality in granting amendments and more reason for imposing such terms as would fully secure the opposite party from any loss occasioned by the negligence and fault of the party desiring to amend. Nor have the trials in prosecutions promoted by the officers of the customs in this judicial district, upon the allegation that merchandise imported has been undervalued upon its entry at the custom house, always commended these officers to the favor of the court. In a large proportion of such cases it has appeared to be quite certain, that if the revenue officers had properly discharged their duties, and required a strict compliance with the forms of law, the party prosecuted would not have attempted to evade the payment of the proper duties, for the reason that such attempt could not be made and the intended fraud consummated without wilful and corrupt perjury, under circumstances which would render the proof of guilt quite certain, and the production of such proof by no means difficult. Indeed, it is believed that the carelessness, ignorance, or inattention of these officers has not unfrequently induced the irregularity and fraud complained of, or given rise to most of the difficulties in the way of a speedy and easy, as well as proper disposition of these cases.

The expenses which the defendant has incurred in his defence, are stated in his affidavit to be more than $900, but as no witnesses were sworn for the defendant at the trial, I cannot but think that expenses have been paid or incurred with more liberality than is generally exercised by private suitors, or was formerly exercised by the government; and it is supposed that $400 will not be a grossly unfair allowance for the reasonable expenses of the defence.

But there are considerations which would seem to authorize an amendment in this case, under certain circumstances, without the payment of all these expenses. The defendant has little reason to complain that an expensive trial has been had upon a clearly defective declaration, alleging a forfeiture under the act of 1799. That it was not a sufficient declaration under the act of 1863 was certain and obvious; and if the defendant or his counsel intended to raise the question of its sufficiency under the act of 1799, and desired to avoid the accumulation of unnecessary costs, he should have demurred to the declaration, instead of pleading issuably, and requiring a trial by jury, in which the costs and expenses of the United States would hardly fail to exceed those of the defendant. The defendant was in fault in this respect, and the count, under the act of 1799, may be amended on payment of $50 costs. The addition of two new counts under the act of 1863, is an amendment of a different character. Such an amendment will introduce an entirely new cause of action in point of law (though probably founded upon the same transaction in point of fact), and so far as the introduction of these counts is concerned, the terms of amendment should not be the same. The terms on which such an amendment ought to be allowed, should not

be very different from those which would be imposed if the count under the act of 1799 were to be abandoned; and if the defendant elect to relinquish his right to apply to the secretary of the treasury for a remission of the alleged forfeiture, this addition of new counts under the act of 1863, will be allowed upon the payment of a further sum of $300. But the defendant's counsel has intimated an intention to apply for a remission of the alleged forfeiture, and it would not be just to require the informer and seizing officer, or other party interested, to pay this large sum, as a condition of amendment, if such an application is afterwards to be made. For this reason the amendment by adding new counts will be allowed on payment of $50, in addition to the $50 before mentioned, unless the defendant shall expressly waive and relinquish his right to apply for a remission of such alleged forfeiture, within a time to be specified in the order for such amendment.

Case No. 14,542.

UNITED STATES v. BATES.

[2 Cranch, C. C. 1.] [1]

Circuit Court, District of Columbia. June Term, 1810.

FORGERY — DRAFT — RIGHT TO DRAW — WITNESS — DRAWEE.

1. The drawee of a forged draft is a competent witness to support the prosecution.

[Followed in U. S. v. Brown, Case No. 14,658. Cited in U. S. v. Anderson, Id. 14,452.]

2. To support an indictment for forgery, under the Maryland statute of 1799, c. 75, § 2, it is not necessary that the drawer should have a right to draw, or that the draft should purport to be by a person having a right to draw.

[Cited in U. S. v. Book, Case No. 14,624.]

Indictment under the act of assembly of Maryland of 1799, c. 75, § 2, for forging a draft upon Gustavus Higden, with intent to defraud him.

Higden was offered as a witness on the part of the United States. He had paid the order.

Mr. Caldwell, Mr. Balch, and Mr. Sprigg, for prisoner [William Bates], cited Peake, Ev. 96, 97.

But THE COURT (THRUSTON, Circuit Judge, absent), permitted the witness to be sworn and examined.

Verdict, "Guilty."

Motion in arrest of judgment, because it is not averred in the indictment that Arnol had a right to draw. 2 East, P. C. 936; Mitchell's Case, anno 1754, upon the act of 7 Geo. II. c. 22; the words of which are like those of the act of Maryland, except that it has not these words, which are in the Maryland act, "Or draught for the payment of money, or delivery of goods, or other valuable articles."

The order, or draft, was in these words: "Washington City, Jan'y 12, 1810. Mr. Higden—Sir, you will please let the bearer, James Gray, have 3½ dollars' worth out of your store, and oblige, Sir, your most obed't serv't. William Arnol."

THE COURT (FITZHUGH, Circuit Judge, absent, but concurring,) was of opinion that the word "draught," in the act of assembly of Maryland, which was not in the English statute, made a difference; and that a draft might be made by a person who had no right to draw.

The sentence of the court was twenty stripes.

CRANCH, Chief Judge, said that it was the first case under this act of assembly which had come before the court; and perhaps there was some ground to doubt whether the case was strictly within it, as explained by the English authorities. For these reasons, the court inflicted a lighter punishment than they would otherwise have done.

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

Case No. 14,543.

UNITED STATES v. BATES.

[2 Cranch, C. C. 405.] [1]

Circuit Court, District of Columbia. April Term, 1823.

WITNESS — INTEREST — CRIMINAL PROSECUTION — TRIAL — RIGHT TO CLOSE.

1. A person who has given a receipt for goods to be delivered to other persons, is a competent witness for the United States, upon a prosecution against another person for stealing the goods.

[Cited in U. S. v. Anderson, Case No. 14,452.]

2. In all criminal prosecutions the attorney for the United States upon the general issue, has a right to close the argument before the jury.

Indictment for stealing a box of books.

Mr. Handy was offered as a witness for the United States.

Mr. Morfit and Mr. Ashton, for prisoner [David Bates], objected that he was interested, as he had given a receipt for the books to B. French, stating them to be so many, more or less, to be delivered to sundry persons. They compared it to the case of forgery, where the person whose name is forged is not permitted to testify; and to the case of usury, where the debtor is not a competent witness until he has paid the debt.

But THE COURT (nem. con.) overruled the objection.

Mr. Morfit, after closing his argument to the jury, contended that the attorney for the United States should not be permitted to reply, inasmuch as the prisoner had not called any witness on his part, but relied on the defect of evidence on the part of the United States. King v. Lord Abingdon, 1 Esp. 227.

But THE COURT (nem. con.) said that, however the practice might be in England, in this court the attorney for the United

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

States has always had the right, in criminal prosecutions, to close the argument before the jury, upon the general issue.

Verdict, "Guilty." Pardoned by the president of the United States.

Case No. 14,544.

UNITED STATES v. BATES.

SLAVE TRADE—HABEAS CORPUS—PROBABLE CAUSE—FAILURE TO INDICT—CRIMINAL LAW—COMMITMENT.

1. The act of congress declaring the slave trade to be piracy is constitutional.

2. A defendant arrested on a criminal charge, may be committed for a further examination, and held under such commitment for a reasonable time.

3. Where a prisoner is not indicted at the first term of the court, or the grand jury has ignored the bill, he is not entitled to be discharged.

4. On a habeas corpus, the court will only inquire whether the warrant of commitment states a sufficient probable cause to believe that the person charged has committed the offence stated.

[See U. S. v. Johns, 4 U. S. (4 Dall.) 413.]

5. On a hearing of a habeas corpus, it is competent for the court to look into the testimony on which the commitments were made.

[The above statement of the points determined was taken from Brightly's Dig. 161, 206, 211, 441. Nowhere reported; opinion not now accessible.]

Case No. 14,545.

UNITED STATES v. BATTISTE.

[2 Sum. 240.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1835.

JURY—OF WHAT JUDGES—SLAVERY—TRANSPORTATION—MAKING SLAVES—AFRICAN NEGROES.

1. The jury have not the right, though they may have the power, in rendering a general verdict, to determine the law in any case, civil or criminal. It is their duty to follow the law as laid down by the court.

[Followed in Stettinius v. United States, Case No. 13,387. Cited in U. S. v. Morris, Case No. 15,815; U. S. v. Riley, Id. 16,164; The Saratoga, 9 Fed. 329; Re Taylor, 11 Fed. 473; Re Jayne, 28 Fed. 424; Cross v. Seeberger, 30 Fed. 428.]

[Brown v. Com. (Va.) 10 S. E. 747; Com. v. Anthes, 71 Mass. 237; Com. v. McManus, 143 Pa. 97, 22 Atl. 765; Pierce v. State, 13 N. H. 551, 566; State v. Burpee, 65 Vt. 28, 25 Atl. 972. Cited in brief in State v. Croteau, 23 Vt. 60. Cited in State v. Rheams, 34 Minn. 21, 24 N. W. 304; State v. Wright, 53 Me. 334; Territory v. Kee (N. M.) 25 Pac. 926; Williams v. State, 10 Ind. 504; Williams v. State, 32 Miss. 389.]

2. By the statutes of the United States (1820, c. 113, § 4 [3 Stat. 600]), it is declared "that if any citizen, &c. shall, on any foreign shore, seize any negro or mulatto, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring or carry, or shall receive such negro or mulatto on board of any such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate, and on conviction thereof, &c., shall suffer death." *Held*, that a person having no interest in or power over the negroes, so as to impress upon them the future character of slaves, and only employed in the transportation of them for hire from port to port, is not guilty under this act.

[Cited in U. S. v. Libby, Case No. 15,597.]

3. It is not necessary, in order to bring the case within the act, that the negroes should be free at the time of their seizure or reception on board.

4. "To make the negro a slave," in the sense of the act, is to be the instrument or means of fixing on him that character for the future.

5. An African negro or mulatto, when bought on the coast of Africa by an American citizen, or any person belonging to an American ship, ceases to be a slave, since no such person can, consistently with our laws, hold him in slavery.

Indictment for a capital offence, in being engaged in the transportation of slaves, contrary to the fourth section of the act of May 15, 1820 (chapter 113). Plea, not guilty. At the trial, the facts were substantially as follows: It appeared that John Battiste sailed from New York, in July, 1834, in the brig America, a vessel belonging to the Messrs. Hathaway, Messrs. Swain, and Mr. Grinnell of New Bedford. The America was bound to St. Helena or a market, and sailed under the command of Captain Miller. The America did not touch at St. Helena, as was intended, on account of the unfavorable winds, but proceeded directly to the coast of Africa, and first touched at Loando, or St. Paul de Loando, the capital of the Portuguese possessions in this section of Africa,—a city of some extent, and with a population variously estimated from 3,000 to 18,000. Here the America remained about three weeks, when she sailed south to Nova Redondo, and finally New Benguela, or St. Philippe. From this port she sailed to St. Helena, and after again touching at the ports above-mentioned, arrived at Nova Redondo, where for the first time she received on board twelve negro slaves as passengers. These negroes were brought to the shore hand-cuffed, and chained together, attended by two negroes, a Portuguese and a soldier. Their fetters were then taken off, and they were carried aboard the America, without making any resistance. The negroes were young, the youngest being about fourteen years of age. That afternoon they sailed for St. Philippe, and arrived the next day between two and three o'clock. The harbor-master then came on board, and the usual custom-house regulations of the place were complied with. The slaves, with some goods, were landed the next morning in one of the boats of the brig; the captain and mate going with them. The America then sailed south to Fish Bay, and returning to St. Philippe and Nova Redondo, made some traffic, and procured a quantity of ivory. Thence she sailed to Old Benguela, where she took in fourteen negroes, who were also brought in irons to the shore, attended by a crowd of the natives, among whom was a king of the tribe. Battiste again assisted in removing the fetters, and receiving them

[1] [Reported by Charles Sumner, Esq.]

on board the brig. They left Benguela the same evening, and sailed for Loando, where the negroes were landed; Battiste and the captain being both present at the delivery. Remaining a fornight at Loando, they next sailed to Old Benguela, where they took in wood and fowls; and thence to Nova Redondo for ivory. At St. Philippe, where the brig next touched, they took in nineteen negroes, whom they received at the shore in irons; at Old Benguela, in the same manner they received twenty-one more negroes, in the month of December or January. On reaching Loando, they discharged this cargo in two or three boats; one of which went to the shore, and another was lost sight of among the Portuguese shipping in the harbor. All were delivered, with the exception of a little girl, taken in at Nova Redondo, who was afterwards brought by Captain Miller to New York, for which place the America sailed, after once more touching at each of the ports above-named. The America took out the usual cargo, and sold it in the usual barter-trade for gum and ivory. The ports, at which she touched, are under the Portuguese jurisdiction, and Portuguese custom-house officers and soldiers were on board during the whole time of the brig's remaining in any port. The fact of receiving the negroes, at the times and places stated, was not denied; and it was not attempted to prove, that Battiste had aided or assisted in kidnapping, or making them slaves.

J. Mills, U. S. Dist. Atty.

D. Webster and C. P. Curtis, for defendant.

The points relied on by the counsel, will be found stated in the charge of the court.

STORY, Circuit Justice, in summing up to the jury, said: Before I proceed to the merits of this case, I wish to say a few words upon a point, suggested by the argument of the learned counsel for the prisoner upon which I have had a decided opinion during my whole professional life. It is, that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact; and includes both. In each they must necessarily determine the law, as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the court. But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain, what the law, as settled by the jury, actually was. On the contrary, if the court should err, in laying down the law to the jury, there is an adequate remedy for the injured party, by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it. If I thought, that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state my views fully and openly on the present occasion. It is not, indeed, an occasion, on which there is any reason to doubt, that an intelligent jury can understand the principles of law applicable to the subject, as well as the court; for they are the principles of common sense. And as little reason is there, in my view, to suppose, that they can operate injuriously to the real merits of the case of the prisoner.

There is no question of fact really in dispute between the parties, except the intent of the prisoner. The admitted facts are, that the prisoner was mate of the brig America, belonging to citizens of the United States, on her late voyage to the coast of Africa. The voyage, as planned by the owners, was a lawful voyage. At one or more places in the province of Angola, one of the Portuguese possessions on the coast of Africa, certain negroes were, by the order of the master of the brig (Capt. Miller) taken on board as passengers, with the assistance of Battiste, and carried to other places within the Portuguese possessions on the same coast. These negroes were carried for hire, and a certain rate of passage money; and were landed and delivered to their respective owners at the places of destination. Neither the owners nor master of the brig, nor Bat-

tiste, nor any of the crew, had any interest or property in these negroes, or in the sale of them. They did not coöperate in making them slaves, or in perpetuating their state of slavery, unless the mere transportation of them, as above-mentioned, is to be deemed such an act.

Under these circumstances, the question for the jury to decide is, whether such a transportation of these negroes is a capital offence, within the true intent of the act of the 15th of May, 1820 (chapter 113). The question is not, whether the defendant is guilty of an offence against some law of the United States; but whether he is guilty of the very offence charged in the indictment. I have no doubt, that he is guilty of a misdemeanor under the second section of the act of the 10th of May, 1800 (chapter 51 [2 Stat. 70]), as that act has been construed by the supreme court of the United States. See The Mexico, 9 Wheat. [22 U. S.] 403–406. But that is unimportant to be considered on the present occasion. The words of the act of 1820 (chapter 113, § 4), on which the present indictment is framed, are as follows: "That if any citizen, &c. or any person whatever, being of the crew or ship's company of any ship or vessel, owned in whole or in part, or navigated for, or in behalf of any citizen or citizens of the United States, shall land from any such ship or vessel, and on any foreign shore, seize any negro or mulatto, not held to service or labor by the laws of either of the states or territories, with intent to make such negro or mulatto a slave; or shall decoy, or forcibly bring or carry, or shall receive such negro or mulatto, on board of any such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate, and on conviction thereof, &c. shall suffer death." The language of this section is peculiar. In no other act is the phrase found "to make such negro, &c. a slave." See Act May 10, 1800, c. 51; Act March 2, 1807, c. 77 [2 Story's Laws, 1050; 2 Stat. 426, c. 22]; Act April 20, 1818, c. 86 [3 Story's Laws, 1698; 3 Stat. 450, c. 91]; Act March 3, 1819, c. 224 [3 Story's Laws, 1752; 3 Stat. 532, c. 101]. And the first question, which arises, is, what did congress mean by the words "to make a slave." It is the intent to make a slave, which constitutes the essence of the offence; for neither the seizing, nor forcibly bringing, or carrying, or receiving a negro on board, is any offence without such superadded intent.

It is argued by the learned counsel for the prisoner, that in order to bring the case within the purview of the act, it is indispensable, that the negro should, previously to the seizing or carrying him on board, have been free; for if he were not previously free, the party could in no just sense be said to intend to make him a slave. The onus probandi would, under such circumstances, be on the government to establish the fact of the negro being free; and, if he was already a slave, then the case was not within the act. To this interpretation of the act I cannot yield my assent. If it be well founded, the act becomes a mere nullity; and as useless an instance of inefficient legislation, as could well have been devised. It might as well be blotted out of the statute book. Congress, in passing the act, must be presumed to have been well acquainted with the nature and course of the slave trade. The known intention of all our statutes on this subject is to prohibit the traffic in African slaves, however carried on, or in other words, to suppress the slave trade on the coast of Africa. Now, by the very course of this trade, it would be almost a moral impossibility to trace out the origin, nativity, or antecedent political state of any negroes found on the coast of Africa, in the hands of the slave dealers. The negroes themselves, in regard to whom the offence should be committed, might, and ordinarily would, be transported to some other foreign country without any possible means of ascertaining their identity, or of obtaining evidence as to their previous condition, long before any prosecution could take place. In truth, the mass of all the negroes bought and sold on the coast would be found, de facto, in a state slavery; and to punish the traffic, only when it took place by proof of the sale, or carrying away of free negroes, would be to establish a prohibition in mere mockery of the avowed objects of public justice. If congress intended bonâ fide to suppress the slave trade, they must have intended to suppress the traffic in slaves, as well as in free negroes on the coast. They must have intended to cut off that, which was the common and usual trade; that, which was in its own nature capable of proof; and not such an offence, as if it existed, could scarcely admit of clear proof; or if proved, would have no real tendency to suppress the traffic.

One or two instances may be put to illustrate these suggestions. According to the argument, if an American ship should be employed in kidnapping and stealing slaves on the coast of Africa from their lawful masters, and the officers of such ship should forcibly carry them to another foreign country, and there sell them as slaves, it would not be an offence within the act. So, if an American ship should be employed in buying slaves, and carrying them to another foreign country, with an intent to sell them there as slaves; and the officers of the ship should actually sell them in such foreign country as slaves; it would also be no offence within the act. Now, I cannot but think, that these cases must have been precisely such as were within the contemplation of the very prohibition of the act of congress. If they were not, the act would be but an empty sound, and a mere nullity, in a practical sense. The construction contended for, ought not, then, to be adopted, unless it be the natural or necessary interpretation of the words. If there

be another interpretation, equally natural and perfectly consistent with the words, and carrying into effect the apparent intent of the act, that ought to be adopted in furtherance of public justice. My opinion is, that the language used, taking the whole context, requires a different interpretation from that assumed in the argument, an interpretation reasonable in itself, and, as I think, also, the true interpretation of the words. The words used are, if any person, &c. shall seize, &c. any negro or mulatto. No descriptive or qualifying words are added as to the character or condition of the negro or mulatto, whether free or enslaved; and consequently, the words being general, apply to all negroes and mulattoes, whether free or slaves. The public mischief is the same, whether the negro, &c. be a slave, or be free. In each case the slave trade is carried on; in each case it is equally important to have it suppressed. In each case the known public policy of the United States has been to suppress it.

In the next place there is an exception from the words, which demonstrates it to have been the intention of congress to include negroes, who are slaves, as well as negroes who are free, within the clause. The exception is of negroes or mulattoes, "held to service or labor by the laws of either of the states or territories of the United States." No one will doubt, that this exception was designed to exclude from the operation of the clause, slaves held to labor in the United States. An exception is always construed to exclude something otherwise within the purview of the enacting clause. The exception would have been wholly useless, if the words "negro or mulatto" would not, in their ordinary meaning, have included slaves. It being made, the legislature must be presumed to have intended to include all other slaves, than those within the exception, within the general words, "negro or mulatto." My construction of the act is this: It intended to punish, as a capital offense, the decoying or forcibly bringing or carrying or receiving on board any negro or mulatto, with intent on the part of the party, decoying, bringing, carrying or receiving, to make such negro or mulatto a slave in future, without any reference whatsoever to his antecedent state or condition, whether a slave or free. The act refers, not to any past state or condition, but to the intent of the party in future, viz. to make the negro or mulatto a slave. The offence consists, then, not merely in the fact of having originally impressed upon the negro or mulatto the character of a slave; but in impressing or continuing it for the future. "To make the negro a slave" in the sense of the act, is to be the instrument or means of fixing on him that character in future. If the words of the act had been, with intent to make the negro or mulatto an apprentice for life or for years, instead of to make him a slave, it seems to me, that there would be little difficulty in construing the act to refer to a future state, to be given or impressed by the party himself, rather than to any past state, whether bond or free. The moment an African negro or mulatto is bought on the coast of Africa by an American citizen, or by any person belonging to an American ship, he ceases to be a slave; for no American can, consistently with our laws, hold him in slavery. And if he bought him with an intent to hold or sell him as a slave thereafter, and received him on board for the purpose of so making him a slave, that would bring the party within the prohibition of the act. My opinion, therefore, is, that to convict the prisoner upon the present indictment, it is indispensable to show, that he had some title or interest in or power over the negroes in question, so as to be able to impress upon them by his own act the character of slaves in future, and that he intended so to do. If he had no title or interest in these slaves, and no such power over them; but he was merely employed in the transportation of them for hire by the owners of them from one port to another port of the Portuguese possessions, then (although it is an offence under our laws) he is not guilty of the offence charged in the indictment, even if such owners of the slaves intended to keep them in slavery in future.

My reasons for this opinion may be shortly given. These are provinces or possessions on the African coast belonging to the Portuguese government, and under the regular administration of Portuguese authorities, duly established there. We all know, that domestic slavery is established or at least recognised as a legitimate state in the Portuguese provinces and possessions. These negroes, being (as is supposed) slaves, were transported from one province or possession to another province or possession of the same sovereignty. And if such a transportation of slaves be, under the act of 1820, a capital offence, then it would be equally a capital offence under the same act for an American ship to transport a Spanish merchant with his domestic slaves, merely as passengers for hire, from one port of the Island of Cuba to another; as, for instance, from Matanzas to Havanna. The cases are exactly parallel. Now, it seems to me impossible to believe, that congress could have intended to punish capitally, as a piracy, such an act as the mere transportation of slaves from one port to another of the same country. It would confound all moral distinctions in regard to crimes. It would punish an act involving not the slightest moral turpitude, in the same manner, as it would punish the hardened atrocity, inhumanity, and horrible iniquities attending the slave trade on the coast of Africa. It would strike us all with astonishment, that congress should make the mere transportation of a negro slave, as a passenger for hire, from one port to another of the same country, an offence of equal enormity with kidnapping or stealing negroes on a for-

eign coast, and selling them to perpetual bondage in another foreign country. If we could strip the present case of the associations connected with its localities on the coast of Africa, where we know the slave trade exists with all its unnumbered horrors, there would be no difficulty in believing, that the mere act of transporting slaves, as passengers for hire, without any interest or title in them, and without any intention to fix upon them, by any personal act, the state of future slavery, could not be the offence intended by the act of congress. The transportation of slaves for hire, from one port to another of the Portuguese settlements on the coast of Africa, though it may there facilitate the operations of the slave dealer, is not in substance a different case from transporting the same slaves from one port to another in the Brazils or in Portugal.

There is another consideration, not wholly without weight in this cause. In the other acts against the slave trade, the transportation of slaves from the coast of Africa, and from one foreign country to another, is in express terms prohibited. See Act 1800, c. 51, § 2; Act 1807, c. 77, § 4; Act 1818, c. 86, § 4. If the legislature had intended to increase the punishment, and to make the mere transportation of slaves a capital offence, it would be natural to expect, in the present act, some language significant of that intent, like that found in the former acts. The very omission, therefore, of the appropriate phraseology, furnishes a presumption, that the legislature had some other and different offence in their view.

Mem. After this charge the jury found a verdict of not guilty for the prisoner. He was afterwards indicted on the second section of the act of 1800 (chapter 51), and was admitted to plead nolo contendere: and thereupon he received sentence for the offence.

Case No. 14,546.

UNITED STATES v. BAUER.

[Cited in Re Lindouer, Case No. 8,358. Nowhere reported; opinion not now accessible.]

UNITED STATES (BAULIGUY v.). See Case No. 1,696a.

Case No. 14,547.

UNITED STATES v. BAYER et al.

[4 Dill. 407;[1] 13 N. B. R. 400; 3 Cent. Law J. 11.]

Circuit Court, D. Minnesota. 1876.

CONSPIRACY—ACTS MADE PENAL BY THE BANKRUPT ACT—REV. ST. §§ 5132, 5440, CONSTRUED.

1. Under the statute (Rev. St. §§ 5132, 5440), other persons than the bankrupt can conspire with the latter to commit the acts made criminal by the 7th and 10th subdivisions of section 5132 of the Revised Statutes.

2. It seems that under the criminal section of the bankrupt act (Rev. St. § 5132), one who procures and abets the person against whom the proceedings in bankruptcy are pending, to commit the acts therein made criminal, may be indicted, though not expressly referred to in the statute.

[Cited in U. S. v. Snyder, 8 Fed. 806; Id., 14 Fed. 556; U. S. v. Stevens, 44 Fed. 141.]

[Cited in People v. McKane, 143 N. Y. 455, 38 N. E. 952.]

The defendants are indicted for a conspiracy to commit offences against the United States in violation of the penal section of the bankrupt act (Rev. St. §§ 5132, 5440). The indictment contains two counts. The first count, based upon section 5132, subd. 10, and section 5440, after alleging the adjudication of bankruptcy of one John Bayer by the district court for the district of Minnesota, June 2, 1875, and after setting forth the facts, showing the jurisdiction of that court in said matter of bankruptcy, proceeds to charge that the said John Bayer, and the defendants Kargleder and Ober, within three months next before the bankruptcy proceedings aforesaid were commenced, to-wit, on June 1st, 1874, in said district, amongst themselves, unlawfully and fraudulently conspired, confederated, and agreed together to commit a certain offence against the United States, to-wit: by the execution and delivery, then and there, by said John Bayer, of a certain instrument in writing, signed by him, wrongfully and unlawfully, and with intent to defraud the creditors of said John Bayer, to mortgage, sell, and dispose of (while they still remained unpaid for, as in the indictment alleged), to said John Kargleder, otherwise than by bona fide transactions in the ordinary way of the trade of said Bayer, certain goods and chattels of said Bayer which had been obtained on credit, etc. It is then alleged that said Bayer and said Kargleder thereupon performed certain specified acts in order to effect the object of said conspiracy. [See Case No. 14,548.] The second count, based upon section 5132, subd. 7, and upon section 5440, after repeating the preliminary averments of the first count, further alleges the appointment of an assignee in bankruptcy of said Bayer's estate, and the proof in bankruptcy by said Kargleder of a false and fictitious debt against said Bayer's estate, and the said Bayer's and Ober's knowledge of the premises: and further charges that the said Bayer, Kargleder, and Ober did then unlawfully conspire and confederate together to commit an offence against the United States, to-wit: did conspire and confederate together, that Bayer, knowing as aforesaid that Kargleder had proved a false and fictitious debt against his estate, should then and there, and continually for more than one month thereafter, fraudulently and unlawfully wholly fail, refuse, and neglect to disclose the same to his said assignee in bankruptcy. It is then aver-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

red that, in order to effect the object of said conspiracy, said Kargleder and Ober then and there falsely asserted and claimed, in the presence of said assignee, that said debt, so proven by said Kargleder, was a true, just, and valid claim against Bayer for money loaned to him by Kargleder, and that in further pursuance of the conspiracy, the bankrupt Bayer then and for two weeks thereafter fraudulently failed, neglected, and refused to disclose said fictitious debt to his said assignee in bankruptcy. The defendants, Kargleder and Ober, move to quash the indictment, because no person, except a person respecting whom proceedings in bankruptcy are commenced, can commit the offence; because the defendants cannot conspire to commit an offence which they cannot, in law, commit, and because a nolle prosequi has been entered as to Bayer, the bankrupt.

Morris Lamprey and Reuben E. Benton, for the motion.

W. W. Billson, Dist. Atty., opposed.

DILLON, Circuit Judge. The questions presented are important, and, so far as the court is advised, are new. The leading objection made by the counsel for the defendants, is that no person can be punished under the penal section of the bankrupt act (Rev. St. § 5132), except the "person respecting whom proceedings in bankruptcy are commenced;" that this section does not extend to those who counsel, aid, and assist in the commission of the acts which that section makes criminal, when committed by "the person respecting whom bankruptcy proceedings" are pending, and, as a corollary, it is urged that if a person cannot himself commit a specified offence, he is necessarily incapable of conspiring with another or others to commit it.

This indictment is for conspiracy, and is based upon section 5440 of the Revised Statutes, which provides that "if two or more persons conspire to commit any offence against the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc. The offence which it is alleged the defendants conspired to commit is made penal by the seventh and tenth subdivisions of section 5132 of the Revised Statutes.

It is not necessary to decide the main proposition relied on by the learned counsel for the defendants, which is that under section 5132 no person, except the one respecting whom proceedings in bankruptcy are commenced, can commit, or be punished for, the acts therein made criminal. Without intending to determine the soundness of this position, I must say that the result of the argument left my mind with a decided impression against it. It is true that the statute only mentions the debtor or bankrupt; but it is a statutory misdemeanor only that is created, and the general principle of the law is that all procurers and abettors of statutory offences are punishable under the statute, although not expressly referred to in the statute. Bish. St. Crimes, 136; Com. v. Gannett, 1 Allen, 7; U. S. v. Harbison [Case No. 15,300] (Judge Emmons), and cases cited infra. Moreover, it has been several times adjudged, upon full consideration, that it is immaterial that the aider and procurer is himself disqualified to be the principal actor in the offence by reason of not being of a particular age, sex, condition, or class. State v. Sprague, 4 R. I. 257; Boggus v. State, 34 Ga. 275; Rex v. Potts, Russ. & R. 352; 1 Bish. Cr. Law, 627, 629.

But if it be true that none but the bankrupt can be indicted under section 5132, still it is clear that other persons can combine and confederate with him to commit the acts therein made offences against the United States. By section 5440, conspiracies to commit any offence against the United States are made punishable, provided some act is done to effect the object of the conspiracy. The statute is based upon the common law principle that conspiring to commit a crime is of itself criminal, but adds the requirement of an overt act, and the fact that one of the conspirators could not himself commit the intended offence, neither relieves him of guilt nor disables him from co-operating with another person who is able to commit it. The legal as well as moral guilt of all the conspirators is the same. One of the offences which it is alleged the conspiracy was entered into to commit, was that the defendants, knowing that a false and fictitious debt against the estate of the bankrupt had been proved, conspired together that the bankrupt should fail to disclose the same to the assignee; the other was in respect to a fraudulent disposition of the property of the person in bankruptcy to one of the alleged conspirators. Now, it is necessary to both of these offences that another person besides the bankrupt should have been guilty of a violation of law, and if the bankrupt and such other person conspire together to commit the acts made criminal by the bankrupt law, and either does any act in pursuance of such conspiracy to effect its object, why should they not be punishable, although the relation of the parties to the criminal act is such that only one of them can commit the act itself? Bish. Cr. Law, § 432. The conspiracy and the consummated act are different offences, in the sense, at least, that the fact that the offence has been completed is no legal bar to a prosecution for the conspiracy. United States v. Boyden [Case No. 14,632], and cases cited; Reg. v. Boulton, 12 Cox, Cr. Cas. 87; Reg. v. Rowlands, 5 Cox, Cr. Cas. 485, 487; U. S. v. Rindskopf [Case No. 16,165].

The motion to quash the indictment is denied. Motion overruled.

Case No. 14,548.

UNITED STATES v. BAYER.

[13 N. B. R. 88.] [1]

District Court, D. Minnesota. 1876.

PENAL ACTION—BANKRUPTCY—INTENT—CHATTEL MORTGAGE.

1. A criminal intent is not to be presumed, but must be proved.

2. The doubt which will entitle a defendant to an acquittal must be reasonable.

3. A chattel mortgage is a disposition of property out of the usual course of business of the mortgagor

Indictment for violation of provisions of bankrupt acts.

NELSON, District Judge (charging jury). The defendant, John Bayer, a retail dealer in boots and shoes committed an act of bankruptcy and was adjudged a bankrupt on the 22d day of June, 1875. He now stands before you charged: First. With purchasing a stock of goods on credit, and while they were unpaid for, and within three months before proceedings in bankruptcy were commenced, giving a chattel mortgage thereon, out of the usual course of his business, with the intent to defraud his creditors. Second. With permitting a fictitious claim to be proved against his estate, and knowing the same to be fictitious, one month before the proof thereof, and not informing his assignee in bankruptcy. These acts constitute an offense under the penal section of the bankrupt law. The purpose of this section is to preserve good faith in mercantile transactions, and to prevent a trader from abusing the credit which may be allowed him in the course of his business. It is in evidence and uncontradicted, that a chattel mortgage was executed by the defendant, and delivered to one John Kargleder, June 1, 1875, purporting to secure a note for five thousand dollars, which mortgage was antedated October 1, 1874; and it is further testified to by witnesses for the defense that Bayer owed Kargleder one thousand dollars prior to October 1, 1874, and on that day received from him four thousand dollars more, and that this mortgage was given June 1, 1875, in pursuance of an agreement between the parties that such security should be given. The theory of the prosecution, which it has attempted to show by positive admissions of the defendant, and circumstances for your consideration, is that Kargleder never loaned Bayer any money October 1, 1874, and although he held his note for five thousand dollars, bearing date on that day, no money passed, and the note and mortgage were without any such consideration, and the whole transaction was a fraud. If you should be satisfied beyond a reasonable doubt that such is the true account of this transaction, you should find the defendant guilty of both charges in the indictment. If, however, you find that Bayer did owe Kargleder, June 1, 1875, five thousand dollars, and executed this mortgage upon his stock, purchased on credit and unpaid for, you must consider whether he made such a disposition of this property with intent to defraud his creditors. The chattel mortgage was a disposition of his property out of the ordinary course of business, but if it was executed in good faith, and in pursuance of a prior promise, and the money which was secured thereby was paid out by the defendant to his creditors, no criminal intent to defraud can legitimately arise from such mortgage. Now, we judge of intentions by acts and circumstances. Criminal intent of a person is not usually divulged, except as it can be discovered from his conduct. If you believe the intention of the defendant was to defraud creditors, such belief must arise from a consideration of all the circumstances—his admissions and his acts. If he has made any false and contradictory statements of the condition of his affairs, and of his indebtedness, they are important in determining his intentions; and so are his admissions in regard to the character of his debt to Kargleder

Now, you are not to presume a criminal intent. This must be proved, as any other fact in the case, by proper evidence. The defendant is presumed innocent of these charges until he is proved guilty beyond a reasonable doubt You are, therefore, to put a favorable construction upon his conduct and his statements, if they admit of two constructions. But while the defendant is entitled to the benefit of any doubt in your minds, it must be a reasonable one, the evidence must be insufficient to establish in your minds his guilt; his conduct and his statements must be inconsistent with any other conclusion. There has been an effort made to attack the credibility of some of the witnesses in this case. If successful in reference to any material fact, you may reject the whole of the evidence given by any witness who is thus discredited. If a witness has given contradictory statements, under oath, of material facts, you would be justified in rejecting all of his testimony, as unworthy of credit. You are the judges of the weight of testimony, and must satisfy your own minds upon a conscientious examination of all the testimony in this case. If the defendant is guilty, you should say so. The interest of every business man in this community, as well as your own, demand his punishment, if guilty. On the other hand, if the evidence fails to convince you of his guilt, you should acquit him.

[For a hearing upon motion to quash an indictment against the defendant and others for conspiracy, see Case No. 14,547.]

[1] [Reprinted by permission.]

Case No. 14,549.

UNITED STATES v. BEALE.

[4 Cranch, C. C. 313.] [1]

Circuit Court, District of Columbia. May Term, 1833.

INDICTMENT—USING CONTEMPTUOUS LANGUAGE TO MAGISTRATE—WORDS SPOKEN—TIME—JUDICIAL FUNCTIONS.

An indictment for using contemptuous language to a magistrate in the exercise of his office, should set forth the words spoken, and the day and month, and that the magistrate was in the discharge of his judicial functions.

Indictment for using contemptuous and threatening language to the mayor of Alexandria, (who is, ex officio, a justice of the peace,) in the exercise of his official duties, on the ——— day of ———, in the year 1833.

The defendant [John S. H. H. E. Beale] demurred generally, and in proper person stated his objections to the indictment. 1st. That no day or month is mentioned. 2d. That it was not stated that the mayor was in the exercise of his judicial functions.

Mr. Key, U. S. Atty. 1. On general demurrer, the defendant cannot take advantage of the omission of the day and month. 2. The obstruction of the official functions of a town-officer, in the discharge of his official duty, is an indictable offence. It is not necessary to state that it was to the obstruction of justice, or of the judicial functions of the mayor.

THE COURT (MORSELL, Circuit Judge, absent,) stopped the defendant, in reply, and said that the indictment was bad, because the words were not set forth; because the day and month were not mentioned; and because it does not state that the mayor was in the discharge of his judicial functions.

Judgment for the defendant on the demurrer.

Case No. 14,550.

UNITED STATES v. BEAN.

[22 Int. Rev. Rec. 43.]

District Court, D. Maine. 1876.

ARREST—CIVIL PROCESS—MAIL CARRIER.

Held, that a driver and carrier of the United States mail is exempt from arrest on civil process while engaged in the service, and this exemption extends to such driver or carrier while he is waiting for the mail.

This was a proceeding before Commissioner Hamlin against Gustavus L. Bean for delaying by arrest for debt one John G. Withee, a mail carrier, who had come to the post office for the mail for Belfast November 15. The testimony was closed on the 25th of November, and the commissioner rendered his opinion. The case was based upon the act of congress (Rev. St. c. 9, § 3995) which provides that any person who shall knowingly and wilfully obstruct or retard the passage of the mail, or any carriage, horse, driver or carrier carrying the same shall, for every such offence be punishable by a fine of not more than one hundred dollars.

HAMLIN, Commissioner. Upon these facts the question arises, was the arrest of the complainant by the defendant, taking into consideration the time when, and the place where, under these circumstances, such an obstruction or retarding of the driver and carrier as is within the intent of the statute? The defendant pleads that he is an officer of the law, a deputy of the sheriff, and in the legal exercise of his duty as such, having executions issued by courts of competent jurisdiction, requiring him to arrest the body of the complainant, and that the complainant was and had been under arrest all the time from November 8th down to the morning of the 15th, when he resumed the custody or re-arrested him. It does not appear necessary to determine whether the arrest made on the 8th of November and continued to the 11th remained an arrest after Thursday or not, or whether it having ceased at that time, the defendant could take the execution debtor as an escape, because it is not perceived how the officer on fresh pursuit could have any higher rights in the case than at the time the arrest was first made, if it were similar to that made November 15th, and was unlawful. Was the last arrest then lawful? It was held in U. S. v. Harvey [Case No. 15,320], by Taney, C. J., that a warrant in a civil suit against a mail carrier was no justification to the ministerial officer executing it, although he may have acted without knowledge of the law of congress, and did not detain the carrier longer than was necessary for the execution of the warrant. In this case the retention was but a short time, and the carrier got to the next office (Bel-Air) at his usual hour. The supreme court of the United States recognized and affirmed the principles of this decision in U. S. v. Kirby, 7 Wall. [74 U. S.] 482, and say: "All persons in the public service are exempt as a matter of public policy, from arrest upon civil process while thus engaged," and where the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object. The justification of the defendant therefore in this respect fails, if the complainant at the time of the arrest was engaged in the public service. Was he so engaged? It already appears that Withee was a sworn driver and carrier of the mail, and that in

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

performance of his duty went to the post-office to get the mail, which was about ready, and at the time of day when his duties as a driver and carrier had begun. It should not be overlooked that the defendant was within the post-office room in violation of the rules of the postmaster-general (sections 30 and 31, Postal Laws and Regulations), and therefore the place of arrest was as much within the prohibition of public policy as the arrest of the person of the complainant himself when in the performance of his duties; and the fact therefore that the driver had not at the time of the arrest actual possession of the mail, the delivery of which the defendant had forbidden, cannot avail the respondent.

The exemption from arrest of persons engaged in the public service as was the complainant Withee, does not depend upon the manual possession of the mail, but upon principles of public policy, which would be quite futile were the operations of the general government subject to be interrupted by the enforcement of merely private rights as in this case. Finally, it was urged that the defendant did not know that the complainant was a driver or carrier of the mail when he arrested him November 15th. Something was said at the hearing which seemed to show the defendant had learned that Withee, some time about July 15th had abandoned his contract, and defendant believed that complainant had not had time or opportunity to be sworn as a driver after reaching Bangor late Saturday night, November 13th, and before he came to the post-office on the morning of the 15th. Sufficient appears to show the driver was sworn, and no provision of the statute or regulation of the postoffice department was pointed out requiring the driver to be sworn again when he resumed the driving of the mail November 9th; nor does it appear to be material whether the complainant was the contractor or not, so long as he was acting as the driver or carrier. No claim is made that Withee was exempt from arrest on civil process because of his being a contractor, but the exemption is put on the ground that he is and was a driver and carrier within the terms of the statute. Still less can the defendant set up his want of knowledge that the complainant was engaged in the public service as a driver or carrier of the mail. It is impossible to reconcile the acts of the defendant in going into the post-office at so early an hour in the day, directing the clerk not to deliver the mail to Withee, and finally going with him to arrange for another driver to take the team upon any other theory except that the defendant well knew the complainant was acting in the capacity of a driver, and it must be held that he run his own risk in delaying the mail, if acting with such belief, it afterwards turned out that he was mistaken.

Defendant ordered to recognize.

Case No. 14,551.

UNITED STATES v. BEARD et al.

[5 McLean, 441.] [1]

Circuit Court, D. Indiana. May Term, 1853.

CONTRACTS — PRECEDENT ACTS TO BE DONE BY PLAINTIFF—DAMAGES—PLEADING.

1. Where certain work was to be done by the defendant, and certain things were to be done by the plaintiffs, to enable the defendant to perform his contract, the declaration must show that the precedent acts were done, by the government, to enable it to sustain an action for damages on the contract.

2. A demurrer reaches the first defect in pleading.

At law.

Mr. O'Neal, U. S. Dist. Atty.

OPINION OF THE COURT. This action is brought on a penal bond in the sum of $10,500, against Beard as principal, and Jesse Beard and John Perdue as securities, that the defendant, Elias S. Beard, should perform a contract made with the United States, on the 9th of April, 1846, "for furnishing materials, and building 6,900 perches of a vertical wall at Memphis, in Tennessee." The action being brought upon the penalty of the bond, the defendants craved oyer of the bond and contract, and averred general performance. The plaintiffs replied, denying that the defendants furnished the materials, built the wall as by the contract he agreed to do, and averred that the said Beard on the 26th of November, 1846, abandoned the contract, and deserted the navy yard, at Memphis, where the work was to be done; whereby the plaintiffs were obliged to employ other persons to do the work, at an increased expense over the contract, &c. To this replication the defendants demurred, and the plaintiffs joined in demurrer.

On these pleadings the question arises, whether the plaintiffs have done all that was incumbent for them to do, under the contract, to maintain this action. By the contract, Beard agreed to furnish, for the consideration named, all the materials, and build 6,900 perches of a vertical wall, at the navy yard, at Memphis, Tennessee, or so much as shall be required of him by the engineer, or other duly authorized agent of the government, of the following description, viz: "The height of the wall to be from five to thirty feet, varying according to the height of the flats, and to suit the grade of the yard. The thickness will vary from three and a half to ten feet, according to the height of the wall. It is to be commenced on the low ground, after it has been properly leveled. So much of the wall as will be below the ground, after it has been graded, is to be rubble masonry, laid without mortar, and built vertical on both sides; the stones for which are to be of the best quality of sand or lime stone, of large

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

size, &c. After the yard has been graded, the wall is to be laid in courses, and with mortar, the courses to be from ten to twenty inches thick, &c. The work was to be completed in twelve months. The materials and work to be paid for, after inspection, retaining ten per cent. The contract is specific as to the materials to be furnished, and the quality of the work to be done, but is indefinite as to the amount to be done. This was left to certain measurements, and to the judgment of the engineer. The height of the wall was to be regulated by the elevation of the flats, and to suit the grade of the yard. It was to be commenced on the low ground, after the ground was properly leveled. This leveling of the ground, and varying the height of the wall, are not so specified in the contract as to enable the contractor to go on with the work, except under the special instruction of the engineer. It does not appear who was to do the grading. As there is no provision for this work in the contract, it was to be done, as may be presumed, by some other person than the defendant, and by what rule does not appear. If the grading was to be done by the contractor, it was indispensable that the grade should be fixed by the agent of the plaintiffs; and it appears by the contract of the defendant, that until the grading was done, the wall to be built by the defendant, could not be commenced. The government reserved the right to increase or diminish the work, paying accordingly. Under this discretion, the quantity of stone required should be stated, as if the wall should be lowered, less stone would be required.

It would seem, therefore, to be clear, that to enable the government to recover damages on this contract, for the non-performance of the work, by the defendant, it must appear that all the steps were taken by the government, to enable the defendant to commence and prosecute the work, which he had agreed to do. He could not commence the work until the ground was leveled, and instructions were given as to the height of the wall. As these were precedent acts to any action by the defendant, it was necessary to show in the declaration that they were done by the government. By the oyer pleaded, the conditions of the contract are brought into the case, and in effect must be considered as if the action had been brought upon the contract. The demurrer to the replication reaches this defect in the pleading. The demurrer is sustained. Leave will be given to amend the pleadings, on motion of the plaintiffs.

Case No. 14,551a.

UNITED STATES ex rel. BERRARD v. BEARNES et al.

[N. Y. Times, Jan. 20, 1863.]

District Court, S. D. New York. 1862.

ADMIRALTY—ATTACHMENT FOR CONTEMPT.

[A court of admiralty has full power to punish by fine the action of one of the parties in taking a vessel away from the custody of the court without permission.]

This was a proceeding by attachment for contempt of court [by the United States ex rel. Berrard against Henry M. Bearnes and James C. Jewett]. The facts disclosed by the papers were as follows: The relator, by Beebe, Dean and Donohue, as her proctors, filed a libel in this court on May 17, 1862, against the bark Cora and Henry M. Bearnes to recover possession of the vessel, claiming to be owner thereof. Process was issued and the vessel was taken into custody by the marshal. Bearnes appeared in the action by Owen, Gray and Owen as his proctors, and claimed the vessel, and on May 23 made a motion on affidavits to the court, Judge Betts being on the bench, for leave to bond the vessel, which application was opposed on affidavits, and the court on May 29 denied the motion for leave to bond, with costs. Nothing further was done in the cause until June 28, when an application to bond was served on the libelant's proctors by B. F. Dunning, Esq., as proctor, founded upon an affidavit of James C. Jewitt that his firm had previously chartered the vessel for a voyage to China, and that the vessel was then ready for sea. She had been, as it afterward appeared, previous to this date, cleared at the custom house, and Jewett paid the clearance and charged them to Bearnes. On this application, no affidavits being read in opposition, an order was obtained from the court on July 1, Judge Smalley then being on the bench, allowing the vessel to be bonded on certain conditions, which conditions were never complied with. The libelant had expressly refused, prior to that order, to consent to the bonding of the vessel and the proceedings afterward upon the application for the order and obtaining it from the court, were conducted without her personal consent or knowledge and against her refusal to her proctors to assent to such release of the vessel. The vessel was thereupon taken by her captain to sea out of the custody of the marshal, with the permission if not by the express direction of Bearnes personally. Bearnes well knew that no authority of the court or the marshal or the libelant had been given for such removal. In September following the libelant in that suit becoming aware of these facts applied to the court on affidavits and obtained an attachment against Bearnes for contempt of court in thus removing the vessel from the custody of the court, and an order against Jewett requiring him to show cause why a similar attachment should not issue against him. Bearnes was arrested and brought before the court under the attachment. The proceedings against him resulted in the concession on his part, under the advice of his counsel, that the fact of a technical contempt in intermeddling with and preventing the due course and effect of legal proceedings in the suit had occurred, and it was referred to a commissioner to take such proof as might

be offered in extenuation of his offence. Jewett appeared in answer to the order and showed by affidavit that he had never authorized any appearance in the suit or motion for leave to bond on his behalf, and had made the affidavit on which the application was founded on the request of Bearnes, whom he had been urging to hasten the vessel to sea, and that he had no part in sending the vessel away The matter then came before the court on affidavits and the evidence reported by the commissioner.

HELD BY THE COURT. That there is no color for the defence that Bearnes was unconscious of the wrongfulness and criminality of his interference with the course of justice, in taking the vessel out of the charge of the officers of the law. That the facts import a fixed purpose of mind in him to deprive the libelant of the protection and rights acquired by the institution of her suit. That the law prevents or redresses, by its most energetic interposition, every wrongful movement of one litigant party tending to counteract the due administration of the law by courts of justice, and which may work to the prejudice of his adversary. The judicatures of all civilized communities guard against mischiefs of that character by strict watchfulness over the conduct of suitors, and by the application of prompt and severe punishment to the parties found guilty of such intermeddling with the course of justice. That the usual method of punishing malconduct of this description is by attachment for contempt. That this act of Bearnes independent of the violation of the provisions of the act of congress (1 Stat. 83) and the inherent authority and powers of the court ([Maryland Ins. Co. v. Woods] 6 Cranch [10 U. S.] 32) was a flagrant contempt under the restricted regulations of the act of March 2, 1831 [4 Stat. 487], in regard to contempts, it being a disobedience and resistance to the writ and command of the court. This offence is punishable by the court at discretion by fine and imprisonment.

The doctrine of the English admiralty accords in the amplest degree authority to the court to vindicate its dignity against contumacious suitors and their abettors, and on proof of the offence to inflict a fine at discretion. Coote, Adm. 2, 18, 19; The Petrel, 3 Hagg. Adm. 299. The like remedy obtains in the admiralty courts of the United States (Ben. Prac. 241, 439), and the laws of this state embrace similar regulations in cases of contempts injurious to the rights of parties in civil actions. The mode of carrying on the remedy in the state courts does not necessarily control the action of the federal courts. That the order of reparation should require Bearnes to make provision for a full indemnification against the hazard to which he has exposed the property abstracted by him, and also to compensate the relator measurably for the damages and expenses she has sustained.

THE COURT therefore, ordered that, because of the offence and wrong committed by Bearnes in this act of contempt against the process of the court and the authority of the law and in violation of the rights and immunities of the relator in the prosecution of her suit, a fine of $500 is imposed upon him, to be paid into court, together with the costs and expenses incurred by the relator in these proceedings, which were taxed at $302.88.

And THE COURT further ordered, as it appeared in the application to Judge Smalley and his order thereon, that the vessel was worth $12,000, and that Bearnes undertook to give security in the sum of $15,000 to redeliver the vessel, that he now deposit in court the sum of $15,000 to abide the decree of the court or give a stipulation in that sum in the cause in which the vessel was arrested with two sureties, to be approved by the court that he will redeliver the bark to the marshal of this district upon the final decree of this court in favor of the libelant in like condition as she was in on July 1, 1862, and that he will pay all damages awarded by the decree. And further ordered that Bearnes stand committed to the custody of the marshal, to remain there charged on said contempt until the fine and costs and expenses are paid and the stipulation given, or the money deposited as above directed. And as it appears that Jewett had never personally interfered in the suit against the Cora, and only insisted that Bearnes should fulfill his charter and dispatch the vessel on her voyage, and though he knew before the departure of the vessel that she was in custody of the law, and was thus prevented from sailing, yet that he personally took no measures to withdraw or remove her illegally from that arrest, the proceedings against him are discharged, but without costs, because there was probable ground to believe that the interference to get the vessel out of port was a concurrent one between him and Bearnes.

Case No. 14,552.

UNITED STATES v. BEARSE.

[4 Mason, 192.] [1]

Circuit Court, D Massachusetts. Oct. Term, 1826.

WORDS AND PHRASES—"MORE INTERIOR DISTRICT"—SHIPPING—PUBLIC REGULATIONS—ENTRY.

1. The words of the twenty-ninth section of the revenue act of 1799, c. 128 [1 Story's Laws, 598; 1 Stat. 648, c. 22], "more interior district," mean a district more interior, within the common sense of the terms, that is, further within the indentations or inlets of the contiguous and adjacent country.

2. A vessel arriving in the district of Barnstable from Nova Scotia, and bound to New York, must make entry in Barnstable district,

[1] [Reported by William P. Mason, Esq.]

for New York is not, in the sense of the twenty-ninth section, "a more interior district," with reference to Barnstable.

[Error to the district court of the United States for the district of Massachusetts.]

Debt for a penalty of 400 dollars for a violation of the twenty-ninth section of the revenue collection act of 2d of March 1799, c. 128 [1 Story's Laws, 598; 1 Stat. 648, c. 22]. Plea, nil debet. On the trial in the district court, a verdict was found for the defendant [Isaac Bearse, Jr.], and a bill of exceptions was taken to the opinion of the district judge, delivered at the trial [case unreported], and the present writ of error was brought thereon. It appeared in evidence on the trial, that the Hope and Esther, being duly registered according to law, and under the command of the defendant, and being bound on a voyage from a foreign port (the port of Halifax) to the port of New York, and having on board a cargo consisting of plaister of Paris and potatoes, taken on board at Halifax, arrived at the harbor of Hyannis, within the limits of the collection district of Barnstable in the state of Massachusetts, and came to anchor in said harbor, within the limits of said collection district, and remained there for the space of fifteen or sixteen hours, no part of which time came within the office hours at the custom-house; that she then put to sea again, and proceeded on her way to the port of New York, from said port or district of Barnstable, without there having been made any report or entry of said vessel, by the defendant, with the collector of the port or district of Barnstable, or with the collector of any other district of the United States; that during the time that the said vessel was remaining at anchor in the harbor of Hyannis, the said master went on shore at the town of Barnstable, to his dwelling-house, about a mile from the place where his vessel was lying, and about six miles from the custom-house, upon a visit to his family, who were then residing in said Barnstable, and left with his family seven or eight bushels of the potatoes, which were brought, as aforesaid, from the port of Halifax; that neither the said master, nor the person next in command of the said vessel, made it appear, by their oath, or by any other sufficient proof, to the satisfaction of the collector of the district of Barnstable, that the departure of said vessel was occasioned by distress of weather, pursuit, or duress of enemies, or any other necessity. Evidence was also produced, on the part of the defendant, to show, that the potatoes, left with the defendant's family, were a part of the ship's stores. And two witnesses, who had been masters of vessels, testified, that they had always supposed, that, in the case of a vessel's arriving from a foreign port within the limits of Barnstable district, and not remaining there for the space of twenty-four hours, the law did not require an entry or report of any kind before her departure to any port to which she might have been destined. The judge, upon the prayer of the defendant's counsel, charged the jury, that the several matters, proved on the part of the defendant, the said vessel not having remained twenty-four hours in said port of Hyannis, were, upon the whole case, sufficient to bar the said action. To this opinion of the judge the district attorney excepted.

Mr. Blake, U. S. Dist. Atty.

Mr. Bassett, for defendant in error.

STORY, Circuit Justice. The twenty-ninth section of the revenue collection act of 1799, c. 128 [1 Story's Laws, 598; 1 Stat. 648, c. 22], enacts, "that if any ship or vessel, which shall have arrived within the limits of any district of the United States, from any foreign port or place, shall depart, or attempt to depart from the same, unless to proceed on her way to some more interior district, to which she may be bound, before report or entry shall have been made by the master or other person having the charge or command of such ship or vessel, with the collector of some district of the United States, the said master, &c. shall forfeit and pay the sum of four hundred dollars." The defendant was master of the schooner Hope and Esther, bound on a voyage from Halifax in Nova Scotia to the port of New York, he voluntarily put into the harbour of Hyannis in the district of Barnstable, and, after remaining there fifteen hours, departed without any necessity, without making any report or entry with the collector of Barnstable district or of any other district. He is of course within the reach of the penalty, unless he was bound to a more interior district; and the question therefore is, whether New York is such a district in the sense of the act. The district judge decided it as a question of law, that New York was such an interior district, there being no doubt as to the other facts of the case, and the relative geographical position of the ports in both districts being well known and not controverted.

What then is the true exposition of the phrase, "more interior district," in the section under consideration? Does it mean any other district, to which the vessel may be bound, and through which she has not already passed in her voyage, although, geographically speaking, it is not more inland, or indeed is less inland, than the district at which she has arrived? If so, the exposition of the learned judge was right, for his opinion is understood to have turned upon the most general import which could be applied to the phrase. Or does the expression, "more interior district," apply only to those districts, which are, in a strict sense, deeper within the interior of the country, than the one, in which the vessel has arrived, and through which she must go, before she can reach the interior district? If this be the true meaning, it is agreed, that the opinion of the learned judge cannot be maintained,

for New York is not such a district with reference to Barnstable. There are many such districts within the United States, upon our long rivers and extended bays, such as Hudson's river, Delaware river, Penobscot Bay, Chesapeake Bay, &c. I confess, that, after much reflection, I have reluctantly come to the conclusion, that this last is the true sense of the terms; and that in this section the legislature intended, by "more interior district," a district, which, with reference to local and geographical position, and in common usage, is deemed interior to another, that is, further within the indentations or inlets of the contiguous or surrounding country, than that in which the vessel has already arrived, and through which she would or might ordinarily pass, in order to reach such inner district. I have not found the words used in any other section of the act; but in the close of the eighteenth section, the words, "interior port," occur in a sense exactly like that, which I feel constrained to apply to the section under examination.

The requisitions of the act may be hard and rigorous: but if they are so, the remedy lies with congress, and not with courts of law. My judgment is, that the judgment of the district court must be reversed, and a venire facias de novo awarded. Judgment accordingly.

Case No. 14,553.

UNITED STATES v. BEARNS.

[See Case No. 14,551a.]

Case No. 14,554.

UNITED STATES v. BEATTIE.

[Gilp. 92.] [1]

District Court, E. D. Pennsylvania. June 10, 1829.

PRINCIPAL AND SURETY—PAYMENT—DISCHARGE—RELINQUISHMENT OF CLAIM—OFFICER.

1. Where one of two sureties in a joint and several bond given to the United States, is sued separately, a discharge of the other surety, by the president under the provisions of the act of 3d March, 1817 [3 Stat. 399], cannot be given in evidence under a plea of payment.

2. The act of 3d March, 1817, merely releases the person of a debtor, but does not affect the debt.

3. The letters and transactions between the officers of the government and a debtor to the United States, relative to his account, may be given in evidence under a plea of payment.

4. Where an officer, receiving a salary from the United States, is surety for a defaulter, the continuance of the payment of his salary is no relinquishment of the claim against him as surety.

5. The settlement and closing of an account of a public officer does not discharge his liability as a surety for another officer, though the default of the latter was previously known.

[Cited in U. S. v. Case, 49 Fed. 271.]

[1] [Reported by Henry D. Gilpin, Esq.]

On the 18th August, 1818, Thomas Burrowes, a purser in the navy, as principal, and Francis S. Beattie and Edward M'Gee as sureties, executed to the United States of America a joint and several bond for twenty-five thousand dollars. The condition was that "Thomas Burrowes should regularly account, when thereunto required, for all public moneys received by him, from time to time, and for all public property committed to his care, with such officers of the government as should be authorised to settle his account, and should pay over any sums found due on such settlement, and should faithfully discharge the trust." By an indorsement on the back of the bond, the secretary of the navy, acting in behalf of the United States, agreed "that the obligors were not to be held responsible for any loss of the said moneys or property, occasioned by capture, sinking, stranding, or any other unavoidable casualty; and, if the purser should be deprived of his books or vouchers by such circumstance, the obligors were to be exonerated, on producing satisfactory evidence of the facts, unless it was shown that the money or public property had been misapplied." In the year 1821, Thomas Burrowes died, and on the 5th October, 1822, the fourth auditor directed the purser at Philadelphia to retain the pay of the defendant, Francis S. Beattie, who was a surgeon's mate, to meet a delinquency in the accounts of the former. This was done accordingly; and the suspension continued until the 30th June, 1823, when the defendant received a letter from the secretary of the navy, informing him that his accounts were closed, and that he was thereafter regularly to receive his pay and rations as a surgeon's mate. By this settlement, a balance appeared to be due to the defendant of two hundred and sixty-six dollars and eighty-seven cents, which was retained by the treasury, to be applied as an offset to the amount for which he was responsible as the surety of Thomas Burrowes. On the 29th November, 1823, a final settlement was made at the treasury of the account of Thomas Burrowes, by which it appeared that, at the time of his death, there was a balance of public money due by him to the United States, amounting to one thousand two hundred and ninety-six dollars and twelve cents. To recover this, separate suits were instituted in the Eastern district of Pennsylvania, on the 19th January, 1824, against each of the sureties, Francis S. Beattie and Edward M'Gee. The summons in the former case was returned "Nil habet;" but judgment was recovered against the latter for the whole amount of the balance due from Thomas Burrowes. On this judgment, execution issued against M'Gee, who was arrested and imprisoned, but, on the 16th August, 1824, the marshal returned that he had been "discharged by order of the president." On the 7th March, 1825, the present suit was brought against

Francis S. Beattie, on the same bond, and to recover the whole of the balance due from Thomas Burrowes, as above stated. The defendant pleaded "nil debet and payment, with leave to give the special matter in evidence," and the United States joined issue.

On the 10th June, 1829, the case came on for trial before Judge HOPKINSON and a special jury. It was argued by District Attorney Dallas, for the United States, and

Mr. Sykes and J. C. Biddle, for defendant.

The validity of the bond, and the correctness of the account of Thomas Burrowes, as settled at the treasury, being admitted by the defendant, and the set off, to the amount of two hundred and sixty-six dollars and eighty-seven cents, retained from his pay, being agreed to on the part of the United States, the only questions in the case arose upon the following evidence, offered by the defendant under his plea of payment, with leave: 1. The record of the proceedings against Edward M'Gee, a party to the bond on which this suit was brought, and of his arrest, imprisonment and discharge, by order of the president. 2. The letters of the fourth auditor and of the secretary of the navy; the first directing the pay of the defendant to be retained, on account of his liability, under the same bond; and the second, informing him that his account was closed, and his pay was to be resumed.

Mr. Dallas, U. S. Dist. Atty.

All this evidence is objectionable; both that which relates to the suit against the co-obligor Edward M'Gee, and that which relates to the closing of the defendant's own account in 1823.

(1) The record of the proceedings against Edward M'Gee is entirely irrelevant; there is no issue to which it can apply; the defendant is separately sued on his separate obligation, to which it does not even appear, by the record, that Edward M'Gee was a party; to this suit he does not plead any release of a co-obligor, or of himself, but merely the general issue and a payment by himself. Is this record evidence to establish either one or the other? It is not; and were it now before the jury, it would not prove any allegation which the defendant has made in his own pleas. But had it been pleaded, it would have been bad on demurrer; the suit against the co-obligor of course is no release, nor is such a discharge. The act of 6th June, 1798, authorised the secretary of the treasury, under certain circumstances, to order the discharge from custody of any person imprisoned upon execution for a debt due to the United States; and the act of 3d March, 1817, authorised the president to do the same, in any case which did not permit a discharge by the secretary, under the power given him in that act; but both laws expressly declare, that "the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then or at any time afterwards belong to the debtor." It was under this law that the president acted; of course what he did was subject to its limitations; to extend it beyond those limitations, would be to give to the acts of the executive officer, an interpretation which would defeat the very object of the law. The legislature intended merely to relieve the person of one obligor from custody; this intention was just, and legal; it cannot be construed into a meaning which would be in fact the reverse. 1 Story's Laws, 506 [1 Stat. 561]; 3 Story's Laws, 1652 [3 Stat. 399]; U. S. v. Stansbury, 1 Pet. [26 U. S.] 573; Hunt v. U. S. [Case No. 6,900]; U. S. v. Sturges [Id. 16,414].

(2) As to the evidence offered in regard to the stoppage of the defendant's pay, it is to be remarked that it can have no possible bearing on this case. The whole transaction occurred before this account of Thomas Burrowes was settled; all the money actually retained is credited; and what is said in regard to the closing of the account, relates to the pay of the defendant in his own right, not to his liability as a surety.

Mr. Sykes and J. C. Biddle, for defendant.

The error made by the plaintiffs, as to this evidence, arises from their endeavouring to separate into parts that which ought to be taken altogether. The defendant asserts that he owes nothing, that he has paid all the United States intended or expected he should pay, and consequently that he has satisfied their claim. This may not be proved by taking separately each particular fact offered in evidence, but it is the result of the whole of them taken together. The acts of the president, the auditor, and the secretary, are links in the chain; the whole series shows that the United States intended to release both the sureties. The plea is a general one, and the evidence offered by the defendant, taken altogether, will sustain it; it is not therefore to be rejected by considering it in parts. As soon as it was discovered that, at the time of his death, Thomas Burrowes was a defaulter, the United States looked to his sureties for indemnity. They first proceeded against the defendant, who, being a surgeon's mate in the navy, was entitled to compensation. According to the provisions of the second section of the act of 4th May, 1822 [3 Stat. 677], his pay was detained at the treasury, "to be applied," as is expressly stated by one of the letters now offered in evidence, "as an offset for the amount for which he was liable as surety of Burrowes." This continued till the 30th June, 1823, when, as is also expressly stated in another of the letters offered in evidence, "the defendant's account was closed by order of the secretary of the navy, and his pay restored as before;" which could not have been legally done had he still been "in arrears to the United States." They then proceeded against the other surety Edward M'Gee, and carried on the suit to final judgment and execution, which of

itself operated as a release of the co-obligor, the present defendant, and consequently is good evidence under the general plea of "Nil debet." The whole proceedings therefore taken together; first, the closing of the defendant's account and payment of his compensation when it ought to have been retained if he owed any thing; and secondly, the discharge of the other surety without the consent of the defendant; are proof that the officers of the United States considered the debt now claimed as satisfied. 7 [Bior. & D.'s] Laws, 50 [3 Stat. 677]; Rowley v. Stoddard, 7 Johns. 207; McLean v. Whiting, 8 Johns. 262.

Mr. Dallas, for the United States, in reply. The neglect of the public officers to retain the defendant's pay, after the 30th June, 1823, is no evidence either of payment or release. If they had neglected to retain it altogether, it would not have affected his liability. No point is better settled, than that the laches of a public officer does not affect the rights or claims of the government. So far as the defendant paid any money, he is entitled to credit; but nothing else can give it to him, whether the public officers were negligent, or whether they intended to release him. As to the discharge of Edward M'Gee, it has nothing to do with this case; the judgment against him remains in full force; therefore, the rights and liabilities of his co-obligor are in no respect affected, by the act which the evidence offered would establish. We admit the fact, but we deny altogether its bearing; it is not therefore proper evidence. U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720.

HOPKINSON, District Judge, rejected the evidence in regard to the discharge of Edward M'Gee, observing that the common law principle was clear, which precluded the introduction of evidence having no bearing upon the issue. This discharge could not serve the defendant under his plea of payment, even if it were proved, because the act of congress, by virtue of which the discharge was made, is a mere release of the person, and does not affect the debt. It was not so however in regard to the transactions of the treasury and navy departments, with the defendant; it was impossible to say that they did not contain proof, to a greater or less degree, of payments made by him on account of this liability. They ought therefore to be received in evidence, leaving for future consideration, the extent to which they operate.

The case went to the jury on this evidence, and HOPKINSON, District Judge, delivered the following charge:

The execution by the defendant of the bond on which this suit is brought is admitted; so of the condition and the breach. The account of Thomas Burrowes, the principal in the bond, was not settled until the 29th November, 1823, when it appeared there was due from him to the United States a balance of one thousand two hundred and ninety-six dollars and twelve cents. Burrowes died in the year 1821, and was known or supposed, some months after, to be a defaulter, although the amount was not ascertained; for on the 5th October, 1822, the fourth auditor wrote to the purser of the navy yard at Philadelphia, directing him to retain the pay of the defendant, Dr. Beattie, to meet the delinquency of Burrowes. On the 30th June, 1823, the secretary of the navy wrote to the defendant that his accounts were closed, and he was thereafter to receive his pay and rations as a surgeon's mate. On this settlement of the accounts of the defendant, there appeared to be due to him two hundred and sixty-six dollars and eighty-seven cents, which were retained to meet his responsibility for Burrowes, whose account was not yet settled; and, of course, the amount of that responsibility was not ascertained. It is now contended by the defendant, that these letters, from the fourth auditor and the secretary, sustain his plea of payment of this bond; and show that all claims upon him by the United States, not only on his own account but also as the surety of Burrowes, were entirely closed. This is an affirmative allegation, and it is incumbent upon the defendant to prove it to your satisfaction. He alleges that the account settled in June, 1823, was not merely of his own transactions with the government, but included the sum for which he was liable as the surety of Burrowes. If such be the fact, he could have shown it conclusively by producing the account. You would then have seen for yourselves of what items or particulars it is composed; you would have certainly known whether the sum of two hundred and sixty-six dollars and eighty-seven cents is simply the balance of the defendant's own account with the government, or whether the account goes beyond this, and charges him with the balance of Burrowes, now demanded of him, or any part of it. The account is not produced, nor is there any rational presumption to be drawn from these letters that such was the case; on the contrary, I do not see how it could be so. The account of defendant was settled some time antecedent to the 30th June, 1823, for on that day the secretary informed him of it. Now it was not until the December following that Burrowes' account was settled, and the amount of his debt to the United States known, to wit, one thousand two hundred and ninety-six dollars and twelve cents. It is evidently impossible that this amount could have formed a part of, or have been an item in, the account of Beattie, which was closed six months before; unless we are driven to the improbable presumption that the amount of Burrowes' balance was anticipated and assumed in the settlement of Beattie's account. If this was done the account itself would show it. The allegation, therefore, that the money due from Burrowes has been paid by the defendant in the settlement of his own account is

altogether unsupported. The letter of the secretary could have referred only to the private account of Beattie himself. If, on the final adjustment of the account of Burrowes, it had appeared that he was not indebted to the government at all; or not to the amount of two hundred and sixty-six dollars and eighty-seven cents, the sum retained from Beattie; would he not have had a just and legal claim for the return of this money? Could he have been told, "Your account is closed"? It is true the secretary informs him that he shall thereafter receive his pay, but does the relinquishment for the time of a harsh remedy, extinguish the claim? It was a liberal and equitable indulgence on the part of the secretary; it was perhaps but strictly right, that the earnings of the defendant should not be withheld from him, to meet an unascertained balance from a debtor for whom he was a surety, and where, whatever might have been the reasonable anticipation, it could not strictly be said that any forfeiture or breach of the bond had taken place. Whatever were the motives of the secretary in renewing the defendant's pay, as an officer in the service of the government, it can never have the effect of discharging him from the obligations of his bond.

We find further, that in March, 1825, the auditor of the treasury wrote to the defendant, informing him that the balance due to him would be applied as an offset to the amount for which he was indebted to the government as the surety of Burrowes. To this he made no answer or complaint, asserting as he now does, that his responsibility was paid and discharged on his account settled in June, 1823. From this it would seem, that neither the accounting officers of the treasury, nor Dr. Beattie himself, considered that this settlement embraced any thing but his private account, and had no relation to any claim upon him arising from the suretyship for Burrowes.

This is the whole testimony you have to act upon, for I consider the discharge of Edward M'Gee, the other surety, to have no relevancy to the case of the defendant. You will give him credit for the two hundred and sixty-six dollars and eighty-seven cents.

The jury found a verdict for the United States for thirteen hundred and sixty-eight dollars and eighty-seven cents.

Case No. 14,555.

UNITED STATES v. BEATY.

[Hempst. 487.] [1]

Circuit Court, D. Arkansas. May 3, 1847.

PENAL ACTION — FAILURE TO DELIVER MAIL — KNOWLEDGE—DILIGENCE—NEW TRIAL.

1. Every steamboat master, manager, captain, owner, or person having charge thereof, is subject to a penalty of one hundred and fifty dollars under the thirteenth section of the act of 1845, for failing to deliver letters as prescribed in the sixth section of the post-office act of 1825. 4 Stat. 104; 5 Stat. 736.

2. Any person employed on any steamboat failing to deliver a letter to the master, captain, or manager of such steamboat, incurs a penalty of ten dollars. 4 Stat. 104.

3. Before a person can be subject to the penalty of one hundred and fifty dollars for failing to deliver a letter, it must have been brought by him, or intrusted to his care, or within his power; and in a case where he has no knowledge of it, and could not obtain such knowledge by the exercise of reasonable diligence, he is not responsible.

4. Express knowledge on the part of a defendant need not be proved; but it is essential to show such facts and circumstances as render it probable, that a defendant by the use of ordinary and reasonable diligence obtained that knowledge or could have done so, so as to authorize the jury to presume it.

5. The master, captain, manager, or owner are not responsible under the act of 1845, for the conduct of the clerk of the boat in the matter of failing to deliver a letter, where they are ignorant of the existence of such letter, or could not obtain a knowledge of it by the use of reasonable diligence.

6. The law does not require the exercise of the utmost diligence of which the case is susceptible; but only such as rational men ordinarily employ in their own affairs.

7. Where the court has misdirected the jury, a new trial will be granted without imposing costs, or any terms whatever.

Debt on statute, before PETER V. DANIEL, associate justice of the supreme court, and BENJAMIN JOHNSON, district judge, holding the circuit court.

This was an action of debt brought against Robert Beaty, master and owner of the Arkansas No. 4, by the direction of the postmaster-general, on the information of A. Gordon, postmaster at Lewisburg, Arkansas. The declaration filed the 30th of December, 1846, was substantially as follows, namely:

"The United States of America, plaintiffs, by S. H. Hempstead, their attorney, complain of Robert Beaty of a plea that he render unto them one hundred and fifty dollars, which to them he owes and from them unjustly detains. For that the defendant at a time past, namely, on the 16th of June, 1846, being then master, commander, and owner of a certain steamboat called the 'Arkansas No. 4,' then lying and being at the port of New Orleans, (where a post-office of the United States was, and had long theretofore been established with a postmaster thereof,) in the state of Louisiana, and bound and destined for the Arkansas river and the several ports and places on said river, in the district of Arkansas aforesaid; did receive on said Arkansas No. 4, a written letter purporting to have been written by one Moses Greenwood, at said port of New Orleans, dated June 16, 1846, and addressed and directed to one M. Whisler, at Lewisburg, a port and place on said Arkansas river, in the district aforesaid, to be conveyed, transported, and brought by the said steamboat Arkansas No. 4, to the said port and place of

[1] [Reported by Samuel H. Hempstead, Esq.]

Lewisburg, in the district aforesaid, and to be there delivered, and which said letter did not relate to the cargo of the said steamboat Arkansas No. 4, or any part thereof of that voyage, and whereof the said defendant had notice. And the said plaintiffs in fact further say, that the said letter was conveyed, brought, and transported on and by the said steamboat to the port and place of Lewisburg aforesaid, in the district aforesaid, and that afterwards, namely, on the 30th of June, 1846, the said steamboat Arkansas No. 4, whereof the defendant still continued to be such master, commander, and owner as aforesaid, on the trip and voyage aforesaid, landed at said port of Lewisburg, where a post-office was then and there, and had long theretofore been established, with a postmaster thereof, then and long theretofore had been acting as such, of which the defendant had notice, and that the defendant utterly failed and neglected to deliver the said letter to the postmaster at Lewisburg, or to deposit the same in the post-office there, in manner and form as required by the acts of congress in that behalf provided, although the said postmaster was then and there ready and willing to receive the same, and that the defendant in violation of his duty and contrary to the form and effect of the acts of congress aforesaid, did then and there deliver and place the said letter into the hands of a private person who was not postmaster at Lewisburg aforesaid, nor in anywise an agent of the post-office department, or connected with that post-office, namely, into the hands of one B. W. Owens, to be delivered to the said Whisler, to whom the same was addressed and directed. And the plaintiffs in fact further say, that the said letter was then and there delivered by the said Owens to the said Whisler; contrary to the form and effect of the statute in that behalf made and provided. By means whereof and by force of that statute, an action has accrued to the plaintiffs, to sue for and recover from the defendant, as a penalty for the violation of that statute, the sum of one hundred and fifty dollars above demanded. Yet the said defendant, although often requested so to do, has not paid to the plaintiffs the said sum of money above demanded or any part thereof. To the damage of the plaintiffs of one hundred and fifty dollars, and therefore they sue. S. H. Hempstead, Attorney of the United States for the District of Arkansas."

On the 16th of April, 1847, the defendant, by Daniel Ringo and F. W. Trapnall, his attorneys, filed a demurrer to the sufficiency of the declaration, assigning various causes; but after argument, and on consideration, the court adjudged the declaration sufficient and overruled the demurrer. The defendant then plead the general issue, and the cause was tried by a jury on the 30th of April, 1847, before PETER V. DANIEL, associate justice of the supreme court of the United States, and BENJAMIN JOHNSON, district judge, and a verdict was found for the United States for the amount of the penalty and costs. On the 3d of May, 1847, the defendant filed his motion for a new trial; on the grounds principally that the verdict was contrary to law and evidence, and because the court had misdirected the jury; and this motion was argued and determined at the same term.

S. H. Hempstead, Dist. Atty., for the United States, contended that the motion for a new trial should not be granted; that the charge of the court to the jury was well sustained by principle and authority, and that to establish a different doctrine would enable the post-office acts to be evaded with perfect impunity. He commented on the post-office acts of 1825 and 1845, and then insisted that the master, captain, or manager of a steamboat, was responsible for the acts of those who were under him, and more especially where the master, as in this case, was the owner. The master has the charge of the boat; may employ or discharge such servants as he pleases, and it is difficult to perceive why he should not be responsible for their conduct. They are selected by him, and it is to be presumed that he will be careful to employ competent, discreet, and skilful persons, as his agents or servants, and surely there can be no hardship in holding him liable for their acts. That liability rests upon clear principles of public law, and cannot be denied. In Bussey v. Donaldson, 4 Dall. [4 U. S.] 206, the owner of a vessel was held liable for the negligence of the pilot, on the ground that he was the agent or servant of the owner, although not chosen by him, but placed in his service by an act of the legislature. And so the captain of a steamboat is responsible for the acts of the pilot. Denison v. Seymour, 9 Wend. 9; 1 Taunt. 569; 14 Johns. 304; Nicholson v. Mounsey, 15 East, 383; 6 Mees. & W. 499, 510. Masters of ships are responsible for the negligences, nonfeasances and misfeasances of subordinate officers and others employed by and under them. Story, Ag. 314, 316, 317; 14 Pick. 71. The clerk of the boat was the agent of the master, and the act of the clerk was the act of the master, on that received maxim of law, "Qui facit per alium facit per se." The actual knowledge of the master cannot be material. He is bound with or without knowledge on the footing of responsibility for the conduct of the clerk, his servant and agent. If any knowledge is necessary, the law intends it to exist, and will not allow any proof to the contrary; any more than allow proof of the ignorance of the law as an excuse. If clerks or servants on a steamboat may receive letters, put them in their pockets, and deliver them out to the persons to whom they are addressed, without making the master or owner liable unless knowledge is brought home to him by the government, an important part of the post-

office act is a dead letter, because it can be successfully evaded. All that a master of a steamboat would have to do would be to shut his eyes to these violations of law, and escape responsibility. All he would have to do would be to plead ignorance, and that would be potent enough to defeat this kind of prosecution. Such a construction of the post-office act could never have been anticipated. If the law is unpopular, let it be repealed by congress; not destroyed by judicial construction. The principle contended for has not the effect of making the principal or master responsible criminally for the act of the agent or clerk. Undoubtedly it is a general rule of law, that a principal cannot be held amenable for the crimes and misdemeanors of the agent, without participation in them. Even that rule, though general, is not universal; for the principal is said to be sometimes liable in a criminal suit. Story, Ag. 452, and cases there cited. But this is a civil, not a criminal proceeding; and although a fixed penalty is in question, yet it is like the recovery of unliquidated damages against the principal, for the wrong of the servant. It is no more criminal than that, and stands on the same footing. In the one case the agent violates the rights of a fellow man; and in the other he violates the rights of the government. In both, he acts against law; and that law affords a vindication through its ministers, for the wrong, in the shape of a pecuniary compensation,—in one instance, to an individual; in the other, to the government.

Daniel Ringo and F. W. Trapnall, for defendant, and for the motion, examined and commented on the post-office acts at length, and then argued that the court had misdirected the jury in point of law, and for which error a new trial should be granted, and without costs. There was no evidence to prove that the defendant had the slightest knowledge of the existence of the letter in question, and that it was manifest that the clerk of the boat acted on his own responsibility as to its reception and delivery, and without the sanction of the defendant. The letter was never in the care or within the power of the defendant, because he was ignorant of it. It could not have been intended by congress to inflict a heavy penalty on the master of a steamboat for the non-delivery of a letter of which he knew nothing, and could have ascertained nothing by the exercise of reasonable diligence. It may be admitted, that if a master has the means of ascertaining the existence of a letter, and does not choose to do it, he cannot escape liability. But this case has no such feature in it. There are no facts or circumstances from which knowledge might be implied by the jury. That there must be knowledge on the part of the master, is evident; and not until the moment he is affected with it, could he possibly be said to be a particeps criminis with the clerk or servant in the violation of the law; and there then might be some more plausible reason for inflicting the penalty than at present. But without knowledge, express or implied, to hold him liable, would in reality amount to making the master answerable for the criminal act of the servant, which is contrary to the well-established doctrines of law. This is not in form a criminal proceeding, but is so in its nature; and the attempt of the district attorney to assimilate it to a civil suit for damages, must fail. There is no analogy between the two. The defendant here, in the form of an action of debt, is prosecuted by the law-officer of the government for a violation of a highly penal law, and a large penalty is claimed for that violation. It is, therefore, totally different from a mere civil, personal suit for damages for an injury received from an agent or servant. If knowledge is essential to a recovery on the part of the government, as we think is clear, a new trial must be granted; for it is not pretended that there was any evidence conducing to prove any thing of the kind.

JOHNSON, District Judge. This suit was brought for the recovery of the penalty provided for a violation of the thirteenth section of the post-office act of 1845 (5 Stat. 736). That section declares in substance that nothing contained in the last-named act shall have the effect, or be construed to prohibit the conveyance or transportation of letters by steamboats, as authorized by the sixth section of the act of 1825 regulating the post-office department (4 Stat. 104), provided that the requirements of such sixth section be strictly complied with, by the delivery, within the time specified by that act, of all letters so conveyed not relating to the cargo or some part thereof, to the postmaster at the post or place to which such letters may be directed or intended to be delivered over from the boat; but it is expressly enacted that all the pains and penalties provided by that act for any violation of the provisions of the eleventh section thereof shall attach in every case to any steamboat, or to the owners and persons having charge thereof, the captain, or other person having charge of which, shall not comply with the requirements of the sixth section of the act of 1825. The eleventh, by reference to previous sections, fixes the penalty at $150, and to recover which this action of debt has been instituted. The sixth section of the act of 1825, above referred to enacts substantially that it shall be the duty of every master or manager of any steamboat which shall pass from one post or place to another in the United States, where a post-office is established, to deliver within three hours after his arrival, if in the daytime, and within two hours after the next sunrise, if the arrival be in the night, all letters and packets addressed to or destined for such post or place to the postmaster there; and if any master or manager of a steamboat shall fail so to deliver any letter or packet which shall have been brought by him, or shall have been

in his care or within his power, he shall incur the penalty therein prescribed; and every person employed on board any steamboat shall deliver every letter and packet of letters intrusted to him to the master or manager of such steamboat before the vessel shall touch at any other post or place; and for every failure or neglect so to deliver, a penalty of ten dollars shall be incurred for each letter or packet. 4 Stat. 104. These constitute the substance of the post-office acts, as far as applicable to the present case.

On the trial, the plaintiff proved that Robert Beaty, the defendant, was the master and owner of the steamboat Arkansas No. 4; that upon her arrival at Louisburg, in this state, from the city of New Orleans, at each of which places a post-office had been established, the clerk of the boat was in possession of a letter bearing date at New Orleans, written by M. Greenwood, residing there, and directed to M. Whisler at the town of Louisburg, and that the letter did not relate to the cargo of the boat, or any part thereof; and that on the arrival of the boat at Louisburg, the postmaster there demanded the letter of the clerk of the boat, who refused to deliver it to him, but did deliver it to a private individual, who handed it to the person to whom it was addressed; and that it was not placed in the post-office at all. This was the substance of the evidence on the part of the plaintiffs. There was no evidence adduced, other than the above, to prove that the defendant had any knowledge that the letter was on board the boat, or in the possession of the clerk, or that it was in his power, or that he knew of the failure and refusal of the clerk to deliver this letter to the postmaster at Louisburg upon the arrival of the steamboat there.

Before the jury retired, at the request of the district attorney, the court, by the presiding justice (the Hon. PETER V. DANIEL), instructed them that the defendant, as master of the boat, was responsible for the acts of the clerk; and if they found from the evidence that he received the letter at New Orleans and brought it up to Louisburg, and there failed to deliver it to the postmaster, and that the letter did not relate to the cargo of the boat, or any part thereof, the defendant was subject to the penalty, although he was in fact ignorant of its delivery at New Orleans, of its transmission, and of the failure of the clerk to deliver it to the postmaster at Louisburg. The jury found a verdict for the plaintiff for the penalty of $150, and the defendant has interposed this motion for a new trial, on the ground of misdirection on the part of the court. Upon looking into the acts of congress imposing this penalty, and giving them the best consideration of which I am capable, I am of opinion that we erred in the instructions we gave to the jury, and which doubtless influenced their finding.

By the terms of the act of congress, the defendant is subject to the penalty prescribed when he fails to deliver any letter or packet to the postmaster, which shall have been brought by him, or shall have been in his care or within his power. Now, as already observed, there was no evidence adduced to the jury from which they could presume that the defendant had brought the letter, or that it was in his care or within his power. In either of these cases, the letter must have been within his knowledge, for it could hardly be said to be brought by him, or to be in his care or within his power, according to the obvious meaning of the act, if he was ignorant of the existence of the letter, its conveyance, and destination. The clerk alone was proved to have had the letter at Louisburg, in the absence of the defendant; and for any thing that appeared from the evidence, the clerk may have received the letter at New Orleans, secretly, kept it in his own possession, and failed to deliver it to the defendant, or inform him that he had it, or place it in a situation to enable him to obtain a knowledge of it, or bring it to the knowledge of the defendant in any way. It is not necessary to bring express knowledge home to the defendant, and the court is not to be so understood. But it is essential to show such facts and circumstances as render it probable that the defendant, by the use of ordinary and reasonable diligence, obtained that knowledge, or could have done so, and thus authorize the jury to presume it. If, in the absence of all knowledge, the master or captain or owner of the steamboat is absolutely responsible under this act for the conduct of the clerk, as the district attorney insists, and as we instructed the jury, then the verdict was right; for in that view, the liability was clearly established, and the case fully made out on the part of the government. But under the circumstances of the case, I think, as already stated, that we erred in instructing the jury that the defendant was responsible for the acts of the clerk; that it was not material whether the defendant did or did not know of the existence of the letter, and that in either event he was equally liable for the penalty, provided the letter was delivered to the clerk, brought up by such clerk, and not delivered to the postmaster at Louisburg, according to the sixth section of the act of 1825. The clerk, for every failure or neglect to deliver to the master of the boat any letter or packet of letters intrusted to him before the vessel touches at any other place, incurs a penalty of ten dollars. 4 Stat. 104. It would seem strange indeed, that the clerk should be subjected to the penalty of ten dollars only for a wilful failure to deliver the letter to the master of the boat, and the master subjected to the penalty of one hundred and fifty dollars for an omission to deliver a letter, of the existence of which he was entirely ignorant. The act is penal in its consequences, and must be strictly construed; and as knowledge is generally a principal and indispensable ingre-

dient in offences, it would seem reasonable to hold the government to the proof of it, or to the proof of circumstances from which it might be fairly inferred, before the penalty can be demanded.

The master of a steamboat is liable for this penalty when he fails to deliver a letter or packet which has been brought by him, or was in his care, or was in his power; but, in my judgment, the sound construction of the acts of congress is, that the defendant could not be placed in this category at all, where the letter was not within his knowledge, nor placed in a situation to enable him, with the use of reasonable diligence, to obtain such knowledge. Knowledge on his part, express or implied, I regard as essential to his liability, and without which the acts of congress have no application, and do not embrace the case. It is not to be supposed that it was the intention of the lawmaker to inflict a penalty upon the master of a steamboat in a case where he was ignorant that a letter had been brought upon the boat, either by the clerk or any person employed on board, and had not the means of ascertaining the fact by the use of reasonable diligence. This would be little less unjust than the disreputable device of the Roman tyrant who placed his laws and edicts on high pillars, so as to prevent the people from reading them, the more effectually to ensnare and bend the people to his purposes.

For these reasons, I think a new trial ought to be granted, and it is so ordered; but, as it was the error of the court which renders this necessary, the costs must abide the event of the suit. Ordered accordingly.

On the second trial, which was had 22d April, 1848,—the Hon. BENJAMIN JOHNSON, district judge, presiding; the Hon. PETER V. DANIEL, associate justice of the supreme court of the United States, absent, —the plaintiffs, in addition to the evidence on the previous trial, proved that the letter in question was, on its reception at New Orleans, placed by the clerk of the Arkansas No. 4 with other letters in the letter box of the boat, and impressed with the boat stamp; that the defendant at all times had access to this letter box, and that it was his habit to examine and see what letters were placed on the boat; but there was no other proof as to his knowledge of the letter.

JOHNSON, District Judge, instructed the jury, that by the act of congress of 1845, § 13 (5 Stat. 736; 4 Stat. 104), the master of a steamboat is liable for a letter brought by him, or committed to his care, or within his power. It is the province of the jury to determine from the evidence whether the letter in question was either brought by the defendant, or committed to his care, or was within his power. If so, he is subject to the penalty of one hundred and fifty dollars claimed by the plaintiffs. Was it in his power by the use of reasonable diligence? The law, in my judgment, does not require the exercise of the utmost diligence of which the case was susceptible. It only requires such diligence to discover the letter as rational men ordinarily employ in their own affairs; and of this the jury must judge.

Verdict and judgment for plaintiffs for one hundred and fifty dollars penalty and costs, and motion for a new trial denied.

UNITED STATES (BECKLEY v.). See Case No. 1,211.

Case No. 14,556.

UNITED STATES v. BEDDO et al.

[4 Cranch, C. C. 664.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

WITNESS—NEGROES—MULATTOES—OF WHAT RACE —MOTHER.

Free negroes and mulattoes, not born of white women, are not competent witnesses against free negroes and mulattoes not in a state of servitude by law.

The defendants were convicted of a cheat, by passing and imposing a paper having the appearance of a bank-note, upon a free negro, born of a free colored mother. The only witnesses for the prosecution were free negroes and mulattoes, born of free colored mothers. The defendants were free mulattoes.

After the trial, it was discovered by Mr. Bradley, the defendants' counsel, that Beddo, one of the defendants, was a mulatto, born of a white woman, and not in a state of servitude, by law; and he now moved for a new trial, on the ground that a free negro or mulatto, born of a free colored woman, is not a competent witness against a free negro or mulatto, born of a white woman, and not in a state of servitude by law. He contended, that, upon the principle, "partus sequitur ventrem," a mulatto, born of a white woman, is, in law, a white person, and, if not in a state of servitude by law, is entitled to all the privileges of a white person.

The Maryland act of 1717 (chapter 13) entitled "A supplementary act to the act relating to servants and slaves," (Act 1715, c. 44,) recites, that "Whereas it may be of very dangerous consequence to admit and allow, as evidences in law, in any of the courts of record, or before any magistrate, within this province, any negro or mulatto slave, or free negro, or mulatto, born of a white woman, during their servitude, appointed by law, or any Indian slave, or free Indian, natives of this or the neighboring provinces. II. Be it therefore enacted," &c., "that from and after the end of this present session of assembly, no negro or mulatto slave, free negro or mulatto,

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

born of a white woman, during his time of servitude by law; or any Indian slave or free Indian, natives of this or the neighboring provinces, be admitted and received as good and valid evidence, in law, in any matter or thing whatsoever, depending before any court of record, or before any magistrate within this province, wherein any Christian white person is concerned. III. Yet, nevertheless when other sufficient evidence is wanting against any negro or mulatto slaves, free negro, or mulatto, born of a white woman, during their servitude by law; or against any Indian, native of this or the neighboring provinces; in such case, the testimony of any negro or mulatto slave, free negro, or mulatto, born of a white woman, or Indian, native of this or the neighboring provinces, may be heard and received, as evidence, according to the discretion of the several courts of record, or magistrate, before whom such matter or thing against such negro, mulatto slave," &c., "shall depend; provided, such evidence or testimony do not extend to the depriving them, or any of them, of life or member."

It was contended, by the defendants' counsel, that, as the third section of this act expressly authorizes the courts to receive the testimony of any slave, free negro, mulatto born of a white woman, against any slave, free negro, or mulatto born of a white woman, during their servitude by law, an inference arises, that a free negro, or mulatto born of a white woman, cannot be received as a witness against a free negro, or mulatto born of a white woman, not in a state of servitude by law; so that, in no case, can the testimony of a colored person be received against another colored person who is not a slave, or in a state of servitude by law.

On the other side, it was argued by Mr. Key, for the United States, that, from the 2d section of the act, as strong, if not a stronger and clearer inference may be drawn, that negroes and mulattoes, not in a state of slavery or servitude by law, are competent witnesses in all cases.

The second section is prohibitory; the third is presumptive. The second prohibits the receiving as witnesses only slaves, or persons in a state of servitude by law, and Indians; and even then only in a matter wherein any Christian white person is concerned. It contains no prohibition to receive free negroes and mulattoes who are not in a state of legal servitude, even in the case where a Christian white person is concerned; nor to receive the testimony of slaves and free negroes and mulattoes in a state of legal servitude, and Indians, in cases where no Christian white person is concerned. But as all public prosecutions, in the year 1737, when that act was passed, were in the name of the lord proprietary, they were cases wherein a Christian white person was concerned, and no slave or colored person, in a state of servitude by law, could be received as a witness therein. For this reason the third section commences with the words, "Yet, nevertheless;" as if to say, that although, by the second section, slaves, and persons in a state of legal servitude, were generally to be excluded in cases wherein a Christian white person is concerned, yet, in prosecutions in the name of the lord proprietary against slaves and persons in a state of servitude by law, the courts may, in their discretion, receive the testimony of slaves, and persons in a state of servitude by law provided such testimony do not extend to the depriving them of life or member. The third section contains only an exception to the generality of the second; and the two sections construed together, (as they ought to be,) amount to this; that the testimony of slaves and persons in a state of legal servitude, shall not be received in any matter wherein any Christian white person shall be concerned except in public prosecutions against slaves or persons in a state of servitude by law. The inference (arising from the admission of slaves, free negroes, and mulattoes, in a state of servitude by law, as witnesses only against slaves, free negroes, and mulattoes, in a state of servitude by law) that free negroes and mulattoes not in a state of servitude by law, are excluded in all other cases, is rebutted by the inference (arising from their exclusion, in the second section, only in matters wherein any Christian white person is concerned) that they are admissible in all other cases. This inference is strengthened by the preamble, which only complains of the admitting "as evidences in law, in any of the courts of record, or before any magistrate, within this province, any negro or mulatto slave, free negro or mulatto born of a white woman during their servitude appointed by law, or any Indian slave or free Indian;" thus showing, that the incompetency resulted from the condition of slavery or servitude, and not from color.

THE COURT (CRANCH, Chief Judge, dissenting,) granted a new trial as to both defendants, upon the ground, as it was understood, that free negroes and mulattoes, not born of white women, were not competent witnesses against free negroes and mulattoes not in a state of servitude by law.

After the granting of the new trial, the attorney for the United States, finding that there were no witnesses for the prosecution other than free negroes and mulattoes born of colored women, ordered a nolle prosequi to be entered with the leave of the court.

[See Case No. 14,557.]

Case No. 14,557.

UNITED STATES v. BEDDO.

[5 Cranch, C. C. 378.] [1]

Circuit Court. District of Columbia. Nov. Term, 1837.

WITNESS—NEGRO—MULATTO BORN OF WHITE WOMAN.

Indictment for larceny. The defendant was a colored man, born of a white woman.

THE COURT rejected, as witnesses, free colored persons, not born of white mothers.

Verdict, not guilty.

[See Case No. 14,456.]

Case No. 14,558.

UNITED STATES v. BEDE.

[Nat. Intel. (Washington, D. C.) June 23, 1837.]

Circuit Court, District of Columbia. 1837.

NUISANCES—KEEPING DISORDERLY HOUSE.

[A person who keeps a public house, which is open on Sundays as well as other days, and in which liquors are sold to persons not lodgers in the house, and in some cases to persons who are drunk when they come in and when they go out, and who act in a noisy and boisterous manner upon the streets, is guilty of keeping a disorderly house.]

[Cited in U. S. v. Columbus, Case No. 14,841.]

Indictment for keeping a disorderly house.

Mr. Burr, a police officer, proved that the traverser kept a shop with the word "Oysters" painted near the door; that he sold liquors, which were drank in his shop; that he sold liquors to persons who were neither lodgers nor boarders in the house; that he did not keep beds or stables for the accommodation of lodgers and travelers; that he had seen people drinking there, but had not seen men there so drunk as to be disorderly, and had not seen habitual drunkards there.

David Waters, a police officer, said he had seen people drinking there, and some who were habitual drunkards; that he never saw any disorder in the house beyond the loud talking of men drinking; but has seen them, when they came out, shouting, and whooping and skylarking. By skylarking he means feeling strong and going through the streets knocking down a sign post or a man when in their way. He further said that the goings on at these little shops were different from the large ones At the large ones, when a drunken man comes in, the practice is to send for a gentleman constable, and have him turned out; at the little ones he gets another horn, and goes out skylarking again. That the traverser in this case kept his house like all these little shops, and was quite a decent man in that line; that the shop was generally kept open on Sundays, and liquors sold and drank there on Sundays, to persons not lodgers or boarders there

The district attorney moved the court to instruct the jury as follows: "If the jury believe from the evidence that the traverser kept a public and open shop in this city, in which he sold liquors to persons not lodgers or boarders in his house, at times to persons who were drunk, at times to persons who came in drunk, and drank there and went out drunk; sometimes to persons who came out and went away from his house in a noisy manner and skylarking in the streets; that his shop was generally kept open on Sundays, and that persons not lodgers or boarders bought and drank spirituous liquors in the shop on Sundays, and that he had no accommodations for travellers or boarders, neither beds nor stables for such accommodation, and that he had no license for keeping a public house from the corporation, then the charge of the indictment is sustained."

And the counsel for the traverser moved the court to instruct the jury as follows: "That, if the jury believe, from the evidence, that the house of Mr. Bede was not disorderly, and a subject of nuisance and complaint, by reason of noise and disorders, to his neighbors, then the traverser must be acquitted."

And the court gave the instruction asked for by the district attorney as stated above, and refused to give that asked by the traverser, and added that the court were not influenced by the traverser's not having a corporation license; that if at Mr Brown's or Mr. Gadsby's, or any other respectable public house in the city, the same sort of conduct took place as is charged in this case, the court would consider a house so kept a nuisance.

And Judge THURSTON, in further stating the opinion of the court, examined the question of what constituted a disorderly house, and in the course of that opinion inveighed in very strong terms against whiskey shops, especially against their being kept open and liquor sold on Sundays to every person; and at night to persons who left them in a state of inebriety, and disturbed the peace of society by violence, and injury to persons and property. He said it was unnecessary for him to argue the matter to the jury, but if from the evidence they should believe the facts charged, it sustained the indictment—and the jury were not bound to find all the facts charged, but so much as in their opinion made it a nuisance to the neighborhood, in which they should embrace the whole community; or so much as made it a disorderly house, to the disturbance of the public peace, and to the injury of public morals and public decency. And in this opinion Judge MORSELL expressed his concurrence.

The jury, after retiring for a short time, returned into court with a verdict of "Guilty."

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

Case No. 14,559.

UNITED STATES v. BEEF SLOUGH MANUFACTURING, BOOMING, LOG-DRIVING & TRANSPORTATION CO. et al.

[8 Biss. 421.] [1]

Circuit Court, W. D. Wisconsin. Feb., 1879.

NAVIGABLE RIVERS—OBSTRUCTIONS—USE OF STREAM.

1. In the absence of specific legislation by congress, the regulation of a navigable stream is left entirely with the state, and the government cannot by bill or information prevent or abate any obstruction.

[Cited in Huse v. Glover, 15 Fed. 296.]

2. Where congress has passed acts for the survey and improvement of a navigable river, the court will not interfere with the existing use of the stream, unless it clearly appears that the acts complained of necessarily interfere with the operation of such legislation.

Information and bill in chancery to abate the works of the Beef Slough Company, above the mouth of the Chippewa river in Wisconsin; and to prevent the running and driving of logs in said river. Defendants filed a demurrer.

W. F. Vilas and L. S. Dixon, for the United States.

Thos. Wilson and S. U. Pinney, for defendants.

Before DRUMMOND, Circuit Judge, and BUNN, District Judge.

DRUMMOND, Circuit Judge. The controversy in this case arose on a demurrer to the amended bill of the plaintiffs. The case was argued before me some time since on a demurrer to the original bill, and the demurrer sustained, with leave given to amend. Accordingly an amended bill has been filed, and a demurrer has been again interposed, and the question is as to the sufficiency of this amended bill. The case, as it was originally presented to the court, has been, to a very great extent, re-argued, and the court has been called upon to reconsider its ruling upon the original bill.

On reconsideration of the case, we see no good reason to change the ruling which was originally made. The bill proceeds upon this theory on the part of the government: That the Chippewa river is a navigable stream, made so by acts of congress, and that the defendants have placed obstructions in that river under the laws of the state, or by their own wrongful acts, without authority from the state. The original question was, admitting that the Chippewa river was a navigable river, free to all persons under the acts of congress, whether, in the absence of any specific legislation upon the subject, the government could by bill or information, prevent persons from obstructing the navigation of the river, either under the authority of the state, or without such authority.

Independently of some acts of congress which will be hereafter referred to there was no specific legislation in relation to the Chippewa river. There was no act of congress which provided in what manner bridges, draws or booms should be constructed or placed, or how any of the various structures which may affect in a greater or less degree, the navigation of the river, should be built; and the rule in all such cases is, in the absence of specific legislation on the part of congress, that the matter is left entirely to the states, and so as to this river, to the state of Wisconsin. Undoubtedly congress has the power to legislate as to all rivers navigable in fact, but not having done so, the court held before, and holds now, that the government cannot interfere by information or by bill in chancery, either to abate or to prevent any obstructions to the navigation of the river.

We think, therefore, that the original ruling upon this subject was correct, and that the only thing that can change it is direct action on the part of congress. Whenever congress has interfered in such a way as to show clearly that the acts authorized by the state, or done by individuals, and which obstruct the navigation of the river, are hostile to such legislation, undoubtedly it is competent for the government to interfere by a bill in chancery, or by an information to abate the nuisance, if it can be so called, or to prevent the obstruction to the navigation of the river. It was upon this principle that the court acted in the case of the Milwaukee & St. Paul Railroad Company as to the bridge over the Mississippi river near La Crosse. Congress had legislated in relation to bridges across that river, and had declared that they should be constructed only in a particular way, and under the direction of the secretary of war. There was an attempt to construct the bridge across the Mississippi in disregard of the provisions of the act of congress, and the United States filed a bill to prevent this from being done, and the court held that it had jurisdiction on the ground that there was something being done which was forbidden by an act of congress. U. S. v. Milwaukee & St. P. R. Co. [Case No. 15,778].

We do not think that the general features of this bill are changed as to the principles which are involved in the case by the amendments which have been made. The material amendment which has been put in is, that there have been certain acts done under the authority of the laws of congress, with which these obstructions or operations of the defendants may or do interfere. But it will be observed that the allegation in the bill is not of such a character as to warrant the court in assuming that at the time the original bill was filed (from which time alone, of course, we can take our departure upon this subject) there was any such effect produced upon the improvements which were made un-

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

der the acts of congress, as to warrant the court in interfering.

I will now notice some of these acts of congress. There have been acts passed under which surveys of the Chippewa river have been made, and appropriations have also been made, specially for the improvement of the river. So far as the survey of the river has been made, with any money so appropriated, the acts done by the defendants would not be of such a character as to warrant the court in interfering in this way with them The disbursements have been made under the authority of the war department, and reports have been made by the engineers who have performed the work. We may refer to the last act of congress. Although that act was passed since this bill was filed, still we think we can examine it for the purpose of ascertaining the intention of congress in making these appropriations, and as giving tone to the whole legislation upon that subject, and to show that it was the intention of the act of congress not to interfere with anything that had been done or was being done under the authority of the state in relation to the river. That act declares that nothing therein contained shall affect existing legal or equitable rights on the river, claimed under the laws of the United States, or of the state.

Now this being so, and there being nothing in the bill to bring it clearly within the principle of U. S. v. Duluth [Case No. 15,001], decided by Mr. Justice Miller, we think it cannot on that ground be sustained any more than the other; in other words, it is not shown by the amendments to the bill, that any acts which may have been done, or which are contemplated by the defendants, will interfere so much with what had been done under the authority of acts of congress up to the time this bill was filed as to justify, or to sustain this pleading, either as an information or as a bill in chancery to abate the nuisance, if nuisances have been committed by the defendants. But we think it is shown that most, if not all, of the acts of the defendants have been done under the authority of the state. Booms have been constructed and logs have been permitted to run loose in the river as in other rivers in the state, and if it be true that there has been any violation of the acts of the legislature, either in the construction of booms, or in the manner in which logs are permitted to run, parties who have suffered injury may have their remedy. But that is not the question here. It is whether the government by this information or bill in chancery, can put a stop to these proceedings, or prevent these acts on the part of the defendants.

We think, in order to maintain the bill on the ground that there is an interference, or a threatened interference, that the allegation should be clear and unmistakable, and should show that such a case is made as to warrant the court in putting a stop to those acts. The question undoubtedly is of very great importance; but it is always competent for congress to interfere. We understand that in the case of Pound v. Turck, 95 U. S. 495, the supreme court of the United States has announced the principle that it is competent for a state even to construct a dam across a navigable stream, in the absence of any special legislation of congress upon that subject, and that case does not make any distinction between the different parts of the river, whether above or below the falls, but speaks of it as a navigable river, and proceeds on that assumption. That being so, and there being no other legislation upon the subject of the Chippewa river, except that appropriations have been made for the purposes of survey, and the improvement of the river, and it not being clearly shown that these acts on the part of the defendants do necessarily interfere in such a way as to prevent the effect of these appropriations under the acts of congress, we must again sustain the demurrer to the amended bill.

See Heerman v. Beef Slough Manuf'g, etc., Co. [1 Fed. 145].

Case No. 14,560.

UNITED STATES v. BEERMAN.

[5 Cranch, C. C. 412; 2 Liv. Law Mag. 524.] [1]

Circuit Court, District of Columbia. July 27, 1838.

LARCENY—JOINT AND SEPARATE PROSECUTIONS—PLEADING.

If the goods of several persons are stolen at the same time, the stealing of each person's goods constitutes a distinct offence, and may be the subject of a distinct and separate indictment; but they may be joined in one indictment; and whether they shall be prosecuted jointly or separately, is properly left to the discretion of the attorney of the United States.

[Cited in U. S. v. Goddard, Case No. 15,220.]

[Disapproved in Hoiles v. United States, 3 McArthur, 370. Cited in brief in State v. Egglesht, 41 Iowa, 577.]

The grand jury found five separate indictments against the defendant [Henry Beerman] for larceny in stealing the goods of five different persons; the property stolen being in each case, of the value of five dollars and upwards. In each indictment the offence was stated to have been committed on the 4th of March, 1838. On the 5th of April, the defendant was found guilty in each case; and on the 21st of April, the court sentenced him to the penitentiary for one year in each case.

THRUSTON, Circuit Judge, concurred in the judgment in the first of the five cases, but dissented in the other four cases; and on the 30th of April, read in court, and directed the clerk with the leave of the court to file the following opinion:

[1] [Reported by Hon. William Cranch, Chief Judge. 2 Liv. Law Mag 524, contains only a partial report.]

In this case, the traverser is convicted on five separate indictments, for stealing certain articles of clothing from a boarding-house on Pennsylvania avenue, belonging to sundry boarders in that house. Upon these several indictments the majority of the court sentenced the convict to five years' imprisonment in the penitentiary in this district, to hard labor, &c., in pursuance of the act of congress [4 Stat. 115] in such cases made and provided; that is to say, for one year on each several indictment. I concurred in the first sentence only, and refused to concur in the other four sentences, because, from the evidence on the trial of the several indictments, it seemed to me that although the goods stolen belonged to five different persons, it appeared they were all taken at one and the same time; or, at least, that there was no evidence that they were taken at several times, and not at the same time; and the said five indictments charged the goods to be all taken on the same day.

Now the grounds of my refusal to concur with the court in more than one sentence against the convict, are the following: 1. That the common law of England being adopted by the state of Maryland, and declared in the 3d article of the bill of rights to be the law of Maryland, it is a well established maxim of that law that "Nemo debet bis puniri pro eodem delicto." 2. That the stealing of goods, at one and the same time, belonging to different persons, is but one act of larceny. 3. That the penitentiary law affixes to larceny of money, goods, &c. above the value of $5, the maximum punishment of only three years confinement in the penitentiary. 4. That this court has decided, in the case of U. S. v. ——— [unreported], a colored woman, who stole two articles, namely, a coat from one scholar, and another garment from another scholar at Holbrook's school, in Alexandria, and both charged in the same indictment, that the indictment was good, and actually sentenced the woman to the penitentiary for three years upon a conviction on the said indictment. 5. Then, if the goods, stolen at one time, belong to different persons, this court has settled the law, that it is but one offence, and that such indictment, charging the goods stolen to belong to different persons, is good. 6. If so, then, where the goods stolen at one time, belong to different persons, one indictment is sufficient; and if one is sufficient, to harass and oppress the accused with more than one is oppressive and vindictive, and against the maxim above quoted, and against common justice and common sense.

1st. As to the first grounds of reasons for dissenting from the court; the common law as well as the bill of rights of Maryland, and the constitution of the United States, have carefully protected the personal liberty of the citizens, by many provisions, too obvious and familiar to require specification; and the constitution of the United States, moreover, especially protects the citizens against "cruel and unusual punishments," and the common law against a double punishment for the same offence.

2dly. That the stealing of goods, at one and the same time, although the property of different persons, is but one act of larceny, and subjects the offender to but one punishment. To make it a distinct larceny for each owner of the stolen goods, is a mere technical rule, totally repugnant to the words and spirit of the penitentiary act, against common sense and common justice, and against the foregoing maxim of the common law, the bill of rights of Maryland, and the constitution of the United States.

What is an act of larceny? When the larcener contemplates the commission of a theft to the extent of the theft actually committed and proved, no matter how many persons the stolen goods may belong to, it is the consummation of a single intent only; as in the case of ———, tried in this court, and convicted and punished for four separate larcenies, merely because the goods, valued at $20, were the property of four different persons; the case was, he went into a gentleman's house, on the night of a party there, snatched up a bundle of cloaks, hats, &c., and for this he was punished with three years' confinement in the penitentiary, and some time also in the common jail, because one of the articles stolen was under the value of $5; thus receiving four distinct and separate punishments for one act of larceny. It is true he was confined in the penitentiary for only three years, which is the maximum of punishment for one single offence; but the court, with the sense they entertained of the character of the offences, might have sentenced him for nine years to the penitentiary; but even in inflicting the minimum confinement for larceny of three years confinement only, they did not exceed their power, if viewed as one act of larceny only, still the conviction and sentence as for a fourth offence of larceny to the common jail for a certain period (one month, as far as my recollection serves,) did exceed the measure of punishment allowed by law, according to my view of the case, in deeming the stealing of goods in one act and at one time as only a single larceny, no matter how many proprietors there might have been of the goods stolen; but to illustrate further my sense of the distinction between what constitutes a single larceny and many larcenies committed by the same person, I argue in this way: if a thief contemplates stealing certain goods belonging to different persons, and carries his intent into execution, at one and the same time, or at least, by one continuous operation, it is but one offence, and subject to but one punishment. For instance, take the case of the party, the subject of this opinion, the German; he stole sundry articles of clothing from the boarders at ——— boarding-house, belonging to different persons, the

whole together to the value of some sixty or seventy dollars. Did he take these articles at one time, or by one continuous operation, and pursuant to one preconceived intent, or at different times, and in pursuance of separate and distinct intents? or, in other words, did he steal from one boarder only, and in pursuance of a preconceived intent to steal from that person only, and then steal from another in execution of another distinct intent conceived after the consummation of the first larceny, and so on with the larcenies committed on all the boarders, with the stealing from whom he was charged? If he stole from all of them with a preconceived intent so to do, at one time, or by one continuous operation, I say, notwithstanding the alleged technical rule above mentioned, it constituted but one larceny; if the second way just mentioned, the acts constituted separate and distinct larcenies. In order to estimate properly the soundness of this doctrine, in contrast with the view taken of the law by the other two judges, let us test them by the penitentiary act, the bill of rights of Maryland, the constitution of the United States, reason, justice, and common sense. The penitentiary act was based upon the principles of apportioning punishments to crimes; of equalizing them, and hence the distinction between larcenies under five dollars' value and those above; and hence the scale graduating punishments to crimes, according to the view congress entertained of their specific enormities. It is true they made no distinction in the punishment of larcenies over the value of five dollars, between the lowest sum above five dollars, and the highest, because such minute distinctions would have overcharged the act with matter not meriting such tedious details; but have left the courts to graduate the punishment in the range submitted to their discretion, between the minimum and the maximum periods of confinement.

How does it comport with this humane and benevolent design of the act, for this court to adjudge that where goods are stolen at one time, or by one continuous operation, and in pursuance of one preconceived intent, from various owners, that because they belonged to various owners merely, it gave them discretion to sentence the larcener to fifteen years' confinement in the penitentiary, for goods stolen not exceeding in value some sixty or seventy dollars, when, if they belonged to one person, and the stolen goods were worth a million of dollars, they could not sentence the convict to more than three years' confinement in the penitentiary? It is no argument to say, we only sentenced the convict on all three indictments, if such had really been the case, to but three years' confinement, and, therefore, the punishment does not exceed the maximum for one act of larceny. It is enough for my argument that they assumed the power to have adjudged the convict to fifteen years' confinement; but, in fact, in the case of —— there was a fourth conviction under the penitentiary act, where the goods were found by the jury to be under five dollars' value, and for this the convict was sentenced to one month's confinement in the common jail, previous to his transportation to the penitentiary building to undergo his several terms of confinement, thus exceeding, by this last punishment of one month's confinement in the common jail, the maximum of the punishment affixed, by the aforesaid act, to one act of larceny; and thus, in my opinion, going counter to the humane intentions of congress, when they passed the penitentiary act, and the obvious policy of the statute, the object of which was to apportion punishments to crimes, and establish a scale of punishments bearing a nearer relation to, and more commensurate with, the sense entertained by congress of the grades of enormity of criminal offences, than was recognized by, or known to, the common law, whose sanguinary, arbitrary code, has been the subject of reproach and of animadversion by distinguished writers for a long period of time. Thus far, as to the opinion of the two judges being against the policy and spirit of the penitentiary act, I have said it was repugnant to common sense and common justice. As to the first, will any man of common sense say, that by the magic of some senseless, antiquated, technical conceit, an old rule which the human understanding revolts at as silly, irrational, and barbarous, and which, as it is against common right, I deem it in no wise irreverent to impeach, that you can change, as you would change a half eagle into five dollars, one crime into four or five, and thus enable this court to invest themselves with an arbitrary and dangerous power of punishing transgressors to four or five times the extent allowed by law; against not only the letter but the spirit of the law, and in direct contravention of its obvious policy, and the humane intentions of the legislature in enacting the law? That you should have power to punish a citizen, merely because the goods belonged to different persons, with fifteen years' confinement in the penitentiary, where the value of all the goods stolen, taken together, amounted to about sixty or seventy dollars only; nay, even twenty dollars; and yet, if he stole to the value of a million of dollars, the property of one person only, you could not and dare not, inflict over three years' confinement on the convict? Can common sense bear, for one moment, such a construction of the law as this? Of a law, too, founded on and suggested by the very purpose of equalizing punishments with crimes. As to common justice, such a construction is so intuitively against it, that I should deem it a waste of words to attempt to approve or illustrate so self-evident a proposition. I have said, also, that this construction was against the third article of the bill of rights

of Maryland, inasmuch as by adopting the common law they adopted that maxim, that "Nemo debet bis puniri pro eodem delicto;" much less shall he be punished four or five times for the same offence. I have said, also, that it was against the constitution of the United States, protecting the citizens from "cruel punishments;" although the punishment of confinement in the penitentiary be not intrinsically and characteristically a cruel punishment, yet I should deem it very cruel, if you multiply it on the offender to four or five times beyond what the law allows. To these great considerations of violence done to the safeguards provided for the citizens by the constitution of the United States, the common law, the bill of rights of Maryland, the frustration of the humane policy of the penitentiary law, the utter confounding of common sense and common justice often urged by me in support of my opinion against that of the two other judges, I have been met only with the old technical rule, that in spite of the letter and spirit of the penitentiary act, and all those great and weighty objections, the goods stolen, although taken at one time, belong to different persons, and for each person there is, by that old rule, a distinct larceny; as if an old rule, bearing absurdity upon its very face, must overawe and bear down the constitution of the United States, the bill of rights of Maryland, the humane designs and policy of the penitentiary act, together with common sense and common justice; but if the foregoing considerations have no force in them, what reply can be made to this argument?

At the last spring term in Alexandria, a woman (colored) named —— was charged, in the same indictment, with stealing two articles belonging to two boys, as their separate property, namely a coat belonging to one, and another garment from another scholar, at Holbrook's school, both together of the value of nine dollars. The court adjudged the indictment to be good, and actually sentenced the woman to three years' confinement in the penitentiary; thus establishing a precedent, that you may charge goods belonging to different persons in the same indictment, without rendering the indictment bad. If so, what justice or propriety is there in harassing the accused with multiplied indictments; or adopting one rule on one side of the river, another on the other, under the same law? Can it be said that both ways are right? This cannot be, because in one way the court assume a power many times greater than in the other; or many times, e converso, less in one way than the other. But suppose, against all reason, as I think, that they have a discretion to sustain both modes of proceeding, can there be any question which one they ought to adopt, and which to reject? Is it not more congenial with the security of the liberty of the citizen, so carefully guarded by our constitutions of the United States and of Maryland; with the known humanity of the law, which professes to repudiate vindictive punishments; with that good old maxim of the common law quoted before; with the known policy and humanity of the penitentiary act; with equal justice, to consider the larceny as but one offence, although the goods stolen belong to different persons, according to the Alexandria decision, than as distinct offences, and so punish, under the same law, and for the same offence, one citizen four or five times more than another; harass him with four or five indictments; with paying counsel fees four or five times; occupying the time of the court, so overburdened with business, with four or five trials instead of one; and multiplying the expense to the government four or five times, unnecessarily, and with no public advantage whatever?

But when some of these arguments were urged by me to the other judges, against sustaining and tolerating these multiplied prosecutions for one and the same offence, as I really thought it to be, I was answered, that the traverser was indicted in five separate and distinct indictments; that the court could not judicially see that the said larcenies were committed at one time, or by one continuous operation pursuant to one preconceived intention to commit the said larcenies, or the said larceny. To this, I replied, that from the evidence there was but one intention to commit larceny proved; that in the indictments all the goods stolen were charged to be stolen on the same day, and the law allows of no fractions of a day, unless acts done are proved to have been done on different times on the same day; that so far from this, all the goods stolen were, as far as the evidence went, taken at the same time, or by one continuous operation, and in execution of one preconceived intent to steal all the said goods; if so, it was the duty of the court to quash all the indictments except one; that in the case of the United States v. ——, alluded to above, there was the clearest proof that the accused stole the goods from the entry, not only at one time, but in very quick time, snatching up a parcel of hats, cloaks, &c., and making off, all under his arm, with great speed. Still the court adjudged the transgression to amount technically to separate and distinct larcenies, and the party was convicted on all the indictments, and punished beyond what the law authorized for one act of larceny only. It is not enough to say, we cannot judicially take notice that the various larcenies charged in the several indictments were for goods stolen at one time, or by one continuous operation, and in pursuance of one preconceived intent, and therefore there was but one larceny committed. I deem it my indispensable duty to hearken to the testimony to see that such is the case or not the case; and if it be so to permit but one indictment to be prose-

cuted; every consideration, as regards public justice, justice to the accused, justice to the suitors, justice to the judges themselves, and the unnecessary and useless waste of the public money, demands this duty at our hands.

I will now proceed to define or expound what I believe to be the true characteristics of a single larceny, and of several larcenies committed by the same person; a single larceny consists in stealing at one and the same time, or by one continuous operation, all the goods, no matter to whom belonging, which the thief had a preconceived intention of stealing. Take, for example, the case of the traverser, Beerman, who stole sundry articles of clothing from Beerman's boarding-house, from several boarders living at the same house; did he take the goods at one time, or by one continuous operation, in pursuance of a preconceived intention to take all the said goods? If so, this, I say, is only one larceny; or did he take part of the goods only at one time, with intent to take those goods only, and finding his theft successful, he, the next day conceived the intent to take, and did take, the residue, this would be a second and distinct larceny; but according to the opinion of the court in the case of the boy who robbed the entry which was clearly and manifestly done at one time, and quick time, too, the court adjudged that there was a distinct larceny for every article of goods stolen, only because they belonged to different persons, establishing the principle, that where it was evident that the goods were all taken uno flatu, as the lawyers say, at one instant of time, yet that the larcenies are equal, in number, to the number of the owners of the goods. In this case of Beerman, it may be urged against my argument, that Beerman knew, at the time he stole the goods, because he was an inmate in the house, that the goods stolen belonged to different persons, and therefore, in taking them with this knowledge, there was a distinct larceny for each owner of the goods, although the goods were all taken at one time, and pursuant to one intention; but according to the opinion of the two other judges, this knowledge constitutes no part of the grounds of their opinion, inasmuch as in the case of the boy who stole goods from the entry, and of the colored woman in Alexandria, there was no evidence that the thieves knew, nor was there scarcely a possibility that they should have known, who were the owners of the goods, or that there were more than one owner; thus establishing the principle, that if a thief, intending to steal from one person only, happens, unknowingly to take goods belonging to several persons, that he is guilty of as many larcenies as there may be proprietors of the goods stolen: to this doctrine I can never assent, for the reasons given openly in court, at the trial of the parties, and when the court were passing sentence on the convicts, but which reasons I have expanded and reduced to more form in this written opinion, and which, to defend my own judgment better than I was able to do verbally and on the spur of the occasion, I have very reluctantly, against my wonted practice, set forth in writing, to be filed, if permitted, among the papers in the said indictments.

CRANCH, Chief Judge, on the last day of the term, observed, that as Judge THRUSTON had thought proper to file his reasons for dissenting from the judgment of the court in the case of U. S. v. Beerman, the other judges would reserve the right to file also in vacation their reasons for that judgment; and on the 20th of August, the following opinion was filed by CRANCH, Chief Judge, with the concurrence of MORSELL, Circuit Judge:

On the 30th of April, 1838, Judge THRUSTON filed a written opinion or protest against the sentences of the court upon four of the five indictments against the prisoner for larceny: 1. Because it seemed to him that there was no evidence that the goods were taken from the five several owners thereof at several times, and not at the same time; and the indictments charge the goods to be all taken on the same day. 2. Because "Nemo debet bis puniri pro eodem delicto." 3. Because the stealing goods, at one and the same time, belonging to different persons, is but one act of larceny. 4. Because the maximum punishment for one larceny, is three years' confinement and labor in the penitentiary. 5. Because this court in Alexandria, decided, as he supposes, in the case of a woman who stole two articles, to wit, a coat from one scholar, and another garment from another scholar at Hallowell's school, and both charged in the same indictment, that it was but one offence; and that the indictment was good, and sentenced the woman to the penitentiary for three years. 6. Because, if all the goods stolen from different persons at the same time may be charged in one indictment; to harass the accused with more is oppressive and against the maxim above quoted, "Nemo bis," &c., and against common justice and common sense.

"That the stealing of goods, at one and the same time, although the property of different persons, is but one act of larceny, and subjects the offender to but one punishment. To make it a distinct larceny for each owner of the stolen goods, is a mere technical rule, totally repugnant to the words and spirit of the penitentiary act, against common sense and common justice, and against the foregoing maxim of the common law, the bill of rights of Maryland, and the constitution of the United States." Again, the judge says: "If a thief contemplates stealing certain goods belonging to different persons, and carries his intent into execution at one and the same time, or, at least, by one continuous operation, it is but one offence, and subject to but one punishment." Again he says: "If

he stole from all of them, with one preconceived intent so to do, at one time, or by one continuous operation, I say, notwithstanding the alleged technical rule above mentioned, it constituted but one larceny." Again the judge says: "I will now proceed to define or expound what I believe to be the true characteristics of a single larceny, and of several larcenies committed by the same person. A single larceny consists in the stealing at one and the same time, or by one continuous operation, all the goods, no matter to whom belonging, which the thief had a preconceived intention of stealing. Take, for example, the case of the traverser, Beerman, who stole sundry articles of clothing from Beerman's boarding-house, from several boarders living at the same house; did he take the goods at one time, or by one continuous operation, in pursuance of a preconceived intention, to take all the said goods? If so, this, I say, is only one larceny. Or did he take part of the goods only at one time, with intent to take those goods only, and finding his theft successful, he, the next day, conceived the intent to take, and did take, the residue; this would be a second and distinct larceny." Again, the judge says: "From the evidence there was but one intention to commit larceny proved." "In the indictments, all the goods stolen were charged to be stolen on the same day, and the law allows of no fractions of a day, unless acts done are proved to have been done at different times on the same day. So far from this, all the goods stolen were, as far as the evidence went, taken at the same time, or by one continuous operation, and in execution of one preconceived intent to steal all the said goods. If so, it was the duty of the court to quash all the indictments except one."

These seem to be the substance of the arguments of the learned judge in his elaborate opinion. By way of illustration, however, he has referred to two or three cases decided by this court. The first case, to which he alludes, is supposed to be that of Esther Gordon, at Alexandria. A woman was indicted for stealing from a closet in Hallowell's Academy, a coat and pantaloons belonging to two of the scholars; and she was charged, in one single count, with stealing both articles at the same time. Each article was of five dollars value or more, so that the stealing of either was a penitentiary offence. It is said that the court sustained the indictment, and sentenced the woman to the penitentiary for three years, and thence it is inferred that the court decided that the stealing of the goods of the two scholars constituted but one offence. The next case alluded to by the judge is supposed to be that of James McDowell, at March term, 1833, who was charged in four indictments; first, for stealing a cloak and hat from F. X. Kennedy, of the value of ten dollars; second, for stealing a small cloak from Henry Hubbard, of the value of two dollars; third, for stealing a hat from W. Wentworth, of the value of six dollars; and, fourth, for stealing a hat from E. L. Childs, of the value of two dollars. The prisoner was convicted upon each indictment, and there having been no motion in arrest of judgment nor demurrer, nor motion to quash any of them, the court (Judge Thruston, dissenting,) proceeded to pass the sentences required by law. Upon the first and third the sentence was two years' imprisonment and labor in the penitentiary in each case; and upon the second and fourth a small fine and simple imprisonment for one month in each case.

In these cases, the evidence is said to have been that the hats and cloaks were stolen out of the hall of F. X. Kennedy, who kept a boarding-house, and were probably all taken at the same time. I was not present at the trial, though I was at the time of passing the sentences. The ground taken by the judge is, in substance, that the stealing of the goods of divers persons, at the same time, constitutes but one offence, and cannot in law be the subject of diverse indictments or prosecutions. This position, I think, cannot be maintained. In Hammon's Case, 2 Leach, 1089, cited in 2 Russ. Crimes, 102, Grose, J., says: "The true meaning of larceny is the felonious taking the property of another, without his consent, and against his will, with intent to convert it to the use of the taker." The gist of the offence is the violation done to the right of property of the injured individual, which it is the duty of the government to protect. The injury done to the right of property of A, is not an injury to the right of property of B. Both are injured, and each has an equal right to call upon the government to punish the offender. Stealing the goods of B, is as much an offence as stealing the goods of A. A man may commit an assault and battery on two persons at the same time, yet the battery of one is not the battery of the other. If the offender should be indicted for the assault upon one of them, and be acquitted, he could not plead his acquittal in bar of an indictment for the assault upon the other. So if the man who stole the several goods of A and of B, should be indicted for stealing the goods of A, and should be acquitted, he could not plead his acquittal in bar of an indictment for stealing the goods of B, although stolen at the same time; because the evidence of stealing the goods of B, would not support the indictment for stealing the goods of A. So if a man, intending to murder A and B, should kill them both at one shot, and should be acquitted upon an indictment for the murder of A, he could not plead that acquittal in bar of an indictment for the murder of B; nor, if convicted of the murder of B, could he plead it in bar of a prosecution for the murder of A. By the common law, the owner of goods stolen, could not, upon conviction of the thief on a prosecution by indictment, ob-

tain restitution of his goods; but was forced to bring an appeal of robbery, in order to have his goods again. 4 Bl. Comm. p. 362, c. 27. But now, by the statute of 21 Hen. VIII., c. 11, it is enacted that if the felon shall be convicted "by reason of the evidence given by the party so robbed, or owner of the said money, goods, or chattels, or by any other by their procurement, then the party so robbed, or the owner, shall be restored to his said money, goods, and chattels." And the justices shall have power "to award from time to time, writs of restitution," &c., "in like manner as though any such felon were attainted at the suit of the party in appeal." Dalton, in his Justice (chapter 122, p. 346), says: "If a thief do rob or steal goods from three men, severally, and he be indicted for the robbing or stealing from one of them, and arraigned thereupon; in this case, though the other two would give evidence against the offender, yet shall they not have restitution of their goods, by the meaning of that statute" (21 Hen. VIII., c. 11), "for the felon is not attainted of any other felony saving that whereof he was indicted. But if he be indicted of all the three robberies or felonies severally, and arraigned upon one of them, and found guilty by the evidence given by one of the parties robbed," &c., "yet shall he be after arraigned upon the other two indictments, to the intent he may also be guilty by the evidence of the other two persons robbed, and that so they may have restitution of their goods stolen according to the meaning of the said statute. And if a man do steal goods at divers times from several men, and he is after attainted at the suit of one of them only for the goods stolen from him, but is not attainted at the suit of the others; by this attainder the felon shall forfeit to the king, not only his own goods, but also the goods stolen from those others at whose suit he was not attainted, though the felon had not the property, but only the possession of those goods. And the property of the goods which remaineth in the right owner in this case is forfeited (by the owner,) to the king, for the default of the owner pursuing the felon." Here it is evident, that Dalton first speaks of goods stolen from three several persons at one time, and considers them as distinct felonies, and liable to be severally prosecuted by indictment; and that if he be found guilty upon one of them, he may be afterwards arraigned and convicted upon the others. He then speaks of goods stolen "at divers times from several men." That the stealing of the goods of several persons at the same time, constitutes several distinct larcenies, appears to have been repeatedly adjudged in the English courts, and has, I believe, never been denied there, or in this country. Thus in Turner's Case, J. Kel. 30: "One James Turner and William Turner, at Christmas sessions last," (1664,) "were indicted of burglary, for breaking the house of Mr. Tryon, in the night, and taking away great sums of money; and thereupon James Turner was found guilty and executed; but William Turner was then acquitted; and now there being great evidence that William Turner was in the same burglary with James Turner, and there being £47 of the money of one Hill, a servant to Mr. Tryon, stolen at the same time, which £47 was not in the former indictment, they would have indicted William Turner again, now, for burglary, for breaking the house of Tryon, and taking thence £47 of the money of Hill. But we all agreed that William Turner, being formerly indicted for burglary, in breaking the house of Mr. Tryon, and stealing his goods, and acquitted, he cannot now be indicted again for the same burglary, for breaking the house; but we all agreed that he might be indicted for felony, for stealing the money of Hill; for they are several felonies; and he was not indicted of the felony before. And so he was indicted. And I afterwards told my Lord Chief Justice Bridgeman what we had done, and he agreed the law to be so as we had directed." The same doctrine is held in Jones' and Bever's Case, J. Kel. 52. "At the jail-delivery in the Old Baily, 19 February, 1665, John Jones and Philip Bever were indicted for burglary, for breaking the king's house at Whitehall, and stealing from thence the goods of my Lord Cornbury, and were found not guilty; and afterwards were indicted for the same burglary and stealing the goods of Mr. Nunnesy; and we agreed that they, being once acquitted for the burglary, could not be again indicted for the same burglary, but might be indicted for stealing the goods of Mr. Nunnesy, according as was formerly resolved in Turner's Case."

These cases, as far as they show that stealing the goods of A, and the goods of B, at the same time, constitutes two distinct felonies, are confirmed by the case of Rex v. Vandercom (in 1796) 2 East, P. C. 519, in which the court overruled the opinion of the judges in the Cases of Turner, and Jones and Bever, so far as they had decided that the breaking and entering of the dwelling-house of Tryon, in the night, and stealing therein the goods of Tryon, and the money of Hill, constituted only one burglary. In this case, (of Vandercom,) "the prisoners were indicted for burglariously breaking and entering the dwelling-house of Merial Nevill and Ann Nevill, &c., with intent to steal their goods therein being; to which they pleaded autrefois acquit upon a former indictment charging the same facts, with this difference, that instead of the breaking, &c., being laid with intent to steal, &c., the indictment charged an actual stealing of certain goods of Merial Nevill, and certain other goods of Ann Nevill, and certain other goods of one Susanna Gibbs; and concluding with an averment of the identity of the persons, and that the two indictments were for the same burglary. The case was argued upon demurrer before all the judges, and they unani-

mously held the plea bad; the grounds of which judgment were afterwards stated by Buller, J., at the Old Baily in June, 1796. He began by observing that, on the part of the prisoners, it was contended that, as the dwelling-house mentioned in the two indictments, and the times, mentioned in each, when the offence was committed, were the same, therefore the offence was the same; and the acquittal on the former indictment a bar to the present. And further, that burglary was defined to be a felonious breaking and entering of a mansion-house in the night-time, to be completed by felony, or an intention to commit it; and that two cases in Kelyng were relied on in support of the plea of autrefois acquit." After stating the two indictments, he proceeded: "The question is, whether the several offences described in the two indictments can be said to be the same? That there was only one act of breaking the house, and a felony committed only at one time, must, on this record, be taken to be clear; but that does not decide the question. The crime of burglary is of two sorts: 1. Breaking and entering a dwelling-house, in the night-time, and stealing goods there. 2. Breaking and entering a dwelling-house, in the night-time, with intent to commit a felony, though that felony be not committed. The circumstance of breaking and entering the dwelling-house, is common and essential to both, but it does not, of itself, constitute the crime in either; for there must be a felony committed, or intended, without one of which the crime of burglary does not exist; and these offences are so distinct in their nature, that evidence of one will not support an indictment for the other. For example, if a man be indicted for breaking and entering a house in the night, and stealing goods there, evidence that he broke, &c., and intended to steal goods, or commit any other felony, would not support the indictment. In the case of the present prisoners, the evidence applicable to the indictment now depending, which is for breaking, &c., with intent to steal, was not evidence to prove the first indictment for breaking, &c., and stealing goods. Then if the crimes are so distinct that evidence of one will not support the other, it is inconsistent with reason to say that they are so far the same that an acquittal of one shall be a bar to a prosecution for the other. Neither do legal authorities support such a proposition." After stating Turner's Case from Kelyng, the judge proceeded: "In that case the judges went on the idea that the breaking the house and the stealing the goods were distinct offences, and that breaking the house only constituted the burglary; which was a manifest mistake. The burglary consisted of breaking the house and stealing the goods; and if the stealing the goods of Hill were a distinct felony from that of stealing the goods of Tryon, (which they admitted to to be,) the burglaries, from necessity, could not be the same. In that case the fact was, that the prisoner broke the house of Tryon and stole the money both of Tryon and of Hill at the same time. He had been tried for breaking the house and stealing the money of Tryon, and might have been convicted if the prosecutor had used due diligence about his evidence, so that the prisoner's life had been put in jeopardy; but still the judges held that he might be tried for the other part of the same act, namely, stealing the money of Hill." The judge then stated the Case of Jones and Bever, from Kelyng, and said: "But authorities are not wanting to show the principle and foundation on which the plea of autrefois acquit is to be sustained." He then referred to 2 Hawk. P. C. c. 35, § 3; Fost. Crown Law, 361, 362; and Rex v. Pedley, B. R. Tr. 1782. These establish the principle that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. "To apply that principle to the present case. The first indictment was for breaking and entering the house and stealing the goods. If it were proved, on that indictment, that the prisoners broke and entered the house, but had not stolen the goods, which are the facts contained in the present indictment, they could not have been convicted on that indictment by such evidence. They have not, then, been tried, nor were their lives ever in jeopardy, for this offence, which is for breaking the house with intent to steal the goods. For these reasons the judges are unanimously of opinion, that the plea is bad; that there must be judgment for the crown upon this demurrer, and that the prisoners must take their trial upon the indictment now depending." From these cases it appears to have been the unanimous opinion of at least sixteen judges in England, that the stealing of the goods of two separate owners, at the same time, by the same person, and in the same place, constitutes two separate offences; and that this proposition, or doctrine, which does not appear to have been ever controverted, was so clear as to have been the admitted ground of the judgments of the courts, in these three cases of burglary; and Chitty (volume 1, p. 457), says: "And if two offences are supposed to have been committed at the same time, as if a horse and a saddle are stolen together, an acquittal of one will be no bar to an indictment for the other, for the crimes are essentially different."

This proposition, then, being established beyond all controversy, it follows that these separate offences may be the subject of separate indictments; and there are some reasons why it is not always "repugnant to common sense and common justice," that they should be, sometimes at least, thus prosecuted.

1. A count charging two distinct felonies

would be liable to the objection of duplicity, and might be quashed, either upon motion before trial, or upon demurrer, or on motion in arrest of judgment; and even if charged in separate counts of the same indictment, although it would be no cause for demurrer, nor for arresting the judgment, because each count is to be considered as for a separate offence, and liable to a separate judgment; yet in England the practice of the judges is, if the objection is discovered before plea, to quash the indictment, and if not discovered until the trial, to put the prosecutor to his election for which offence he will proceed. See Starkie, Cr. Pl. c. 2, § 2, p. 42; East, P. C. 515-522; Young v. King, 3 Term R. 106; Leach, 531, 568; Rex v. Jones, 2 Camp. 132; Archb. Cr. Pl. 54, 59, 60; Rex v. Fuller, 1 Bos. & P. 181; Rex v. Galloway, 1 Moody, Crown Cas. 234; Rex v. Flower, 3 Car. & P. 413; Rex v. Madden, 1 Moody, Crown Cas. 277; Com. v. Symonds, 2 Mass. 163, 164; 1 Chitty, Cr. Law, 168, 172, 248, 252a; Thomas's Case, 2 East, P. C. 934; Co. Litt. 304a; Com. v. Dove, 2 Va. Cas. 26. If an indictment charging several distinct offences, be thus liable to be quashed, the prosecutor ought not to be compelled to include them in one indictment, when there never has been a question that they may be indicted separately.

2. To charge the defendant with two distinct felonies in one count, or even in one indictment, may embarrass him as to his challenge of jurors. He might have good cause of challenge as to one of the offences, and not as to the other. If a juror should be found not indifferent as to the trial of one of the offences, and indifferent as to the other, the United States might claim him as a competent juror as to this offence, while the prisoner might insist upon his being rejected as to the former; and if the juror should be rejected, it must be because the prosecuting attorney, by joining the two offences in one indictment, had subjected himself to this inconvenience. He ought not, therefore, to be compelled thus to join them.

3. If the prosecutor is obliged to charge, in one count, all the goods of divers persons stolen at the same time, he may be obliged, against his will, to charge the defendant with a penitentiary offence; for if charged in separate indictments, or even in separate counts, neither of them might be of sufficient value to send him to the penitentiary.

4. The prosecuting attorney may not know how the evidence may turn out, as to the time and manner of taking the goods. They may all have been found in the defendant's possession at the same time, but there may be no evidence that they were all taken at the same time. The attorney of the United States would probably charge them as having been stolen on the same day; but the day laid in the indictment is immaterial, and need not be proved.

If he should not be able to prove that the goods were taken at the same time, then he might be put to elect, for the goods of which owner he would prosecute, and abandon the rest; and then one of the owners only would be entitled to restitution of his goods, for the defendant could be convicted of taking the goods of one only. These are some of the inconveniences of charging separate offences in the same indictment, all of which may be avoided by charging them separately; and as the propriety and legality of joining them may, at least, be questionable, a prudent prosecutor would generally charge them in separate indictments. It is true that Russell (volume 2, p. 178), says: "With respect to those larcenies which are aggravated by the amount of the property stolen, it should appear that the property, the value of which is taken into the computation, was all stolen at the same time." "For, in fact, where things are stolen at different times, they are different acts of stealing, and no number of petit larcenies would amount to grand larceny, nor any number of grand larcenies, where it depended upon the value of the property stolen, to a capital offense. But it seems that if the property of several persons, lying together in one bundle, or chest, upon the same table, or even in the same house, be stolen together at one time, the value of the whole may be put together, for such stealing is one entire felony." And Hale (1 Hale, P. C. p. 530, c. 45,) says: "If two or more be indicted of stealing goods above the value of twelve pence, though in law the felonies are several, yet it is grand larceny in both. 8 E. 2, Coron. 404. But if upon the evidence it appears that A stole twelve pence at one time, and B twelve pence at another time, so that the acts were several, at several times, though they were the goods of the same person, this is petit larceny in each, and not grand larceny in either." And again, in page 531, he says: "But it seems to me, that if, at the same time he steals goods of A, to the value of six pence; goods of B, to the value of six pence, and goods of C, to the value of six pence, being perchance, in one bundle, or upon a table, or in one shop, this is grand larceny, because it is one entire felony, done at the same time, though the persons had several properties; and therefore if in one indictment, they make grand larceny." It is remarkable, however, that neither Hawkins, nor his editors, have noticed this opinion of Lord Hale, although they have cited a preceding opinion which is now exploded, that goods stolen from the same person, at different times, if charged in one indictment, constitute grand larceny, although each parcel stolen at one time was under the value of twelve pence. Again, Hale (2 Hale, P. C. 173), says: "Larcenies committed of several things, though at several times, and from several persons, may be joined in one indictment." This, no doubt, means in several counts, and that the joinder is no ground of demurrer, or of motion in arrest of judgment; and thus it agrees with the other authorities, and

is cited, as law, by Chitty (volume 1, p. 252a), and Chitty (volume 3, p. 959a) has copied from the Crown Circuit Companion, (which, however, is not remarkably accurate in its forms,) the form of an indictment charging, in one count, the stealing of the goods of two separate owners; and Mr. Starkie has transferred the same form to his appendix of precedents. Mr. Chitty (volume 3, p. 959a), in a note says: "Where several persons' goods are taken at the same time, so that the transaction is the same, the indictment may properly include the whole; but not so if the takings were at different times." And Mr. Starkie, in a note to page 440, note d, says: "Where the felonies are completely distinct, they ought not to be joined in the same indictment (see page 44); but where the transaction is the same, as where the property of different persons is taken at the same time, there seems to be no objection to the joinder." It seems, therefore, that whether they may or may not be properly joined in one indictment, depends upon the evidence which may be adduced at the trial; and it is, therefore, impossible for the court to know beforehand, whether they are or are not properly joined; and the prosecuting attorney may be equally ignorant till the cause comes on to trial. The only safe course for him, therefore, in such case, is to charge the offences separately. There never has been a doubt suggested in any book or case which has come to my knowledge during the fifty years that I have been daily conversant with the law, whether they may not be separately indicted. The only doubt has been whether they may be joined.

In the case of Beerman, which has called forth the protest and opinion of our learned brother, there was no evidence to show that the goods were all taken from the several five lodgers, in the same house, at the same time, except that they were found in his possession at the same time. Some of the owners did not miss their goods till they were found in the prisoner's possession. One of the lodgers was sick, and I think kept his room. The prisoner was a lodger in the same house, and must probably have gone into the rooms of the other lodgers, at various successive times when they were absent, so that the probability is that the goods were not all taken at the same time and place. There was no suggestion at the trial, that the goods taken were found by the prisoner in one bundle, or on a table, or in a shop, according to the case put by Lord Hale. The district attorney, therefore, in this case, would not, in the exercise of his discretion, have been justified by the principles of law, nor the practice of courts, and especially by the practice of this court (which will be presently shown,) in joining these five offences in one indictment. But, it is said, that "it was the duty of the court to quash all the indictments except one." I do not know by what law the court had a right to quash good indictments, after conviction by verdict, without the consent of the attorney for the United States. On the contrary, I apprehend it was the duty of the court, upon the motion of the attorney of the United States, to pronounce the judgment of the law upon each of these convictions. If it was the duty of the court to quash four of the five indictments, who had the right to select them? And which of them shall be reserved for trial? If the selection is to be made before trial and by the court, it might be that the court would select for trial the only one which could not be supported by the evidence; and what would be the effect of quashing the indictments upon the future liability of the prisoner to a new prosecution? Could it be pleaded as a former acquittal? Whether quashed before verdict, or after conviction, it would be equally unavailable as a defence to a subsequent prosecution, for no conviction is a bar unless followed by judgment. See Starkie, Cr. Pl. 364; 2 Hale, P. C. 251; 1 Chitty, Cr. Law, 457, 462. 2 Hale, P. C. 248. And no acquittal is a bar, unless it be "a legal acquittal by judgment, upon trial, by verdict of a petit jury." 1 Chitty, Cr. Law, 457. "There must be not only an acquittal by verdict, but a judgment thereupon quod eat sine die, for the bare verdict of his former acquittal is not a sufficient bar, without a judgment pleaded also." 2 Hale, P. C. 243, 246. The court, after verdict, had no authority to quash any of these indictments, unless for some legal defect appearing in the record, or upon a motion in arrest of judgment; and the judgment should be arrested for some such cause before the court would quash them; and then, perhaps, only upon the motion of the attorney of the United States. If the defendant had been acquitted, by verdict, upon these indictments, the court could not, unless for some legal defect, have quashed the indictments, and thus deprived the defendant of the benefit of his acquittal; and for the same reason, now that the defendant has been convicted upon them, the court cannot, unless for some such legal defect, quash them, and deprive the United States of the benefit of the conviction. Surely such a thing could not be done in a civil cause. If a plaintiff bring several suits upon distinct causes of action, which might have been joined in one declaration, and obtain a verdict in his favor in each suit, it cannot be pretended that the court would have a right to quash all these declarations but one, and thus deprive the plaintiff of the benefit of his verdict, unless for some legal defect in the declarations or pleadings apparent upon the record or shown upon motion in arrest of judgment. Certainly this court has never exercised any such power either in a civil or a criminal case.

I have examined every case of larceny in this country, of which any record remains, from the commencement of this court in 1801 to the present time, and have found it to be the general practice of all the attorneys of the United States to send up to the grand

jury separate indictments for goods stolen from divers persons at the same time by the same person. In the time of Mr. Mason and of Mr. Jones, a period of twenty years, there does not appear to be a single case where the thief is charged, in one indictment, with stealing the goods of divers persons at the same time, while there are, within the same period, eleven cases where goods stolen from divers owners, at the same time, are charged in as many indictments as there were owners of the stolen goods, namely, thirty-six indictments. In Mr. Swann's time, a period of twelve years, there were only three cases, in which goods stolen from divers persons, at one time, by the same person, were charged in one indictment. These were in 1834; but there were, within the same period, thirty-six cases in which separate indictments were found for the stealing of the goods of divers persons, stolen at the same time, making ninety-one indictments in the thirty-six cases. In Mr. Key's time, (a period of five years,) after Judge Thruston, in March term, 1833, (which was the first term after Mr. Key's appointment) had, in the case of James McDowell, publicly censured the practice of sending up separate indictments for stealing the goods of several persons at the same time, Mr. Key sent up indictments, charging in one count the stealing the goods of divers persons in seven cases; namely, against, Layland and Kurtz, severally at November term, 1835, for stealing two cloaks, one belonging to Mr. Martini, worth $30, and the other to Miss Kane, worth $7; against William Kurtz, at November term, 1836, for stealing ninety pieces of silver coin worth $90, of W. R. King, and one handkerchief worth fifty cents, of F. K. Beck; against Wm. Jones, at March term, 1837, for stealing a vest worth $4.50, of George Mullen, and two boots worth $3, of James Fitzgerald; against Wm. Bell and Nicholas Golding severally, at the same term, who were each charged in two separate indictments for stealing the goods of sundry persons on the same day. In one of the indictments they were charged with stealing fifteen bank-notes of $10 each, from Bernard Kelly, and in the other they were charged with stealing goods, worth more than five dollars, belonging to three several persons; this case, therefore, exhibited the practice in both ways; and against Esther Gordon, at Alexandria, in May term, 1836, for stealing a coat worth $10, of D. W. Scott, and a pair of pantaloons worth $5, of W. H. Metcalf. In the mean time, however, that is, from March, 1833, to March, 1838, inclusive, Mr. Key had sent up separate and distinct indictments for goods stolen at the same time from separate and distinct owners, in twenty-three cases, making sixty-eight indictments. Thus it appears that in the actual practice in this court the proportion of separate indictments to joint indictments, for goods stolen at the same time, is one hundred and ninety-five to ten. Until about the year 1833, when Mr. Key came into office as district attorney, no objection to this practice had been suggested, it is believed, either here or in England. It had been left to the discretion of the prosecuting attorney to indict for the offences separately, or to join them in one count. In the few cases in which they have been thus joined it may have been doubtful in the mind of the attorney whether he could prove the ownership of all the alleged owners, or it might be very expensive to procure the necessary testimony; or the goods stolen from some of the owners may have been of very trifling value, and therefore he may have thought it prudent not to put the United States to the expense of separate prosecutions; but whatever may have been the motive, the mode of proceeding has been left to the discretion of the district attorney, who is an officer of the United States, and responsible for the proper discharge of the duties of his office. If, then, it be clear, as I think it is, that the stealing of the goods of divers persons at the same time, constitutes several distinct felonies, à fortiori are they to be considered as several and distinct felonies, when the goods are taken at different times, although "taken under a preconceived intention of stealing them, and by a continuous operation." Never having seen such a doctrine as this broached in any law-book which came within my notice, and no authority having been cited in support of it, I cannot believe it necessary to attempt to refute it.

In the opinion of the judge, it is intimated that in the case at Alexandria, where the goods of two of Mr. Hallowell's scholars were stolen at the same time (which was Esther Gordon's case,) this court settled the law that it was but one offence. But it does not appear that any question was made, either by motion to quash the indictment, or by demurrer, or by arrest of judgment; and the court might have been of opinion that the two offences, committed at the same time, might be charged in one indictment. The sentence was for two years' imprisonment and labor in the penitentiary; not three years as supposed by the judge; this however makes no difference in principle. The defendant would have been liable to the same sentence if she had taken only the goods of either of the owners stated in the indictment. Upon the whole, I am clearly of opinion that the stealing of the goods of divers persons at the same time, constitutes as many distinct offences as there are distinct owners of the goods stolen, and that they may be charged in as many separate and distinct indictments. That it is doubtful whether, if all should be charged in one count, the court may not, before trial, quash the indictment, or upon the trial, compel the prosecutor to elect which of the offences he will prosecute, and therefore it is properly left to the discretion of the attorney of the

United States in which mode he will proceed. I am also of opinion that if he prosecutes by separate indictments for each offence, and the defendant is found guilty in all, the court cannot, without the consent of the United States attorney, quash any of the indictments; but on his motion, is bound to render judgment upon the verdicts according to law, unless there should appear upon the record, or upon motion, legal ground to arrest the judgments.

Case No. 14,561.

UNITED STATES v. BEJANDIO.

[1 Woods, 294.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1873.

COUNTERFEITING—INDICTMENT—PERSON INTENDED TO BE DEFRAUDED.

An indictment based on the 21st section of the act approved March 3, 1825 (4 Stat. 121), which names the person whom the accused intended to defraud by the passing of the counterfeit coin, need not also name the person to whom the coin was passed.

In equity.

This case was heard upon a motion to quash the indictment.

J. R. Beckwith, U. S. Atty.

Charles Case, for defendant.

WOODS, Circuit Judge This is an indictment for passing and uttering as true a forged and counterfeit coin in the resemblance and similitude of the coin of the United States, composed of copper and nickel and known as five-cent pieces. The indictment is based on the 1st and 2d sections of the act of May 16, 1866, entitled "An act to authorize the coinage of five cent pieces" (14 Stat. 47), and the 21st section of the act of March 3, 1825, entitled "An act more effectually to provide for the punishment of certain coiners against the United States, and for other purposes" (4 Stat. 121). The substance of these sections so far as they apply to this indictment is, that if any person shall forge or counterfeit a five cent piece, composed of copper and nickel, or shall pass any such forged or counterfeited coin with intent to defraud any body politic or corporate, or any other person or persons whatever, he shall be deemed guilty of a felony, etc.

The indictment contains three counts, one of which charges the defendant with uttering and passing, etc., with intent to defraud one Robert Harris, and the other two with uttering and passing, etc., with intent to defraud some person or persons to the grand jury unknown. Neither count of the indictment contains any averment of the name of the person to whom the counterfeit coin was passed. The defendant moves to quash the several counts of the indictment as insufficient for want of such averment, and to sustain his motion cites the following authorities: 2 Bish. Cr. Proc. § 258, note 2; Id. § 425; 1 Bish. Cr. Proc. §§ 522, 559, note 5; 3 Greenl. Ev. § 22. The English precedents of indictments for uttering forged coin, to be found in 2 Chit. Cr. Law, 112–114, all aver the name of the person to whom the forged coin was passed. These authorities, it must be observed, all apply to statutes that do not contain the clause to be found in the law upon which this indictment is founded, namely: "with intent to defraud any person whomsoever." Thus the act of 15 Geo. II., c. 28, § 2, provides that "if any person shall utter or tender in payment any false or counterfeit money, knowing the same to be so, he shall suffer six months imprisonment," etc. The object of the rule requiring under such a statute, the name of the person to be stated to whom the forged coin was passed, was to describe the offense and give the accused notice of the charge he would be called on to meet.

I think the averment that the forged coin was passed with intent to defraud some person or persons, which is required to be made in an indictment under the United States statute, is a substitute for an averment specifying the name of the person to whom the coin was passed. It seems to define the offense and to give notice to defendant of the accusation against him. To require both averments to be made, as that the coin was passed to A. B. to defraud A. B., or was passed to A. B. to defraud C. D., is requiring too great particularity. This view is sustained by the form of indictments to be found in Wharton's Precedents (volume 1, forms 338–340), which we are informed by a note have been sustained in the United States circuit courts sitting in New York and Philadelphia. The like forms are also given in 2 Abb. Prac. 465. I am disposed to follow these precedents.

I think the indictment is a sufficient notice to the defendant of the accusation against him, and defines with sufficient particularity the offense with which he stands charged, that after he is charged with passing a counterfeit coin to defraud A., it would be a matter of form to aver further that he passed the coin to A. or to B., the omission of which could not tend to the prejudice of the defendant. Therefore, even if the omission complained of was a defect in the indictment, it would be cured by the 8th section of the act of June 1, 1872, entitled "An act to further the administration of justice." 17 Stat. 198.

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

Case No. 14,562.

UNITED STATES v. BELDING.

UNITED STATES v. MYNDERSE.

[12 Int. Rev. Rec. 39.]

Circuit Court, N. D. New York. July, 1870.

INTERNAL REVENUE—ILLEGAL DISTILLATION—RECOVERY OF PENALTY—FORFEITURE OF PROPERTY—CHARACTER OF PROCEEDING.

[1. Act July 1, 1862, providing that one using or owning appliances for the distillation of liquors, who neglects to report the same, shall forfeit the spirits made by him as well as the apparatus and shall pay a penalty of $500, authorizes a suit to recover such $500, and also a separate proceeding in rem to enforce the forfeiture of the property by condemnation.]

[2. The provision that there must be a seizure of the property within 30 days after the cause for the same occurred, and that proceedings to enforce the forfeiture shall be begun within 20 days after the seizure, does not apply to or affect the recovery of the penalty.]

[Error to the district court of the United States for the Northern district of New York.

[These were actions by the United States against Edward Belding and Edward Mynderse, respectively, brought to recover the statutory penalty for the violation of the revenue laws. The judgments rendered in the court below were in favor of the defendants. Cases unreported. The causes are now before this court upon a writ of error to review its judgments.]

WOODRUFF, Circuit Judge. These two cases, argued together at the recent session of the court in March last, present one and the same question, touching the construction of section 54 of the act to provide internal revenue, etc., passed July 1, 1862. 12 Stat. 432. By that section it is enacted "that the owner, agent, or superintendent of any vessel or vessels used in making fermented liquors, or of any still, boiler, or other vessel used in the distillation of spirits on which duty is payable, who shall neglect or refuse to make true and exact entry and report of the same, or to do or cause to be done any of the things by this act required to be done, as aforesaid, shall forfeit, for every such neglect or refusal, all the liquors and spirits made by or for him, and all the vessels used in making the same, and the stills, boilers, and other vessels used in distillation, together with the sum of $500, to be recovered with costs of suit; which said liquors or spirits, with the vessels containing the same, with all the vessels used in making the same, may be seized by any collector of internal duties, and held by him until a decision shall be had thereon according to law: provided, that such seizure be made within thirty days after the cause for the same may have occurred, and that proceedings to enforce said forfeiture shall have been commenced by such collector within twenty days after the seizure thereof. And the proceedings to enforce said forfeiture of said property shall be in the nature of a proceeding in rem, in the circuit or district court of the United States, for the district where such seizure is made, or in any other court of competent jurisdiction."

These actions were brought to recover several sums of $500, liability for the payment of which is alleged to have been incurred by the defendants in each, by sundry violations of the 45th section of the same act, at sundry times in the declaration stated. On the trial of the actions respectively, proof of such violations was given on the part of the plaintiffs. But "it was conceded that no seizure of the property of the defendant had been made, and that no proceedings to enforce the forfeiture were commenced within fifty days after the cause for the same occurred." Thereupon the question arose, can the action to recover the several sums of $500 be maintained? Or was a seizure of the liquors, spirits, stills, boilers, and other vessels, within thirty days after the cause for the same occurred, and the commencement of proceedings to enforce the forfeiture, necessary and precedent conditions of the right to recover from the owner personally the $500? The seizure of the property and the commencement of proceedings to enforce the forfeiture within the times respectively mentioned, were held on the trial indispensable conditions precedent to a recovery of the $500 from the owner, and the jury were, therefore, on that sole ground, instructed to find a verdict for the defendant in each case. The plaintiffs, by their writ of error, seek to review such ruling, and allege that it was an erroneous construction of the act.

In support of the ruling below, it is insisted that the fifty-fourth section, upon which the actions respectively are based, contemplates one entire forfeiture and one only proceeding for its enforcement, including therein the condemnation of the property seized, and a judgment against the owner personally for the $500, or several sums of $500, if he be liable for more than one; and that the proviso forbids any seizure or forfeiture, unless such seizure be made within the number of days mentioned after the cause of seizure occurred. The statute is expressed in terms which are, in many respects, liable to criticism, and the structure of the section is somewhat confused. The meaning is, nevertheless, sufficiently clear and intelligible, and I think it does not at all import that there shall be but one proceeding founded upon a violation of the law. The purpose was to secure obedience to the statute by subjecting its violators to a loss of the property produced and the instruments employed in the production, and to impose upon them personally a penalty. The penalty is to be recovered with costs of suit. This language is to be understood in the usual sense in which it is employed, viz. in a suit to be brought therefor, in which the person liable may be charged by a judgment against him with

costs. The statute uses the ordinary form of the "ideo consideratum est," which embodies and declares the judgment of the court in an action for the recovery of money.

On the other hand, the section says expressly that the proceedings to enforce the forfeiture of the property shall be in the nature of proceedings in rem, in which proceedings there is no personal judgment, and in which the property is defendant. Indeed, if in such proceedings the owner of the rem does not see fit to appear and claim, he will not be before the court at all, to be charged by any judgment. The giving of a recovery, with costs of suit, per se, indicates a discrimination intentionally made between the action for the penalty and the proceeding in rem, for in the latter all that is secured to the plaintiffs is the rem itself for condemnation and appropriation to their use; and when the owner does not see fit to appear and claim, the whole subject of condemnation comes to the plaintiff, and no more whether the costs are greater or less. The costs of suit spoken of are not costs of the proceeding in rem, but costs of suit for the $500. No mode is pointed out by which the owner can be required to appear in the proceeding in rem, and the construction in this respect would deprive the plaintiffs of any power by any practice of the courts of law to obtain such judgment against the owner personally if he preferred not to intervene by claiming the property. There can be no just reason to suppose that congress intended to prescribe the practice of courts of admiralty for the enforcement of this statute. The proceeding in rem must by the terms of the section be taken in the district where such seizure is made. The owner of the property seized may reside in another district. Is it to be held that by this section congress intended a constructive repeal, pro hac vice, of the eleventh section of the judiciary act of 1789 [1 Stat. 78], which declares that no civil suit shall be brought against any defendant (being an inhabitant of the United States) out of the district in which he resides or may be found, etc.? If so, then by what process, citation, or notice, can the court acquire jurisdiction of his person? Can the district court send its capias ad respondendum to another district? Upon its mandate, can the marshal of the other district act in serving a citation or other process or notice? Can he be made a party by advertisement? Clearly it is competent for congress to devise and provide for these and all like questions, and construct a proceeding which might accomplish the condemnation of the property and give jurisdiction to order a recovery of the money penalty with costs of the entire proceedings, but in my judgment they have not done nor attempted to do so. The learned attorney for the United States has forcibly and I think justly and truly suggested the reason why, under other rules and principles governing the subject, the congress cannot be deemed to intend by the section under consideration to work such a result as would flow from holding the proceedings to be necessarily single, and for both the condemnation of the property and the collection of the money from the owner, viz.: that it "confounds modes of procedure which have always been held to be distinct; seeks in one action remedies wholly dissimilar; invents a new form of action in which an individual and his property shall be pursued at the same time; an action a part of which (by the death of the owner) might abate and another part survive, and in which there must be two judgments, one to be enforced by writ of execution, the other by an order of sale. To one side of such a hybrid-mongrel proceeding, any person having a claim to the property might become a party; to another side or part of the proceeding, he who had incurred the penalty would be the party as sole defendant."

I repeat that, conceding the power of congress to do all this, they have not in this fifty-fourth section done so. Although not so expressed in distinct terms, the intention sufficiently appears to authorize a suit for the recovery of the $500 with costs, and a proceeding in the nature of a proceeding in rem, to enforce the forfeiture of the property, by condemnation, to the use of the plaintiffs. So far, therefore, as the support of the ruling below depends upon the idea that there can be but one suit or proceeding, I think it fails.

Second. But the views above stated are not necessarily conclusive upon the principal question under examination. It is insisted that, whether the condemnation of the property and the recovery of the pecuniary penalty from the owner are to be effected by one or by two suits or proceedings, the condition annexed to both is that a seizure be made within thirty days, and proceedings to enforce the forfeiture be commenced within twenty days thereafter; that the entire penalty and forfeiture, or whatever consequence the statute denounces for the violation of the law, is dependent on the performance of that condition. Although the disposition of the first point above stated is not necessarily conclusive upon the present, it is, nevertheless, of great significance, and at once lets in with great force the inquiry, what reason can exist for making the collection of the penalty from the owner dependent upon the seizure of the property also?

I have had occasion to observe in substance, in another case, argued at the same term, that this statute is not to be construed with rigid strictness, so as to favor any possible construction by which a defendant may be saved from the consequences of its violation. But, on the contrary, it is to be interpreted with just and fair liberality, so as to promote the object of the statute and secure obedience to its requirements. The argument in behalf of the defendants in er-

ror places great stress upon the contrary rule of interpretation, viz.: that a penal statute should be construed strictly, and if there may be two constructions, that which is most in favor of the citizen should prevail. But in the language of the court in the case of Clicquot's Champagne, 3 Wall. [70 U. S.] 145, substantially borrowed from the opinion of the court in Taylor v. U. S. [3 How. (44 U. S.) 197]: "Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them, and most effectually accomplish these objects." Construed in this spirit, I think the proviso should be held to relate to the forfeiture of the property, or rather to the seizure of the property. Indeed, it is no violence to the words or to the structure of the section to say, that it qualifies the paragraph immediately preceding, and that only, to wit; "which said liquors, etc., may be seized, etc., provided that such seizure be made within thirty days, etc." There is reason for some limitation of the right to seize the liquors or spirits. They may pass lawfully into the hands of innocent third parties, and so also the stills, boilers, and other vessels may be sold. It was therefore fitting that the right of seizure for past offences by the owner should have a limit in respect of time, which could have no application to the personal liability of the offender.

If such seizure were declared a condition of such liability, on the rule of strict construction which is invoked, another question would at once arise, viz.: How extensive must the seizure be? The literal meaning of "such seizure," in the proviso, is of "all the liquors and spirits made," and the stills, boilers, and other vessels used in distillation; these are what the collector is authorized to seize. Now, if the liability of the owner for the $500 depends on the making of the seizure, who shall say that the condition is satisfied by anything less than a seizure as extensive as the terms authorize? Authority being given to seize all the spirits made, and it being a condition that "such" seizure shall be made, can the court say that a seizure of a part of the spirits, etc., satisfies the conditions? Not if the statute is to be construed with such literal strictness as would apply the proviso to the liability of the owner; while on the other hand a just construction in respect to the proceedings for a forfeiture of the property is that that which is seized may be condemned, and obviously no more than is seized can be. Any other construction would defeat the statute, for obviously portions of the property might be disposed of or eloigned so that it could not be seized. This brings into view another consideration in support of the views of the plaintiff's counsel: the seizure of property has no relation to the owner's liability, or the suit that is brought to collect the $500 from him; while, on the other hand, the seizure of property and the proceedings to enforce the forfeiture in rem are related, the latter being in its very nature dependent upon the former.

If the intention of the legislature in enacting this section may be inferred from subsequent legislation, or if we may be aided by the latter in ascertaining such intention, then the amendment of the section by the act of March 3, 1865 [13 Stat. 469], furnishes (as was, I think, well insisted by the counsel for the plaintiffs) a significant if not conclusive guide to their meaning. By that section, an addition was made providing for the punishment of the offending party by imprisonment, and the declaration of that punishment was introduced after and in immediate connection with the declared liability for the $500 and costs of suit, "together with the sum of $500 to be recovered with costs of suit; and shall be deemed guilty of a misdemeanor, and be subject to imprisonment for a term not exceeding one year." The construction contended for by the defendants would therefore involve the serious absurdity that unless a seizure of the property of the owner was made within thirty days, he could not be prosecuted at all for his offence against the law, nor punished for his misdemeanor.

Upon the most careful reflection, I am constrained to conclude that the ruling upon the trial was erroneous. The judgment must be reversed, and a new trial ordered.

Case No. 14,563.

UNITED STATES v. BELEW.

[2 Brock. 280.] [1]

Circuit Court, D. Virginia. May Term, 1826.

EMBEZZLEMENT—POST-OFFICE—MAIL CARRIER.

A mail carrier is within the eighteenth section of the "Act regulating the post-office establishment," subjecting to a penalty in certain cases, "persons employed in any of the departments of the general post-office."

[Cited in Twenty Per Cent. Cases, 13 Wall. (80 U. S.) 576; Id., 20 Wall. (87 U. S.) 185.]

The prisoner [Soloman Belew] was indicted for secreting and embezzling sundry letters, and stealing therefrom divers bank notes, which had come into his hands as the carrier of the mail of the United States, between Charlottesville, in Virginia, and Richmond, in the same state, and the jury found the prisoner guilty. The counsel for the prisoner then moved in arrest of judgment,

[1] [Reported by John W. Brockenbrough, Esq.]

on the ground stated in the following opinion:

MARSHALL, Circuit Justice. The prisoner is convicted under the eighteenth section of the "Act regulating the post-office establishment,"—Act April 30, 1810 (2 Story's Laws, 1156 [2 Stat. 592]), repealed by Act 1825, c. 275 [3 Story's Laws, 1935; 4 Stat. 102, c. 64],—and the question submitted to the consideration of the court, is, whether a carrier of the mail be, "a person employed in any of the departments of the general post-office." To answer this question, it becomes necessary to settle the meaning of the word "department," as used in the act of congress. One of its significations, as our lexicons inform us, is, "a province or business, assigned to a particular person." The business assigned to a particular person, is, according to this definition, in his department. The business belonging to the post-office, is in a department of the post-office; a person employed in that business, is a person employed in a department of the post-office. If, then, the carrying of the mail be a part of the business of the post-office, it would seem that the person who carries it, is a person employed in a department of the general post-office.

The first section of the act, makes it the duty of the postmaster-general, "to provide for the carriage of the mail on all post roads that are, or may be, established by law." The carriage of the mail, then, is a part of the business of the postmaster-general; it is within his department, and a person employed in it, is employed in a department of the general post-office. There are several other sections of the act which obviously contemplate the carrier of the mail, as a person who is, particularly, within the purview of the statute. The second section enacts, that "the postmaster-general and all other persons employed in the general post-office, or in the care, custody, or conveyance, of the mail," shall take an oath prescribed by the law. But "every person who shall be in any manner employed in the care, custody, conveyance, or management, of the mail, shall be subject to all pains, penalties, and forfeiture, for violating the injunctions, or neglecting the duties required of him by the laws relating to the establishment of the post-office and post-roads, whether such person shall have taken the oath above prescribed or not." It is apparent from this section, that the framers of the act designed to provide particularly for the punishment of offences committed by persons carrying the mail; they are supposed to be subjected to particular "pains, penalties, and forfeitures." Yet it is by section 18, only, that these pains and penalties are inflicted, and they are described only as "persons employed in a department of the general post-office." We say it is by this section and this description only, that these pains and penalties are inflicted on the carriers of the mail, for stealing a letter out of the mail, because we believe that the nineteenth section is not intended to be applicable to them.[2]

The counsel for the prisoner supposes that no person can be the object of the eighteenth section, who is not appointed directly by the postmaster-general, or for whose appointment a special provision is not made by the act. He insists that he must be an officer. But this is not the object of the law; the terms of the enactment do not require an officer; they are satisfied with an agent, or any person employed in any of the departments, or, in other words, in the business allotted to the general post-office. Nor do they require that he shall be employed by the postmaster-general, or by authority expressly delegated by him; it is enough to satisfy the law, that they are so employed. The contractor cannot himself carry the mail through the whole extent of his contract; and the law contemplates his employing other persons. The fourth section provides, that these shall be free white persons, and subjects the contractor to a penalty for employing others. The mail-carrier, then, is, in this section also, specially the object of the act. The reason, as well as the language of the law, leads to the opinion, that all persons intrusted with the mail, should be alike subjected to the penalties of the law for a fraudulent violation of the trust reposed in them; the carrier of the mail is as much intrusted with it, as the person who makes it up and places it in his custody, and there are the same motives for subjecting him to the penalties inflicted on the violators of that trust. If, then, as we think, the words employed do, in their natural import comprehend him, the court would not be justified in a strained construction, to exclude him from their operation.

The counsel for the prisoner maintains that the act does, in its language, distinguish between a mail-carrier, and the persons to whom the eighteenth section of the act applies. He supposes that the conclud-

[2] The eighteenth section of the law regulating the post-office establishment, provided, that if any person employed in any of the departments of the general post-office, shall secrete, embezzle, or destroy, any letter, packet, bag, or mail of letters with which he shall have been entrusted, or which shall have come to his possession, and are intended to be conveyed by post, containing any bank note, or bank post bill, &c., or shall steal or take any of the same out of any letter, &c., that shall come to his possession, he shall, on conviction for any such offence, be imprisoned not exceeding ten years, &c. The nineteenth section of the same law declared, that if any person shall attempt to rob the mail, &c., he shall be punished, on conviction, by imprisonment not exceeding seven years, &c.; and if any person shall steal the mail, or steal or take from any mail, &c., whether with or without the consent of the person having the custody thereof, &c., such offender shall be punished, &c.

ing sentences of the eighteenth section exhibit this distinction. We do not think so. The preceding part of that section, enumerates offences which may be committed by any person intrusted with the mail, or with the letters to be carried by the post, and in that part, the offenders are described in general terms. The concluding sentences, enumerate offences which can be committed only by the person carrying the mail, and in those sentences, he is mentioned particularly. The nineteenth section, too, enumerates particularly the offences which may be committed, and, in the recital, mentions both the mail-carrier and the post-office. This distinguishes them from each other, but does not indicate that either is not comprehended in the general terms of the eighteenth section. Those general terms are not introduced in the nineteenth section, nor was it necessary that they should. Their absence no more proves that a mail-carrier is not employed in any of the departments of the general post-office, than that the person who receives the mail or delivers out the letters, is not so employed.

The counsel also supposes that section 2, distinguishes between a person employed in the departments of the general post-office, and a mail-carrier. But we cannot concur in this opinion. The language is, "That the postmaster-general, and all other persons employed in the general post-office, or in the care, custody, or conveyance of the mail, shall, &c." It is obvious that this section, in using the terms "persons employed in the general post-office," designates the general post-office itself, and uses a phrase more limited, and intended to be more limited, than the phrase "any person employed in any department of the general post-office." It excludes persons employed in the particular post-offices established in the several states. These are comprehended by the words, "care or custody" of the mail. These words comprehend all persons who have the "care or custody" of the mail, and are not comprehended by the words, "other persons employed in the general post-office." But the separate enumeration of individuals in this section, no more proves that the one, than that the other is not comprehended within the general term which designates them all. It no more proves that the person carrying the mail is not employed in any of the departments of the general post-office, than it proves that a person having the care or custody of the mail in a particular post-office, is not within any of those departments. The decisions of the English courts, showing the strict construction which has been given to the law, will not apply to this case, because we think a mail-carrier is within the very words of the eighteenth section of the act of congress.

Motion in arrest of judgment overruled, and the prisoner sentenced to imprisonment for seven years.

Case No. 14,564.

UNITED STATES v. BELL.

[1 Cranch, C. C. 94.] [1]

Circuit Court, District of Columbia. Nov. Term, 1802.

WITNESS—SLAVE—FREE MULATTO.

A slave may be a witness on a prosecution against a free mulatto, in Alexandria county.

Indictment for stealing. Slaves were permitted to be sworn on the part of the United States against the prisoner [Betty Bell, alias Mullican, a free mulatto]. Old Acts Va. 348; Code 1792, pp. 199, 200; Act 1801, Jan. 21, § 4.

Case No. 14,565.

UNITED STATES v. BELL.

[Gilp. 41.] [2]

District Court, E. D. Pennsylvania. Feb. 17, 1829.

CONSULS — OFFICIAL BOND — CONSULAR DUTIES — ACTION FOR MONEY NOT ACCOUNTED FOR.

1. The surety of a consul for the faithful discharge of his duties, and for his truly accounting for all moneys coming into his possession by virtue of the act of 14th April, 1792 [1 Stat. 254], is not responsible on account of moneys remitted to him for purposes not comprehended within his consular duties, as prescribed by that act.

[Cited in brief in State v. McFetridge (Wis.) 54 N. W. 3.]

2. In a suit by the United States against a surety, in an official bond, the burden of proof lies upon them, to show that the principal failed to discharge the duties of his office.

This was a suit on a bond dated on the 19th June, 1806, in which Maurice Rogers was the principal, and William Bell his surety. It appeared that Maurice Rogers had been appointed a consul of the United States in a foreign port, and the condition of this bond was, "tha. he should faithfully discharge the duties of his office, according to law, and also truly account for all moneys, goods and effects, which should come into his possession, by virtue of the act of congress concerning consuls and vice-consuls."

Mr. Ingersoll, U. S. Dist. Atty.

Mr. Binney, for defendants.

The question substantially was, whether Maurice Rogers had truly accounted for all moneys received by him as consul. It appeared that he had received from the treasury of the United States, by several payments, the sum of three thousand and fifty-two dollars and sixteen cents, and he was credited with disbursements to the amount of one thousand three hundred and ninety-eight dollars and seventy-eight cents. The suit was brought for the balance with interest. It was contended, on the part of the defendants, [Joseph Bell and William J. Bell, executors of William Bell,] that the money,

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

[2] [Reported by Henry D. Gilpin, Esq.]

thus paid to Rogers by the United States, was not received by him officially, as a consul; that it did not come into his possession by virtue of his office, or by virtue of the laws of the United States; that the law referred to, of 14th April, 1792, 1 Story's Laws, 235 [1 Stat. 254], makes it the duty of consuls to take possession of the personal estate left by any citizen of the United States, who shall die within their consulates, leaving there no legal representative; but that no other money or effects, except in the case of a stranded vessel, are mentioned or intended by the act to come into his hands, or can, officially, and by virtue of the act, be in his possession. Of consequence, the condition of the bond taken under the act, has relation only to such moneys and effects as are specified, and not to any sums, which the treasury of the United States, for other purposes, and to any amount, may remit to their consuls.

HOPKINSON, District Judge (charging jury). The question, under the issues in this case, is, whether the money received by Rogers from the treasury of the United States, for which this suit is brought, came into his possession by virtue of his office as a consul of the United States, under the laws of the United States. If it did so come into his possession, it is not denied that he has not faithfully discharged the duty of his office, by truly accounting for this money: and that the bond is forfeited and the defendant liable. By the fourth section of the act of 28th February, 1803 (2 Story's Laws, 883 [2 Stat. 203]), it is made the duty of the consuls to provide for the mariners and seamen of the United States, who may be found destitute within their districts, sufficient subsistence, and passages to some port of the United States, "at the expense of the United States." The performance of this duty, which is strictly official according to law, and indeed prescribed by the act under which the bond was taken, obviously requires money, and it may be to a considerable amount; and from whence is it to be supplied, unless by the treasury of the United States? The consul acts but as the agent of the United States; the payments are to be made for and on their account; and no agent is bound to make advances for his principal, unless by a special contract between them. The United States are bound to furnish their consuls with the funds necessary to provide for destitute seamen, in the manner directed by their laws; and if the moneys, in this case, paid by the United States to Mr. Rogers, were paid to him for the purposes mentioned in the act, to be applied to the relief of destitute seamen, it is my opinion that they came into his possession by virtue of his office, and under the laws of the United States. But if they were remitted to him, for other objects and purposes, not comprehended within his consular duties, as prescribed by the act of congress, under which the bond was taken; then, although he is a debtor to the United States for the amount due, they are not such moneys as the sureties in his bond can be called upon to account for. This is a question of fact for the decision of the jury. The account itself is the only evidence produced to show the nature and object of the advances; and they do not specifically appear there. The jury must, however, decide this matter by the light that is given to them.

A question has been made by the district attorney, on which party the burden of proof is thrown. I think it is on the United States. They assert and claim the forfeiture of the bond. They aver that Rogers received large sums of money; that he did not faithfully discharge the duties of his office; that he has not truly accounted for the moneys which came into his possession by virtue of the act of congress; and it is with them to show, what money did go into his possession by virtue of the act; what amount, which thus came into his possession, has not been truly accounted for; and in what he has not faithfully discharged the duties of his office. In short, they must make out their case against the defendant.

The jury found a verdict for the defendant.

Case No. 14,566.

UNITED STATES v. BELLINGSTEIN.

[16 Int. Rev. Rec. 92.]

District Court, E. D. Michigan. 1872.

INTERNAL REVENUE—BREWER—FALSE ENTRIES IN BOOKS.

[These were informations against John B. Bellingstein.]

A. B. Maynard, U. S. Dist. Atty., and Mr. Finney, Asst. Dist. Atty.

Mr. Lothrop, for defendant.

LONGYEAR, District Judge (charging jury). In this case the defendant is on trial on two informations against him as a brewer under the internal revenue laws, the two informations having been consolidated.

The first charges the defendant, as a brewer, under section 51 of the act of 1866 (14 Stat. 165), with intentionally making false entries in the books required by law to be kept by him of his manufacture and sale of beer. The district attorney concedes that this charge is not sustained by the proofs, and no conviction is asked upon it. The views of the district attorney are concurred in by the court. Your verdict, therefore, upon this information will be not guilty.

The other information charges the defendant, as a brewer, under the same section, with having neglected to keep the books required by law. The requirements of the law as to the books to be kept by brewers are found in section 49 of the act of 1866, and are as follows: "That every person owning or

occupying any brewery or premises used, or intended to be used, for the purpose of brewing or making such fermented liquors, or who shall have such premises under his control or supervision as agent for the owner or occupant, or shall have in his possession or custody any brewing materials, utensils, or apparatus used on said premises in the manufacture of bier, lager-bier, ale, porter, or other similar fermented liquors, either as owner, agent, or superintendent, shall from day to day enter, or cause to be entered, in a book to be kept by him for that purpose, the kind of such fermented liquors, the description of packages, and number of barrels and fractional parts of barrels of fermented liquors made, and also the quantity sold, or removed for consumption or sale, and shall also, from day to day, enter or cause to be entered, in a separate book to be kept by him for that purpose, an account of all material purchased by him for the purpose of producing such fermented liquors, including grain and malt," etc. The law then further provides that statements in writing taken from said books shall be rendered to the assessor at certain stated periods, and that the books shall be open at all times for the inspection of the proper revenue officers. And then at the end of section 51 it is provided as follows: "And any brewer who shall neglect to keep the books, or refuse to furnish the account and duplicate thereof, as provided by law, or who shall refuse to permit the proper officer to examine the books in the manner provided, shall, for every such refusal or neglect, forfeit and pay the sum of $300." The specific charge in this case is that the defendant neglected to keep a book of entries of materials purchased, as required by section 49. The facts in the case are not disputed. It is conceded on the one hand that the defendant did make entries of materials purchased in a book, and on the other hand that the book, and the only book in which such entries were made, was the book in which the defendant kept his general accounts, or, in other words, as expressed by the witness, it was "a book of general accounts."

The facts, therefore, being undisputed, it is a simple question of law, to be decided by the court, whether the facts constitute a compliance with the statutory requirement. The question here has no relation to the form in which the required book should be kept, neither do I regard form of any consequence so long as none is prescribed by the commissioner of internal revenue. The brewer may keep it in any form he chooses, only so that it is accessible and intelligible. The question is whether any book of entries of materials purchased, within the meaning of section 49, was kept by the defendant. The question is clearly and, I think, conclusively answered by a simple reference to that part of section 49 which describes the book in question. The language is, "a book to be kept by him for that purpose." That is, a book for the purpose of entering from day to day an account of materials purchased. Clearly, and it seems to me indisputably, a book of general accounts kept by a brewer in conducting his business cannot, by any stretch of construction, be deemed or held to be a book kept by him for the purpose specified, within the meaning of the statutory requirement. The purpose of the requirement evidently is to enable the revenue officers at a glance, by comparison of the product, as required to be entered in the other book, provided for in section 49, with the amount of materials purchased, to form some opinion of the correctness of the former; and the account of such materials is required to be kept in a book for that purpose, undoubtedly, in order to avoid the necessity of going through a long general account to obtain the required information.

It being conceded that no other book of entries of materials purchased was kept by the defendant than his book of general accounts here produced, I charge you that no compliance with the law in that respect has been shown, and therefore that, as a matter of law, the defendant is guilty of the offence charged.

Verdict accordingly.

NOTE. An objection was made to the account-book produced by the defendant, on the ground that the entries were in the German language. That objection was not noticed in the charge, for the reason that it was not necessary to a decision of the case. I allude to it here for the purpose of saying, for the benefit of all concerned, that the English language, being the only language recognized by this government in its records and proceedings, legislative, judicial, and otherwise, the court will naturally hesitate to recognize any book, record, writing, or proceeding required by any express statute which is in any other than the English language. Especially so where, as in this case, the book is required to be kept for the use and information of the government's own officers.

Case No. 14,567.

UNITED STATES v. BENDER.

[5 Cranch, C. C. 620.] [1]

Circuit Court, District of Columbia. Nov. Term, 1839.

GUARDIAN—ACTION UPON BOND—JURISDICTION TO TAKE BOND — MONEY RECEIVED OUT OF DISTRICT—NOTES TAKEN.

1. In debt upon a guardian's bond taken by the orphans' court of the county of Washington, this court refused to permit the defendant to show by testimony that no land descended nor was devised to the orphan in that county, and that he was not entitled to a distributive share of the personal estate of any intestate, or to a legacy or bequest under a last will and testament of any person on whose personal estate any administration had been granted in that county, and that no friend of the orphan had applied to the orphans' court to require the guardian to give bond; in order to show that that court had not authority or jurisdiction to take the bond.

[Cited in De Kraft v. Barney, Append. Fed. Cas.]

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

2. A guardian here is liable to account for money of his ward received in Maryland for land sold in Maryland.

3. If a guardian receive a promissory negotiable note in payment of a debt due to his ward, such guardian is liable for the same to his ward, although the money has not been received by him.

Debt against the defendant [Jacob A. Bender], as surety in a bond given by Walter Gody, (the father and natural guardian of John W. Gody,) by order of the orphans' court of the county of Washington.

Upon the trial, Mr. Bradley, for the defendant, in order to show that the orphans' court had no jurisdiction or authority to require and take the bond, offered evidence to prove that no land descended nor was devised to the orphan in that county, and that he was not entitled to a distributive share of the personal estate of any intestate, or to a legacy or bequest under a last will and testament of any person on whose personal estate any administration had been granted in that county; and that no friend of the orphan had applied to the orphans' court to require the guardian to give bond for the performance of his trust.

But THE COURT (MORSELL, Circuit Judge, contra) refused to permit such evidence to be given.

Mr. Bradley then prayed the court to instruct the jury, that if from the evidence, they should believe that the money was received by the said Walter Gody, (the guardian,) in Maryland, the plaintiffs cannot recover in this action.

Which instruction the court refused to give.

Mr. Bradley further prayed the court to instruct the jury, that if from the evidence they should find "that the money was not paid to, nor received by the said Walter Gody, his agent or attorney, the plaintiff is not entitled to recover."

But THE COURT refused to give the said instruction unless with this addition; namely, "unless the jury should be satisfied by the evidence that the said note was given by the said Cox to the said Walter Gody, and by him received in satisfaction of the money which the said Cox was ordered by the orphans' court of Charles county in Maryland, to pay over to the said Walter Gody as aforesaid."

Mr. Marbury and Brent & Brent, for the United States.

Mr. Bradley and Mr. Fendall, for defendant, upon the question whether the defendant was liable for money received by his principal in Maryland, cited U. S. v. Nicholls, in this court at March term, 1833 [Case No. 15,876]; Kraft v. Wickey, 4 Gill & J. 332; Burch v. State, Id. 452; Williams v. Storrs, 6 Johns. Ch. 353; Muir v. Wilson, 1 Hopk. Ch. 512; Minor v. Mechanics' Bank, 1 Pet. [26 U. S.] 46, 3 Instructor Clericalis, 89; Miller v. Stewart, 9 Pet. [34 U. S.] 608; U. S. v. Jones, 8 Pet. [33 U. S.] 418, 419; U. S. v. Bradley, 10 Pet. [35 U. S.] 351; Story, Confl. Laws, 414, 415; Rob. Succ. 76, 345, 346; Act Cong. June 24, 1812 [2 Stat. 755]; Fenwick v. Sears, 1 Cranch [5 U. S.] 259; Genet v. Tallmadge, 1 Johns. Ch. 5.

R. J. Brent, contra, cited the cases in 7 Johns. Ch., Gen. Index, p. 105.

Verdict for the plaintiff. The defendant took bills of exception, and writ of error, but did not prosecute it.

Case No. 14,568.

UNITED STATES v. BENNER.

[Baldw. 234.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1830.

FOREIGN MINISTERS — ATTACHE — IMMUNITY FROM ARREST—PROSECUTION FOR ARRESTING ATTACHE —CERTIFICATE OF SECRETARY OF STATE—INDICTMENT.

1. A certificate by the secretary of state, under seal of office, that a person has been recognised by the department of state as a foreign minister, is full evidence that he has been authorized and received as such by the president of the United States

[Cited in Ex parte Baiz, 135 U. S. 421, 10 Sup. Ct 854.]

[Cited in Harris v. Barnett, 4 Blackf. 373; People v. Jones, 24 Mich. 226.]

2. Any person who executes process on a foreign minister is to be deemed an officer under the twenty-fifth section of the act of 1790 [1 Stat. 117]. To support an indictment under this law it is not necessary that the defendant should know the person arrested to be a foreign minister.

3. A foreign minister cannot waive his privileges or immunities, his submission or consent to an arrest is no justification.

4. An assault committed by him may be repelled in self-defence, but does not justify an arrest on process.

5. An indictment under the twenty-seventh section of the act of 1790 need not state the offence to be committed by an officer. It is sufficient to state that the person on whom it was committed was a public minister, without stating that he had been authorized and received as such by the president. This section applies to all public ministers.

6. An attaché to a foreign legation is a public minister within the act of congress.

[7. Cited in Hartshorn v. South Reading, 3 Allen, 501, and in Rhodes v. Walsh (Minn.) 57 N. W. 215, to the point that an officer effects an arrest of a person by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him.]

The defendant was indicted under the twenty-fifth, twenty-sixth and twenty-seventh sections of the act of 1790,—1 Story Laws, 88, 89 [1 Stat. 117, 118],—for arresting and imprisoning Louis Brandis, a minister of the king of Denmark. The indictment contained four counts: (1) Stating Mr. Brandis to be a public minister, to wit, a secretary of legation. (2) A public minister, to wit, an attaché to the legation of the king of Denmark. (3) A minister received as such

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

by the president of the United States. (4) An attaché received as such, &c.

Mr. Dallas, district attorney, gave in evidence a warrant of arrest, issued by an alderman of this city against Mr. Brandis, for a small debt, on which the defendant, acting as a constable, arrested Mr. Brandis, detained, and took him before the alderman. Mr. Dallas then offered in evidence the following certificate from the secretary of state, under the seal of the department, to show the public character of Mr. Brandis: "I certify, that by letter dated the 8th November, 1828, the Danish minister informed this department that Mr. Louis Brandis had arrived in this country in the character of attaché to the legation of Denmark in the United States; and that the said Louis Brandis has accordingly, since that date, been recognised by this department as attached to the said legation in that character."

C. J. Ingersoll, for defendant, objected to its admission because it did not state that Mr. Brandis had been received, or authorized by the president of the United States, as a public minister. It only states that he has been recognised as attached to the legation of Denmark, which is neither authorization or reception, and it does not state the recognition to be by the president, which is necessary to bring the case within the law.

Mr. Dallas referred to the law organizing the department of state. 1 Story's Laws, 5 [1 Stat. 28]. A recognition by the department of state, the officers of which acting under the orders of the president, their acts are his; such recognition is an authorization and reception by the president. Independently of this, the certificate is evidence of the fact of Mr. Brandis being a public minister, within the twenty-seventh section, which does not require him to be authorized or received in order to protect him from violence or imprisonment; it is therefore clearly admissible on the counts founded on that section.

BY THE COURT. The evidence is admissible to show the fact of Mr. Brandis being a public minister. It is a question of law what is its legal effect, as to bringing him within the twenty-fifth and twenty-sixth sections of the law, on which the court will give an opinion to the jury, but as it is clearly competent under the twenty-seventh, it must go to the jury.

Mr. Dallas, in summing up to the jury, took the position, that every person charged by his sovereign with the administration of his affairs in a foreign country, is viewed by the law of nations as a public minister; be his grade what it may, he becomes a minister by being sent abroad, by authority, on a diplomatic function. Vatt. Law Nat. bk. 4, p. 132, c. 5, § 56; Dip. Man. 99. Every person so sent to this country, and recognised as such by the department of state, is deemed a minister, authorized and received by the president, both by the acts of congress, and the decisions of this and the supreme court. U. S. v. Liddle [Case No. 15,598]; U. S. v. Hand [Id. 15,297]; U. S. v. Ortega [Id. 15,971]; U. S. v. Ortega, 11 Wheat. [24 U. S.] 467.

As a person attached to the Danish legation, or an attaché, Mr. Brandis was invested with a diplomatic character, as a public minister of some grade, which invested him with all the immunities of one. The only question for the jury is, whether he has been arrested, imprisoned, or violence offered to his person.

C. J. Ingersoll, for the defendant: The twenty-fifth section applies only to ministers who have been authorized and received by the president; it is this act alone which has the effect of conferring on them the privileges of ministers, as the registration of domestics has under the twenty-sixth. To bring the case within these sections the authorization and reception must be by the president himself, a recognition by the department of state is not his act. The third section of the second article of the constitution, gives the power of receiving ambassadors and other public ministers to him alone, which is a constitutional power, that cannot be exercised by the secretary of state, under the act of 1789,—1 Story, Laws, 5 [1 Stat. 28]. It must be done by the sovereign. Mart. 218; 2 Burlam. Pol. Inst. 198, § 3. The twenty-seventh section applies only to such ministers, as are not in the exercise of their functions, in virtue of their having been received or authorized as such, but are here in transitu, or returning. If, however, Mr. Brandis can be considered as having the privileges of a minister, he waived them by submitting to the arrest, and no man can be deemed in law to be imprisoned, when it is done with his consent. 1 Bl. Comm. 136. If he waived his privilege, the arrest was lawful by our laws, as that is a matter between him and his sovereign. So if a minister assaults another, he may be killed in self defence, though not by way of punishment. Grotius, bk. 2, c. 17. True, it is proved that Mr. Brandis struck the defendant, by which he lost his privilege; this may be done by his own acts, in not asserting it when arrested, in the same manner as if a man sued in a state court, does not claim his right to be sued only in a federal court. Harrison v. Rowan [Case No. 6,140]. A minister also loses his privilege, if he is superseded by another who acts in the place, by the orders of the sovereign. 9 East, 447. To entitle him to exemption from process, it must be proved that his privilege continued till the arrest. The certificate in this case states only, that he had been recognised, not that he was a minister at the date of it.

Mr. Dallas, in reply: The certificate is full evidence of a recognition by the president, up to the time when it is given, recognition ex vi termini, imports his authorizing and

receiving him as minister, his appointment and authority from his sovereign makes him such, the recognition of which by the president, is an admission of the fact, and a receiving him as such without any prescribed form or ceremonial. It is the act of the executive, in whom the nation has incarnated their power to receive ambassadors and other ministers, as a supreme unlimited power, expressly conferred by the constitution, not controllable by any other branch of the government. Being a minister, certain privileges and immunities attach to his character, not as an individual, but as the representative of his sovereign; he is considered as not resident in the country to which he is sent, but near to it, and is not amenable to the laws, or jurisdiction of its courts. The immunity of his sovereign is imparted to him, his person, his house, is on the territory of his sovereign, and so are all his privileges those of his sovereign. He may waive or renounce his personal rights, but not those he enjoys in his representative character. U. S. v. Ortega [supra]; 3 Burrows, 1480; Talb. 281. If his sovereign divests him of it, as in the case of 9 East, 447, he may be arrested. The cases where a person may waive his privilege, are where the court has jurisdiction of the person and cause of action, but a party has a personal privilege which he does not assert, as in Harrison v. Rowan [supra]. Here there is a want of jurisdiction. Admitting that by giving a blow to the defendant, he subjected himself to the law of self defence, according to Grotius, it is not to punish, it cannot make him subject to an arrest on process for a debt. Having proved that Mr. Brandis was a public minister, and that defendant arrested him, it is not necessary to prove that he knew his character. This is not required by the law. U. S. v. Liddle [Case No. 15,598]; U. S. v. Ortega [supra]; U. S. v. Smith [Case No. 16,338]. The defendant acts at his peril.

BALDWIN, Circuit Justice (charging jury). By the constitution of the United States, the power of receiving ambassadors and other public ministers, is vested in the president of the United States; this power is plenary and supreme, with which no other department of the government can interfere, and when exercised by the president, carries with it all the sanction which the constitution can give to an act done by its authority. In the reception of ambassadors and ministers, the president is the government, he judges of the mode of reception, and by the act of reception, the person so received, becomes at once clothed with all the immunities which the law of nations and the United States, attach to the diplomatic character.

The evidence of the reception of Mr. Brandis in this character, is the certificate from the secretary of the state which has been read. By the law organizing the department of state, it is the special duty of this officer, to perform all such duties as shall be entrusted to him by the president, to conduct the business of the department in such manner as he shall order and instruct, also to take an oath for the faithful performance of his duties. He is denominated in the law, "the secretary of foreign affairs;" his appropriate duties are, correspondence and communication with foreign ministers under the orders of the president; he has the custody of all the papers and archives of the department in relation to the concerns of the United States with foreign nations. Whatever act then is done by that department must be taken to be done by the orders or instructions of the president; the certificate of the secretary under the seal, oath, and responsibility of office, must also be taken as full evidence of the act certified. The president acts in that department through the secretary, the one directs, the other performs the duties assigned; the law makes that department with all its officers, the agent of the executive branch of the government, so that a certificate under its seal by the secretary is full evidence, that what has been done by the department has been done by it in that capacity. If the law imposed on that department any duties upon subjects over which the president had no control, or none exclusive of the other branches of the government, a certificate from its chief officer would not be evidence that it was done by the president; but as it can act on no subject unless under his orders, its acts must be taken to be his, especially as to the reception of ministers, as to which congress has no power to enjoin any duties on the department, or its officers.

You will therefore consider Mr. Brandis as having been recognised by the president in the character of an attaché to the legation of Denmark in the United States; and that such recognition is, per se, an authorization and reception of him, within the meaning of the act of congress, for we cannot presume, that the president would recognise a minister, without receiving him. In the case of U. S. v. Liddle [Case No. 15,598], it was held by this court, that a certificate from the secretary of state, that a chargé d'affaires of Spain, had introduced a person to the president as an attaché and secretary to that legation, was evidence of his reception as such. U. S. v. Liddle [supra]; U. S. v. Ortega [Case No. 15,971]. Such recognition invests him with the immunities of a minister, in whatever form it may be done, and no court or jury can require any other evidence of a reception: we instruct you then as a matter of law, that at the time of the alleged arrest, Mr. Brandis was a minister of Denmark in the character stated in the certificate.

The only remaining question is, whether he was arrested, imprisoned, or violence offered to his person by the defendant. An arrest is the taking, seizing or detaining the person of another, touching or putting hands upon him in the execution of process, or any

act indicating an intention to arrest. Imprisonment is the detention of another against his will, depriving him of the power of locomotion: if you believe the witnesses, the evidence fully establishes these charges in the indictment. Whether Mr. Brandis submitted or consented to the arrest is not material. The privileges of a foreign minister are not personal, nor is their violation punished as an injury to himself, the immunity from arrest is the privilege of the sovereign who sends him, the injury is done to him, in the person of his representative. The laws of nations protect the minister, that he may not be obstructed in the business of his mission, his person is as inviolable as his sovereign, within whose territory he is presumed to reside.

Hence the laws of the country to which he is sent, can no more be enforced against him, than in the country from whence he came; being considered as in the territory of his own sovereign, no other has any jurisdiction over him. The consent of the sovereign to the violation of the rights and privileges which belong to himself, either in person or in his representative, are equally necessary, whether the minister resides in a foreign country or his own. The general law of all nations, as well as the municipal laws of each, exempt ministers from all jurisdiction or control over their persons, so long as their representative character is recognised by the government which sends or receives them; if they exercise the functions of ministers, or retain that character, their exemptions attach to their office whether they claim them or not. There is no principle of national law, or any word in the act of congress, which justifies the arrest of a minister who waives the privileges of the diplomatic character, you will therefore dismiss all considerations of this kind from your minds. But though the person of a minister is inviolable, yet he is not exempted from the law of self defence; if he unlawfully assaults another, the attack may be repelled by as much force as will prevent its continuance or repetition. The counsel for the defendant has endeavoured to bring his case within this principle, by evidence that he received a blow from Mr. Brandis; were the fact so, however, it would be no justification of the arrest on process, which is not a right of self defence.

It is objected to this prosecution, that the defendant was not an officer within the meaning of the law; but this objection cannot avail him, the warrant was directed "to the constable of —— ward," the defendant assumed and acted in that character in the execution of the warrant, and must be considered as one de facto estopped by his acts from denying it.

It is next contended that it must be proved that the defendant knew Mr. Brandis to be a minister at the time of the arrest; the law does not make knowledge an ingredient in the offence, the case meets fully the definition of the offence prohibited by the act of congress, which, as a general rule, is all that is requisite to find a verdict of guilty; this objection has been overruled by this court in other cases,—U. S. v. Liddle [supra]; U. S. v. Ortega [supra],—and, we think, very properly.

The jury found the defendant guilty on the second count, charging, "that the said Peter R. Benner, afterwards, to wit, &c. with force and arms, did imprison the said Louis R. Brandis, he, the said Louis R. Brandis, then and there being a public minister, to wit, an attaché to the legation of his majesty the king of Denmark, near the United States of America, in manifest infraction of the law of nations, contrary," &c.

Mr. Ingersoll then moved for a new trial, which was overruled. He then moved in arrest of judgment. (1) Because this count does not allege the defendant to have been an officer, or to have executed process against a minister. (2) Because it does not allege that Mr. Brandis had been authorized or received as a minister by the president.

Mr. Ingersoll: Every indictment must contain a description of the offence with certainty. 1 Chit. Cr. Law, 169–172, 227, 228, 275, 281, 287. The want of certainty is not cured by verdict, and any defect which can be reached by demurrer is good cause for arresting the judgment. Id. 661. There can be no conviction under the twenty-fifth and twenty-sixth sections, unless the imprisonment is under process and executed by an officer who acts under colour of its authority; here no process is averred to have issued, and the defendant is not stated to be an officer. Under the twenty-seventh section, the imprisonment need not be by colour of or under process, but the minister must have been authorized and received by the president; the three sections are connected, the twenty-seventh refers to a minister who has been received, as the definition of one who was intended to be protected by the law. The fact of reception must therefore be averred distinctly, the want of which can be supplied by no intendment, that being the only act which accredits the minister, it must be found to have been done by the president, or the law cannot apply. An attaché is not a public minister; "attaché" is not an English word, and all indictments must be in English. 1 Saund. 242, note 1. Finding him a minister, viz. an attaché, does not show him to be one; the office of a videlicet is only to particularize, explain or restrain; but like an innuendo, it cannot enlarge the meaning. 1 Chit. Cr. Law, 226.

Mr. Dallas: The second count is under the twenty-seventh section, and laid in the words of the law, which do not require that the indictment should superadd any thing to the description of the offence, or to aver any thing which is not made a constituent of the offence. U. S. v. La Jenne Eugenie [Case No.

15,551]. This law is passed to vindicate the law of nations, which protects ministers not received (Vatt. Law Nat. bk. 4, p. 466, c. 7, § 84), as where they are in transitu, or on their arrival before being received, recalled or dismissed; this section is intended to embrace ministers of every description, whatever may be their situation, if they are so at the time of the offence. It is sufficient for an indictment that it lays the offence in substance according to the requisitions of the law creating it: exceptions must be made out by the defendant. Hawk. P. C. bk. 2, c. 25; Salk. 110; 1 W. Bl. 230; U. S. v. Bachelder [Case No. 14,490]; 2 Hale, P. C. 107. If it follows the words of the statute, no further particularity is required. 2 Burrows, 1035; [U. S. v. Gooding] 12 Wheat. [25 U. S.] 460, 461; U. S. v. La Coste [Case No. 15,548]. A videlicet is to explain. If material, it must be proved; if not, it is surplusage and not traversable (2 Saund. 291, note 1); though it must appear that Mr. Brandis is a public minister, the grade is immaterial; the word "attaché" is used here as the description, a designation of his particular relation to his sovereign; it is a term well known, as "chargé des affaires," which in the case of Ortega was held good. U. S. v. Ortega [Case No. 15,971]; Id., 11 Wheat. [24 U. S.] 467. It is not usual or necessary to translate in an indictment a term of designation used by a foreign government in its application to one of their agents near foreign governments. 1 Chit. Cr. Law, 175; 1 Saund. 242.

HOPKINSON, District Judge. The defendant was put upon his trial upon an indictment containing six counts. The first charged, that he did imprison one Louis Brandis, he being public minister, to wit, the secretary of the legation from his majesty the king of Denmark, near the United States of America. The second, that he did imprison the said Louis Brandis, he being a public minister, to wit, an attaché to the legation of his majesty the king of Denmark, near the United States. The third sets forth that a certain writ was sued forth and prosecuted by one George Wilson, from one John Binns, an alderman of the city of Philadelphia, whereby the person of the said Louis Brandis, a public minister, the secretary of the legation of his majesty the king of Denmark, authorized and received as such by the president of the United States, was arrested; and that the defendant, Peter R. Benner, being an officer, to wit, a constable of the city of Philadelphia, did execute the said writ, and thereby arrest the person of the said Louis Brandis. The fourth is the same with the third, except that Louis Brandis is styled an attaché of the legation of his majesty the king of Denmark. The fifth charges, that the defendant did offer violence to the person of the said Louis Brandis, a public minister, to wit, the secretary of the legation of his majesty the king of Denmark. And the sixth is the same with the fifth, except that Louis Brandis is styled an attaché to the legation. After a full hearing upon all the facts and law of the case, it was given to the jury under a charge from the court, in which the evidence was reviewed, and the questions of law distinctly answered. The jury returned with a verdict of conviction on the second count of the indictment, and of acquittal as to all the others. The counsel of the defendant has filed certain reasons in arrest of the judgment on this conviction; and other reasons for a new trial. Both motions have been elaborately argued, and are now to be decided.

The reasons in arrest of judgment are two: (1) That the only count on which the verdict is given against the accused does not describe him as an officer; does not charge him with having executed process, nor state any offence against any act of congress or law of the United States. (2) That the said count does not state that a public minister of any foreign power or state, authorized and received as such by the president of the United States, was imprisoned, or was or might have been arrested or imprisoned.

The act of congress upon which this indictment is framed provides, in its different sections, for different classes of cases, and the counts of the indictment are made to meet the different provisions of these sections. The twenty-fifth section enacts, that if any writ or process shall be sued forth or prosecuted in any of the courts of the United States, or of a particular state, whereby the person of any ambassador or other public minister of any foreign prince or state, authorized and received as such by the president of the United States, may be arrested or imprisoned, &c., such writ or process shall be adjudged to be utterly null and void. The twenty-sixth section enacts that in case any person or persons shall sue forth or prosecute any such writ or process, such person or persons, and all attorneys or solicitors prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, &c. The twenty-seventh section enacts, that if any person shall violate any safe conduct, or passport duly obtained, and issued under the authority of the United States, or shall strike, wound, imprison, &c., by offering violence to the person of an ambassador or other public minister, such person, &c. The twenty-fifth and twenty-sixth sections afford protection and redress for public ministers, authorized and received as such by the president of the United States, and against arrest and imprisonment under and by virtue of any writ or process sued forth and prosecuted in any court of the United States, or of a particular state, or by any judge or justice therein, and all the counts in this indictment intended to charge an offence in violation of these sections, do state that Louis Brandis was a public minister, authorized and received as such by the president of the United States; that a writ

was sued forth against him from an alderman of the city of Philadelphia, and that the defendant, being an officer, did execute the said writ, and thereby arrest the person of the said Louis Brandis; upon these counts the defendant is acquitted by the verdict of the jury. The twenty-seventh section of the act is intended to cover other cases not described in the preceding sections, and makes it penal for any person to imprison the person of a public minister, although he may not be authorized and received as such by the president of the United States, and although the person who thus offers violence to his person, be not an officer, and does it not by virtue of any writ or process from any court, judge or justice. The count on which the defendant has been convicted, charges the offence punishable under this section of the act, and the offence is described in the indictment as it is described in the act; which does not require that the defendant should be an officer having executed process, nor that the public minister, who was imprisoned, should have been authorized and received as such by the president of the United States.

The reasons for a new trial will now be considered. The second count on which the defendant has been convicted, relates to the same transaction, and the same public minister as the first, of which he is acquitted, and differs from it only in describing the minister as an attaché to the legation of Denmark, and the first calls him the secretary of the legation; but it was the clear right of the jury, and so it was given them in charge, to find a general verdict of guilty, leaving it to the court to apply it to the counts in the indictment, or to select for themselves the count on which they would render the verdict, as in their opinion the evidence might warrant. If the count were bad in itself, such a verdict could not be maintained; but it is no objection to it, that it is substantially the same with another count on which the defendant has been acquitted, for the different counts of an indictment always relate to the same transaction, describing it in different ways, or with different circumstances, that the jury may apply their verdict to all or either of them, as the evidence shall warrant; or if the verdict be generally guilty, the application of it is made by the court. No injury or injustice is done to the defendant, who is put but once on his trial for the same offence. The jury, in this case, have not selected the count for their verdict of conviction to which the evidence most particularly applies; but this was for them to judge of, and is no cause of complaint on the part of the defendant; it cannot affect his punishment, and is clearly maintained by the evidence.

It is our opinion that the reasons filed in arrest of judgment are not maintained, and it is ordered that the motion be overruled.

Case No. 14,569.

UNITED STATES v. BENNER.

[5 Cranch, C. C. 347.] [1]

Circuit Court, District of Columbia. Nov. Term, 1837.

NUISANCE—BAR-ROOM—LICENSE.

If a person hires a bar-room and fixtures and occupies part of the house, and keeps his bar-room open at all days and hours and on Sundays and other days for the sale of spirituous liquors to other persons than boarders and lodgers, and allows such liquors to be drank in the said bar-room at such days and times; the keeping of such a bar-room and house is a nuisance, and will support an indictment for keeping a disorderly house. Quære?

Indictment charging that the defendant [Joseph Benner] kept a certain unlawful, disorderly, and ill-governed house as a common tavern, without license, and as a common tippling-house, and therein openly sold spirituous liquors to all persons calling for the same, and allowed the same to be drank by such persons in and about the said house, at all times, both at day and at night, and on all days, both Sundays and other days, and did permit certain idle and ill-disposed persons, to the jurors unknown, to assemble in his said house then and there to continue drinking and tippling, to the common nuisance of the good people of the United States, to the evil example of all others, the corruption of the public morals, and against the peace and government of the United States.

Upon the trial, Mr. Key, for the United States, moved the court to instruct the jury, That if they believe, from the evidence, that the traverser hired of the person who had kept the house before, the bar-room and fixtures, and that he occupied a part of the house, and kept the bar-room open at all days and hours, and on Sundays, as on other days, for the sale of spirituous liquors to other persons than boarders and lodgers, and allowed the said liquors to be drank in the said bar-room, at such days and times; then such keeping said bar-room and house is a nuisance, and the traverser, if the jury should be satisfied that he so kept said house and bar-room, is guilty under the indictment.

Mr. Morfit, contra, cited 6 Wheel. Abr. 9, tit. "Nuisance."

MORSELL, Circuit Judge, was of opinion that the instruction ought to be given.

CRANCH, Chief Judge, had strong doubts; but agreed to give it, and leave the defendant to move for a new trial if the verdict should be against him.

THE COURT therefore (THRUSTON, Circuit Judge, absent) gave the instruction as moved by Mr. Key.

Verdict, not guilty.

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

Case No. 14,570.

UNITED STATES v. BENNETT.

[12 Blatchf 345.] [1]

Circuit Court, N. D. New York. Oct. 13, 1874.

PENSIONS — AGENT — WITHHOLDING FROM PENSIONER—FEES—STATUTES—REPEAL.

1. The offence of wrongfully withholding from a pensioner the whole, or any part, of a claim or pension allowed and due to the pensioner, created by section 7 of the act of July 14th, 1862 (12 Stat. 568), and again created by section 13 of the act of July 4th, 1864 (13 Stat. 389), is not specified as an offence in section 8 of the act of July 8th, 1870 (16 Stat. 195), but is made an offence again by section 31 of the act of March 3d, 1873 (17 Stat. 575). The act of 1862 regulated the fees of pension agents, and punished the taking of greater fees, besides creating the above offence. The act of 1870 covered like ground, other than creating the above offence. It enacted a new tariff of fees, prescribed a different punishment from that before existing for the offences it retained, and omitted one class of cases which previously were offences. *Held*, that this operated to repeal those parts of the act of 1864 which were not found in the act of 1870, so that no conviction could be had on an allegation of the commission of the above offence in September, 1872.

[Cited in U. S. v Hall, 98 U. S. 356.]

2. This view is strengthened by the fact, that payments of pensions to agents and attorneys having been allowed by the acts of 1862 and 1864, it was enacted, by the act of 1870, that a pension should be paid only to the claimant, and should not be paid to an agent or attorney, and that, by the act of 1873, which created again the above offence, the payment of pensions to agents and attorneys was again authorized.

3. The 4th section of the act of February 25th, 1871 (16 Stat. 432), providing that the repeal of a statute shall not extinguish any liability incurred under it, unless the repealing act shall expressly so provide, contemplates an offence committed while a statute forbidding it is in force, and does not meet the case of an act not forbidden by statute at the time of its commission.

4. Where the money was received and withheld in September, 1872, and continued to be withheld until after the passage of the act of March 3d, 1873, *held* that, on an indictment under that act, alleging the withholding to have occurred on the 31st of March, 1873, no conviction could be had.

[This was a motion in arrest of judgment by John C. Bennett, who was charged with the wrongful withholding from a pensioner of a part of a claim.]

George N. Kennedy, for the motion.
Richard Crowley, U. S. Dist. Atty.

HUNT, Circuit Justice. The defendant was indicted in the district court, in November, 1873. It was charged, in the first count of the indictment, that, as the agent of Ellen Mack, a pensioner, on the 23d of September, 1872, he received from the United States officer appointed to pay pensions, the sum of seven hundred and sixty-five dollars and forty cents due to said pensioner, and that he then and there wrongfully withheld from said pensioner four hundred and five dollars and thirty-three cents of such money, contrary to the form of the statute, &c. The second count was the same as the first. The third count contained the same allegations as the first, as to receiving the money on the 23d of September, 1872, but charged that the sum mentioned was wrongfully withheld on the 31st of March, 1873. The jury found the defendant guilty on the first three counts of the indictment, and found him not guilty as to certain other counts, to which it will not be necessary further to refer. The defendant now insists, that, at the time of the alleged commission of the offence of withholding pension money, to wit, September 23d, 1872, such withholding was not an offence under the statutes of the United States. This offence it is said, was created by the statute of July 14th, 1862 (12 Stat. 568, §§ 6, 7), and by the statute of July 4th, 1864 (13 Stat. 389, §§ 12, 13). The provisions of these statutes, it is argued, were repealed by the act of July 8th, 1870 (16 Stat. 195, § 7), and were not in force at the time specified in the first two counts, viz., September 23d, 1872.

The statutes referred to are as follows: By section 6 of the act of 1862 it was enacted, that the fees of agents and attorneys in obtaining pensions for those entitled to pension money under that act, should not exceed certain rates therein specified. By section 7 it was enacted, that any agent or attorney who should demand or receive any greater compensation for services under that act than was thus specified, "or who shall wrongfully withhold from a pensioner, or other claimant, the whole, or any part, of the pension or claim allowed and due to such pensioner or claimant," should be guilty of a high misdemeanor, to be punished by a fine not exceeding $300, or by imprisonment not exceeding two years, or by both such fine and imprisonment. By section 12 of the act of 1864 a different tariff of fees is prescribed, and the sixth and seventh sections of the act of 1862 (above set forth) are declared to be repealed. By section 13 of the act of 1864 it is provided, that any agent or attorney "who shall demand or receive any greater compensation for his services under this act, than is prescribed in the preceding section of this act, * * * or who shall wrongfully withhold from a pensioner, or other claimant, the whole, or any part, of the pension or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor," to be punished by a fine not exceeding $300, or by imprisonment not exceeding two years, or by both. By the act of July 8th, 1870 (16 Stat. 194, 195, §§ 7, 8), still another rate of fees is prescribed for agents obtaining pensions, under any or all the acts of congress on that subject, and the agreement on the subject of fees is required to be filed with the commissioner of pensions. It was further enacted, in section 8 of that act, that any agent or attorney who should receive a greater compensation for obtaining a pension than was

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

allowed in the preceding section, should be deemed guilty of a misdemeanor, to be punished by a fine not exceeding $500, or by imprisonment not exceeding five years, or by both. This statute contains nothing upon the subject of wrongfully withholding from a pensioner the whole or any part of the sum found due and allowed to him. By the 31st section of the act of March 3d, 1873 (17 Stat. 575), it is enacted, that any agent or attorney who shall receive any greater compensation for prosecuting any pension claim than the commissioner of pensions shall direct, not exceeding $25, "or who shall wrongfully withhold from a pensioner or claimant the whole, or any part, of the pension or claim allowed and due such pensioner or claimant," shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding $500, or by imprisonment not exceeding two years, or by both.

Upon these statutes the question is made, whether, on the 23d of September, 1872, the withholding of pension money by an agent was an offence punishable by indictment. The argument to sustain the negative of this question is this: The alleged offence was created and made punishable by sections 6 and 7 of the act of 1862, above cited. By the express terms of section 12 of the act of 1864, above cited, these sections 6 and 7 are repealed. The offence, however, is renewed and recreated by section 13 of the last mentioned act, which provides, that an agent who shall receive a greater compensation for services under that act than is permitted by the preceding section, or who shall wrongfully withhold from a claimant or pensioner any portion of the sum allowed and due to him, shall be guilty of a misdemeanor, punishable by a fine not exceeding $300, or by imprisonment for two years, or by both. Assuming, for the present purpose, that the last clause applies to all the pension acts of the United States, it is insisted that it was repealed by the act of July 8th, 1870 (16 Stat. 194, 195, §§ 7, 8). The substance of these sections has been already stated.

The statute of 1870 intended, apparently, to embrace the whole subject-matter of pension fees, the excess of charges, the withholding of pension money, and the liability of pension agents. It enacted different provisions, retaining some of the previous regulations, omitting others, and making contradictory provisions respecting still others. It enacted a new tariff of fees. It prescribed a different punishment from that before existing for the offences retained, and it omitted one class of the cases which constituted an offence under the former acts. This, upon principle, operates as a repeal of the former act, and annuls those portions of it which are not found in the new act. Norris v. Crocker, 13 How. [54 U. S.] 429; U. S. v. Tynen, 11 Wall. [78 U. S.] 88. In Bartlet v. King, 12 Mass. 537, a statute passed in 1754 concerning bequests and donations to pious and charitable uses, was held to be repealed by the passage of an act, in 1785, upon the same subject, and which act did not contain the provisions of the former act. In Dash v. Van Kleeck, 7 Johns. 477, the court say, that a subsequent statute, making a different provision on the same subject, is not to be construed as an explanatory act, but as a repeal of the former act. In Daviess v. Fairbairn, 3 How. [44 U. S.] 636, it is laid down, that, though a subsequent statute be not repugnant in all its provisions to a prior one, yet, if it is clear that the latter was intended to prescribe the only rule which should govern in the case provided for, it repeals the prior one. See, also, Stewart v. Kahn, 11 Wall. [78 U. S.] 502; U. S. v. Tynen, Id. 92; Ellis v. Paige, 1 Pick. 43; Nichols v. Squire, 5 Pick. 168.

By the statute of 1864, the offence of taking excessive fees, and the offence of withholding pension money, are each punishable by a fine not exceeding $300, or by imprisonment for two years. By the statute of 1870, the offence of taking excessive fees may be punished by a fine of $500, or by imprisonment for five years. There is no other repeal of the former statute as to the offence of taking excessive fees, than that arising from the repugnancy of the provisions of the two statutes. It is not contended, however, that the former statute remains in force as to that offence. It is impossible that there should be in force, at the same time, a statute punishing the offence of taking excessive fees by a fine not exceeding the sum of $300, and an imprisonment not exceeding two years, for each offence, and a statute punishing the same offence by a fine of $500 and an imprisonment for five years. The latter statute, in such case, operates as a repeal of the former statute.

I have said, and I place my decision upon the ground, that the statute of 1870 was intended to embrace the whole subject-matter of the duty of pension agents, including excessive charges and withholding pension moneys. It was intended as a revision or a codification of the existing laws on those subjects. Thus, the act of 1862 is entitled, "An act to grant pensions," and is devoted chiefly to enacting who shall have pensions. The sixth and seventh sections, already cited, referring to the fees of pension agents, and making excessive charges of agents, or the withholding of pension money by agents, a criminal offence, are the only ones referring to any other subject. The act of 1864 is entitled, "An act supplementary" to the act of 1862, and, as might be expected, is devoted mainly to the same subject. Sections twelve and thirteen are the only exceptions, these sections being substituted for sections six and seven in the former act. Then comes the act of 1870, which is entitled, "An act to define the duties of pension agents, to prescribe the manner of paying pensions, and for other purposes." This act is made up of provisions touching

the duties of agents, their liabilities, their rights and their exclusions, and the manner of conducting business with them by the departments. When, under such circumstances, it is enacted that one act described in the former statute shall remain an offence punishable by a larger fine and a longer imprisonment, and when all reference to another act on the same subject, described and made punishable in the former statute, is omitted in the later statute, it is a reasonable conclusion that such omission was intended as a repeal of the offence thus omitted. In 1873, the offence of withholding was again created and its punishment declared, but, from the passage of the act of 1870 until the passage of the act of 1873, there was a hiatus,—a space of time when the offence did not exist.

This view is sustained, also, by the course of legislation respecting the right of attorneys or agents of this class to receive the money allowed to claimants. By the statutes of April 10th, 1806 (2 Stat. 376), and of July 4th, 1836 (5 Stat. 127), on the subject of pensions, as well as by the statutes of 1862 and 1864, above quoted, the employment of agents and attorneys was recognized, their relation to the claimants was regulated, their fees were fixed, and the manner in which payment should be made to or through them was pointed out. This so continued until the passage of the law of 1870. By the third section of that act, payment to the claimant alone was authorized, and it was expressly declared that no power of attorney should be recognized, nor should any pension be paid thereon. It was quite in accordance with this idea, and a part of the same scheme of legislation, that the offence of withholding a pension should at the same time be dropped from the category of offences. While congress permitted and authorized attorneys to receive the money due to pensioners, it was well to make the withholding of such money an offence. When it declared that the money should be paid directly to the claimant, and no power of attorney should be recognized, it was natural to drop the offence of withholding. Indeed, if the statute was complied with, the offence could not exist. The attorney not being allowed under any circumstances to receive the money, a statute prohibiting his withholding it is not to be expected. In pursuance of the same scheme, when, in 1873, congress again authorized the action of agents and attorneys, and the payment of pension money to them, it was to be expected that the offence of illegally withholding such money would be renewed, and, accordingly, we find such offence renewed and recreated by section 31 of that act.

The statute of February 25th, 1871 (16 Stat. 432, § 4), has been cited in support of the indictment. That statute provides "that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." In the case before us, there was no "liability incurred under such statute." When the act was committed, the statute forbidding it did not exist. The act of 1871 contemplates the case of an offence committed while a statute forbidding it is in force, and provides that the repeal of such statute shall not prevent a prosecution for the offence. It does not meet the case of an act unforbidden by statute at the time of its commission.

The district attorney contends that the prisoner was lawfullly convicted under the third count of the indictment, which charges a receipt of the money on the 23d of September, 1872, and a wrongful withholding thereof on the 31st of March, 1873. He insists that section 31 of the act of March 3d, 1873, covers the case. The jury convicted the prisoner on the 1st and 2d counts, which charged the withholding to have been on the 23d of September, 1872, as well as upon the 3d count. It is conceded that but one offence was committed, and punishment is only asked as upon the commission of one offence. The transaction, in fact, occurred in September, 1872, and the withholding is transferred to March, 1873, only upon the principle that the offence is continuous, that it continues as long as the money is retained by the prisoner. The money was actually received in September, 1872. At that time, as the record shows and the jury have found, in convicting upon the first and second counts, the prisoner illegally withheld four hundred and five dollars thereof. He then put it into his pocket, and refused to deliver it to the claimant. His offence was then complete. He could have been indicted at once under the United States statute, for illegally withholding the money, if forbidden by such statute. He could have been sued at once in a civil action for the amount so withheld. The offence and the liability being complete, the statute of limitations at once commenced to run. The offence charged is the act and fact of withholding. What the prisoner afterwards does with the money cannot create, alter or continue the offence. He, surely, could not set up, as a defence, that, after the 23d of September, 1872, he had returned the money to the pensioner. It was never heard that a larceny could be purged by a return of the stolen property. It would not mitigate the offence, that he should bestow the money in pious uses. Nor, in my judgment, does it create a new, a subsequent and a perpetual offence, unbarred by all statutes of limitation, that the

prisoner should retain the money. He stands or falls upon the act as and when it was committed. It is provided by the statutes of certain states, that, when stolen property is transferred into a county different from that from which it was taken, the thief may be indicted for larceny in the latter county. So, in some states, it is held, that, when stolen property is brought into another state, the taker may be indicted in the latter state. The rule on this point varies in the different states. In all these cases there is a subsequent and additional act besides the one constituting the original offence. Thus, a thief steals property in the county of Albany. That is of itself an offence. Stopping there, the offence is limited to the original taking, and the thief can be indicted in the county of Albany only. When the thief also carries the property into the adjoining county of Rensselaer, he adds another fact to the case. He transports stolen property to another jurisdiction, and the sin of the original taking accompanies such transportation. But I know of no principle upon which the original act itself, nothing additional being said or done, can be converted into a new offence, or carried on indefinitely, that is, can be made perpetually continuous.

The judgment must be arrested, and, as the objection goes to the foundation of the indictment, the indictment must be quashed and the prisoner discharged.

Case No. 14,571.

UNITED STATES v. BENNETT.

[16 Blatchf. 338 8 Reporter, 38; 12 Myer's Fed. Dec. 692; 25 Int. Rev. Rec. 305.] [1]

Circuit Court, S. D. New York. May 31, 1879.

CRIMINAL PRACTICE — OFFENCE AGAINST POSTAL REGULATIONS—OBSCENE PUBLICATION—INDICTMENT—HOW SET OUT—TRIAL—VERDICT.

1. There is no provision of law whereby an indictment found in a circuit court can be remitted by it to the district court, unless the district attorney deems it necessary.

2. The provisions of section 3893 of the Revised Statutes, as amended by section 1 of the act of July 12, 1876 (19 Stat. 90), which forbids the depositing in the mail, of any obscene or indecent publication, are not repugnant to any provision of the constitution of the United States.

3. It is not necessary that an indictment under that statute, in respect to a book, should set forth in hæc verba the alleged obscene book, or the alleged obscene passages in it, if the indictment states that such book is so indecent, that it would be offensive to the court and improper to be placed on its records, and that, therefore the jurors do not set forth the same in the indictment, and if the book is sufficiently identified in the indictment for the defendant to know what book is intended.

[Cited in U. S. v. Noelke, 1 Fed. 433.]

4. The defendant can always procure information of the charge which he is to meet, so far as regards being furnished with a copy of the publication, or with a copy of the alleged obscene parts of it, by applying to the court, before the trial, for particulars.

5. The question whether, on the matter alleged to be obscene, a verdict that it is obscene would be set aside, as clearly against evidence and reason, can be fully raised before the trial, by a motion to be made on the indictment and a bill of particulars; and, under all other circumstances, it is for the jury to say whether the matter is obscene or not

6. A pamphlet of 24 pages, consisting of a sheet and a half secured together by stitching, and with a cover of four pages, and having a title page, is properly described as a book, in an indictment under said statute.

7. Whether a count in respect to a publication merely, without averring what kind of publication, is bad for uncertainty, quere.

8. It is sufficient if the indictment alleges that the defendant knowingly deposited the obscene book, without alleging that he knew it to be nonmailable matter under the statute.

9. It was proper to exclude, on the trial, a question put to the defendant, as a witness, as to whether, at any time, in the sale or mailing of the book, he did it with a knowledge or belief that it was obscene.

10. The district attorney having, at the trial, marked the particular portions of the book which he claimed to be within the statute, and having stated that he did not rely on any others, the court properly refused to permit the counsel for the defendant to read to the jury any portions of the book except the parts so marked, unless they were in immediate connection, to qualify the parts so marked. The marked parts and the contexts of the same were read to the jury and commented on by the defendant's counsel in his summing up, and each one of the jurors had a copy of the book in his hand during the reading and took the same with him.

11. The court properly refused to permit the defendant's counsel to read from other books clauses of alleged similar character, by way of illustration.

12. The court properly charged the jury, that the test of obscenity, within the meaning of said statute, is, whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of the sort may fall.

[Cited in U. S. v. Britton, 17 Fed. 733. Approved in U. S. v. Wightman, 29 Fed. 636. Cited in U. S. v. Clarke, 38 Fed. 733; U. S. v. Harmon, 45 Fed. 417; U. S. v. Smith, Id. 477; U. S. v. Males, 51 Fed. 42.]

13. The object of the use of the obscene words is not a subject for consideration.

14. The statute differs from no other criminal statute, so as to require a different rule as to a reasonable doubt, on the evidence.

15. During the absence of the jury, the court sent to them by the officer in charge, and in the absence of the prisoner, after exhibiting the same to the counsel for the prisoner, a direction in writing that they might deliver a sealed verdict to said officer and then separate. They delivered a sealed verdict to said officer, and then separated. The next day they came into court, and announced, by their foreman, that they had agreed on a verdict, and that he had handed a sealed verdict to said officer. The jury then rendered a verdict of guilty, as stated in such sealed verdict, which was received by the court from said officer, in the presence of the defendant, and which was thereupon announced, and recorded, in open court, as a verdict of guilty. The jury were then polled, at the request of the defendant, and each of the jurors answered, that the verdict announced was his verdict. The offence was, by the statute, declared to be a misde-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 8 Reporter, 38, and 25 Int. Rev. Rec. 305, contain only partial reports.]

meanor: *Held*, that no ground was shown for granting a new trial.

[This was an indictment against Deboigne M. Bennett.]

William P. Fiero, Asst. Dist. Atty.
Abram Wakeman, for defendant.

Before BLATCHFORD, Circuit Judge, and BENEDICT and CHOATE, District Judges.

BLATCHFORD, Circuit Judge. The indictment against the defendant contains two counts. The first count avers, that the defendant, "on the twelfth day of November, in the year of our Lord one thousand eight hundred and seventy-eight, at the Southern district of New York, and within the jurisdiction of this court, did unlawfully and knowingly deposit, and cause to be deposited, in the mail of the United States, then and there, for mailing and delivery, a certain obscene, lewd and lascivious book, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said book is so lewd, obscene and lascivious, that the same would be offensive to the court here, and improper to be placed upon the records thereof; wherefore, the jurors aforesaid do not set forth the same in this indictment; which said book was then and there inclosed in a paper wrapper, which said wrapper was then and there addressed and directed as follows: G. Brackett, Box 202, Granville, N. Y." The second count avers, that the defendant, "on the twelfth day of November, in the year of our Lord one thousand eight hundred and seventy-eight, at the Southern district of New York, and within the jurisdiction of this court, unlawfully and knowingly did deposit, and cause to be deposited, in the mail of the United States, then and there, for mailing and delivery, a certain publication of an indecent character, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said publication is so indecent that the same would be offensive to the court here, and improper to be placed on the records thereof; wherefore, the jurors aforesaid do not set forth the same in this indictment; which said publication was then and there inclosed in a wrapper, which said wrapper was then and there addressed and directed as follows, to wit: G. Brackett, Box 202, Granville, N. Y." The defendant was tried at one of the exclusively criminal terms of this court, held under the provisions of sections 613 and 658 of the Revised Statutes, by the district judge for the Eastern district of New York. The jury rendered a verdict of guilty, and the defendant has moved for a new trial, on a case and exceptions, and also to set aside the verdict, and for an arrest of judgment upon the same, the motion being made at an exclusively criminal term, held under the same sections, by the circuit judge for the Second judicial circuit, and the district judges for the Southern and Eastern districts of New York. [Case unreported.]

Before the commencement of the trial, the counsel for the defendant moved the court, that the case be remitted from this court to the district court for this district, so that the defendant might be there tried, and thereby acquire a right to the benefit of the act of March 3, 1879 (20 Stat. 354), entitled "An act to give circuit courts appellate jurisdiction in certain criminal cases." The court denied the motion. The act of 1879 provides, that "the circuit court for each judicial district shall have jurisdiction of writs of error in all criminal cases tried before the district court, where the sentence is imprisonment, or fine and imprisonment, or where, if a fine only, the fine shall exceed the sum of three hundred dollars." It then provides for the settlement of a bill of exceptions, and for the allowance of a writ of error, and for the affirmance or reversal, by the circuit court, of the judgment of the district court, when it is a judgment against the defendant, in a criminal case. In this case, the sentence may be imprisonment or fine and imprisonment, or, if a fine only, the fine is to be not less than $100, nor more than $5,000. But, this indictment was found in this court before the act of 1879 was passed, and there is no provision of law whereby an indictment can be remitted by a circuit court to a district court, unless the district attorney deems it necessary. Such is the provision of section 1037 of the Revised Statutes. Section 1038 provides for the remission of an indictment from the district court to the circuit court, when, in the opinion of the district court, "difficult and important questions of law are involved in the case," but there is no provision under which a circuit court can, of its own motion, or on the application of the defendant, remit an indictment to a district court.

The case states as follows: "The prosecution then proved the deposit, by the defendant, in the United States mail, for mailing and delivery, of the work entitled 'Cupid's Yokes, or The Binding Forces of Conjugal Life.' The counsel for the prosecution then announced that he had marked the passages in the work already in evidence, in its entirety, which he would read to the jury, and with the reading of those passages to the jury he rested on the part of the prosecution." The counsel for the prisoner thereupon moved for the discharge of the prisoner, on the following grounds, to wit: "1. That the statute under which this indictment has been presented is not warranted by, and is in contravention of, the constitution of the United States, and is, therefore, without force and void. 2. That the indictment itself is defective, because it does not set out the whole pamphlet, nor localize in any way in it the matter alleged to be within the statute, nor the passages relied upon as obscene or of an indecent character, and which are now, for the first time, asserted as the grounds of this prosecution. 3. That the first count of the indictment is not sustained by the proof, for it avers the deposit of a book, whereas the

proof shows a deposit of a pamphlet. This, under the statute, is a fatal variance. 4. The second count is also liable to a similar objection. It avers the deposit of 'a certain publication of an indecent character,' without further describing it, and the averment is not sustained by the evidence given. It is, therefore, void for uncertainty. 5. That the indictment does not allege an offence under the statute, in that it does not set forth that the said pamphlet is 'non-mailable' under said statute, and that it does not set out that the prisoner knew that the same was non-mailable, as is required by the statute, so as to constitute an offence thereunder." The court denied the motion.

The statute under which this indictment proceeds is section 3893 of the Revised Statutes, as amended by section 1 of the act of July 12, 1876 (19 Stat. 90). It provides as follows: "Every obscene, lewd or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, * * * are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post office, nor by any letter carrier, and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter * * * shall be deemed guilty of a misdemeanor, and shall, for each and every offence, be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court." The question of the constitutionality of this statute, so far as the offences charged in this indictment are concerned, seems to us to have been definitely settled by the decision of the supreme court in Ex parte Jackson, 96 U. S. 727. That decision related to a statute excluding from the mail letters and circulars concerning lotteries, but the views of the court apply fully to the present case.

It is insisted that the book or publication alleged in the indictment to be obscene, lewd and lascivious or of an indecent character, should have been set forth in hæc verba in the indictment, or that, at least, the passages in it relied upon as obscene or of an indecent character, should have been thus set forth. This is claimed, on the view, that the accused has a right to demand a precise statement, in the indictment, of all the facts constituting his alleged offence. The indictment proceeds on the ground, that, if it states that the obscene, lewd or lascivious book is so obscene, lewd and lascivious, or that the publication of an indecent character is so indecent, that the same would be offensive to the court and improper to be placed on the records thereof, and that, therefore, the jurors do not set forth the same in the indictment, it is not necessary to set forth in hæc verba the book or publication or the obscene or indecent parts of it relied on, provided the book or publication is otherwise sufficiently identified in the indictment for the defendant to know what book or publication is intended.

It is the law of England, as decided in Bradlaugh v. Reg., 3 Q. B. Div. 607, by the court of appeal, that, in an indictment at common law, for publishing an obscene book, it is not sufficient to describe the book by its title only, but the words thereof alleged to be obscene must be set out, and, if they are omitted, the defect will not be cured by a verdict of guilty, and the indictment will be bad, either upon a motion in arrest of judgment, or upon a writ of error. This decision reversed, on a writ of error, that of the queen's bench division in Reg. v. Bradlaugh, 2 Q. B. Div. 569. The indictment in that case identified the book only by its title, and it neither set forth the book nor any part of it, and it did not allege any reason for not setting forth the same. The conclusion arrived at by the court of appeal was, that, whenever the offence consists of words written or spoken, those words must be stated in the indictment, and, if they are not, it will be defective upon demurrer, or on motion in arrest of judgment, or on writ of error. The court rejected the reason given for not setting forth on the record obscene libels, that the records of the court should not be defiled by the indecency, and it pointed out, that, in order to bring the indictment before it within the American cases cited to it, referred to hereafter, it would have been necessary to aver that the libel was so indecent and obscene that it ought not to appear on the records of the court.

In Com. v. Holmes, 17 Mass. 336, the indictment was for an offence at common law —publishing an obscene print, in a book, and also for publishing such book. The second count did not set forth the book or any part of it, but alleged that it was so obscene that it would be offensive to the court and improper to be placed on the records thereof, and that, therefore, the jurors did not set it forth in the indictment. The fifth count described the print. The defendant, after conviction, moved in arrest of judgment, because, in certain counts, no part of the book was set forth, and because, in certain other counts, the print was not so particularly described as it ought to have been, so that the jury might judge whether the same was obscene. The court said: "The second and fifth counts in this indictment are certainly good, for it can never be required that an obscene book and picture should be displayed upon the records of the court, which must be done if the description in these counts is insufficient. This would be to require that the public itself should give permanency and notoriety to indecency, in order to punish it."

In Com. v. Tarbox, 1 Cush. 66, the indictment was for a statutory offence—publishing and distributing a paper containing obscene language. The indictment set forth what it

alleged to be the purport and effect of the paper and gave no excuse for not setting it forth in hæc verba. The defendant, after conviction, moved in arrest of judgment, because the indictment did not profess to set out the words or tenor of the publication, but only its substance, and did not aver any reason or excuse for not setting out the words. The court say: "In indictments for offences of this description, it is not always necessary that the contents of the publication should be inserted: but, whenever it is necessary to do so, or whenever the indictment undertakes to state the contents, whether necessary or not, the same rule prevails as in the case of libel, that is to say, the alleged obscene publication must be set out in the very words of which it is composed, and the indictment must undertake or profess to do so, by the use of appropriate language. The excepted cases occur whenever a publication of this character is so obscene as to render it improper that it should appear on the record; and then the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment, by proper averments. The case of Com. v. Holmes, 17 Mass. 336, furnishes both an authority and a precedent for this form of pleading. In the present case, the indictment sets out the printed paper according to its purport and effect, and not in hæc verba, or according to its tenor, or by words importing an exact transcript. The mode of pleading adopted cannot be sustained, and, the indictment being insufficient, judgment is arrested."

In Com. v. Sharpless, 2 Serg. & R. 91, the indictment charged that the defendant "did exhibit and show for money to persons, to the inquest aforesaid unknown, a certain lewd, wicked, scandalous, infamous, and obscene painting, representing a man in an obscene, impudent and indecent posture with a woman." After a verdict against the defendant, a motion in arrest of judgment was made, on the ground that the picture was not sufficiently described in the indictment. On this point, Tilghman, C. J., says: "We do not know that the picture had any name, and, therefore, it might be impossible to designate it by name. What, then, is expected? Must the indictment describe minutely the attitude and posture of the figures? I am for paying some respect to the chastity of our records. These are circumstances which may be well omitted. Whether the picture was really indecent the jury might judge from the evidence, or, if necessary, from inspection. The witnesses could identify it. I am of opinion that the description is sufficient." The motion in arrest was overruled.

In People v. Girardin, 1 Mich. 91, the indictment charged that the defendant printed and published "a certain wicked, nasty, filthy, bawdy and obscene paper and libel, entitled City Argus, in which said libel are contained, among other things, divers wicked, false, feigned, impious, impure, bawdy and obscene matters, language and descriptions, wherein and whereby are represented the most gross scenes of lewdness and obscenity," &c. After conviction, the defendant moved in arrest of judgment, on the ground that the obscene matter was not set forth in the indictment. The motion was overruled. The court said: "There is another rule, as ancient as that contended for by the counsel for the prisoner, which forbids the introduction in an indictment of obscene pictures and books. Courts will never allow their records to be polluted by bawdy and obscene matters. To do this, would be to require a court of justice to perpetuate and give notoriety to an indecent publication, before its author could be visited for the great wrong he may have done to the public or to individuals. And there is no hardship in this rule. To convict the defendant, he must be shown to have published the libel. If he is the publisher, he must be presumed to have been advised of the contents of the libel, and fully prepared to justify it. The indictment in this cause corresponds with the precedents to be found in books of the highest merit. If authority were necessary, the case of Com. v. Holmes, 17 Mass. 336, fully sustains the views we have expressed."

In State v. Brown, 1 Williams [27 Vt.] 619, the indictment was for selling an obscene publication, which was described in the indictment as "a certain lewd, scandalous and obscene printed paper, entitled 'Amatory Letters,' 'Ellen's Letter to Maria,' and 'Maria's Letter to Ellen,' which said printed paper is so lewd and obscene that the same would be offensive to the court here, and improper to be placed upon the records thereof, wherefore, the jurors aforesaid do not set forth the same in this indictment." The defendant demurred to the indictment, but it was held sufficient. The court, (Redfield, C. J.,) say: "Ordinarily, the indictment, in a case like the present, should set forth the book or publication in hæc verba, the same as in indictments for libel or forgery. This seems to be an acknowledged principle in the books. But, even in indictments for forgery, it may be excused, as, if the forged instrument is in the possession of the opposite party. So, also, in a case like the present, if the publication be of so gross a character that spreading it upon the record will be an offence against decency, it may be excused, as all the English precedents show. Some of the precedents are much like the present, describing the obscene character of the publication in general terms. But, more generally, the nature of the publication is more specifically described. But, in both cases, the principle of the case is the same. If the paper is of a character to offend decency and outrage modesty, it need not be so

spread upon the record as to produce that effect. And, if it is alleged, in such case, to be a publication within the general terms in which the offence is defined by the statute, it is sufficient, which seems to be done in the present case. The degree of particularity with which the paper could be described without exposing its grossness, would depend something upon the nature of that feature, whether it consisted in the words used or the general description given. In the former case, it could not be more particularly described than it here is, without offending decency."

In McNair v. People [89 Ill. 441], the view of the court was, that, if the obscene publication is in the hands of the defendant, or is not in the power of the prosecution, or the matter is too gross and obscene to be spread on the records of the court, and the excuse for the failure to set out the obscene matter is averred in the indictment, the supposed obscene matter need not be set out in the indictment.

One Heywood was indicted in the district court of the United States for the district of Massachusetts. The indictment contained two counts. The first count alleged that the defendant "did unlawfully and knowingly deposit, and cause to be deposited, in the mail of the United States of America, then and there, for mailing and delivery, a certain obscene, lewd and lascivious book, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said book is so lewd, obscene and lascivious that the same would be offensive to the court here and improper to be placed upon the records thereof, wherefore, the jurors aforesaid do not set forth the same in this indictment, which said book was then and there enclosed in a wrapper and addressed as follows, that is to say: 'E. Edgewell, Squan Village, New Jersey, Box 49.'" The second count alleged that the defendant "did wilfully and unlawfully deposit, and cause to be deposited, in the mail of the United States of America, then and there, for mailing and delivery, a certain publication of an indecent character, called 'Cupid's Yokes, or The Binding Forces of Conjugal Life,' which said publication is so indecent that the same would be offensive to the court here and improper to be placed upon the records thereof, wherefore, the jurors aforesaid do not set forth the same in this indictment, which said publication was then and there enclosed in a paper wrapper and addressed as follows, that is to say: 'E. Edgewell, Box 49, Squan Village, New Jersey.'" The indictment was remitted to the circuit court, and the defendant was tried on it before Judge Clark, at the October term, 1877, and convicted. Afterwards he filed a motion in arrest of judgment, in January, 1878, before sentence, on the ground that the act of congress under which the indictment was found, to wit, section 3893 of the Revised Statutes, was unconstitutional, inoperative and void. In June, 1878, he filed a motion for leave to amend said motion in arrest, by assigning the additional cause, that "the indictment does not set out the book alleged to be obscene, lewd and lascivious and indecent, and the same is not made a part of said indictment." Both motions were heard before Mr. Justice Clifford and Judge Clark and were overruled, and the defendant was sentenced to pay a fine and be imprisoned.

No case in the United States has been cited where an indictment in form like the one in this case, for publishing or circulating or mailing an obscene or indecent publication, has been held defective, either on demurrer or on motion in arrest of judgment. In Knowles v. State, 3 Day, 103, the information alleged that the defendant exhibited a horrid and unnatural monster, highly indecent, unseemly, and improper to be seen or exposed, as a show. It stated no circumstances describing the appearance of the thing, and gave no excuse for omitting such description. It was held bad, on a motion in arrest of judgment. In State v. Hanson, 23 Tex. 232, the indictment alleged that the defendant "did publish an indecent and obscene newspaper called 'John Donkey,' manifestly designed to corrupt the morals of the youth of said county." The composition or print was not set out or described, nor was any excuse given in the indictment for failing to do so. The indictment was held bad, on exception. In People v. Hallenbeck, 52 How. Prac. 502, the indictment alleged that the defendant did utter, write and publish a certain obscene, lewd and indecent paper and writing, which said paper was enclosed in an envelope and deposited in the post office of the United States at said town of Catskill, for mailing and delivery, the said envelope being then and there addressed by the words following, that is to say: "Mrs. Mary T. Westmore, Catskill, N. Y." The indictment was demurred to. The court held, that, as there was no description whatever of the alleged libellous writing, not even by its title, and not the slightest thing was mentioned by date, subject matter, expression, thought or word, which identified or described the alleged obscene writing, the indictment was bad.

For the rule that an indictment must state the facts which constitute the crime, three reasons have been assigned by the authorities: (1) That the person indicted may know what charge he has to meet; (2) that, if convicted or acquitted, he may with facility plead or prove a plea of autrefois convict or autrefois acquit; (3) that he may take the opinion of the court before which he is indicted, by demurrer, or by motion in arrest of judgment, or the opinion of a court of error by writ of error, on the sufficiency of the statements in the indictment. As to the first two reasons, Lord Justice Bramwell says, in Bradlaugh v. Reg., 3 Q. B. Div. 616, that

"those two reasons may be disregarded, because an accused person is very rarely ignorant of the charge which he is called upon to meet, and no real difficulty exists as to pleading or proving a former conviction or acquittal," adding, however, that it was a very plausible observation, that, where the book as a whole is charged as an offence, the defendant cannot tell what passages will be selected as those on which the charge is to be supported. As to the third reason, the lord justice says, that, in his opinion, it is to this day substantial and cannot be disregarded.

As to being informed of the charge which he has to meet, so far as regards being furnished with a copy of the book or with a copy of the alleged obscene parts of it, a defendant can always procure such information by applying to the court, before the trial, for particulars. In the present case, there is no complaint that such application was made and refused, and the case shows that, at the trial, immediately after the mailing of the book was proved, the counsel for the prosecution announced that he had marked the passages in the book which he would read to the jury, and then read them to the jury. The defendant made no claim that he was not until then advised what such passages were, or that he was prejudiced by not being until then so advised, nor did he move to delay the trial because not sooner advised of them; and the court afforded time for the examination of such marked passages and their contexts, by adjourning until the next day, before the counsel for the defendant commenced his summing up to the jury.

We are unable to recognize the force of the suggestion, that the defendant, in the case of an indictment for depositing an obscene book in the mail, is entitled to take the opinion of the court by demurrer, as to whether the matter alleged to be obscene is obscene. The suggestion referred to has never been regarded, in the American cases, as of sufficient weight to lead to a following of the present English rule. The true view, we think, is, that if, in a case like the present one, any question can be raised to the court, it can only be the question whether, on the matter alleged to be obscene, a verdict that it is obscene would be set aside as clearly against evidence and reason. This question can be fully raised before the trial, by a motion to be made on the indictment and a bill of particulars. Under all other circumstances, it is for the jury to say whether the matter is obscene or not. See Com. v. Landis, 8 Phila. 453.

In the present indictment, the defendant had information given to him as to the offence charged, by the date of the mailing, by the title of the book, and by the address on the wrapper. The indictment states the reason for not setting forth the book to be, that it is too obscene and indecent to be set forth. A copy of the book, with a designation of the obscene passages relied on, could have been obtained before the trial, by asking for a bill of particulars. The defendant was not deprived of the right "to be informed of the nature and cause of the accusation." The weight of authority, as well as of reasoning, is in favor of the sufficiency of the present indictment. See U. S. v. Foote [Case No. 15,128].

It is objected, that the publication in question is not a "book," as alleged in the first count of the indictment, but is a pamphlet of 23 pages. It consists of one sheet of 16 pages and a half sheet of 8 pages, secured together, making 24 pages of white paper, with a cover of 4 pages of colored paper. It has a title page, which is page one of the white paper, and the title on such title page is printed identically on page one of the cover. Page 24 of the white paper and pages 3 and 4 of the cover are filled with advertisements. The case shows, that the defendant's counsel, on the trial, in his offers of evidence and in his questions to witnesses, called the publication in question a "book." He so called it in questions to the defendant as a witness. We think there is nothing in the objection.

It is also objected, that the second count does not state whether the publication is a book, a pamphlet, a picture, a paper, a writing, or a print, or what other publication than any one of those it is; and that it is bad for uncertainty. Whether the second count is good or not, the first count is good and sufficient to support the conviction.

It is also contended, that it is not sufficient for the indictment to allege that the defendant knowingly deposited the obscene book, but that it should aver that he knew the same to be non-mailable matter under the statute. We think the objection untenable. If the defendant knew what the book was which he was depositing, if he did not deposit it by mistake, or if he did not deposit it when he thought he was depositing another book, it is of no consequence that he may not have known or thought it to be obscene and so non-mailable, so long as it was, in fact, obscene, and he knew he was depositing the identical book complained of.

The defendant, as a witness at the trial, was asked, on direct examination: "Q. At any time, in the sale or mailing of this book, you may state whether you did it with a knowledge or belief that it was obscene?" On objection, the question was excluded. The propriety of such exclusion is manifest, as will appear from views to be presented hereafter, in connection with the charge and the defendant's requests to charge.

At the close of the testimony, the counsel for the defendant offered to read to the jury the whole book in question, and the district attorney objected to the reading of the whole book. The district attorney had marked the particular portions of the book which he claimed to be within the statute,

and stated that he did not claim that any portions of the book, except those which were marked, brought it within the scope of the statute. The court said: "I do not feel called upon to permit the reading of any portions of the book, except the parts marked, unless it be in immediate connection, to qualify that particular portion of the book. The general scope of the book is not in issue. I, therefore, shall confine the counsel to those parts that the government has marked. If counsel on the part of the defence think proper to read them to the jury, I do not forbid that, and I allow any latitude of comment upon those portions; but, as to the rest of the book, in my opinion, there is no occasion for its being read. When counsel reach that stage where it is proper to sum up the case, portions of it may be read then. The jury shall have the whole book, but the necessity of reading the whole book is not apparent, and I am inclined to forbid it, and give you an exception. If there is any particular sentence necessary to make the sense and meaning of a passage clear, I intend to allow you to read that." To this ruling the defendant's counsel excepted. The case afterwards says: "The counsel then proceeded, under permission of the court, to read, and to comment to the jury upon, each of the passages marked, as relied upon by the prosecution, and the context of the same. The passages relied upon by the prosecution, and read and commented on by the prisoner's counsel, are marked and numbered with black ink, in the Exhibit 'Cupid's Yokes' herewith submitted to the court, and the contents of the same, read by the prisoner's counsel, are indicated by red ink, and are at pages 1, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and each one of the jurymen had a copy of the book in his hand during the reading, and took the same with him." The case elsewhere states, that the court allowed the counsel for the defendant to read and comment on the contexts of the passages marked by the prosecution, so far as to show the meaning of the language of the marked passages. So far as the case shows, the counsel for the defendant was, under this ruling, left entirely free to select and read everything which he thought would show the meaning of the language of the marked passages, except that, after reading the last passage marked by the prosecution, marked 22, he offered to read to the jury the last page of the book, page 23, and, on objection, the court refused to permit it to be read, and the defendant excepted. It is entirely clear, that the page so excluded contained nothing which shows the meaning of the language of any passage marked by the prosecution. We do not perceive that the defendant was deprived of any right or privilege to which he was entitled. The jurors had each of them a copy of the whole book, and the parts which the defendant's counsel was excluded from reading and commenting on, were parts which, under the law applicable to this case, may properly be regarded as not being in the book.

In commenting on one of the passages which he read, the counsel for the defendant stated that he desired to read from another book, a clause of a similar character, by way of showing "how that sort of illustration or expression or narrative is regarded in standard literature." The court excluded all reference to, and illustrations from, other books and publications, and the defendant's counsel excepted. We are unable to see that there was any error in their exclusion. It is the duty of the court to prevent the presentation to the jury of any issues other than the one on trial, and it did not tend to show that the marked passage in question was not obscene, that another passage in the book from which the marked passage was quoted, or another passage in some other book, was not generally accepted as obscene.

The foregoing are all the matters occurring prior to the requests to charge, in respect to which error is alleged, in the argument of the defendant's counsel.

Prior to the charge to the jury, the following requests to charge were made by the defendant and were refused by the courts, except as they agree with its charge and rulings as made: "(1) That, by the word 'obscene' is meant, 'that which openly wounds the sense of decency,' by exciting lust or disgust. That, by 'indecent' is meant, the wanton and unnecessary expression or exposure, in words or pictures, of that which the common sense of decency requires should be kept private or concealed. That, where words which might otherwise be obscene or indecent, are used in good faith, in social polemics, philosophical writings, serious arguments, or for any scientific purpose, and are not thrust forward wantonly, or for the purpose of exciting lust or disgust, they are justified by the object of their use, and are not obscene or indecent, within the meaning and purpose of the law. (2) That none of the words used in the parts of the essay in question relied upon by the prosecution are, by and of themselves, necessarily obscene or indecent; that all of said words are well known and common words of the English language, and may be properly used as such, and are not within the meaning and purpose of the law, unless wantonly and unnecessarily used, so as to offend the sense of decency. (3) That the true character of these words, and whether they are obscene or not, must be determined by their context, and by the scope and purpose of the whole essay, and by the jury. That any of the words objected to, which may at first seem to be unnecessarily used, are not within the law, if reasonably required by the argument and the context, and if they were plainly so used by the author.

(4) That, because some of the words and sentences used may be, from certain points of view, or generally, immodest, indelicate, impolite, unbecoming, blasphemous, irreligious, immoral, and bad in their influence upon society, such words and sentences are not, therefore, necessarily obscene, and do not make the essay obscene, within the intent of the law, nor under this indictment. (5) That the whole scope of the essay and the purposes and intent of the author must be considered, before it is found that the words and sentences, claimed to be objectionable bring it within the meaning and purpose of the law. That, if the general intent and purpose of the essay was not to make an obscene or indecent publication, the passages relied upon by the prosecution do not necessarily make it so. (6) That the fact, that the words and sentences claimed to be obscene, or similar ones, are, and have been for years, in common use in scientific, polemic, or controversial writings, and in reformatory and general literature, is to be considered by the jury, in determining whether they are used in this essay so as to be really an offence under the law or not, and that such use affords a strong presumption that they are not within the law. (7) That, when the words and sentences claimed to be obscene are used in a social polemic, the necessity and propriety of their use in a work of that character should be considered by the jury, and, if they appear to have been used by the author in good faith, for the purposes of the polemic, and not wantonly, for the purpose to offend decency or to excite lust or disgust, they do not constitute an offence under the statute. (8) That, although it may appear certain to the jury, that the doctrines and sentiments of the passages relied upon by the prosecution, or of the whole essay, would be injurious to the community, or destructive to society, if generally practiced, yet, if said words and sentences were used by the author in good faith, to properly and reasonably set forth his mistaken and wicked doctrines and sentiments, and not wantonly or unnecessarily, to offend decency or to excite lust or disgust, such words and sentences are not within the law. In no case should the jury be influenced by the effect which, in their judgment, those mistaken and wicked doctrines and sentiments might have upon morals, or society, or the family, or religion, or the welfare of the community, if brought into general practice. (9) That, this statute, being in derogation of the common law, and restrictive of the liberties of the citizen, and of a highly penal character, should be strictly construed, in cases of this kind. (10) That, when, in cases under this law, doubts and uncertainties arise as to the meaning and intentions of the words objected to, or in construing them with the context, or if there are difficulties in applying the definitions given by the court, all reasonable doubts, uncertainties and difficulties are to be resolved by giving the accused the benefit of them."

The court then charged the jury as follows: "The statute under which the defendant is indicted provides, that 'every obscene, lewd, or lascivious book or pamphlet, picture, paper, writing, print, or other publication of an indecent character' is nonmailable matter, and shall not be conveyed in the mails, nor delivered from any post office, nor by any letter-carrier; and that any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything so declared to be non-mailable matter, shall be guilty of an offence, and liable to the punishment stated. The object of this statute was to prevent the employment of the mails of the United States for the purpose of disseminating obscene literature. The necessity of such a statute is obvious to any person who has paid attention to the facts. If you think what the United States mails are, how they are protected by the law, where they go, the secrecy attending their operations, you will at once see, that, for the distribution of matter of any kind upon paper, there is no other engine of equal power. It is the machine best adapted to the dissemination of obscene literature, because of the fact that it reaches every person, and letters delivered by the mail can be received in secret by the person to whom they are addressed, whether in their own or in fictitious names. For this reason the mails have been used, and the extent to which they have been used for that purpose is appalling to one acquainted with the facts. These facts have been made known to the congress of the United States, the government of the United States alone being charged with the carrying of the mails, and it being competent for the congress of the United States to say what shall be and what shall not be carried in the mails, whereupon congress declared that obscene matter should not be so carried. Nobody can question the justice, the wisdom, the necessity of such a statute. This statute does not undertake to regulate the publication of matter. Matter of any kind may be published, and not violate this law. It does not undertake to regulate the dissemination of obscene matter. Such matter may be sent by express, without violating any law of the United States. But, what the United States government says is, that the mails of the United States shall not be devoted to this purpose. It is a law to protect the community against the abuse of that powerful engine, the United States mail. The constitutionality of the law is not a question here. The statute is the law of the land, and it is to be enforced by the courts, to be obeyed by the citizens. Under this statute, this defendant is charged with having deposited in the mail an obscene book or publication. There has

been some talk about who made the complaint. But, who made the complaint which caused this prosecution to be instituted is a matter of no consequence to you or to me. The motives of the person who made the complaint are not material here. Most infractions of law are discovered and punished by reason of hostility or enmity on the part of some person in the community against some other person. But that does not affect the question of the guilt or innocence of the party accused, when he is properly accused under the law. So, you will dismiss from your consideration the question whether Mr. Comstock has hostile feelings against this man or not. It makes no difference whether he has or has not. The prosecution is not his. It is the prosecution of the United States. Under our form of criminal procedure, a prosecution must be endorsed by the district attorney, an officer selected under the law, as a public prosecutor. There is not such an officer in all countries. In England, I think, to this day, there is no public prosecutor, which accounts, perhaps, for the happening of such an event as was alluded to by the counsel, in the case of Shelley's works. But here there is a public prosecutor, and he must entertain the complaint and present it to the grand jury. The grand jury, under their oaths, must find it a case proper to be presented to a petit jury; and that has been done in this case. Whether it is wise to institute such prosecutions or not, is not a question for you or for me. You are not the district attorney; you have not the responsibility of the district attorney upon you; and it is not likely that you will be willing to assume that responsibility, by deciding any case like this upon the question whether the effect of such a prosecution will be good or ill. Your duty in this case, under your oaths, can only be discharged by rendering a verdict according to the facts proven. The facts belong to you; the questions of law belong to the court. You will not undertake, therefore, to speculate upon the construction of the law, but leave that responsibility upon the court, where it belongs. You will consider the facts, for, your responsibility is a responsibility in regard to the facts of the case. I do not intend, in my remarks, to convey to you my opinion of the questions of fact involved. I intend to leave you, upon your oaths and your responsibility, to say what are the facts here, and to render the verdict which the facts may require. This is not a question of religion, nor a question of the freedom of the press. There is no such question involved in this prosecution. This defendant may entertain peculiar views on the subject of religion; he may be an infidel; he may have peculiar and improper notions on the marriage relation; he may be a freethinker; he may be whatever he pleases; that should have no effect upon your deliberations. Whatever may be his beliefs or opinions, he is entitled here to a verdict at your hands, impartially, upon the simple fact involved in this case, and upon no other fact. If you should find a verdict against this man because you do not like his doctrines in respect to religion, if you should find a verdict against him because you do not like attacks on the marriage relation, you would do injustice to the man, and to the community also, for the community has no other interest than to have criminal cases decided correctly according to the law, and impartially upon the facts. But, if you should find that this book is an obscene book, he having deposited it, and you nevertheless acquit him because of any opinion you may have in harmony with his doctrines or beliefs, you would be equally guilty of an injustice. You are not, therefore, called upon by your verdict to express your opinion in regard to any doctrines alluded to in this publication. All men in this country, so far as this statute is concerned, have a right to their opinions. They may publish them; this man may entertain the opinions expressed in this book, or he may not. Freelovers and freethinkers have a right to their views, and they may express them, and they may publish them; but they cannot publish them in connection with obscene matter, and then send that matter through the mails. If, in the discussion of any doctrine, any man uses obscene matter, he cannot send it through the mails of the United States, without violating the law. Of course, freedom of the press, which, I think, was alluded to, has nothing to do with this case. Freedom of the press does not include freedom to use the mails for the purpose of distributing obscene literature, and no right or privilege of the press is infringed by the exclusion of obscene literature from the mails. That this man mailed this book is proved, and not controverted; that he knew what the book was that he mailed is not controverted. The statute has the word 'knowingly.' That means that the man must know what book he deposited. A boy might be sent with an obscene book wrapped in a paper, and he might deposit it in the mail, and he would not be guilty under this statute, for it says, 'knowingly;' but, when a man deposits in the mail a book, if he knows what the book is, then he has made a deposit knowingly, within the statute. You could have no question about that, it not being controverted that this man mailed this book, and that he knew what book he was mailing. The only question, therefore, which you are called upon to decide, is, whether or not the book is obscene, lewd or lascivious, or of an indecent character. Now, you have had this book in your hands, and the district attorney has marked certain passages. He does not claim that any passages in that bring it within the stat-

ute, except those marked, and, therefore, you may confine your attention to the marked passages, as the matter which you are to determine upon. It is upon those passages alone that this case must turn. There has been some discussion in this case, tending in the direction of the argument, that, if the general scope of the book was not obscene, the presence of obscene matter in it would not bring it within this statute. Such is not the law. If this book is, in any substantial part of it, obscene, lewd, lascivious, or of an indecent character, then it is non-mailable under this statute and the defendant is guilty. Any other rule of law would render the statute nugatory. If a person should write an essay upon the subject of honesty, and fill it with notes containing filthy and obscene stories, and could then pass it through the mails on the ground that it was an essay on honesty, the way would be easy to a disregard of the statute. So, I again charge you, that the general scope of this book is not the matter in hand. but the question is, whether those marked passages are obscene or indecent in character. There are, in the language, words known as words obscene in themselves. It is not necessary, in order to make a book obscene, that such words should be found in it. The most obscene, lewd, and lascivious matter may be conveyed by words which in themselves are not of an obscene character. The question is as to the idea which is conveyed in the words that are used, and that idea characterizes the language. As I have stated, the object with which this book is written is not material, nor is the motive which led the defendant to mail the book material. The effect likely to be produced by this matter which was in the book is the question for you. A man might—I mention this by way of illustration only—a man might conclude that it would be the best way to promote honesty and purity to bind together in a single book all the obscene stories that could be found—and we may imagine a person to honestly entertain the belief that that course would be the best way to excite disgust and so to prevent vice—he might honestly entertain that view and be as good a man as any man in the community, yet, if he published such a book and concluded to disseminate it through the mails, he would be a violator of this statute. The question is, whether this man mailed an obsence book; not why he mailed it. His motive may have been ever so pure; if the book he mailed was obscene, he is guilty. You see, then, that all you are called upon to determine in this case is, whether the marked passages in this book are obscene, lewd or of an indecent character. Now, I give you the test by which you are to determine the question. It is a test which has been often applied, and has passed the examination of many courts, and I repeat it here, as the test to be used by you. You will apply this test to these marked passages, and if, judged by this test, you find any of them to be obscene, or of an indecent character, it will be your duty to find the prisoner guilty. If you do not find them, judged by this test, to be obscene, or of an indecent character. it will be your duty to acquit him. This is the test of obscenity, within the meaning of the statute: It is, whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall. If you believe such to be the tendency of the matter in these marked passages, you must find the book obscene. If you find that such is not the tendency of the matter in these marked passages, you must find the book not obscene, and acquit the prisoner. The statute uses the word 'lewd,' which means, having a tendency to excite lustful thoughts. It also uses the word 'indecent.' Passages are indecent within the meaning of this act, when they tend to obscenity—that is to say, matter having that form of indecency which is calculated to promote the general corruption of morals. Now, gentlemen, I have given you the test; it is not a question whether it would corrupt the morals, tend to deprave your minds or the minds of every person; it is a question whether it tends to deprave the minds of those open to such influences and into whose hands a publication of this character might come. It is within the law if it would suggest impure and libidinous thoughts in the young and the inexperienced. There has been some comment on the fact, that, in many libraries you may find books which contain more objectionable matter, it is said, than this book contains. It may be so; it is not material here. When such books are brought before you, you will be able to determine whether it is lawful to mail them or not. Here, the question is with reference to this book; and it is of no importance how many books of worse character this man, or that man, or the other man, has, or whether the tendency of those books is worse or better than this book. The question is, the tendency of this book. If you find that the tendency of the passages marked in this book is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall, it is your duty to convict the defendant, notwithstanding the fact that there may be many worse books in every library of this city. Now, gentlemen, I have endeavored to bring you down, in your examination of this case, to the precise point. This is a question, as I have before stated, for you alone; the responsibility is upon you, and upon each of you, to say, upon your oaths, after an examination of those passages, what the tendency of those pas-

sages is, and whether they have that tendency which I have described to you as necessary to be found in order to bring it within this statute. The statute is an important statute; it is a statute to be enforced in all proper cases; it is not a statute to be strained; it is not a statute for twelve men to refine upon. The question which I have stated to you calls for good judgment—one to be submitted to the intelligent judgment of twelve intelligent men, who should judge sensibly, not straining points, when they determine what the tendency of the matter in this book is. It is a criminal case, and the defendant is entitled to the benefit of a reasonable doubt. You are bound to be satisfied beyond a reasonable doubt, that the tendency of this matter is such as I have described. This must not be a fancy. By a reasonable doubt is meant a doubt arising from the want of evidence. As to what the book contains, there is no dispute; and you must be satisfied in your own minds, satisfied clearly, so that you are willing to say on your oaths that you believe, that the tendency of the matter in those marked passages is such as I have described. If you believe such to be the tendency of this matter, then you must find the book non-mailable and the prisoner guilty. If you are not satisfied beyond a reasonable doubt, that the tendency of this matter is such as I have described to you, then it is your duty to give him the benefit of that doubt and acquit him."

At the close of the charge, the defendant requested the court to charge the jury, in addition, as follows: "That the jury are the final judges of the law and fact in this case, and that the definitions charged by the court are not conclusive upon them. That the court should make no absolute test or definition of the words of the statute, and that the test and definitions made and submitted to the jury by the court are advisory, and not authoritative or conclusive upon them."

The defendant also objected to the definitions given, and excepted to each of them in detail, and also excepted to each and every part of the charge, rulings and directions of the court contrary to or inconsistent with the foregoing requests, and to the refusal of the court to charge the same.

It is contended, that the court erred in what it said to the jury as to the test of obscenity within the meaning of the statute; that it substituted the stated test for the words of the statute; that the stated test was, as a definition, erroneous, and was not a definition of obscenity; that it was a definition of an effect and not of the word "obscenity;" that, because an essay tends to deprave and corrupt the morals of society, it does not follow that it is obscene; that, while all obscenity tends to immorality, all immorality is not obscenity; and that essays on the drama, gluttony, inebriety, gaming, cock fighting, horse racing, polygamy, divorce or blasphemy, advocating or palliating any of them might tend "to deprave and corrupt the morals of those whose minds are open to such influences and into whose hands a publication of this sort may fall," but they would not necessarily be obscene. It is a mistake to suppose, that, in what the court said as to the test of obscenity, it intended to give to the jury a definition of "obscenity." The dictionary says, that "obscene" means, "offensive to chastity and decency; expressing or presenting to the mind or view something which delicacy, purity and decency forbid to be exposed." The statute and the indictment both use the word "obscene" without affixing to it any definition. In the first request to charge made before the charge was given, the defendant requested the court to charge that the word "obscene" and the word "indecent" mean severally what is set forth in such request. The court refused so to charge except as such request agreed with its charge. There is nothing in the charge which is contrary to the substance of such request. On the contrary, after using, in the course of the charge, the words "obscene," "lewd," "lascivious" and "indecent," as being words whose meaning the jurors, as intelligent men, fully understood, and as being words needing, therefore, no definition to be given of them by the court to the jury, the court defines the word "lewd," as used in the statute, (it being also used in the first count of the indictment,) as meaning "having a tendency to excite lustful thoughts." The court did not define the word "lustful" any more than the first request to charge defined the word "lust," or the words "sense of decency." The court then defined the word "indecent," as used in the statute, (it being also used in the second count of the indictment,) as meaning "tending to obscenity"—"having that form of indecency which is calculated to promote the general corruption of morals." This does not mean any other form of indecency calculated to promote the general corruption of morals, than the obscene form; because, the court immediately proceeds to say, that, in what it had said about corrupting morals, it had been speaking of corrupting the morals and depraving the minds of those "open to such influences," that is, the influences of "obscene" matter, and that it meant thereby matter which would "suggest impure and libidinous thoughts in the young and inexperienced." It did not define the word "impure" or the word "libidinous" any more than the first request to charge defined the word "lust" or the words "sense of decency."

In saying that the "test of obscenity, within the meaning of the statute," is, as to "whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall," the court substantially said, that the matter must be regarded as obscene, if it

would have a tendency to suggest impure and libidinous thoughts in the minds of those open to the influence of such thoughts, and thus deprave and corrupt their morals, if they should read such matter. It was not an erroneous statement of the test of obscenity, nor did the court give an erroneous definition of obscenity, or a definition different from that of the first request to charge. It gave a definition substantially agreeing with that of such request.

In Reg. v. Hicklin, L. R. 3 Q. B. 360, the question arose as to what was an "obscene" book, within a statute authorizing the destruction of obscene books. The book in question was, to a considerable extent, an obscene publication, and, by reason of the obscene matter in it, was calculated to produce a pernicious effect, in depraving and debauching the minds of the persons into whose hands it might come. It was contended, however, that, although such was the tendency of the book upon the public mind, yet, as the immediate intention of the person selling it was not so to affect the public mind, but to expose certain alleged practices and errors of a religious system, the book was not obscene. As to this point, Cockburn, C. J., said: "I think, that, if there be an infraction of the law, the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior object in view, (which is the immediate and primary object of the parties,) of a different and an honest character. It is quite clear, that the publishing an obscene book is an offence against the law of the land. It is perfectly true, as has been pointed out by Mr. Kydd, that there are a great many publications of high repute in the literary productions of the country, the tendency of which is immodest, and, if you please, immoral, and, possibly, there might have been subject-matter for indictment in many of the works which have been referred to. But it is not to be said, because there are in many standard and established works objectionable passages, that, therefore, the law is not as alleged on the part of this prosecution, namely, that obscene works are the subject-matter of indictment; and I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character." These views seem to us very sound. In the present case, the remarks made by the court, in its charge, as to the test of obscenity, were made in reference to suggestions like those made in the Hicklin Case. It was contended, that the motive and object of the book were material. On this question the court said: "The question is, whether this man mailed an obscene book; not why he mailed it. His motive may have been ever so pure; if the book he mailed was obscene, he is guilty. You see, then, that all you are called upon to determine in this case is, whether the marked passages in this book are obscene, lewd, or of an indecent character. Now, I give you the test by which you are to determine this question. It is a test which has been often applied, has passed the examination of many courts, and I repeat it here, as the test to be used by you. You will apply this test to these marked passages, and, if, judged by this test, you find any of them to be obscene or of an indecent character, it will be your duty to find the prisoner guilty. If you do not find them, judged by this test, to be obscene or of an indecent character, it will be your duty to acquit him. This is the test of obscenity, within the meaning of the statute: It is whether, &c." The test there stated is substantially the same as that stated by Cockburn, C. J. The words "charged as obscenity," and the word "immoral" used by Cockburn, C. J., are dropped, and the words "the morals of," are not used by Cockburn, C. J. But the meaning of the two sentences is identical. The case of Reg. v. Hicklin, was approved in Steele v. Brannan, L. R. 7 C. P. 261, where Bovill, C. J., states that he fully concurs in the decision in Reg. v. Hicklin.

In the case against Heywood, before referred to, the defendant was the writer of the book, and the book was the same book which is in question in the present case. In the trial of the Heywood Case, Judge Clark, in charging the jury said: "A book is obscene which is offensive to decency. A book, to be obscene, need not be obscene throughout the whole of its contents, but, if the book is obscene, lewd, or lascivious or indecent in whole or in part, it is an obscene book, within the meaning of the law, a lewd and lascivious and indecent book. A book is said to be obscene which is offensive to decency or chastity, which is immodest, which is indelicate, impure, causing lewd thoughts of an immoral tendency. A book is said to be lewd which is incited by lust, or incites lustful thoughts, leading to irregular indulgence of animal desires, lustful, lecherous, libidinous. A book is lascivious which is lustful, which excites or promotes impure sexual desires. A book is indecent which is unbecoming, immodest, unfit to be seen. A book which is obscene, as I have said to you before, or lewd, or lascivious, or indecent, in whole or in part, or in its general scope or tendency, in its plates or pictures, or in its reading matter, falls within the scope of the prohibition of the statute. * * * An argument has been made here to show you that Mr. Heywood was a moral man, a well-behaved man, and that his design in publishing this work was a good one, that he really believed the doctrines which he taught. But the court say to you,

that, such an argument cannot be received and considered by you, and cannot make any difference in the question of guilt or innocence. A man might believe that obscene things may be and ought to be corrected, and he might argue against them and publish for this purpose; but still the book might not be allowed to go through the mails, if obscene in itself. It is not the design. There is no reference in the statute to the design that a man has in putting the book in the mail, whether for a bad or a good purpose; but the law says, explicitly, that such books shall not go through the mails, and that, if anybody deposits them, he is to be punished for it. There is no question here in regard to the suppression or the spread of knowledge. * * * Something was said in regard to other books—that these books are no more offensive than some other books, but you are not sent here to try other books, nor to compare this book with other books, and you heard the court rule out all other books. The sole question is, whether these books are obscene, lewd, or indecent. Other books may be so, or may not be so. They may or may not have gone in the mail. * * * Observations were made in regard to the extent to which these books might be obscene, lewd, lascivious or impure, or might excite unlawful or impure desires; and it was said to you, that you might read these books, and they would excite no impure desire in you, no impure thought; but that is not a sure criterion, by any means. These books are not sent ordinarily to such people as you. But you may consider whether they are obscene, or lewd, or lascivious to any considerable portion of the community, or whether they excite impure desires in the minds of the boys and girls or other persons who are susceptible to such impure thoughts and desires. If any other standard were adopted, probably no book would be obscene, because there would be some men and women so pure, perhaps, that it would not excite an impure thought; but it is to be governed by its effect upon the community—whether it is obscene and is of dangerous tendency in the community generally, or any considerable portion of the community." These views are, in substance, those contained in the charge in the present case.

We are of opinion that there was no error in what was charged by the court as to the test of obscenity. No other part of the charge was specifically complained of in the argument; but it was urged that the court erred in refusing to charge as requested in the second paragraph of the first request, and in requests 2, 3, 4, 5, 6, 7, 8 and 9.

As to the second paragraph of the first request, we are of opinion that the object of the use of the obscene or indecent words is not a subject for consideration. In addition to the observations already cited from the case of Reg. v. Hicklin, Cockburn, C. J., says, further: "May you commit an offence against the law in order that thereby you may effect some ulterior object, which you have in view, which may be an honest or even a laudable one? My answer is, emphatically, no. The law says, you shall not publish an obscene work. An obscene work is here published, and a work the obscenity of which is so clear and decided, that it is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come, would be of a mischievous and demoralizing character. Is he justified in doing that which clearly would be wrong, legally as well as morally, because he thinks that some greater good would be accomplished? * * * I hold, that, where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act; and that, as soon as you have an illegal act thus established, quoad the intention and quoad the act, it does not lie in the mouth of the man who does it to say: 'Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose.'" In Steele v. Brannan, supra, it was contended that the book treated of a matter which might properly be the subject of discussion and controversy, and that the object of those who put it forward was not only innocent but praiseworthy, inasmuch as they intended thereby to advance the interests of religion and of the public, and that therefore, the book was not obscene. The court held otherwise, and approved the ruling in the Hicklin Case. The views of Judge Clark, to the same effect, have been quoted.

As to request 2, it was charged in substance, so far as its propositions are correct. The rest of it falls within what has been said as to the last paragraph of the first request. This last observation applies also to request 3.

As to request 4, its substance was charged, and, as to anything in it not charged, there was no error in not charging it.

The observations made as to the last paragraph of the first request apply, also, to requests 5, 6 and 7, and the first paragraph of request 8.

The last paragraph of request 8 was, in substance, charged.

We perceive no error in the refusal to charge as requested in request 9. This statute differs from no other criminal statute, and the jury were properly instructed on the subject of a reasonable doubt.

We have given no attention to any exceptions appearing in the case, which are not presented in the printed brief of the counsel for the defendant.

The case contains the following statement: "During the absence of the jury, the court sent to them by the officer in charge, and, in the absence of the prisoner, after exhibiting the same to the counsel for the prisoner, a direction in writing, that they might deliver a sealed verdict to said officer, and that there-

upon they should be allowed to separate and directed to appear in court at the hour of the opening of the court on the next day. At about 6.30 o'clock the next morning, (March 21st, 1879,) the jury delivered a sealed verdict to the officer, and were thereupon allowed by him to separate. The court resumed its session at 11 o'clock a. m. of that day, and the jury, having been called by the clerk, announced, by their foreman, that they had agreed upon a verdict, and that he had handed a sealed verdict to the officer in charge of them. The counsel for the prisoner duly excepted to the direction of the court that the jury should bring in a sealed verdict at all, and to the reception by the court of such a verdict from the officer, and also to the right of the jury to separate at all until they had rendered their verdict in open court. Under these exceptions the jury were allowed to render a verdict of guilty, as stated in the sealed verdict received by the court from the officer, in the presence of the defendant, and which was thereupon announced and recorded in open court, as a verdict of guilty. The counsel for the prisoner then and there requested that the jury be polled, which was done, and thereupon each of the jurymen, to the question of the clerk, whether the verdict announced was his verdict, answered in the affirmative." It is contended for the defendant, that the direction of the court to the jury, in the absence of the prisoner, and without his consent, that they might deliver a sealed verdict to the officer in charge and then separate, and their doing so, is ground for a new trial. The propositions urged to this end are, that sealed verdicts have no authority in law without the prisoner's consent; that they have been introduced with great reluctance and great suspicion in civil cases, and are always a source of danger; that the separation of juries in criminal cases, after the charge of the court, is always a recognized source of danger to the prisoner, to which the law does not voluntarily expose him; that the prisoner cannot prove a negative, to show that he has not been injured; that the direction of the court is no justification or protection; that an instruction to the jury, that, after a long confinement, they may obtain a much desired release by a sealed verdict, is a direct inducement to the minority of the jury to yield against the prisoner, and was effective against him in this case; that the absence of authority for the course pursued upon this trial, and the reluctance with which any separation, before or after the charge, is allowed, is conclusive for the prisoner, on this point; and that, while the rule has been somewhat relaxed from necessity only, this has never been done so as to allow of a sealed verdict and a general separation of the jury, without the prisoner's presence, knowledge and consent, before their real verdict should be rendered in court and in the prisoner's presence.

It appears, by the case, that the direction in writing to the jury, that they might deliver a sealed verdict to the officer and might then separate, was exhibited to the counsel for the prisoner before it was sent to the jury by the court; that the jury strictly followed such direction; that the court received the sealed verdict from the officer the next morning, in the presence of the jury and of the defendant, in open court, after the jury had then and there announced that they had agreed upon a verdict and that such sealed verdict contained it; that the verdict of guilty announced and recorded was the verdict contained in such sealed verdict; and that, on the polling of the jury, at the request of the counsel for the defendant, each juror stated that the verdict announced was his verdict.

It is laid down in Whart. Cr. Law (6th Ed.) § 3125, that, "in misdemeanors, there is no difficulty, in practice, in permitting the jury to separate during the trial." In the present case, the statute expressly declares the offence to be a misdemeanor. Wharton cites the leading case of Rex v. Woolf, 1 Chit. 401, where it is held, that, in a case of misdemeanor, the dispersion of the jury does not vitiate the verdict. The dispersion referred to is one before agreement on a verdict. A fortiori, a dispersion after agreement, and after the verdict is written and signed and sealed up, and where the jury afterwards attend in court with it, and the court receives and opens it, and the jury give an oral verdict in accordance with it, on being polled, does not vitiate the trial. In People v. Douglass, 4 Cow. 26, it is laid down, that the mere separation of a jury is not a sufficient cause for setting aside a verdict either in a civil or a criminal case, if there be no farther abuse. In People v. Ransom, 7 Wend. 417, 424, it is said, that any irregularity or misconduct of the jurors will not be a sufficient ground for setting aside a verdict, either in a criminal or a civil case, where the court are satisfied that the party complaining has not, and could not have, sustained any injury from it. In Com. v. Carrington, 116 Mass. 37, the question arose, whether, in a criminal case, not capital, the jury may be authorized by the court, without the consent of the defendant, to separate after agreeing upon, signing and sealing up a paper in the form of a verdict, and afterwards return a verdict in open court, in accordance with the result so stated and sealed up. It was held, that such a course is proper. The court say: "The tendency of modern decisions has been to relax the strictness of the ancient practice which required jurors to be kept together from the time they were empanelled until they returned their verdict, or were finally discharged by the court. In civil cases the jury are never kept together at the intermissions of the sittings of the court pending the trial; and it is well settled, that, after the case is finally committed to them, they may be allowed by the court to separate, if they first agree upon and

seal up their verdict, and afterwards affirm it in open court; and that, if their verdict, when opened, does not cover all the issues on which they are to pass, the case may be recommitted to them and a verdict subsequently rendered will be good. Winslow v. Draper, 8 Pick. 170; Pritchard v. Hennessy, 1 Gray, 294; Chapman v. Coffin, 14 Gray, 454. But if, upon returning into court, one of the jurors dissents from the verdict to which all had agreed out of court, it cannot be recorded. Lawrence v. Stearns, 11 Pick. 501. In capital cases, indeed, the uniform practice in this commonwealth has been to keep the jury together from the time the case is opened to them until their final discharge. But the practice is equally well settled, and in accordance with the decisions elsewhere, that, pending a trial for a misdemeanor, the jury may be permitted by the court, without the consent or knowledge of the defendant, to separate and go to their homes at night, without vitiating the verdict. Rex v. Woolf, 1 Chit. 401; s. c. nom. Rex v. Kinnear, 2 Barn. & Ald. 462; McCreary v. Com., 29 Pa. St. 323. If the jury, in a case of misdemeanor, are allowed, without the consent of the defendant, to separate after the case is finally committed to them by the court, and before the verdict is returned, the verdict cannot be recorded, unless it clearly appears that the verdict was not influenced by anything that took place during the separation. It was accordingly held, that, where the jury were allowed by the judge to disperse upon stating to the officer they had agreed on and sealed up a verdict, and, upon coming into court, rendered an oral verdict, without any sealed verdict being produced or opened, or its contents made known to the defendant or his counsel, the verdict was invalid. Com. v. Durfee, 100 Mass. 146; Com. v. Dorus, 108 Mass. 488. But, when all possibility of improper influences is excluded by conclusive evidence that the jury arrived at and reduced to writing, before their separation, the same result which they afterwards announced in open court, the verdict may be received and recorded. State v. Engle, 13 Ohio, 490; State v. Weber, 22 Mo. 321; Reins v. People, 30 Ill. 256." These views seem to us to be the clear result of the authorities, and to be founded in reason. In the present case, it clearly appears that the jury, before they separated, arrived at the same result which they afterwards orally announced in due form, when enquired of by the clerk, in open court, and therefore, that the verdict was not influenced by anything that took place during the separation.

We have examined the cases cited by the counsel for the defendant, and find in them nothing inconsistent with the foregoing views.

After a careful consideration of all the points presented, we are unanimously of opinion, that the motion for a new trial, and to set aside the verdict, and for an arrest of judgment upon the same, must be denied.

Case No. 14,572.

UNITED STATES v. BENNETT.

[17 Blatchf. 357; 26 Int. Rev. Rec. 45; 9 Reporter, 136.] [1]

Circuit Court, S. D. New York. Dec. 22, 1879.

COUNTERFEITING — INDICTMENT — NATIONAL BANK NOTES—SEAL OF TREASURY—VARIANCE—COUNTS —JOINDER—TRIAL—PRODUCTION OF WITNESS.

1. An indictment under sections 5431 and 5434 of the Revised Statutes, in setting out counterfeit notes, did not exhibit any imprint of the seal of the treasury, while the notes put in evidence on the trial exhibited such imprint. *Held*, that there was no such variance as to make it improper to admit the notes in evidence.

2. The notes were circulating notes of a national banking association, but the indictment, while setting them out at length, called them "national bank currency notes." *Held*, not a variance.

3. At the close of the evidence for the prosecution the defendant requested that one M. be called as a witness for the government. He was not then called. Afterwards, and after the defendant had testified in his own behalf, M. was produced in rebuttal. *Held*, no error.

4. The circulating notes of a national banking association are valid contracts without having the imprint of the seal of the treasury on them.

5. The indictment is not bad for not giving a fac-simile of the seal to which it refers, or for not setting out the numbers on the notes.

6. The indictment properly charges in different counts different offences, under sections 5431 and 5434, for which different punishments are prescribed by those sections, the offences charged being of the same class of crimes, such joinder being permitted by section 1024.

7. Whether the offences were "properly joined," under section 1024, was a question to be determined on a motion to quash or to compel an election.

8. Where the defendant is convicted of the several offences charged in said indictment, he is, in effect, convicted on separate indictments, and may be separately punished for each offence proved.

[This was an indictment against Frank Bennett. Heard upon motion for a new trial, and in arrest of judgment.]

Sutherland Tenney, Asst. U. S. Dist. Atty.

A. J. Dittenhoefer, for defendant.

Before BLATCHFORD, Circuit Judge, and BENEDICT and CHOATE, District Judges.

BENEDICT, District Judge. The prisoner was tried upon an indictment containing six counts. The first five counts are framed under section 5431 of the Revised Statutes of the United States, and the sixth under section 5434. Having been convicted he now moves for a new trial and in arrest of judgment.

The main question presented on the motion for a new trial is raised by an exception to the admission in evidence of the counterfeit notes offered to prove the several charges in the indictment, on the ground of variance; first, because each note exhibits what pur-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 9 Reporter, 136, contains only a partial report.]

ports to be the imprint of the seal of the treasury, while the notes set forth in the indictment exhibit no such imprint. It is contended, that the provision in section 5172, authorizing the issue of circulating notes by a banking association, which declares that the notes shall "express upon their face that they are secured by United States bonds deposited with the treasurer of the United States, by the written or engraved signature of the treasurer and register, and by the imprint of the seal of the treasury," renders the imprint of the seal a part of the contract, necessary to its validity, and, therefore, necessary to be set out, and proved as laid. But, it is evident, from the language of the statute, just cited, that the imprint of the seal of the treasury is simply intended to be evidence in regard to the security of the contract and forms no part or the contract itself. An indictment of this character is sufficient if it sets forth so much or the note as contains the evidence of the contract, and so much is set forth in this instance. To that extent the notes admitted in evidence correspond exactly with the notes in the indictment, and prove the substance of the charge, although they exhibit, in addition, what purports to be the imprint or the seal of the treasury.

It is next contended, that there is a fatal variance because the notes admitted in evidence are circulating notes of a banking association, while the notes set forth in the indictment are styled therein national bank currency notes. Here, the argument is, that section 5413, which provides that the phrase, "obligation or other security of the United States," shall be held to mean (among other things) "national bank currency," has been modified by the use, in section 5434, of the words, "any obligation or other security of the United States, or circulating note of any banking association organized or acting under the laws thereof," and that a distinction must now be drawn between the circulating notes issued by a banking association and national bank currency. Section 5431 is claimed to be no longer applicable to such circulating notes, and it is urged that the notes admitted in evidence do not correspond with the description given in the indictment. Upon this question our opinion is, that there was no intention to create a distinction between national bank currency and the circulating notes issued by a banking association, by the language employed in section 5434, and that section 5413 is not modified by section 5434. The words "or circulating note," &c., in section 5434, were inserted through excess of caution, no doubt. If there had been the intention to modify section 5413, and thereby to change the scope of section 5415 and section 5431, it may be presumed that such an intention would have been plainly expressed, and not left to follow from a doubtful implication. The notes were, therefore, correctly designated as national bank currency notes, that being the designation of such notes in section 5413. Besides, the notes are set out at length in the indictment, and show, on their face, that they are circulating notes of a banking association organized under the laws of the United States. The designation of their legal character, given in the indictment, becomes, then, immaterial. Reg. v. Williams, 2 Denison, Crown Cas. 61; U. S v. Trout [Case No. 16,542].

Several other points of variance were made at the trial, viz.: that the numbers—the figure 5, in the corner—the words, "printed by the bureau of engraving and printing, Treasury Department"—the words, "Act approved June 30"—the words, "New York," and "U. S.," over the seal—and the word "Excelsior"—which appear on the notes admitted in evidence, do not appear on the notes set forth in the indictment. But, these differences have not been relied on here and are immaterial. Com. v. Stevens, 1 Mass. 203; Com. v. Bailey, Id. 62.

The only remaining question presented by the motion for a new trial, and calling for attention, arose as follows: At the close of the evidence for the prosecution, a request was made in behalf of the defendant, that the court instruct the district attorney to call as a witness in behalf of the government, one McGuire. The request was refused, and McGuire was not then called. Subsequently, and when the evidence for the defence had been given, the district attorney offered McGuire as a witness, to give evidence in rebuttal. Objection was taken to the witness' being allowed to testify, which was overruled, and the witness then gave evidence in rebuttal. To these rulings exception was taken.

The only ground upon which the request for the instruction to the district attorney, and the subsequent objection to the witness McGuire, were placed is, that injustice would be done, to permit this witness to be informed of the testimony of the prisoner, and then to go upon the stand and contradict him. The case shows, that, when the instruction to the district attorney was prayed, evidence had been given that McGuire was the person who communicated the fact of the possession of these notes by the prisoner; and that he had said that the prisoner had given him a five dollar counterfeit note on the day of his arrest. Whether this evidence had been drawn out by the defendant or the prosecution does not appear in the case; but, the absence of any objection from the defendant shows, that, if not called out by the defence, no point was made in regard to its admission. Whether it was in the power of the district attorney to produce McGuire while the case was with the prosecution does not appear.

The ruling objected to seems to relate simply to the order of proof, but, without intending to admit that a ruling of that character is subject to review, we may say, that we are unable to see, from the case, that any injustice was done to the defendant by the

course pursued. Whether the evidence of McGuire was necessary to make out a case for the prosecution belonged to the district attorney to determine for himself. If McGuire was the bad person supposed by the defence, the district attorney was justified in avoiding, if possible, presenting him to the jury as a witness to establish the case for the government. What the defendant would testify to could not be foreseen, and, when the defendant's testimony compelled the production of evidence in rebuttal, the right of the prosecution to present such evidence by the testimony of any witness able to testify to the facts, is not open to question.

There remain to be considered the points made in support of the motion in arrest of judgment. It is said, that the notes set forth in the indictment are not valid contracts, owing to the absence of the seal; and, therefore, not the subject of forgery. To this, there is one sufficient answer, that, as already stated, the seal of the treasury forms no part of the contract.

Again, it is contended the indictment is bad because it avers that the forged note purported to bear the imprint of the seal of the treasury, but omits to give a copy of the seal. It is said, that, while it would, perhaps, be unnecessary to say anything about the devices, yet when they are described a fac-simile or copy must be given. But, if, as has been seen, it was unnecessary, in setting forth the note, to set forth the seal, stating that the note purported to have a seal cannot affect the validity of the indictment.

It is further contended, that the indictment is insufficient, because, by omitting the numbers on the bills, it renders the record unavailable as a bar to a subsequent prosecution for the same offence. The case does not show that the numbers upon any one of the notes admitted in evidence would identify the note. On the contrary, several of the notes exhibit the same numbers. Nor is it necessary that the indictment be so particular that the record will, upon its face, and without extrinsic evidence, identify the subject-matter of the charge. The subject-matter of a former trial is always a matter of evidence and may be proved like any other fact. The books show many cases where such a particularity of description as is here contended for has been held unnecessary.

Lastly, it is contended that judgment must be arrested because the indictment charges different offences, for which different punishments are prescribed by statute; and Tweed's Case (People v. Liscomb, 60 N. Y. 559) is cited in support of the objection. An examination of the doctrine declared in that case would be out of place here, because this is a prosecution instituted under a statute of the United States, which permits the joinder of separate and distinct offences in one indictment, in separate counts. No doubt is entertained that section 1024 of the Revised Statutes permits the joinder in a single indictment, in separate counts, of offences created by section 5431 and an offence created by section 5434, notwithstanding the fact that the punishment prescribed by section 5431 is a fine of not more than $5,000, and imprisonment at hard labor not more than 15 years, and the punishment prescribed by section 5434 is imprisonment at hard labor not more than 10 years, or a fine of not more than $5,000, or both. It would seem, from the case, that, in this instance, the several charges are for the same transaction, or for transactions connected together. They appear to have occurred at the same time and were proved by the same witnesses. But, if not, the offences are similar in character, the challenges are the same, and the punishments alike in kind, differing only in degree, and they are, therefore, of "the same class of crimes" within the meaning of section 1024. Whether the joinder was calculated to embarrass the prisoner, and, therefore, the offences not "properly joined," within the meaning of the statute, was a question to be determined by the judge in his discretion, on a motion to quash or to compel an election. Com. v. Birdsall, 69 Pa. St. 482.

No difficulty in regard to the judgment to be entered arises from the difference between section 5431 and section 5434 in respect to the punishment prescribed. The prisoner has been convicted of the several offences charged in the indictment. Each count, charging a separate and distinct offence, is, in legal effect, a separate indictment, and a conviction thereon may be followed by a sentence imposing such punishment as the statute has prescribed for that offence. The statute, in permitting the joinder of different offences in a single indictment, and even the consolidation of two or more indictments, by necessary implication authorizes a separate punishment for each offence proved. Otherwise, a conviction of offences permitted to be joined would be the same, in effect, as an acquittal.

We have now considered all the points in behalf of the prisoner that can be claimed to be worthy of notice, and find no ground upon which to grant a new trial, or to arrest the judgment. The motions are, therefore, denied.

Case No. 14,573.

UNITED STATES v. BENNETT.

[Hoff. Land Cas. 281.] [1]

District Court, N. D. California. Dec. Term, 1857.

PRACTICE IN EQUITY—CORRECTING DECREE.

Where a decree through mistake or accident, does not express the judgment of the court, it may be corrected on motion made after the expiration of the term at which it was enrolled.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[Action by the United States against Mary S. Bennett, claiming two tracts of land in Santa Clara county.] This was a motion to amend the decree of confirmation so as to conform to the decree of the board of commissioners.

P. Della Torre, U. S. Atty., and William Blanding, for the motion.

Volney E. Howard, against it.

HOFFMAN, District Judge. When this cause was called in its order on the calendar, the district attorney stated to the court that he had no objection to make to the affirmance of the decree of the board and to the confirmation of the claim. An order confirming the claim was thereupon entered upon the minutes, and the parties were directed to draft the decree and present it to the judge for signature, first submitting it to the district attorney for examination. A draft decree was accordingly presented to the judge, with an endorsement thereon, signed by the district attorney, that the same was correct. It was thereupon signed by the judge without examination, and in entire reliance upon the consent of the district attorney that the decision of the board should be affirmed, and his certificate that the form of the decree was correct.

Notice having been received from the attorney general that the United States would not prosecute the appeal from the decision of the board, and a decree in this court having been made as above stated before the reception of the notice, the district attorney entered into a stipulation and consent that no appeal should be taken from the decree of this court, and that the claimants might proceed as under a final decree. After this stipulation was entered into, it was discovered by the district attorney, that, through error or accident, the description of the land contained in the decree of this court was widely different from that contained in the decree of the board; and that the land confirmed by this court is of larger extent and different situation from that confirmed to the claimants by the board—the claim to which alone he intended to consent should be affirmed, and the United States had consented not further to litigate.

A motion is now made to amend the decree signed by this court, as above stated, so as to make it conform to the decision of the board. It is resisted, on the ground that the term having expired, the court has no power to alter or amend its final decrees. If the application were intended to procure a revision and correction of any errors, either in law or fact, or to change opinions once given, or to obtain a new decision, it would of course be denied. Even if a court had no jurisdiction over the cause, the judgment is binding until reversed on error. [Bank of U. S. v. Moss] 6 How. [47 U. S.] 31. But in this case, so far as the court can be said to have passed at all upon the questions submitted to it, its judgment and intention were that the decision of the board should be affirmed. It certainly cannot be said to have intended to depart from that decision by confirming to the claimant another and a different tract.

Such was the obvious effect of the first order of confirmation directed in open court to be made, and such was supposed to be the effect of the decree signed on the faith of the district attorney's certificate of its correctness. If, then, through accident or the mistake of the district attorney, the decree approved by him and signed by the court does not describe the land which he was willing should be confirmed, and which the court supposed it was confirming, it would seem to present a case of mistake which the court after enrollment has the power to correct. In so doing it makes no new decree, nor does it review or reverse any former judgment, nor make a new decision on points already passed upon. It merely makes the written decree conform to what was in fact the judgment of the court, and enters a decree now, such as it intended to enter then.

The case of Marr's Adm'r v. Miller's Ex'r, 1 Hen. & M. 204, is directly in point. In that case a decree was improperly entered at a previous term by the inattention of counsel who drew it. It was sought to be amended on motion. Per Curiam. "The practice of this court heretofore and of the federal courts in this place has been inquired into, and it appears that in all cases where, by mistake, an entry has been made, it has been rectified on motion. And where any error has been committed by the officers of the court, or gentlemen of the bar, it has been corrected on motion. Let the decree be set aside and entered now as it should have been." A similar power appears to have been exercised by Lord Hardwicke, in Kemp v. Squire, 1 Ves. Sr. 205, and in other cases cited in the brief on the part of the United States.

On the whole, we think that the case presented is one where the court has the authority to amend its decree; and that a decree should be entered nunc pro tunc affirming the decision of the board, and confirming the claim of the appellees to the land as therein described. It should, perhaps, be observed that it is contended by the counsel for the claimant that the decree entered in this court does not substantially differ from that of the board. It is enough to say that the description of the land is entirely different, and designates boundaries not mentioned either in the original petition of the claimant, or in any of the documents presented by her. It is apparent that the land confirmed by the decree of this court may be different from that confirmed by the board. The possible existence of such a discrepancy would seem to be enough to warrant the amendment of

the decree, so that it may conform to the decision intended to be, as expressed in the decree itself, "in all things affirmed."

Case No. 14,574.

UNITED STATES v. BENNETT.

[3 Hughes, 466.] [1]

District Court, D. Maryland. 1877.

UNITED STATES—JURISDICTION — AMERICAN VESSELS—LAW.

The law of the United States (especially section 5347 of the United States Revised Statutes) follows an American vessel wherever she may be on navigable waters, so that an offence committed on board such vessel is an offence against the United States, though the vessel be in the harbor or river of a foreign country.

[Cited in Ex parte Byers, 32 Fed. 407.]

The defendant [John E. Bennett] was indicted for a violation of the 5347th section of the Revised Statutes, which punishes any officer of any American vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, who, under the conditions as to malice expressed in the section, beats, or imprisons, or inflicts cruel punishment on any of the crew of such vessel. The indictment alleged that the offence was committed on board of the American ship Macauley, on certain waters (other than the high seas) within the admiralty and maritime jurisdiction of the United States, to wit, those of the tidal river called the Garonne, near the city of Bordeaux, in the republic of France. To this indictment the defendant demurred. On the argument of the demurrer it was agreed that at the time of the offence charged the vessel was in river Garonne, lying close and fastened to a wharf built along the bank of the river, which runs past the city, and the wharf in question, as well as all the wharves being built along the river bank.

It was contended by the defendant's counsel: "That the river being in a foreign country the vessel was not on waters within the admiralty and maritime jurisdiction of the United States. That the 5th section of the act of 1825, c. 65 [4 Stat. 115], had been omitted from the Revised Statutes." This section of the act of 1825 provided: "That any offence committed on any American vessel while lying in a place within the jurisdiction of any foreign state by any person belonging to the ship's company or passengers should be cognizable by the proper circuit court of the United States, as if the offence had been committed on board the vessel on the high seas; provided, that if by a proper court of the foreign state the offender had been acquitted or convicted, he should not be again tried by the United States." It was also contended for defendant, that this omission had repealed all law by which the United States could punish an offence committed upon an American vessel not on the righ seas or on an arm of the sea, or on waters within the territory of the United States, but on waters within the territory of a foreign state. The omission of this section of the act of 1825 from the Revised Statutes was admitted.

It was contended for the United States: "That the law of the United States followed persons on board an American vessel wherever she might be on navigable waters, and that the offence in this case was committed on waters within the admiralty and maritime jurisdiction of the United States in this: 'That the waters floating the vessel became within such jurisdiction by virtue of the jurisdiction of the United States over the vessel and her company, and to that extent.'"

Archibald Stirling, Jr., U. S. Atty., for the United States.

W. Fell Giles, Jr., for defendant.

GILES, District Judge, delivered a short oral opinion, in which he concurred with the views of the district attorney, and decided that the offence was within the 5347th section of the Revised Statutes, notwithstanding the omission from the Revised Statutes of the 5th section of the act of 1825, which section he held to be declarative and for greater certainty, and overruled the demurrer.

NOTE. In a similar case tried before me in Baltimore, in March, 1879, while holding court for Judge Giles, I expressed a doubt whether the decision in the foregoing case had not gone too far, but, inasmuch as I was holding the court for Judge Giles, I followed his ruling. [Per Hughes, District Judge.]

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

Case No. 14,575.

UNITED STATES v. BENNITZ.

[See Case No. 1,327.]

Case No. 14,576.

UNITED STATES v. BENZ.

District Court. N. D. Illinois. 1868.

INTERNAL REVENUE—INCOME TAX—FALSE RETURN.

Philip Benz was indicted for making a fraudulent return of his income for taxation. It appeared that he had subscribed to a statement that his income was less than $1,000, but, after receiving a "warning," sent at the instigation of his brother, he made a return showing an income of $3,500. *Held*, that the oath, or even subscription to the return, is not needed to constitute it a fraudulent return; but that, if the party makes a false return, intending it to be acted on by the officers of the government, knowing its contents to be untrue, an indictment will lie.

[Decided by Drummond, District Judge. Nowhere reported; opinion not now accessible. Statement of the point determined was taken from 7 Int. Rev. Rec. 25.]

Case No. 14,577.

UNITED STATES v. BENZON et al.

[2 Cliff. 512.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1865.

CUSTOMS DUTIES—WITHDRAWAL FROM WAREHOUSE—CONTRACT—REGULATIONS—NEW TARIFF ACT.

1. The plaintiffs, prior to July 14, 1862, made certain importations into the United States, and warehoused the same. Upon these importations the duties were ascertained, according to the existing act of August 5, 1861 [12 Stat. 292], and when said importations were made, the act of August 5, 1861, was in force. The importations were withdrawn from the warehouse, for consumption, after the 1st day of August, 1862, and after the act of congress of July 14, 1862 [12 Stat. 543], took effect, each withdrawal having been made more than three months from the date of importation, but less than three months from the date of the deposit in the warehouse. *Held*, that the importations were subject to the duties prescribed by the act of July 14, 1862.

[Cited in McAndrew v. Robertson, 29 Fed. 246; Re Chae Chan Ping, 36 Fed. 436.]

2. By the act of March 2, 1862, the importer could withdraw his merchandise from warehouse within three months from the time of depositing it there; but by the act of July 14th this period was changed to three months from the date of original importation. *Held*, that the act of July 14th, in its application to a case of this nature, was operative and constitutional.

3. The provisions of the act of March 2d, relating to the time in which the importations might be withdrawn from warehouse, is not to be considered a contract between the importer and the government, but a regulation of a privilege granted by the government, which privilege the government may entirely withhold. Similar changes have frequently been made upon this subject by congress.

4. The importation of goods, as between the importer and the government, is not complete as long as the goods remain in the custody of the officers of the customs; and until they are delivered to the importer, whether on shipboard or in warehouse, they are subject to any duties on imports which congress may see fit to impose, and to new legislation as well in relation to duties as to alteration in warehouse laws.

[Cited in Fabbri v. Murphy, 95 U. S. 192.]

This was an action of assumpsit brought to recover the sum of $4,992.42 and interest, alleged to be due the United States from the defendants [Edmund L. S. Benzon and others], as and for duties on certain goods imported by them into the port of Boston. The following is the substance of the agreed statement upon which the case was submitted: In the year 1862, in the months of April, May, and June, the defendants made eleven different importations of iron and steel into the port of Boston; each importation was duly entered on its arrival, and the duties being ascertained according to the existing rates of duty on such goods. Each importation was properly warehoused, and the defendants in each instance executed a bond in the form then required by law. At the time of the arrival of each importation, duties were assessed on it in accordance with the tariff acts then in force. And only the duties thus assessed were paid by the defendants on the withdrawal of the several importations from warehouse. The importations were all withdrawn from warehouse after the 1st day of August, 1862, and after the tariff act of July 14, 1862 [12 Stat. 543], went into effect; and in the case of each importation, the withdrawal was more than three months from the date of the importation, but less than three months from the deposit in warehouse. The government claimed that the goods were liable to duty under the provisions of the act of July 14, 1862. The whole amount of these duties was the sum of $4,992.42; for the recovery of which, with the interest thereon, this suit was brought. The government claimed that interest should be allowed on each of the items which make up this amount of $4,992.42, from the day when the goods were withdrawn from warehouse. If the plaintiffs were entitled to recover any or all of the sums claimed, judgment was to be entered for the amount due them, according to the opinion of the court, and for costs. If the plaintiffs were not entitled to recover, then judgment to be for the defendants.

R. H. Dana, Jr., U. S. Dist. Atty., and T. K. Lothrop, Asst. U. S. Dist. Atty.

The language of the fifth section of the act of August 5, 1861 [12 Stat. 292], is as follows: "All goods, wares, and merchandise, actually on shipboard and bound to the United States, and all goods, wares, and merchandise, on deposit in warehouses or public stores at the date of the passage of this act, shall be subject to pay such duties as provided by law before and at the time of the passage of this act: provided, that all goods deposited in public store or bonded warehouse after this act takes effect and goes into operation, if designed for consumption in the United States, must be withdrawn therefrom, or the duties thereon paid in three months after the same are deposited." This statute was in force when the several importations of goods made by the defendants, and for a part of the duties on which this suit is brought, were made. The goods, on their arrival, were deposited in warehouse under its provisions, and the form of the bonds given, was in accordance with its requirements.

At this time, the duty to which these goods were subject was fixed by this statute, and on the arrival and entry of the respective importations, the amount of this duty was ascertained, in accordance with its provisions.

While the goods were still in warehouse, congress passed the act of July 14, 1862 [supra], the twenty-first section of which provides: "That all goods, wares, and merchandise, which may be in the public stores or bonded warehouses on the 1st of August, 1862, may be withdrawn for consumption upon payment of the duties now imposed thereon by law, provided the same shall be

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

so withdrawn within three months from the date of original importation; but all goods, wares, and merchandise which shall remain in the public stores or bonded warehouse for more than three months from the date of original importation, if withdrawn for consumption, * * * shall be subject to the duties prescribed by this act." The twenty-second section of the same act repealed all inconsistent provisions of laws. These goods were all in the predicament in which, by the language of the twenty-first section of this statute, they became subject to the duties imposed by that act. They were all, as the statement of facts finds, in the public stores on the 1st of August, 1862. The defendants, therefore, under the provisions of the act of the 14th of July, might have withdrawn them for consumption, subject only to the duties assessed on them by the act of August 5, 1861, if, in making this withdrawal, they had complied with the conditions prescribed by the act of 1862, and had withdrawn them "within three months from the date of original importation." They did not make any such withdrawal of any of the importations named, but suffered every one of them to remain in warehouse, after the expiration of three months from the date of its original importation, and made no withdrawal till after that period had elapsed. Every one of them is, therefore, by the precise language of this statute, subject to the additional duties imposed by the act of the 14th of July, 1862.

The true rule for the construction of statutes is, that the words are to be read according to their natural and obvious import, without either restricting or enlarging their meaning for the purpose of limiting or extending the operation of the statute. Martin v. Hunter, 1 Wheat. [14 U. S.] 326. "Courts cannot correct what they may deem either excesses or omissions in legislation, nor relieve against the occasionally harsh operation of statutory provisions, without the danger of doing vastly more mischief than good." Waller v. Harris, 20 Wend. 557.

The act is not properly a retroactive law. It is an act imposing new and additional duties, fixing the time when they shall take effect, a future day (the act was passed on the 14th of July, and went into effect on the 1st of August following), and saving the rights of importers already acquired under previous tariffs, by permitting them to enter for consumption at the old rates of duty their goods in warehouse on the day the act took effect, and fixing the limit of time within which this privilege may be exercised, namely, three months from the date of the importation of the goods.

As a general rule, unless there is some other period fixed by the law itself, it takes effect upon its passage. But in statutes altering the duties on imported goods, as they affect business operations carried on at a distance, and when time is necessary to enable importers to act understandingly, it is usually considered wise and expedient for the legislature to fix some future day at which such statutes shall become operative. Congress has undertaken to do this in the statute of July 14, 1862. It has fixed the 1st of August, 1862, as the day when the new act shall take effect.

There is no constitutional objection to this construction of the statute of July, 1862, which subjects defendants' goods to duty. The defendants' goods being in the custody of the customs officers at the time this act was passed, and on the day when it took effect, their importation was not then complete, and they were still subject to duty. The importation of foreign goods is not complete, so long as they remain in the custody of the government, and until the final entry and delivery of the goods to the importer; until that time they are still subject to any duty on imports which congress may see fit to impose on them. Whether delivered to the importer or not, however, they were still imports and liable to duty as imports. Brown v. Maryland, 12 Wheat. [25 U. S.] 419, 438.

Even if the law under this construction did impose a double tax on the defendants' goods, it would be valid. The only constitutional limitations on the power of congress to lay taxes, necessary to be considered in this connection are: That the tax shall be for an object within the scope of the constitutional sovereignty of the United States. Gibbons v. Ogden, 9 Wheat. [22 U. S.] 198, 199. That it shall be a tax of the kind authorized by the constitution; that it shall be uniform; and, if a direct tax, that it shall be laid in the mode prescribed by the constitution. Const. U. S. art. 1, §§ 8, 9; Hylton v. U. S., 3 Dall. [3 U. S.] 173. Congress may tax and retax the same property, trade, or person without necessarily violating thereby its constitutional powers. It has done so more than once without objection. The increased duty of fifty per cent on imports assessed by the resolve of April 29, 1864, was collected on all goods entered for consumption on or after that day, even though they had been entered in bond previous to its passage. 13 Stat. 405. The tariff act of June 30, 1864, recognizes this as the true construction of this resolve. Id. 216. §§ 19, 29.

The section of the statute under consideration, and the whole statute, purport to be and are an exercise of the power of taxation, not of the right of eminent domain; and arguments drawn from that clause of the fifth article of the amendments to the constitution, which provides that private property shall not be taken for public use without just compensation, and from consideration of the limits which this clause imposes on the exercise of this right, afford no light on the decision of this question.

The duties upon all imported goods constitute a personal debt due to the United States from the importer, independently of any lien

on the goods themselves, and of any bond given for the duties; and an action will lie in favor of the government against the importer for their recovery. Meredith v. U. S., 13 Pet. [38 U. S.] 486. Assumpsit will lie for these duties as well as debt. Id.

B. R. Curtis and M. Andros, for defendants.

Congress did not intend that the said act should have a retroactive operation. If congress did so intend, then so much of said act as increases the duties on merchandise actually imported, duly entered at the custom-house, warehoused, and the duties ascertained under previous acts of congress, is unconstitutional, inoperative, and void. It should be deemed that the legislature did not intend to enact a statute which in whole or in part, is inconsistent with the great principles of justice and right, is unjust, unequal in its operation, oppressive, and at variance with the principles of the jurisprudence of enlightened nations. Such a statute, or such a construction of a statute, is condemned in the most unqualified terms by the jurists, as well of the United States as of Europe. "There is neither policy nor safety in retrospective laws, and therefore I have always had a strong aversion against them. It may in general be truly observed of retrospective laws of every description, that they neither accord with sound legislation nor the fundamental principles of the social compact." Calder v. Bull, 3 Dall. [3 U. S.] 395; Dwar. St. 540.

An ex post facto law, in the strict technical sense of the term, is usually understood to apply only to criminal cases, yet laws impairing previously acquired civil rights are equally within the reason of that prohibition, and equally to be condemned. Dash v. Van Kleeck, 7 Johns. 477. See Society for the Propagation of the Gospel v. Wheeler [Case No. 13,156]; Benson v. Mayor of New York, 10 Barb. 244; 1 Kent, Comm. 455; Ogden v. Saunders, 12 Wheat. [25 U S.] 262. The right to duties, and the amount of the same vest in the government upon the arrival of the merchandise within the limits of a port of entry. Arnold v. U. S., 9 Cranch [13 U. S.] 104; U. S. v. Vowell, 5 Cranch [9 U. S.] 368; Prince v. U. S. [Case No. 11,425]; Meredith v. U. S., 13 Pet. [38 U. S.] 494. Construed otherwise, the law is unjust and oppressive, because the amount of duties to be paid is made to depend upon a circumstance over which the defendants could have no control, and against which no prudence or sagacity could provide. It is unequal in its operation, because the amount of duties depends upon the time of importation, instead of the time of warehousing, and it imposes a greater rate of duty upon warehoused goods of one merchant which may have been imported more than three months, than upon the warehoused goods of another merchant which were liable to the same duty under the same law, but who may have imported them a few days later. The whole system of legislation upon the subject-matter is to be considered, and the different statutes considered together. It is an established rule of law that all acts in pari materia are to be taken together, as if they were one law, and they are directed to be compared in the construction of statutes, because they are considered as formed upon one system and having one object in view. Dwar. St. 569. All the revenue laws, with the single exception of the act of July 14, 1862, operate prospectively. See 2 Stat. 299; 3 Stat. 310; 9 Stat. 42; 11 Stat. 192; 12 Stat. 179.

In the construction of a statute, it is the duty of an expositor to put such a sense upon the words that no innocent person shall receive damage by a literal construction. Somerset v. Dighton, 12 Mass. 384; Murray v. Gibson, 15 How. [56 U. S.] 421. "Congress shall have power to lay and collect taxes, duties, imposts, and excises." Const. art. 1, § 8, cl. 1. Now congress, having power to lay "duties" upon merchandise imported from a foreign country, exercised it by the act of 1861, and fixed the rate of duty on bar iron and steel. These duties accrued, and the right of the government to demand them vested, immediately when the goods were brought within the limits of a port of entry, as appears by the cases of Arnold v. U. S., 9 Cranch [13 U. S.] 104; U. S. v. Vowell, 5 Cranch [9 U. S.] 368. It must, therefore, necessarily follow that the defendants had a right to demand and receive their merchandise upon the payment of these duties. The rights of the government and the rights of the importer, were, in this respect, equal. The duties having accrued, and having been paid, or secured to be paid, the merchandise ceased to be an import within the meaning of the revenue laws, and therefore ceased to be subject to any further or additional duty.

CLIFFORD, Circuit Justice. Duties were required, by the act establishing a warehousing system, passed the 6th of August, 1846, to be paid in cash. 9 Stat. 53. The same act made provision that whenever the owner, importer, or consignee made entry for warehousing, the same as therein directed, the goods so entered should be taken possession of by the collector and be deposited in the public stores, or in the other stores therein recognized and described. Both the duties and the expenses were required to be ascertained on due entry of the goods for warehousing, and they were to be secured by a bond of the owner, importer, or consignee, with surety or sureties, to the satisfaction of the collector, in double the amount of the duties; but the provision was, that the goods should be kept in these stores with due and reasonable care at the charge and risk of the owner, importer, consignee, or agent, subject at all times however, to their order upon the payment of the proper duties and expenses Provision was also

made, that in case any goods deposited as aforesaid, should remain in public store beyond one year, without payment of the duties and charges thereon, then such goods shall be appraised and sold by the collector at public auction. The effect of the provision was, that the importer might, if he saw fit, enter his goods for warehousing instead of entering them for consumption, and paying the duties immediately; but if he elected to make the former entry and take the credit, he must submit to the conditions imposed, that is, the goods must remain in the possession of the collector, and he must give the bond required by the section. None of these regulations, however, amounted to a contract between the government and the importer, and of course they were all subject to modifications or repeal. Import duties were also required to be paid or secured to be paid, before a permit was granted for landing the goods. 1 Stat. 673, § 62. Sums not exceeding $50 were required to be paid immediately, but it was at the option of the importer or importers, where the duties exceeded the sum of $50, to pay or secure the same by bond. The terms of credit under that act were not always the same, varying from three months to two years, according to the nature of the importation and the place whence exported. Credit had always been given or allowed until the act of August 30, 1842, which provided in the twelfth section "that the duties on all imported goods shall be paid in cash." 5 Stat. 562. The same requirement is re-enacted in the act establishing the warehousing system, but it is there blended with all the other provisions to which reference has been made. The warehousing act, it will be remembered, allowed the goods to remain one year in warehouse before they were required to be entered for consumption; but that provision was modified by the fourth section of the act of the 28th of March, 1854, and extended to three years from the date of the original importation. 10 Stat. 271. Important changes, however, were made in that behalf before the several importations embraced in this controversy were made, and some new provisions were enacted which it is necessary to notice. The fifth section of the act of the 5th of August, 1861, provides, that all goods actually on shipboard bound to the United States, and all goods on deposit in warehouses or public stores, at the date of the passage of the act, shall be subject to pay such duties as are provided by law, before and at the passage of this act. 12 Stat. 293.

Annexed to those enactments are several provisions, of which two are of some importance. The first proviso is, that all goods deposited in public store or bonded warehouse after this act takes effect and goes into operation, if designed for consumption in the United States, must be withdrawn therefrom, or the duties thereon paid, in three months after the same are deposited. The second proviso is, that merchandise upon which the owner may have neglected to pay duties within three months from the time of the deposit, may be withdrawn and entered for consumption, at any time within two years of the time of its deposit, upon the payment of the legal duties with the addition of twenty-five per centum thereto. The rates of duties on imports were largely increased by the first section of that act, and yet the provisions of the fifth section were made applicable as well to goods on deposit in warehouses or public stores, as to goods actually on shipboard and bound to the United States. Defendants' importations each of them were made while that act was in force, and the several importations were entered for warehousing under the provisions of the warehouse act, and the several amendments thereto, as already explained. When the goods arrived, and the several entries for warehousing were made, the goods were subject to the duties prescribed by the last-named tariff act, and the amount of the duties was ascertained in each case in accordance with the provisions. 12 Stat. 292, § 1. They were also deposited in warehouse under these provisions as amendments to the general warehousing system; and the form of the bond given in each case was in strict conformity to its requirements. The parties concede the facts to be so, and indeed they were substantially so stated in the agreed statement, and therefore they cannot be controverted. The schedule annexed to the agreed statement shows, that the first entry for warehousing was made on the 28th of April, 1862, and that the last one was made on the 3d of July following; but the agreed statement also shows, that all the goods of the several importations in question, were still in warehouse on the 14th of July of the same year, when the tariff act of that date increasing temporarily the duties on imports was passed. Additional duties were imposed by that act, under certain conditions, on goods previously imported and deposited and remaining in warehouse.

Defendants insist that the provisions of that act do not apply to any of the importations in this case; and that is one of the principal questions presented for decision. The material provisions of the act, as applicable to the present inquiry, are, that all goods which may be in the public stores or bonded warehouse on the 1st of August, 1862, may be withdrawn for consumption upon payment of the duties now imposed thereon by law. But it also provides that all goods which shall remain in the public stores or bonded warehouse for more than three months from the date of original importation, if withdrawn for consumption, and all goods on shipboard on that day, shall be subject to the duties prescribed by this act. Warehoused goods might remain, under the provisions of the prior act, three months after

the same were deposited, before they were required to be withdrawn from the warehouse or the duties thereon were required to be paid; but the twenty-first section of the act under consideration changes the period allowed for the goods to be deposited without payment of duties, from three months after the same are deposited to three months from the date of original importations. The agreed statement shows, that all the goods of the several importations of the defendants were in public store on the 1st of August, 1862, and consequently all of them were in the predicament in which, by the express language of the twenty-first section, they became subject to the duties imposed by that act. They were imported goods, entered for warehousing, and deposited in warehouse, remaining in public stores on the day fixed by the act, and neither the owner, importer, consignee, nor agents had paid the duties thereon, or withdrawn them from the warehouse, within three months from the date of original importation. Evidently they fall within every one of the conditions described in the act, and are plainly within its intent and meaning. Argument upon that subject is unnecessary, as the statement of the case affords a demonstration that the proposition of the defendants cannot be sustained.

The second proposition of the defendants is, that if congress intended that the provisions of the act should apply to a case like the present, then so much of the act as increased the duties on the goods is unconstitutional, inoperative, and void. The views of the defendants are, that the provisions in the act of congress under which these importations were made, giving them the right to withdraw their goods from warehouse within three months after the same were deposited, upon the payment of the duties specified in the act, was in the nature of a contract; that the government having allowed the merchant to import goods and to warehouse them, upon the condition that he would withdraw them within a certain time, and pay a certain rate of duty, and the amount of the duties having been ascertained by the proper officers of the customs, and the defendants having given bonds for that amount as required by law, their right to have the possession of the goods became valid upon complying with the conditions of the bond, and that congress had no power to pass any act to divest them of that privilege. Congress has the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare; and it has not generally been supposed that the power conferred, if the taxes are uniform throughout the United States, has any other limitation than the ability of the tax-payers, provided the power be exercised in a proper manner and for the legitimate purposes recognized in the constitution. Using the language of the constitution, "to lay" one tax implies no contract that another shall not be laid within the same year or within a shorter period. Congress may increase the tariff and increase the duties on imports at the commencement of its session, and if the public exigency requires it, they may do the same thing by still further increase in the rates at the close of their session. State legislatures, also, and municipal corporations, may raise taxes in such sums and at such times as in the judgment of the members the interests of those they represent may require; and the former may change the system of taxation as often as they see fit, unless it is otherwise provided in the state constitution. Events beyond control have made it necessary within a few years that taxes should follow taxes in rapid succession, but it cannot be admitted that they are any the less obligatory because the exactions are more frequent, and at far higher rates than in former years. The precise objection to the law in this case, however, is not only that the rates of duty are increased, but also that a change is made by the last act in the conditions under which the goods were deposited in warehouse. When deposited, the requirements of law were, that they must be withdrawn therefrom or the duties thereon paid in three months after the same were deposited; and the complaint is, that the new act which imposes the increased duty repeals or modifies that clause, and provides in effect that the withdrawal of the goods or the payment of the duties must be made within three months from the date of original importation.

Assuming that the particular provision is a contract, then perhaps the objection taken to the modification would be entitled to weight; but if it is nothing more than a regulation of a privilege which congress may withhold entirely, it is obvious that the complaint is without foundation. The exact language of the provision is, that all goods which may be in the public stores or bonded warehouse, on the day mentioned, may be withdrawn for consumption upon payment of the duties now imposed thereon by law, provided the same shall be so withdrawn within three months from the date of the original importation. The change complained of is, that the period allowed for the withdrawal is limited to three months from the date of original importation, instead of three months from the time the goods were deposited. Such changes, however, have frequently been made in the different provisions upon the subject; and unless it be assumed that warehousing imported goods is a right, and not merely a privilege which may be granted or withheld, it is difficult to see on what ground the importer has any right to complain. One of the conditions of the bonds given was, that the importer would, on or before the expiration of three months, to be computed from the time when the goods were first deposited in public store or bonded

warehouse, well and truly pay the amount of the duties as ascertained, to the collector of the port. The alternative condition was, that he should, in the mode prescribed by law, on or before the expiration of three months, withdraw the goods from the bonded store or public warehouse. Neither of these conditions affords any evidence that the government engaged that congress would not revise the tariff laws, or would not increase or diminish the duties, nor that congress would not make any changes in the warehousing system which the public interest might require. The ground of complaint is not that the importer has been required to pay the duties specified in the bonds earlier than he agreed to do, nor that he has been compelled to withdraw them before the time therein stipulated, but that congress has increased the rates of duties upon imports, and made the new provision applicable to their goods previously deposited in warehouse.

The theory of the defendants is, that the importation in each case was complete, and that the proceedings in making the entry for warehousing, deposit of the goods, and the giving of the bond, amount to a contract that the duties upon the goods so remaining in the possession of the collector should not be increased, and that none of the provisions of the warehouse laws should be so changed as to affect unfavorably their interests as owners of the goods. Neither of those propositions, however, can be sustained. The better opinion is, that the importation of foreign goods is not complete, as between the importer and the government, so long as the goods remain in the custody of the officers of the customs, and that until they are delivered to the importer, whether on shipboard or in warehouse, they are subject to any duties on imports which congress may see fit to impose. The practice of the government shows that goods in warehouse or on shipboard have always been regarded as subject to new legislation, both in respect to duties and in respect to alteration in the warehouse laws.

The privilege of warehousing imported goods in certain cases was granted at a very early period in the history of the country. 1 Stat. 673. Option was given to the importers of teas, under the sixty-second section of the act of the 2d of March, 1799, either to secure the duties thereon, as in case of other importations, or to give bond to the collector of the district where the teas were landed, in double the amount, with condition for the payment of the duties in two years from the date of the bond. Whenever the importer elected to give the bond, the requirement was, that the goods were to be deposited, at the expense of the importers, in one or more storehouses, to be agreed upon between the importer and the inspector of the revenue. Two locks were required to be affixed to each storehouse, and the key of one was to be kept by the importer, and the key of the other by the government officer. Regulations to the same effect were enacted in the first section of the act of the 20th of April, 1818, in respect to the importation of wines and distilled spirits. 3 Stat. 469. The express condition was, if the importer elected to give the bond, that the goods should be deposited in such public or other storehouses as should be agreed upon between the importer and the surveyor, and the goods, as in the case of the importation of teas, were to be kept under the joint locks of the inspector and the importer. Duties under that act were to be paid in twelve calendar months from the date of the bond, and the collector was required to accept the bond without surety. Wool, or the manufactures of wool, or manufactures of which wool was a component part, might, under the sixth section of the act of July 14, 1832, be placed in the public stores under bond, at the risk of the importer, subject to the payment of the customary storage and charges, and to the payment of interest at the rate of six per centum per annum while so stored. Payment of the duties on the articles so stored was required to be made, one half in three and one half in six months from the date of importation. The requirement in the twelfth section of the act of the 30th of August, 1842, was, that the duties on all imported goods after the act went into operation should be paid in cash; and in case of failure to pay the duties on completion of the entry, it was provided that the goods should be taken possession of by the collector and be deposited in the public stores, there to be kept, with due and reasonable care, at the charge and risk of the owner, importer, consignee, or agent. Such goods might remain in public store sixty days; but if they remained beyond that period, without the payment of the duties, they were required to be appraised and sold by the collector. 5 Stat. 562.

Throughout these provisions the plain inference is, that congress did not regard the importation as complete while the goods remained in the custody of the proper officers of the customs. Possession of the goods in every such case is retained by the government: and there can be no doubt that such goods are properly the subject of new legislation, both in respect to the duties on imports and in respect to the warehousing system. Repeated instances may be found where congress has so legislated in addition to those already mentioned, and I am not aware that the power has ever before been called in question. The substantial effect of the new act was, that all imported goods, not then entered for consumption, whether in the foreign port or on shipboard, or in the public warehouses, were placed in the same category, and were subjected to the increased duties imposed by the act. The rights of the importer were saved by allowing him to withdraw his goods previously deposited, by paying the duties to which they were sub-

ject under the tariff acts in force when they were deposited, and at the time of the passage of the new act, provided they elected to make the withdrawal or pay the duties within the period therein specified. But they elected not to do so, and suffered the goods to remain in warehouse or in the public stores, and consequently the goods are subject to the increased duty.

Judgment for plaintiffs, according to the opinion of the court, and for costs.

Case No. 14,578.

UNITED STATES v. BERNAL.

[1 Cal. Law J. 196.]

District Court, N. D. California. Dec. 15, 1862.

MEXICAN LAND GRANT—CONSTRUCTION—DESCRIPTION AND QUANTITY—BOUNDARIES.

[1. In 1834 an invalid soldier petitioned the governor for a tract of land called Santa Teresa, of which he had long had possession. The tract contained about two square leagues, and, after an examination into the qualifications of the petitioner, the governor made a decree of concession, describing the tract by its name, and, in a general way, by its boundaries, and referring the concession to the departmental assembly. Pending these proceedings a contest arose between the petitioner and one who was applying for an adjoining rancho, concerning a small piece of land, which the former contended was within the limits of Santa Teresa. This controversy having been referred to the departmental assembly, also, a decision was rendered in favor of the other claimant. A grant was then made to the petitioner of the rancho of Santa Teresa, according to boundaries named, but excepting therefrom the portion adjudged to the other claimant; and the grant stated the quantity as "one square league, —a little more or less." *Held*, that the evident intent was to except from the grant only so much of the tract as was adjudged to the other claimant; and this intent should control, although the rancho would still contain much more than "one square league."]

[2. The rule of construction which excludes from a conveyance an object named as a boundary is of very uncertain application, as to Mexican grants, where objects are frequently mentioned rather as landmarks to identify the tract, than as boundaries to which it is to extend.]

[This was a claim by Agustin Bernal for Santa Teresa, one square league in Santa Clara county. Granted July 11, 1834, by José Figueroa to Joaquin Bernal. Claim filed January 3, 1853. Confirmed by the commission September 5, 1854, and by the district court August 11, 1856. Case No. 14,583.]

HOFFMAN, District Judge. An opinion having been [filed] in this cause [Case No. 14,580], in which the various questions relative to the surveys and location of the above rancho were discussed and decided, a motion was made by the claimants for a rehearing and modification of so much of it as required the line across the valley to be run direct from the tree near the Lagunas hill, marked No. 3, to that on the Pueblo hills, marked No. 5. This motion having been granted, the counsel for certain parties, intervening for their interests, have filed a brief in which not only the modification proposed is resisted, but the correctness of those parts of the opinion which were in favor of the claimants is discussed, and the whole subject reargued on its merits. The decree of the board which was in the same terms as that of this court, adopted the boundaries as described in the record of the judicial possession of the rancho. The description, however, of some of the lines, is derived in part from the testimony of witnesses, the principal of whom are the alcalde who gave the possession, and the assisting witnesses. Of these lines, the most important are the third and fourth. The decree directs that the third line shall be run westerly with "the meanders of Coyote creek to a point at or near the base of a hill known by the name of Las Lagunas, where a live oak tree was marked as a corner; thence southerly, crossing the road to Monterey by an oak tree, and, through a dry tulare, to a tree on the top of a mountain, marked as a corner," etc. In the record of the judicial possession it is not stated that a tree was marked at the end of the third line. The line is described as run "hasta otra vesar una loma." And the exterior line is run "from that place crossing the road to Monterey to a tulare seca, and an oak grove, until it reached the crest of the Sierra." The call in the decree for a marked tree was, therefore, derived from the testimony produced to the board, of the alcalde and assisting witnesses, by all of whom the tree was identified. That the decree referred to the one spoken of by them, is evident from the fact that no other tree at the base of the Las Lagunas had then been mentioned. And Hernandez expressly states that the line was run along the creek until the hill was passed, and the tree marked, situated about 500 varas beyond the hill. The effort now made to substitute the tree at the point marked "F" on Healey's map for that marked No. 3, is not only inconsistent with the testimony of the witnesses and the language of the act of possession (which states that the hill was passed or crossed), but also with the plain intent of the decree of the board by whom the tree at No 3 was adopted. At the time the opinion on objections to the survey was delivered, it was supposed to be agreed by the claimants that the line from No. 3 should be run direct to No. 5, crossing, if necessary, any portion of the Lagunas hill that intervened. But it was observed that, by the concurrent testimony of all the witnesses, as well as the intrinsic probabilities of the case, it appeared that the line from No. 3 was run to a tree in the plain, passing a tulare seca and an oak grove, and thence to the hills. The claimant now asks that this line may be so located.

The decree of the board describes the western boundary as extending to tree No. 3, "southerly, crossing the road from Monterey, by an oak tree, and through a tulare

seca to a tree on the top of a mountain." This description is evidently taken from the testimony of the witnesses, who all state that, from the tree near the Lagunas (No. 3) they ran to a tree situated to the eastward of the hill of San Juan Bautista, thence to a tulare seca, and thence to a tree on the mountain. If, then, the tree, near the San Juan Bautista, can be identified, it would seem that, in strict conformity with the decree of the board, the line should be run to it, and thence by the tulare seca to the mountain. All the witnesses concur in designating this tree as situated on the plain at no great distance from the hill referred to. It is marked on Healey's map as No. 4. It is described by all of them as established as a boundary mark between the rancho of the claimant and that of Narvaez, his neighbor, on the west, and it was pointed out by them to the surveyors.

It is objected that the record of possession shows that but one line was drawn from tree No. 3 to the tree on the mountain. The language of the record is "from this place crossing the road to Monterey, to a tulare seca, an oak grove, until the crest of the mountain is reached, direction to the south, turning towards the north." It is plain from this description that the line, whether straight or composed of two lines forming an angle with each other, must have been run to the tulare seca, the roblar, and thence to the crest of the mountain. It is not stated that it was a "linea recta," and certainly a straight line to the tree on the mountain, which would fail to reach the tulare seca and the roblar, would not be run in compliance with the description in the record. The alcalde seems to have supposed that, to obtain a tract one square league in extent, it was only necessary to make the exterior lines of such a length as would make their sum amount to 20,000 varas, without regard to the figure of the tract. Under this idea he may well have treated the lines run across the plain, though in fact two, as only one, and contented himself with giving the supposed sum of their lengths; and this supposition is slightly corroborated by the obscure mention of the direction—"south turning to the north,"—indicating, perhaps, some change in the direction, such as would be produced by a deflection in the course of the line after reaching the oak tree. I find, therefore, no incompatibility between the terms of the judicial record and the testimony—at least, none sufficient to justify me in rejecting this positive and concurrent evidence of the alcalde and all the witnesses, which was manifestly adopted by the board as the basis of its decree.

It is objected that the juridical possession includes a much larger quantity of land than that granted,—"one league, more or less." It appears from the expediente that, in 1834, Bernal presented his petition to Governor Figueroa, setting forth that he was an invalid soldier, seventy years of age, with a posterity of seventy-eight souls; that, five years before, he had obtained from the ayuntamiento of San José a tract of land called "Santa Teresa;" that he had taken possession of it, occupied it with 2,100 head of cattle, mares, horses, &c., planted a vineyard, and built four houses, on it, in which he and his descendants resided. He, therefore, asked for a formal title, &c. This petition was referred by the governor to the alcalde, with directions to take testimony as to the qualifications of the petitioner, the extent of the land, &c. This order was duly executed,—all the witnesses testifying to the qualifications of the petitioner, and that the extent of the land was about two square leagues. On the 10th June, 1834, the governor made a decree of concession, declaring Bernal owner of the tract "known as Santa Teresa, bounded by the rancho of Laguna Seca, the hills of San Juan, and the lateral hills," and referring the concession to the departmental assembly. Pending these proceedings a contest arose between Bernal and one Alvirez, who was applying for a grant of the adjoining rancho of Laguna Seca, concerning a small piece of land which the former contended was within the limits of Santa Teresa, but which had been improved and occupied by the latter. This controversy, together with the respective decrees of concession, was referred to the departmental assembly, who decided in favor of Alvirez, on the ground of his prior possession. They, therefore, approved the grant to him, including the disputed tract, and, at the same time, approved the grant to Bernal, excluding the same piece of land. In the grant to Bernal the land is described as that known by the name of Santa Teresa, bounded by the rancho of Laguna Seca and that of Narvaez, by the Coyote creek and the hills of Lagunas and San Juan, with the exception of the portion adjudicated, as above stated, to Alvirez. The fourth condition states the quantity as "one square league—a little more or less."

It is evident, from these proceedings that the rancho of Santa Teresa was, at the time of the petition, of known and determinate limits. The long services, the great age, the numerous posterity, and extensive occupation, of Bernal, afforded abundant reasons to the governor for granting him the whole tract up to the hill of San Juan, understood to be two leagues in extent. When, however, the piece adjudicated to Alvirez was excepted out of it, the quantity was necessarily reduced; and it was, therefore, stated as of the extent of "one square league—a little more or less;" the dimensions of the portion excepted being, probably, unknown. But there is no reason to suppose the governor meant to deprive Bernal of any other portion of the land than that adjudicated to Alvirez, or to restrict, in any other direction, the boundaries already established by his decree of concession. Before proceeding to give the possession, the

alcalde, as usual, examined witnesses as to the boundaries of the land. They all declare that they know the tract, that it has been in the possession of Bernal, and they all, with one exception, mention the hill of San Juan Bautista as one of the landmarks. The tree marked No. 4 is at some distance to the east of the hill of San Juan Bautista. It appears, therefore, that in establishing this boundary the alcalde did not include all the land within the exterior boundary mentioned in the decree of concession, the title, and the testimony of the witnesses. Whatever, therefore, might, in other cases be the force of an objection to a judicial survey which largely exceeded the quantity mentioned in the grant, it can possess but little in this case. For the judicial officer has evidently carried into effect the intention of the governor, to give to Bernal the well-known tract of Santa Teresa, of which he had long been in possession, and which was supposed to be two leagues in extent, less the quantity appropriated to Alvirez.

It is further objected that the judicial survey includes the hill of Las Lagunas, mentioned as a boundary. But the rule of construction, which in our conveyances excludes the object named as a boundary, is of very uncertain application to Mexican grants. For it frequently happens that a cerro, or a loma, with which a rancho is said to be "colindante," is evidently intended to be included in the grant. Such objects are mentioned rather as landmarks to identify the tract, than as boundaries to which it is to extend, but which are not to be included. There is nothing, therefore, in the fact that the Lagunas hill was included in the settled monument, to justify us in disregarding the return and official determination of boundaries and delivery of possession of the land made by a competent officer, with all the forms required by the law, and contemplated in the grant, a proceeding which, under the former government, was accepted as finally and forever determining the limits of the lands conceded to its citizens. My opinion, therefore, is that the survey should be made as heretofore directed, except that the western boundary should be run from the tree No. 3, identified by the witnesses, to the oak tree mentioned by them (No. 4), and thence by the tulare seca to tree No. 5, on the crest of the mountain.

Case No. 14,579.

UNITED STATES v. BERNAL.

[Hoff. Dec. 47.]

District Court, N. D. California. Nov. 29, 1861.

MEXICAN LAND GRANTS—PROCEEDINGS FOR CONFIRMATION—EVIDENCE.

[Claim rejected, where the only evidence of the grant rested in parol, and no title papers were produced by the claimant, no trace of the grant was found in the archives, and it did not appear that its existence was known or suspected by the nearest neighbors of the alleged grantee, or that he had been in open and notorious possession of the tract, or that there was within a reasonable time after the grant any judicial survey of the land and possession taken under it.]

[This was a claim by Barcelia Bernal for a tract of land one league square, in Santa Clara county. Rejected by the board.]

HOFFMAN, District Judge. The claim in this case is for a tract of land of the extent of about one square league, alleged to have been granted to the deceased husband of the claimant, as an augmentation of a tract previously granted. No title paper is produced by the party interested, nor do the archives contain any trace whatever of the pretended grant. It is alleged in the petition to the board that Juan Martin, some time in 1845 or 1846, made an application to Manuel Castro, prefect of the district, for the tract in question, accompanying the petition with a map; that he was subsequently informed by Castro that the grant had been made, but that he had been unable to procure it from Castro, not having seen him until that day, viz. March 2, 1853; that petitioner further stated that Castro had informed her attorney that he had the title in his possession, in the city of Monterey, and from whence it should be brought with all possible dispatch. In the deposition of Manuel Castro, taken nearly two years afterwards, the theory of the petition that the grant was in Monterey appears to have been abandoned. Castro testifies that Juan Martin presented a petition to him for the land in question, accompanied by a map; that he referred it for information to the alcalde, and the latter having reported favorably, the expediente was forwarded to the governor. About a week afterward, it was returned, with a marginal order for concession, and a direction that the land should be measured, after which the expediente was to be sent back to the governor, that the title might issue. About this time the war broke out, and the proceedings were suspended. He further states that he retained the expediente in his possession among his papers until 1851 or 1852, when he brought it to this city to be delivered to the parties interested. Being unable to find any one to receive it, he took it with him to Lower California and left it with his private papers in his house, where it was subsequently destroyed, as he has learnt, by men engaged on Walker's expedition. It is evident that when Castro informed the claimant's attorney, in 1853, that the grant was in Monterey, the theory that it had been taken to California two years before had not been thought of. But it is unnecessary to comment on these minor but not unimportant discrepancies. It is sufficient to say that the only proof offered of the existence of the grant is the parol testimony of Manuel Castro, Vicente P. Gomes, and Antonio Chaves. The alleged grant does not appear to have been known, or its existence suspected, by the nearest neighbors of the grantee, until a comparatively recent period,

nor is any open and notorious possession of the tract proved to have been taken. It is not improbable that a petition was presented by Martin to the alcalde for an augmento of the 1,000 varas already granted to his wife. This augmento was to be taken out of the sobrantes, or surplus lands not included in the ranchos of his neighbors. It is not unlikely that reports were made that the land might be granted, provided it was not embraced within any of the adjoining ranchos; and it is possible that A. M. Pico, by Castro's direction, pointed out to Martin what land was vacant. But I think it clear that no concession or grant was made, nor the proceeding prosecuted further than an order for a measurement of the land, which was now effected. At all events, the proofs offered by the claimant are wholly insufficient as well as unreliable. Under the recent decision of the supreme court in U. S. v. Castro, 24 How. [65 U. S.] 350, they would even seem to be inadmissible. The existence of the grant has not been shown to the satisfaction of the court, nor is it even alleged to have been recorded in the proper office. It has not been shown that the papers in the public office, or some of them, have been lost or destroyed. Nor, thirdly, has it been shown that, within a reasonable time after the grant was made, there was a judicial survey of the land and actual possession taken of it. There requirements, the supreme court declare, must in all cases be complied with, even where a grant is produced from the claimant's own custody and duly proved. A fortiori, they cannot be dispensed with in a case like the present, where no grant or title paper whatever is produced, and the archives contain no trace of its ever having existed. The board rejected the claim, and I have not the slightest doubt of the correctness of their decision.

Case No. 14,580.

UNITED STATES v. BERNAL.

[Hoff. Dec. 56.]

District Court, N. D. California. Feb. 28, 1862.

MEXICAN LAND GRANT—OBJECTIONS TO SURVEY.

In this case [of the United States against Agustin Bernal] the survey was rejected. The rancho, called "Santa Teresa," lies in Santa Clara county, between San Jose and the Almaden mine, and the amount of land is about a league and a half. The objection to the survey was made by the claimants.

HOFFMAN, District Judge. In the decree of confirmation in this case the land confirmed is described as follows: Beginning at a point a short distance south of the solar or house lot of said rancho, and near a spring, and running thence in an easterly direction to a pile of stones in the portazuelo, or pass of the laguna, being a point on the boundary of a tract of land known by the name of the "Laguna Seca"; thence in a northerly direction, and with the line of the last mentioned rancho, until it intersects the Coyote creek; thence westerly, with the meanders of the Coyote creek to a point at or near the base of a hill known by the name of "Las Lagrimas," where a live oak tree was marked as a corner; thence southerly, crossing the road "from Monterey by an oak tree, and through a dry tulare, to a tree on the top of a mountain, marked as a corner; thence easterly, along the range of hills on the south side of the tract, to the point of beginning,—containing one square league of land, more or less, according to the terms of the grant, and excluding a small portion of land which was occupied by and adjudged to belong to Juan Alvirez, the owner of the adjoining rancho,—reference for a more particular description to be had to the original grant, and to the testimonial of judicial admeasurement and possession, and to the traced copy of the map contained in the expediente, all of which are on file in this case." This decree, which was literally copied from the decision of the board, was evidently designed to confirm to the claimant the land whereof he had received formal judicial possession, as shown by the record of that proceeding.

In the official survey the terms of the decree, as well as the description of the measurement given in the act of possession, seem to have been entirely disregarded. That survey must, therefore, be set aside. But questions of some difficulty will still arise as to the manner in which the location should be made, and to these questions the arguments of counsel were addressed. The location of the line first mentioned in the decree and in the act of possession, viz. that from the solar to the portazuelo, is not disputed. The description of the second line, as given in the decree, seems to differ from that contained in the act of possession. In the former it is described as running from the portazuelo, in a northerly direction, until it intersects the Coyote creek; while the latter describes it as having been run from the portazuelo to a "desague," a distance of eight cordels of fifty varas each, where some trees were marked as a boundary. In official survey this line is continued across the northern branch of the Coyote to a tree situated at or near its bank. This tree is identified by several witnesses as the one actually marked at the time of giving judicial possession, and neither that fact nor the correctness of the location is disputed. But it is nevertheless evident that the line so located does not answer the calls either of the decree or of the act of possession; for, by the first it should terminate at, and not cross over, the creek, while, by the last, it should run only 400 varas to a "desague." The mention of distance in any record of judicial possession is usually of little importance, in view of the loose and inaccurate manner in which measurements were made under the former government; and the "de-

sague" referred to might possibly have been supposed to refer to one of the branches or outlets of the Coyote creek. But if the line be extended to that creek as mentioned in the decree, or across both branches to the tree on its northern bank, as has been done in the official survey, its length will exceed 1,500 varas,—making a difference between the length specified in the act of possession and that of the line as located of more than 900 varas,—a greater difference than, with every allowance for probable errors in measurement, we can suppose to have occurred. That the "desague" referred to was not a branch of the Coyote, would seem clear from the diseños,—as well that which accompanied the original petition as that attached to the record of judicial measurement. In both a "desague" is represented at a short distance from the portazuelo, and constituting the outlet of the laguna, considerably to the south of the Coyote creek.

If to these considerations we add the fact that neither in the preliminary reconnoissance, or "vista de ojos," nor in the record of possession, is any mention made of the Coyote creek as a boundary, which, as presenting the most clearly defined and unmistakable line, would, if so intended, have hardly been neglected, we will find it difficult to reconcile the location of the second line, as made in the official survey, with its description in the act of possession. It is also to be considered that if the second line be made to terminate at the "desague," at the distance from the portazuelo of about 400 varas, the land of Alvirez, which was expressly excepted out of the grant, is not included; whereas, if that line be extended to the Coyote, as mentioned in the decree, or to the tree on its northern bank, as has been done in the official survey, the land of Alvirez is included within the limits of the judicial measurement. It is true that in the official survey a wedge-like piece of land is enclosed within red lines, and excluded from the tract surveyed, but that tract is, nevertheless, included within the boundaries, as run by the judicial officer, if the line run by him be correctly located. And we must suppose that the magistrate, though well aware that the land of Alvirez was not included in the grant, nevertheless made a measurement and established boundaries, including that land and gave formal possession to Bernal, without anywhere mentioning, in the act of possession, that out of the tract was to be excepted the land of Alvirez. But, as before stated, the decree of this court, which has become final, established the Coyote creek as the northern boundary. No objection is taken on either side to the location of the second line, as fixed by the surveyor, and the witnesses, who are ancient inhabitants of the county, seem to concur in identifying the tree on the northern bank of the Coyote as that actually marked and ever since recognized as the northeastern boundary of the tract. As all parties seem thus to have acquiesced in the location of the second line, it is not the business of the court now to disturb it.

The real controversy has arisen as to the location of the northwestern corner, or the termination of the third line. The decree describes this line as running from the termination of the second line "westerly with the meanders of the Coyote creek to a point at or near the base of a hill known by the name of 'Las Lagrimas,' where a live oak tree was marked as a corner." In the act of possession it is described as running from the trees marked as the termination of the second line "to the west until a loma called 'De Las Lagrimas' was crossed or passed by, ('hasta a traversa una loma,' etc.,) a distance of 97 cordels, and from this place crossing the road to Monterey," etc. Antonio M. Pico, the alcalde who gave the possession; José Noirega, an assisting witness; and Antonio Suñol, who was present at the proceeding, have all been examined in this court as witnesses. Pico identified the oak tree on the northern side of the Coyote, and marked "No. 3" on the map appended to his deposition, as the northwest corner of the tract of which he gave judicial possession. José Noriega testifies that the boundary line was run by the banks of the Coyote to an oak tree on the northerly side of that stream, and that he pointed out this tree to Mr. Healey, the surveyor. It is the same as that identified by Pico. Antonio Suñol's testimony, in some particulars, differs from that of the other witnesses, for he states that the second line was run across the Coyote to the cuchilla of the opposite mountains, to a large rock, which was adopted as a land-mark. But in this, it seems to be conceded, the witness is mistaken. His statement is inconsistent with the record of possession, which, as we have seen, does not even mention that the Coyote was reached; and by the decree that creek is fixed as the northern boundary. He has probably confounded the preliminary reconnoissance, or vista de ojos, in which the exterior limits of the tract were pointed out to the magistrate, with the subsequent measurement and establishment of boundaries, which determined the limits of the rancho. But Suñol, though he describes the northern line as run along the cuchilla of the hills, and not up the Coyote, fixes its termination at the same point as that testified to by the other witnesses, viz. the tree marked "No. 3."

But it is urged that the decree requires this line to terminate "at a point or near the base of a hill called Loma de Las Lagrimas, where a tree was marked." And that it should therefore stop at the eastern or nearest base of that hill at or near the point "T," where a witness testifies a marked tree is to be found. But it is to be observed that the decree does not call for a tree at the eastern base of the hill, nor does the act of possession state that any tree was marked at the termination of the line. The call for a

tree in the decree was therefore founded on the testimony of the alcalde and assisting witnesses, taken before the board. Fernandez, an assisting witness, whose deposition is found in the transcripts, states that "they continued along the banks of the Coyote, until reaching the hill of Las Lagrimas, and at about four hundred varas beyond the hill a live oak was marked." It is plain that the board, in calling for the oak tree at or near the base of the hill of Las Lagrimas, must have intended the tree which, by the testimony before them, was fixed as a boundary, and which was identified as having been marked at the time. But the tree at the eastern base of the loma does not appear to satisfy the description of the line given in the act of judicial measurement. The record describes the line as having been run "hasta a traversa una loma," etc., until a loma (Las Lagrimas) was crossed or passed by. But this description would not apply if the line was run only until the loma was reached—that is, if it stopped at its eastern or nearest base. It is said that if the line be run to the tree marked "No. 3," as contended for by the claimants, and thence south to the tree on the top of the mountain, it will necessarily cross the western portion of the Loma de Las Lagrimas; whereas the record describes the line as crossing only "the road to Monterey by an oak grove, and dry tulare marsh," while all mention of crossing the hill is omitted. But it is I think evident, from the concurrent testimony of all the witnesses that the line from tree No. 3 was not run in a southerly, but in a southwesterly, direction, towards a tree in the plain. In that case it would not have passed over but by the westerly base of the loma. The language of the act of possession is not inconsistent with this supposition, for it describes the line as run "from that place (viz., the point reached after passing the loma, already shown to be tree No. 3,) crossing the road of Monterey to a tulare seca—an oak grove—so as to reach to the crest of the mountain direction to the south verging to the north." The direction by compass here given is unintelligible; but it does not necessarily follow, from the description, that a single straight line was drawn from tree No. 3 to that on the crest of the hill. On the contrary, it seems almost certain, that if tree No. 3 be in fact the termination of the second line, the third line would have been deflected towards the west, through the open land, so as to avoid crossing the hill, and a point established in about the position of the tree identified by the witnesses as the westerly limit of the land; that tree being, it will be remembered, considerably to the east of the hill of San Juan, and therefore within the exterior limits mentioned in the grant. The decree describes the line under consideration as drawn "southerly, crossing the road to Monterey by an oak tree, and through a dry tulare, to a tree on the top of the mountain." If this oak and dry tulare can be identified, it would seem that the line ought to deflect so as to run by the one, and through the other, notwithstanding that its course might not in such case be due south. I do not, however, understand it to be contended, on the part of the claimants, that the line should be so drawn. They are content that the line should run direct from tree No. 3 to the tree on the top of the hill, marked "No. 5" on the map referred to.

On the whole, my opinion is, that the survey should be made by running a line from the solar of Bernal to the portazuelo, thence to the point marked "No. 1," on Exhibit No. 1, A. M. P., thence with the meanders of Coyote creek to tree No. 3, thence in a straight line to tree marked "No. 5," and thence in a straight line to the place of beginning. The true location of this last line I have not enquired into, for I understand that no dispute exists with regard to it. If in this I should be under a misapprehension, the parties may apply for a modification of this decree, or may except in this particular, to the survey made in pursuance of it.

Case No. 14,581.

UNITED STATES v. BERNAL.

[1 Hoff. Land Cas. 50.] [1]

District Court, N. D. California. June Term, 1855.

MEXICAN LAND GRANT—VALIDITY OF GRANT.

The allegations of fraud not being proved by the United States, the claim must be confirmed.

Claim for one square league of land in San Francisco county, confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

Halleck, Peachy & Billings, for appellees.

HOFFMAN, District Judge. The confirmation of this claim was resisted on the part of the United States on the ground of fraud. The court being desirous that the fullest opportunity should be afforded to the appellants and the numerous parties interested in defeating this claim to establish the charge, has devoted an entire week to its investigation. A mass of testimony has accordingly been taken, but it is for the most part so inconclusive, irrelevant and conflicting that the district attorney in his concluding argument forbore to allude to it, and based his objections to the confirmation of the claim almost exclusively upon the suspicions suggested by a comparison of the original title papers with the expediente from the archives. A brief review of the testimony may not, however, be inappropriate.

The claim of the appellees is for a tract of land, or more correctly, perhaps, for two tracts, known as the "Rincon de las Salinas" and the "Potrero Viejo," as shown by the map accompanying the expediente. In support of

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

this claim, the appellees have offered in evidence the original documento or title paper issued by the governor to the party interested; a map certified to be a copy of that which accompanies the expediente, and a certificate of the approval of the grant by the departmental assembly. The expediente was also produced by the United States, and is chiefly relied on by the district attorney as affording evidence of fraud on the part of the claimants. On examining the expediente and comparing it with the title papers produced by the claimants, it is obvious that the words "y Potrero viejo" have been interlined in two places, and in one instance in a handwriting evidently different from that in which the body of the document is written. The map, too, found in the expediente differs from that produced by the party, for the words "que pide" are not found in the former. The effect of these discrepancies will be subsequently considered. It is sufficient at present to observe that the only inference which can by possibility be drawn from them is, that although the grant for the Salinas was regularly obtained, that for the Potrero viejo has been subsequently interpolated, and the map in the possession of the claimants made to conform to the interpolated grant.

The principal witnesses produced on the part of the United States to establish the alleged fraud on the part of Doña Carmen Bernal were Mrs. Lowell and her husband, Marcus Lowell, and a Mexican woman named Teresa Moreno. Amidst the contradictions, inconsistencies and misstatements, to call them by no harsher name, of these witnesses, it is almost impossible to obtain any definite idea of the precise character of the fraud sought to be established. The district attorney, as has been stated, did not in his argument rely on their evidence as establishing any one fact in the case; nor did the counsel retained by those who have an interest in defeating this claim attempt to reconcile the contradictions in their testimony, or to deduce from it any clear or consistent theory of the case to be adopted by the court. The principal facts sought to be established by the testimony of these witnesses were as follows: That Doña Carmen Bernal had shown them her title papers; that the papers now produced are the same, but have since been altered; that, as testified by Mr. and Mrs. Lowell, the alterations were effected by a Mexican who came with a party from Monterey for the purpose; or, as testified by Teresa Moreno, that the papers were altered by a person named Barragan, residing in the house. On examining their testimony, it strikes us as surprising that Doña Carmen should have so freely exhibited her title papers to the witnesses, and have asked their opinion as to their validity, although one of them, and the only one who seems to have expressed an opinion, was an American who had never seen a Mexican grant, and who was unable to read or comprehend a word of Spanish; and it appears, at least, extremely improbable that she should so freely have avowed her intention to have the fraudulent alterations made pursuant to the suggestions which Mr. Lowell himself tells us he did not scruple to make.

In testifying to the alterations made in the papers, the witnesses professedly rely on their recollection of their contents when exhibited to them in 1851. They took no copy of them, nor did they make any comparison then of the papers shown them with any others. They merely swear, with more or less confidence, that certain portions of the papers have since been added. Mrs. Lowell, who was the first witness examined, testified that she recognized the title papers as those shown her by Doña Carmen; that the words "el terreno de la Mision que pide" were not on the map when she saw it, nor the words "Laguna," "terreno que pide" and "aguagita;" that there was no seal on the eighth page, and that the date on that page has been altered; that she had no recollection of the seal on the ninth page, and that there is more writing on it now than when she saw it; that she translated it to her husband; and that what she translated to her husband contained no grant for the Potrero. With regard to the eighth page, Mrs. Lowell at first testified that she saw no alteration or addition to it, except the certificate of J. L. Herg and the seal, which were not on that page when she saw it in the possession of Doña Carmen. That she was sure there were no other alterations. She immediately afterwards stated that she was not quite sure she had ever seen the eighth page before; that her reason for supposing it to be the same paper she saw before is, that it was "the same looking paper," and that the writing looked something like what she had seen; and she adds that she cannot say on oath that she had ever seen it before. In a subsequent part of her examination, she states that she remembers having seen the eighth page; that the word "Salinas" on that page has since been "put in," and that she is certain she saw that page before "by the reading on it." Marcus Lowell, her husband, when called to the stand, testified with a confidence and an apparent candor well calculated to give plausibility to his evidence. In some particulars his testimony conflicts with that of his wife, while on some points, and those the most important, it is completely disproved. This witness swears in the most positive manner that the only papers he ever saw were the fifth, sixth, seventh and eighth pages of the originals submitted; that he never saw the ninth page which his wife stated she translated to him; and that the eighth, on which his wife detected only a few alterations, was a perfect blank. This last statement he frequently reiterates with a positiveness which would have been impressive, if the other testimony in the case had permitted us to hesitate a moment in believing him to have been

mistaken. He also states that there was no writing whatever in the place on the map where the words "el terreno de la Mision" now are; nor were the points of the compass marked on it then as now.

On both these points the opposing testimony is conclusive. On the eighth page, which, according to Mr. Lowell, was a blank, and according to his wife there was writing, but no certificate of the county recorder, appears the certificate of that officer duly signed and dated February 19, 1850, more than a year previous to the time when the witnesses say they saw it. It is idle to allude to the absurdity of the supposition that such an endorsement would have been forged, as useless crimes are not ordinarily committed; for not only is the genuineness of the signature of the recorder fully proved, but the original records from his office are produced, and the document appears fully recorded and containing everything which Mrs. Lowell supposes has been since added. The record further shows, that at the time it was made, all the documents existed and were presented for record precisely in the state they are now offered to the court, with the exception of the map, which was not recorded; and it conclusively disproves, not only Mr. Lowell's statement, but it removes whatever doubts might have been suggested by the testimony of his wife as to additions and alterations which she swears have since been made. But independently of this and other evidence, which will hereafter be adverted to, the testimony of Mr. and Mrs. Lowell on the points under consideration is entitled to but little weight. Their whole evidence is exclusively founded on their recollection of documents seen more than four years ago. The husband was then, and is now, totally ignorant of the Spanish language, and wholly unacquainted with the forms used in Mexican grants; and the wife when called on to translate in open court one of the papers, after slow and painful attempts, only succeeded in rendering into English detached words and "disjecta membra" of sentences not sufficient to convey to herself, or any one else, a clear idea of the purport of the document. It is incredible that the recollections of such witnesses as to the contents of papers could be sufficiently accurate to justify the court in relying with confidence on their testimony.

With a view of showing by whom the alterations in the papers were made, much testimony was taken as to the visit to Doña Carmen of a party from Monterey. On this as on the other points the witneses contradict each other. Mrs. Lowell swears that the party consisted of four—three Americans, dressed in American costumes, and one Mexican, a stout man of a dark complexion; she had, however, previously stated that she did not know of what country three of them were, but one was a Mexican. She further says that they went together into a large front room, but that she did not go into it while they were there. Her husband states, with considerable minuteness, the appearance of the party: that three were Indians, and servants to the fourth, who was a Mexican mounted on a black horse; that he went into the house while his servants remained in the kitchen; and that he wore a broadcloth mantle trimmed with silver. To any one acquainted with the difference in appearance between Americans and the Indians of the country, the existence of such a discrepancy suggests doubts which impair the credibility of all the evidence of these witnesses. But Mr. Lowell does not confine himself to the mere statement, derived, as he says, from Doña Carmen, that the Monterey party had "fixed" the papers. He testifies that while the Mexican gentleman was at breakfast, having occasion to enter the room of Doña Carmen, he there saw on the table some Spanish papers, and near them a kind of seal corresponding in size with the impression on page eight of the original document; that he examined it for about half a minute, and that he is sure it would make just such an impression as that on the paper. On his cross examination he asserts with characteristic confidence that the word on the seal was Monterey (written Monterea, or Monte de rea). There was also a word before Monterea. "He is very certain of it; he cannot be mistaken." It will be remembered that he and his wife had previously sworn that when they saw page eight, there was no seal upon it. The object of Mr. Lowell's testimony is therefore apparent.

Unfortunately, however, for Mr. Lowell's statement, it is shown conclusively by the testimony of Francisco Arce, who was a clerk in the office of the secretary of the former government, and sometimes secretary ad interim, and by that of Governor Alvarado, who has held almost every office of dignity in California under the Mexican rule, that the impression on the eighth page is that of the private seal of the secretary of dispatch; that they have frequently seen it used, and examined it, and that it has no letters whatever upon it. A close inspection of the impression on the paper confirms this statement, and its accuracy is conclusively established by the exhibition of a similar but less blotted impression of the same seal on another document from the archives, which shows beyond a doubt that the device on the stamp had no letters upon it. The account given by the Mexican woman Teresa Moreno, of the person by whom the alterations were made, is different; she says that in January, 1852, she saw a Mexican who had been living in Doña Carmen's house for a year, more or less, altering them. Though she at first was unable to say who he was, she subsequently identified a person then in court, as the individual. At his own request, this person, whose name was Barragan, was placed on the stand, where he, in the most solemn and emphatic manner, denied having altered or even seen the

papers. He further stated that at the time mentioned, he was not living in Doña Carmen's house, and in this last statement he is corroborated by the testimony of another witness, Ramon De Zaldo, who knew him at the mission until after the time when, according to Teresa, the alterations were made. But from Teresa Moreno we learn who was the Mexican mentioned by Lowell and his wife as having made the alterations. She states that it was a Mr. Hartnell, a relative of Doña Carmen. Unfortunately, this gentleman is now dead, but witnesses of the greatest respectability testified to his character. He seems to have enjoyed to an extraordinary degree a reputation for integrity. He was an Englishman by birth, but long resident in this country, where he had acquired a considerable property, and the witnesses called to testify as to his character, seem at pains to express, in the strongest manner, their sense of his high reputation for probity and inflexible honesty. He is shown moreover, to have been a short stout man, of a florid or light complexion, such as is usual in Englishmen, and to have worn the ordinary dress of his countrymen or of Americans. While listening to the description of his appearance given by the witnesses, it was certainly not easy for the court to recognize in him the Mexican of dark complexion, mounted on a black horse, and clad in a broadcloth mantilla, laced with silver, described by Mr. Lowell.

One other point on which the testimony of Mrs. Lowell and her husband may be deemed material, remains to be noticed, viz. the admissions of Mrs. Bernal to them. Mrs. Lowell in her direct examination, swears that she told Mrs. Bernal she had better have the papers fixed; that there was one paper that had a seal to it which was right, but the other, which had no seal, was not right. Mrs. Bernal then said she would have them fixed; "that she had no doubt as to the Potrero, but had some doubts as to the place where she was living, the latter being called 'Doña Carmen's Rancho.'" She further states that after the visit of the party from Monterey, Mrs. Bernal told her the papers had been fixed good and sure, and that she now had the title for the place she was living on; that she had heard Mrs. Bernal speak to her (the witness') husband about the date of the papers, and say to him that she should have the date made later than it was; that he advised her to get the papers right for the place on which she then was living, as they were not right as they were, and that Mrs. Bernal replied she would get her lawyer to fix them. The change recommended, was to get the title papers so fixed as to embrace the Potrero, and the Rincon de las Salinas. Mr. Lowell testifies that Mrs. Bernal stated to him that she had no fear as to the Potrero, because she had lived on it, and done all that was required of her, but that she was doubtful as to the other part, and therefore went and lived on it. That he thereupon gave her some advice, which he declines to state, on the ground that it would criminate himself, to which Doña Carmen replied that there were parties who she understood could correct the papers. After the visit of the party from Monterey, the witness adds, Doña Carmen seemed to be in good spirits. The above embraces all the admissions of Mrs. Bernal which might seem to possess any importance. If they prove anything, they prove that Mrs. Bernal's title to the Potrero viejo was, in her own opinion, perfectly good, and that the necessity for the papers being fixed, either by her lawyer, Mr. Halleck, or by her friends from Monterey, only existed with regard to the Rincon de las Salinas, and that they were so fixed by the party from Monterey, which figures so largely in their evidence.

Whatever doubts might arise in any case as to the reliability of evidence of conversations and admissions, they present themselves in this case with unusual force. Not only do Mr. and Mrs. Lowell contradict each other on many points, but the unfortunate attempt of the former to strengthen his evidence by an account of his discovery of a seal in the bed chamber of Mrs. Bernal abundantly justifies us in receiving with distrust and suspicion every statement which he makes. That Mrs. Bernal should have announced the fact that she had procured a forgery to be committed, is incredible; and to suppose that she so freely declared her intentions to procure for that purpose the services of a gentleman so well known, and of such high character as Mr. Halleck, is absurd. If any explanation of these statements by Mrs. Bernal is needed, it is found in the testimony of Teresa Moreno. That witness states that after Mr. Hartnell left, Mrs. Bernal said she had determined to take his advice, which was to consult Mr. Halleck as to the expediency of selling, renting or otherwise disposing of the property. It was probably some such remark as this, perhaps misunderstood, certainly misrepresented, which has suggested to the fertile imaginations of the witnesses the story of the Monterey party, with all its dramatic details. But independently of the intrinsic incredibility of the testimony of these witnesses, there are some clearly established facts in the case which conclusively disprove it.

The record produced from the recorder's office, shows beyond a doubt that the original papers, as they now exist, were recorded there more than a year before the time when Mr. and Mrs. Lowell first saw them. The ingenuity of counsel has suggested no answer to this decisive fact, nor can any be given, unless we suppose that a wholesale falsification of those records has been committed by another party from Monterey, who in some unexplained way have obtained access to them, and who have since consummated their crime by forging the name of J. L. Herg, the recorder, appended to the

endorsement on the originals. With a view of strengthening their case, the original expediente from the archives was introduced by the counsel of the parties interested in defeating this claim. By a comparison of that document with the original title papers in the possession of the party, the origin of the charge of fraud in this case becomes obvious.

The petition asks for a grant of the Rincon de las Salinas alone, and not for the Potrero viejo. (This petition, it may be observed in passing, which was never included among the title papers delivered to the party, Teresa Moreno swears was shown her by Mrs. Bernal, and that it asked for the Potrero viejo.) The concession which follows the petition, declares Don Cornelio Bernal owner in full property of the place named Las Salinas, with the Potrero viejo. In this document, which was the original concession by the governor, the handwriting is similar throughout, and there is nothing to suggest any interpolation. But in the record of the proceedings of the departmental assembly, the words "y Potrero viejo" have evidently been interlined at a time and with ink different from that used in the body of the document. In the copy of the document or title paper delivered to the party, which forms part of the expediente, the words "con el Potrero viejo" have in like manner been interlined, but whether in the same handwriting as that in which the rest of the record is written, it is not easy on inspection to discover. Whether or not there is reason to believe, under the circumstances of the case, that the grant for the Potrero viejo has been fraudulently added to the original grant, will presently be considered. One fact is apparent, that the doubt exists as to the Potrero, and not as to the Salinas, and that the efforts of the witness, Mrs. Lowell, to cast a doubt on the title to the Salinas, by suggesting that those words have been added on the eighth page, however well meant, were certainly misdirected. The same witness testifies, as has been before stated, that Mrs. Bernal said she had no doubt as to the Potrero, but had some doubts as to the place she was living on, and that after the departure of the party from Monterey, the papers had been "fixed good and sure," and that she now had a title for the place she was living on. It is apparent that the inference sought to be drawn from the interlineations of the words "Potrero viejo" in the expediente, is wholly inconsistent with the theory of the case, which supposes the fraud to have been committed with regard to the Salinas; and the suspicion is suggested that the witnesses, though intending perhaps to confirm by their testimony whatever doubts might arise from the appearance of the expediente, have unfortunately mistaken the object of their attack, and have directed the fraudulent efforts of the Monterey party upon the Salinas, when the true theory of the case demanded that they should have related to the Potrero exclusively.

Discarding, then, without further comment the testimony we have been considering, we approach the examination of the point on which the district attorney exclusively relied in his argument. It has already been stated that the words "Potrero viejo" have been interlined in the expediente in two places—in the copy of the documento or title paper, and in the record of the proceedings of the departmental assembly. This circumstance, together with the facts that the original petition does not ask for the Potrero, and that the map accompanying it does not contain the words "que pide" after the words "terreno de la Mision," are relied on by the district attorney as tending to show a fraudulent alteration of the title papers. If the documents from the archives were the true and only title deeds of the claimants, this objection might well be deemed insuperable.

It will be remembered that by the regulations of 1828, it is made the duty of the governor, after taking the necessary information as to the propriety of granting the land solicited, to accede or not to the petition. When he determined to grant the prayer of the petitioner, a decree or concession was made by him declaring the appellant to be the owner in full property of the land solicited. This decree is invariably found in the expediente, and it usually commences with the words "Vista la peticion." When the approval of the assembly was obtained, a certificate of the fact was given to the interested party; but an expediente containing the report of the committee and the resolution of approval, signed by the president of the assembly, seems to have been transmitted to the governor, and retained in the archives. The concession of the governor having been definitively made, it was his duty, under the seventh article of the regulations, to issue to the party interested a "documento" or grant, which might serve as a title paper. A copy of this documento or title paper issued to the party was made, and in some instances recorded in a book kept for that purpose. This copy, found in the expediente, is usually, as in the case before us, not signed, and, as appears by the testimony of Mr. Evershed, often contains erasures and interlineations. The instrument, then, by which the title passed to the party was the "documento," delivered to him after the concession was made, and to this and to the concession which preceded it, we must look to ascertain the nature of the grant.

On referring to the expediente, we find the concession duly signed by the governor and the secretary (the latter of whom established the genuineness of his signature by his own oath in court). The land granted is mentioned as "the Salinas and the Potrero

viejo." No suggestion has been made that these words are not in the same handwriting, nor that any interpolation has been made in this instrument. The documento or title paper produced by the party, is in exact conformity with the concession, without interlineations or interpolations. The genuineness of this document is fully proved by Don Francisco Arce, who testifies not only to his own signature and that of the governor, but he also declares the whole document to be in his own handwriting. We think that from the testimony of Governor Alvarado and of Don Francisco Arce, it is clear that these papers are genuine, and there is nothing either in the evidence or in their appearance to justify a suspicion that they have in any way been altered, for we consider the circumstance that the unsigned draft or copy of the documento has been interlined as of no weight where the original is produced, and its authenticity fully established.

The effect of the interlineation in the resolutions of the departmental assembly remains to be considered. In that paper the words "y Potrero viejo," spelled "vejo," have evidently been interlined. With respect to this interlineation, Francisco Arce testifies that he thinks it in the handwriting of a person named Gonzales, who was employed in the secretary's office. The certificate of the approval of the assembly delivered to the party is without interlineation or alteration of any kind, and it refers to the Potrero viejo as well as the Salinas. The signatures of Alvarado and Jimeno to this document are conclusively proved, the former by Governor Alvarado himself. The handwriting of the body of the instrument is also proved to be that of one Estrada, a clerk in the secretary's office. But we are fortified in the conclusion with respect to the authenticity of this certificate to which we are irresistably led by the evidence, by some considerations suggested by the papers themselves.

By the terms of the resolution of the assembly, as found in the archives, that body approves the concession made by the governor, ad interim, Don Manuel Jimeno, of the tract of land called Las Salinas "y Potrero vejo," the last words being interlined. Now, the concession of Governor Jimeno is, as we have seen, for the Salinas and also the Potrero viejo. If, therefore, the assembly meant to approve the concession, as they evidently did, they must have intended to approve the grant for both pieces of land. The omission of the Potrero viejo was in all probability a clerical error, which was corrected when the terms of the concession were compared with those of the resolution of approval. On the back of this page of the expediente appears a memorandum, stating that on the 30th day of May a testimonio or certificate of the foregoing approbation was delivered to the party.

On referring to this testimonio produced by the claimants, we find it dated the 30th of May, 1840, in conformity with the memorandum, and it is signed by Alvarado, as governor, and Manuel Jimeno, secretary. Unless, then, the signature of Jimeno is forged, an idea not suggested by any one in the case, and wholly inadmissible, we must suppose that the assembly confirmed the concession for the Potrero viejo, as well as that for the Salinas, according to the tenor of the certificate, for the resolution of approval is signed by the same Jimeno as president, and is for the confirmation of a grant made by himself. If, therefore, the assembly had only approved, as contended, the Salinas concession, while that for the Potrero has since been fraudulently inserted, Jimeno, the president of the assembly, who authenticates the record by his signature, must surely have known it; and yet, within eight days after the passage of the resolution, he signs a testimonio for the approval of the concession of both tracts to be delivered to the party. But we think that the burden of accounting for the interlineation in the report of the committee cannot justly be thrown upon the claimants. They produce the certificate of the approval, duly authenticated. The genuineness of this document is not disputed, or if disputed, it is conclusively proved. That the report of the committee, with the resolution of approval attached, which is preserved in the archives, should contain interlineations is a circumstance which might very naturally happen, and yet the claimants may have no means to explain it. If the certificate of the approval given to the party interested be genuine, it must be received as the legal and conclusive evidence of the fact, unless other circumstances show that it was improperly furnished through fraud or mistake.

An attempt on the part of the opponents of this claim to show by whom the interlineations in the expediente were made should perhaps be noticed. Mr. James Thompson, a witness produced on the part of the United States, on being shown the expediente, testified that he had seen it several times in the office of the surveyor general; that he recognized one page certainly from the interlineations upon it; that he believed he had seen the same paper in the hands of Mr. De Zaldo, at the mission. He was then asked what Mr. De Zaldo had told him with respect to the paper. To this inquiry, the counsel for the respondents objected, and the objection was sustained by the court. William Corbett also testified that he had frequently met Mr. De Zaldo on the road between this city and the mission with a bundle. He was then asked what was the subject of the conversation, and what he said he had in the bundle. To this question the counsel for the respondent objected, and the objection was sustained by the court. With a view, however, of enabling the parties to prove, if possible, that Mr. De Zaldo had some knowledge of or connection with

the alterations in the expediente, that gentleman was placed upon the stand by the court. He denied, in the most emphatic manner, and with an indignation not unnatural, that he had ever had the expediente in his possession, except in the office and as keeper of the archives, and stated that it had never, to his knowledge, been out of the archives. He also denied in the most positive manner ever having stated to Mr. Thompson that he had many Mexican archives in his possession; and with reference to Mr. Corbett's testimony, he explained that he had been employed in translating many expedientes for a legal firm in this city, but that those translations were made from fac simile copies on tracing paper, made in the surveyor general's office, and that the originals were in no case taken from the archives. No questions were put to the witness as to any conversations with Mr. Thompson relative to alterations in the documents, and the attempt to prove that he had made such declarations, if ever seriously made, seemed to be abandoned.

Much time was consumed on the trial of the cause in hearing testimony of experts and others as to alterations in or additions to the map produced by the claimants. We do not deem it necessary to refer particularly to the evidence on this point. The testimony of Mr. and Mrs. Lowell with regard to other alterations has been so conclusively refuted, that we think no reliance whatever can be placed on their recollection as to what words were or were not on the map when it was exhibited to them. The testimony of the experts called to prove by inspection that the words on the map were, in their opinion, written by a different hand, or at different times, or with different ink, or with a different pen, must, we think, be regarded rather as plausible conjectures than as affording any solid basis for an absolute conclusion. On comparing, however, the map in the expediente with that produced by the party, we find that the words "que pide" do not appear in the former. But it is to be considered that the grant is for "Las Salinas and the Potrero viejo," as shown by the map which accompanies the expediente. To this latter alone, then, we look to ascertain the situation and boundaries of the granted land, and on this it is not suggesed that any alteration or addition has been made.

How the certified copy of the map in the possession of the party came to differ from that in the expediente, does not appear, but Francisco Arce testifies that all the writing on it is in the hand of Pedro Estrada, the words "que pide," as well as the rest. That those words have been fraudulently inserted, is, we think, an idea that cannot be entertained, for so long as the map in the expediente, according to which the land was granted and to which the grant refers, remained unaltered, any addition to the certified copy was wholly useless. The fact that the expediente map remains unaltered, has even a double significance, for it serves to repel the suspicion that the expediente has been tampered with. Whoever was engaged in introducing fraudulent interlineations into that instrument, would hardly have omitted to make such additions to the map as were necessary to carry out his object.

We have thus, with some care and at perhaps unnecessary length, reviewed the testimony in this case. We find no reason to conclude, perhaps none even to suspect, that any fraud has been attempted. To suppose it to have been committed, a series of forgeries and perjuries must have been committed of an extent and character without parallel. In the first place, the documento or title paper in the possession of the party, together with the certificate of the approval of the departmental assembly, with all their signatures, must have been forged. The original concession in the expediente must also have been forged, and the skillful hand which could thus have imitated Jimeno's writing, must be supposed to have made the interlineations in the resolutions of the assembly and the copy of the grant, without an attempt to make these interlineations resemble the writing of the body of the instruments. The map, perhaps from some sudden qualm of conscience, he must have wholly neglected, although the mere addition of the words "que pide" would have accomplished his object. In addition to this, if Mr. and Mrs. Lowell are to be believed, the useless crime of forging the name of the county recorder in this city must have been committed, and some means have been discovered to procure the recording at length, in the books of the recorder, of all the original papers precisely as they are now exhibited—the record purporting to have been made more than a year before the time when, according to Mr. and Mrs. Lowell, the originals, which have since been altered, were exhibited to them. A supposition involving such a series of impossible or improbable crimes, we are surely justified, under the evidence in this cause, in rejecting.

No other objections to the confirmation of this claim than those we have been considering, have been urged before this court. It is not denied that the grantee fulfilled the conditions of his grant. He appears to have resided on his land from the date of his grant until his decease, and his widow and heirs still continue to occupy it. The only objections raised by the law agent before the board were, that the land was within the ten littoral leagues, and that no juridical possession of it was given. Both of these objections this court has already considered and overruled. The claim of the respondents must therefore be affirmed.

Case No. 14,582.

UNITED STATES v. BERNAL et al.

[1 Hoff. Land Cas. 99.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT—VALIDITY OF GRANT.

No objection to this claim made by district attorney.

Claim [by Carmen Sibrian De Bernal] for a lot two hundred varas square in the county of San Francisco, confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

Halleck, Peachy & Billings, for appellees.

HOFFMAN, District Judge. The claim in this case is for a solar in the Mission of Dolores. It appears to have been granted by Governor Figueroa on the recommendation of the priest of the Mission, and in consideration of services rendered to the Mission by the claimant as mayor domo. No argument was had in the case at the hearing, nor did the district attorney suggest any objection to the validity of the grant. The claim was confirmed by the board, and we think their decision, in the absence of any showing to the contrary on the part of the government, ought to be affirmed.

Case No. 14,583.

UNITED STATES v. BERNAL.

[1 Hoff. Land Cas. 139.] [1]

District Court, N. D. California. June Term, 1856.

MEXICAN LAND GRANT—VALIDITY OF GRANT.

The validity of this claim not disputed.

Claim [by Augustin Bernal] for one league of land in Santa Clara county [the Rancho Santa Teresa], confirmed by the board, and appealed by the United States.

William Blanding, U. S. Atty.

B. W. Leigh, for appellee.

HOFFMAN, District Judge. The claim in this case was confirmed by the board, and it has been submitted to this court on appeal without argument on the part of the United States. The claim seems to be one of the most meritorious which have been presented for our consideration The petition of Joaquin Bernal bears date on the tenth of May, 1834, and states that the petitioner was an invalid soldier ninety-four years old, and with a posterity of seventy-eight souls. That he had entered into possession of the place solicited five years before, by permission of the ayuntamiento of the pueblo of San José, and that he and his family had built four adobe houses, and had continued to occupy the land with his property consisting of twenty-one hundred head of cattle, one hundred and twenty sheep, three mares and fifty tame horses, etc The governor, after the usual references, acceded to the petition, and the concession was confirmed by the departmental assembly, with a slight modification of the boundaries of the tract—the assembly having decided on the application of Juan Alvirez to except out of the land the portion claimed by the latter. In accordance with this resolution, the title was issued to Bernal on the eleventh of July, 1834. In the month of July, 1835, Bernal applied to the constitutional alcalde of San José for judicial possession of the tract granted, which was accordingly given by that officer.

The genuineness of the original title is clearly proved, as well as that of the "testimonio" or certificate delivered to the grantee by the officer giving judicial possession. To this latter instrument were prefixed the original grant and a copy of the map contained in the expediente. The latter document is also duly produced from the archives, and the genuineness of the claim is established beyond all doubt by the production of all the evidence of every kind which can be adduced in support of a grant by the former government of this country. From the year 1826 until the present time, the land has been occupied under an unquestioned title by the grantee and his numerous descendants. The only doubt suggested in this case arises from an alleged error in the boundaries, as fixed by the officers giving judicial possession. But on closely examining the proofs, there does not seem any reason to suppose such an error to have been committed. The survey on which reliance was placed as establishing that the tract of which possession was given exceeded in extent the quantity granted, appears to have been exceedingly inaccurate, for independently of the mistake of calculation apparent on the scale appended to the surveyor's map, it is also shown that the tract surveyed, and the extent of which he attempts to establish, included a considerable quantity of land not comprised within the boundaries established by the officer who gave judicial possession. On the whole case there seems no reason to suppose that the tract of which possession was given, and of which the grantee and his heirs have enjoyed the undisputed and notorious possession for more than thirty years, differs either in quantity or as to boundaries, from that described in the grant and the map to which it refers.

The opinion of the commissioners is so full and conclusive on this point, that it is not deemed necessary to discuss it further, particularly as the objection has not been urged in this court, or any attempt to impair the force of the reasoning, or correctness of the conclusion of the board.

We think, therefore, that a decree of confirmation should be entered for the land, as described in the grant, and according to the boundaries fixed in the act of judicial possession.

[See Case No. 14,578.]

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

Case No. 14,584.

UNITED STATES v. BERNARD.

[2 Wheeler, Crim. Cas. xliv.]

Circuit Court, D. New Jersey. 1819.

ROBBING MAIL—POSSESSION AND EXHIBITION OF DANGEROUS WEAPONS.

In this case of Bernard and others, indicted and found guilty of robbing the mail near New Brunswick, (Trenton, N. J. 1819, before WASHINGTON, Circuit Justice), the principle was recognized that the possession and exhibition of dangerous weapons in effecting the robbery of the mail was within the 2d clause of the 19th section of the act of congress of the 30th April, 1810 [2 Stat. 598].

Case No. 14,585.

UNITED STATES v. BERREYESA.

District Court, D. California.[1]

SPANISH GRANT—PAROL EVIDENCE—PUEBLO LANDS—POSSESSION BY PERMISSION—EFFECT—EQUITABLE CLAIMS.

[1. Oral testimony is not admissible to establish the making and contents of a Spanish grant, of the issue of which the archives contain no trace.]

[2. The ayuntamiento of a pueblo had no power to grant lands, within the limits of propios duly and formally assigned to the pueblo, so as to create a greater estate in them than a lease hold for five years.]

[3. Evidence that in 1837 an expediente was formed in the matter of an application for land in the possession of the applicant, and that the application was favorably reported on by the ayuntamiento, does not show that any grant was actually made.]

[4. Possession of lands in a pueblo, under a concession by an officer having authority only to lease for five years, accompanied by efforts on the part of the occupant to obtain a grant, was not "under claim of ownership."]

[5. The facts that one in possession of land applied for a title thereto, and that his application was approved by the governor, did not affect the character of his possession, so as to render it that of a Mexican colonist with the permission of the government.]

[6. The facts that one obtaining from the ayuntamiento a loan of certain pueblo land, with the expectation of settling on it, and obtaining a grant from the governor, occupied and cultivated it, and that his possessory rights were respected by his neighbors and some of the authorities, impose no obligation upon the United States to allow his claim to the land; the Mexican government having failed, from 1834 to its overthrow, to act favorably on his application for a grant.]

[This was a claim by Nicolas Berreyesa for the rancho called "Milpitas."]

OPINION OF THE COURT. Since the former opinion was filed, the case has been reopened for further proofs and argument, voluminous depositions have been taken, and its whole merits discussed with great ability and zeal. The claimant has not succeeded in materially changing its aspect, so far as relates to the proof of a grant to Berreyesa. A document alleged to come from the archives, and purporting to be a copy of a grant, was offered in evidence; but the proofs of its authenticity were so unsatisfactory, and its appearance was so suspicious, that it was abandoned at the hearing by the counsel for the claimants, with the expression of the hope that its introduction would not unduly prejudice the case of the claimant. A very long and elaborate deposition by Mr. Hopkins, the well-known keeper of the archives, was also taken. In this deposition, Mr. Hopkins mentions a considerable number of expedientes, of unquestionable authenticity, which were not found in the archives, but were produced from private custody. To this the counsel of the United States, while admitting the fact, replies that in each of those instances either the expediente itself, or the circumstances of the case, satisfactorily explain how it happened that the expediente was not in the archives. But the inquiry appears to me wholly immaterial. The question in this case is not what degree of suspicion should attach to an expediente from the mere fact that it is produced from private custody, but whether the court can accept oral testimony to establish the making and contents of a grant, where the archives contain no trace whatever of its having been issued. Under the decisions of the supreme court, such testimony must be rejected. The case before us is even stronger. For not only is no proof of the alleged grant found in the archives, but the grant itself, which should have been delivered to the grantee, is not produced. Berreyesa himself merely states that "he has reason to believe" the grant issued. His exertions to find it, and his disappointment at not succeeding, seem to indicate that this belief was sincere; but he does not pretend to have ever had the grant in his possession, for in that case he would have known that it issued. Still less does he attempt to prove its loss or destruction, or to give any satisfactory evidence of its contents. It is evident, therefore, that the claimant has wholly failed to establish by competent, or even morally convincing, proofs, that he ever obtained a grant for the land in question. An effort was made on the part of the United States to show that the boundaries of the land of which the claimant was in possession were vague and undefined, and that the possession itself was disputed, and not evidenced by the exercise of clear, notorious, and exclusive acts. I consider it unnecessary to review the testimony on these points. It is established, in my judgment, beyond controversy, that the tract of land upon which Berreyesa, by the permission of the ayuntamiento, established himself, had defined and recognized limits,—quite as much so as in a large majority of cases where grants were made by the former government. It is bounded on three sides by the hills and two arroyos or brooks, and, though there may be some room for discussion as to the precise location of a portion of the west-

[1] [Not previously reported. Date not given.]

ern line, the uncertainty is no greater than exists in the descriptions found in almost all the Mexican grants, or than would probably have existed in the grant for this land, had Berreyesa succeeded in obtaining one.

Before referring to the various acts relied on by the claimants as recognitions of the rights of Berreyesa, let us first ascertain what those rights were, and in what proceedings they had their origin. On the 15th of April, 1834, Berreyesa presented a petition to the constitutional alcalde of San José, in which, after setting forth his claims by reason of his numerous family, and considerable property, he solicits the place called "Milpitas," in order permanently to establish himself, and place it all in his possession ("para radicarme y poner en el toda mi finca"). On the 6th of May of the same year the ayuntamiento, by an order in the margin of Berreyesa's petition, concedes to him the place he solicits on the same terms as other concessions in the "proprios of these demarcations" (or limits of the pueblo). As to the "terms" on which this concession was made, no evidence is offered; but some light may be thrown upon the matter from the account of the proceedings of the ayuntamiento of Monterey with reference to a somewhat similar application. On the 5th of December, 1836, one Espinosa petitioned that ayuntamiento for a solar (town lot) within the "egidos" (suburbs) of the pueblo. The ayuntamiento, being in doubt whether the power to grant lay with them, or with the political chief, referred the matter to him for decision. The governor ordered the communication to be transmitted to the assessor attorney general of the territory, for his report. In his "consulta," or opinion, the assessor advises the governor that his power to grant applied to such lands, only, as did not belong to any private individuals or corporation, and that as the egidos, as well as lands belonging to the "fundo legal," are the absolute property of the ayuntamiento, it was "clear that, where such lands are in question, there should be no intervention on the part of the political chiefs." The assessor further observes that, by the laws of the Novissima Recopilacion, and by a royal resolution, which he cites, the power of the ayuntamiento over the lands referred to is limited to leasing them for five years. The political chief, in transmitting this "consulta" to the ayuntamiento, takes occasion to define with precision the meaning of the various terms applied to pueblo lands, and the rights of the municipality with regard to them. By "termino jurisdicional" "is understood, all lands comprised within the limits to which the jurisdiction of the alcalde or judge of the pueblo extends." "Termino municipal" is the land assigned to the pueblo for the use of its inhabitants, within which neither the cattle nor inhabitants of adjoining pueblos can enter either for grazing or cutting wood. The "terrenos de proprios" are lands assigned to ayuntamientos which may be leased by them for a term not exceeding five years to defray their expenses. The remaining ungranted lands, after the assignment of proprios, are at the disposal of the government; but upon lands granted within the limits of the termino municipal a censo or tax may be imposed. "Egidos" are lands immediate to, and in the circumference of, the pueblo, reserved for the use of the inhabitants, a quarter or half a league in width, to form walks and alleys, and to secure ventilation. These lands the ayuntamiento may dispose of for building lots. These instructions of the governor, and the consulta of the assessor, appear to have been accepted as correct by the ayuntamiento. It thus appears that the power of the ayuntamiento, to dispose of lands, was confined to granting building lots within the narrow strip of suburbs reserved as "egidos," and to leasing for the term of five years the lands within the "proprios." Assuming, then, that the lands conceded to Berreyesa were within the limits of proprios which had been duly and formally assigned to the pueblo, the ayuntamiento had no right to grant them, or create any greater estate in them than a leasehold for five years. It may therefore be conjectured that the "terms" referred to in the marginal order of the alcalde were the liability to a censo, or tax, in case the lands, being within the termino municipal, should afterwards be granted.

In the archives of San José, under date of June 18th, 1837, is found a minute or borrador of a report made by the ayuntamiento of San José, evidently in reply to an order for information sent there by the governor. This report is as follows: "In reference to the superior decree which precedes this, a long time ago the ayuntamiento reported that the party mentioned therein had the necessary prerequisites, as a native of the country, to obtain a rancho. He has been in possession for some time past of the land which he solicits, in the quality of a loan which the illustrious ayuntamiento of that year graciously made him. It may be granted to him in full property, without prejudice, and subjecting him to pay the municipal tax which is due to the limits of a town, in case it should reach there." This record, which is regarded by Mr. Hopkins as of unquestionable authenticity, may be accepted as proof that in June, 1837, an expediente had been formed in the matter of the application of Berreyesa for a grant; that his petition had been referred by the governor to the ayuntamiento, and a favorable report made by them. It also proves that a similar report had been made by them "a long time" before, in all probability, on a similar order of reference. The testimony of Anto. Maria Pico, to the effect that, some two years after Berreyesa entered upon the land, an expediente, with a map attached, was referred to him, and that he reported that it might be

granted to Berreyesa, is thus corroborated. Here all record evidence of the formation of an expediente ends. If Alvarado is to be believed, a grant was made by him in 1842; and Victor Castro testifies that he saw the papers, with Alvarado's name attached, at Monterey in 1841. For the reasons assigned in this and a former opinion, this testimony must be rejected as evidence that a grant was made, but it may be accepted as an admission by the claimant that up to 1842, at least, his possession had continued under the original concession of the alcalde, and that his efforts to obtain a grant had been abortive.

It is strenuously urged by the counsel for the claimant that from the date of his concession, up to the time when he was ousted by American intruders, Berreyesa's possession was "notorious, exclusive, uninterrupted, and under claim of ownership." That it was notorious is unquestionable. That it was uninterrupted and exclusive may also be admitted, but I see not how it can be asserted to be "under claim of ownership," when it was held under a concession from an authority which had no power to grant, and when we find him, by his own admission, endeavoring in vain, during eight years, to obtain a title. The causes of his failure it is impossible now to conjecture. He had obtained two favorable reports from the ayuntamiento, and from the alcalde, Antonio Maria Pico, as early as 1835, and yet it is not pretended that he received a title before 1842. It is a singular circumstance that, of the four persons in whose favor the ayuntamiento reported in 1837, no one appears to have obtained a grant founded on those reports. Grants were subsequently obtained by all but Berreyesa, but they were based on other proceedings, and the expedientes contain no mention of, or reference to, the reports of the ayuntamiento of 1837. Berreyesa's want of success, therefore, was shared by his companions; but he has had, as he alleges, the additional and peculiar ill fortune to have subsequently obtained from Alvarado a grant, for which the expediente has disappeared, of which no mention or trace is found in the archives, and the title paper of which was lost or destroyed before it reached his hands. That Berreyesa's possessory rights were generally recognized and respected is abundantly proved. He was cited to appear as a colindante when juridical possession of an adjoining rancho was to be given. The investigations respecting a murder are officially stated to have taken place "at the rancho of Berreyesa." In the map of San José, the tract of Milpitas is laid down, and a house marked as the "house of Berreyesa" is represented. In these and other ways his possessory rights were respected and recognized, and we know enough of the customs of the former inhabitants of the country to require little proof to show that the rights of a person who had obtained from an ayuntamiento permission to occupy a tract of pueblo land, and who had entered and built upon and was in the actual occupation of it, with his herds, would be respected by his neighbors. It is ingeniously urged by the counsel for the claimant that from the time when Berreyesa applied for a title, and on the order of reference by the governor, favorable reports were made, he must be considered as in possession of the land as a Mexican colonist (i. e. under the colonization laws), with the knowledge and permission of the government, and as no longer holding by virtue of the concession or loan by the ayuntamiento. But I am unable to perceive how the facts that he applied for a grant, and that his application was approved by the ayuntamiento, can alter the character of the possession he had theretofore held. No permission on the part of the governor to hold as a colonist is shown. No expediente exists to disclose the governor's action with regard to the application. All we know is that the petition was referred to the ayuntamiento, and a favorable report made by them, but that no grant was issued. It might be inferred that it was refused; certainly, the petition was not acted on by the governor. I see nothing in this refusal, or at least neglect, to act, on the part of the governor, which can affect the character of the possession held by Berreyesa.

The depositions in this case are very voluminous. I have not thought it necessary to enter upon a minute and critical review of them; for, in my judgment, the decision of the cause must depend upon a few facts, concerning which there is little room for controversy. It is unquestionable that in 1834 Berreyesa obtained from the alcalde a concession or loan of the place called "Milpitas," with the intention of permanently establishing himself upon it. He undoubtedly intended and expected to obtain from the governor a grant. It is probable that the ayuntamiento made the concession under a similar expectation. It is certain that they offered no opposition to Berreyesa's repeated applications for a grant. But neither they nor Berreyesa could have supposed that the concession conferred any proprietary rights. Under this concession, Berreyesa went upon the land with his horses and cattle. He built a house, cultivated a portion of it, and fully complied with all the conditions of occupation and cultivation usually imposed on grantees in colonization. In 1835, one year after his entry, he applied for a grant. He failed to obtain it; in 1837 he renewed his application, with a like result; and it is conceded that during eight years from the time of his first occupation (i. e. up to 1842) he had in vain solicited a grant. It is alleged that in 1842 he obtained a grant. But no reliable evidence of the facts is offered. The grant is not produced. Berreyesa himself does not pretend, in his affidavit, that it

ever was in his possession. No expediente is found in the archives, nor do these records contain a document or a line to indicate that a grant was ever made, save only the sheet "No. 2,008," which is abandoned as a fraudulent interpolation. It must therefore be taken as a fact that no grant was issued to Berreyesa by the Mexican government.

The question thus arises,—and it is the only one in the case,—is this government bound, in equity, to do what the former government, though repeatedly solicited, declined or omitted to do? It is strenuously urged that the ancient occupation and cultivation of the land by Berreyesa, and the recognition of his rights by his neighbors and some of the Mexican authorities, create an equity which the United States are bound to respect. That his possessory rights were respected, cannot be doubted. And the land was popularly regarded and spoken of as his, under the belief that he had obtained, or would obtain, a title, and from a knowledge of the fact that on such an application his occupation and cultivation would entitle him to a preference. But all these considerations could have been urged with far greater force upon the former government. And yet we find that during certainly eight years, and, as I am bound to conclude, up to the period of its overthrow, the government declined or neglected to issue the title. The equities of Berreyesa must therefore be considered as having been presented to the former government, and as having been by it ignored or rejected. In the former opinion in this case the decisions of the supreme court in analogous cases were noticed, and it was shown that in none have equities such as those relied on in this case been recognized. The position taken by the counsel for claimant, in his belief that the government, on receiving the favorable report of the ayuntamiento, was bound by law to make the grant, is novel and untenable. The law confided the exercise of the granting power to the governor's discretion. That discretion he might use arbitrarily or unjustly, but the power lay with him. What motives induced the governors, for so long a time, to withhold a grant from a person apparently so meritorious as Berreyesa, we cannot now ascertain. But, in the absence of any expediente, we have no right to assume that there could have been before the governors no unfavorable reports whatever, and no considerations urged upon them which induced the withholding of the grant. If Berreyesa had gone upon the land by the governor's authority, or with his sanction and permission, and under a tacit promise of the title, it might be urged that the governor was bound to make the grant. Such was Alvisu's case. But his only authority to enter on the land, was derived from the ayuntamiento. His entry was without the sanction, authority, or probably the knowledge, of the granting power. Serrano v. U. S., 5 Wall. [72 U. S.] 461.

In the views I take of the case, it is unnecessary to do more than allude to the fact that in 1853 Berreyesa and his sons preempted a portion of the lands now claimed, and, under oath, affirmed that the same were vacant and "not claimed under any existing title." They subsequently obtained deeds from the town of San José for their respective tracts. Their example was followed by others, and the lands in controversy are now occupied by some 30 or 40 families, who have cultivated and improved them. They are said to be of the value of $120,000 to $125,000. The petition in this case was not presented to the board until the day preceding the expiration of the time allowed by law for the purpose, and it is said that neither Berreyesa nor his family has any interest in the controversy. The circumstance that Berreyesa has in so formal a manner disclaimed title, and thus probably induced others to settle and spend money on the land, may not, perhaps, estop the claimant to set up in this proceeding whatever title he in fact had. For he may have acted ignorantly, or under interested advice. But this, with the other circumstances referred to, cannot be left out of consideration, in determining what are the equitable obligations and duties of the United States towards Berreyesa, or others who have acquired his rights.

My opinion is that the claim should be rejected.

Case No. 14,586.

UNITED STATES v. BERREYESA.

[1 Hoff. Land Cas. 99.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT—VALIDITY OF GRANT.

The confirmation of this claim not disputed.

Claim [by Jose Santos Berreyesa] for four square leagues of land in Napa county [the rancho Mallacomes], confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

Thornton & Williams, for appellee.

HOFFMAN, District Judge. The genuineness of the grant is fully proved, and the circumstances mentioned appear in the expediente which is found in the archives. The boundaries of the land are proved to be well defined, being on three sides high mountains, on the fourth the rancho of Dr. Bale, from which the claimant's land is separated by an arroyo having a mill upon it erected by Dr. Bale. The claim was confirmed by the board. No objection is urged on the part of the United States, and we think their decision should be affirmed.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

UNITED STATES v. BERREYESA. See Case No. 15,140.

Case No. 14,587.

UNITED STATES v. BETTILINI.

[1 Woods, 654;[1] 15 Int. Rev. Rec. 32.]

Circuit Court, N. D. Florida. Dec. Term, 1871.

INDICTMENT—CUSTOM FRAUDS—OFFENSES IN SAME COUNT—FRAUDULENT MEANS.

1. The offenses of effecting an entry, and of aiding and assisting in effecting an entry, of goods, etc., at less than their true weight or measure, by means of false samples or false representations, etc., may be charged conjunctively in the same count of an indictment.

2. An indictment under section 3 of the act of March 3, 1863 (12 Stat. 739), charging the defendant with effecting an entry of goods by fraudulent means, must specify what fraudulent means were used, otherwise it is bad.

[Approved in U. S. v. Goggin, 1 Fed. 53.]

Heard upon motion to quash the indictment.

J. P. Sanderson and M. D. Papy, for the motion.

H. Bisbee, Jr., U. S. Atty.

FRASER, District Judge. The indictment in this case is found for the offense of knowingly effecting an entry of goods contrary to the provisions of the third section of the act of March 3, 1863, entitled "An act to prevent and punish frauds upon the revenue; to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes" (12 Stat. 739). The said section reads as follows: "If any person shall, by the exhibition of any false sample, or by means of any false representation or device, or by collusion with any officer of the revenue, or otherwise, knowingly effect, or aid in effecting an entry of any goods, wares, or merchandise at less than the true weight or measure thereof, or upon a false classification thereof, as to quality or value, or by the payment of less than the amount of duty legally due thereon, such person shall, upon conviction thereof, be fined in any sum not exceeding five thousand dollars, or be imprisoned not exceeding two years, or both, at the discretion of the court."

The first ground of objection is that every count in the indictment is double, and that the duplicity consists in this, that the prisoner is charged with both knowingly effecting an entry, and knowingly aiding in effecting an entry of the goods at the custom house. The offense created by the act is a misdemeanor where all are principals. The offense of effecting an entry, and of aiding in effecting an entry, may be committed by different persons, yet they are different stages of the same offense, and may be charged conjunctively in one count against the same person, and the proof of either will sustain the charge. This has been the uniform ruling of this court, and this case is no exception to those already determined. In this respect the indictment is not defective. U. S. v. Mills, 7 Pet. [32 U. S.] 140; Whart. Cr. Law, § 390, and note.

The next objection is that the offense is not set out in the indictment with sufficient certainty: that the facts or circumstances which constitute the definition of the offense in the act are not set forth, and that, therefore, the indictment is bad. Mr. Chitty, in his Criminal Law (volume 1, p. 281), says: "It is a general rule that all indictments upon statutes, especially the most penal, must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it." It is argued that this rule is relaxed by the decision of the supreme court in U. S. v. Mills, 7 Pet. [32 U. S.] 138, cited above, and that, in consequence of that decision, it is not necessary, in practice, to set out in an indictment any circumstances or facts to apprise the accused of the crime with which he is charged. The court say, in that case: "The general rule is, that in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute. There is not that technical nicety required as to form, which seems to have been adopted and sanctioned by long practice in cases of felony, and with respect to some crimes, when particular words must be used, and no other words, however synonymous they may seem, can be substituted." Thus far the court simply say that the pleader need not resort to technical words in describing the offense, but that the words of the statute shall be sufficient. "But that in all cases the offense must be set forth with clearness, and all necessary certainty, to apprise the accused of the crime with which he stands charged." The supreme court, in this, makes a distinction between the technical words necessary to be used in describing an offense, and the circumstances necessary to show that an offense has been committed. Mr. Chitty makes the same distinction. In his work on Criminal Law (volume 1, p. 283), he says: "It is, in general, necessary not only to set forth on the record all the circumstances which make up the statutable definition of the offense, but also to pursue the precise and technical language in which they are expressed." "The certainty essential to the charge consists of two parts, the matter to be charged, and the manner of charging it. 1 Chit. Cr. Law, pp. 169, 170. The technical niceties, called by Lord Hale unseemly niceties, which were allowed to prevail in the early English cases, were regretted by many eminent and learned judges in England—Lord Hale, Lord Kenyon, Lord Ellenborough and Lord Mansfield being among the number; but these regrets related

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

to mere formal objections based upon the manner of charging the offense in the use of words, or even in the omission of a letter. Chit. Cr. Law, p. 170 et seq.; 2 Hale, P. C. 193. But none of the judges have gone so far as to admit that it would be safe in practice to relax the rule which requires clearness and certainty as to the matter charged. This embraces "a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, that the accused may know what crime he is called upon to answer; that the jury may be warranted in finding a verdict; and that the court may see such a definite offense upon the record; that the judgment and punishment which the law prescribes may be applied; that the defendant may plead the conviction or acquittal, should he be again called to answer a charge for the same offense; and, I may add, that it may be impossible to convict an innocent person by dispensing with proof of the facts and circumstances which constitute the crime." 1 Chit. Cr. Law, p. 172. "Therefore, an indictment charging the defendant with obtaining money by false pretenses, without stating what were the particular pretenses, is insufficient." 1 Chit. Cr. Law, 171. For the defendant must be advised, not only of what he has to answer, but the court must be advised what the pretenses are; for it is not every false pretense which will bring the case within the meaning of the law. Rex v. Goodhall, Russ. & R. 461; Whart. Cr. Law, §§ 2086, 2087

But it is argued on the part of the prosecution that in this country the courts have modified this rule, and dispensed with the degree of certainty formerly required in setting out an offense in an indictment, and that now it is necessary only to charge the offense in the words of the act creating it; that in this case the facts and circumstances could not be set out because unknown to the attorney for the United States; and that this case is governed by rules and principles entirely different from a case arising under the law for obtaining goods by false pretenses; that the false representation or device or collusion with an officer of the revenue, or the exhibition of any false sample, is not a material part or element of the offense, and therefore need not be set forth in describing it, and that the words "or otherwise" employed in the statute, so far enlarge the definition of the offense as to make what precedes them entirely immaterial, and do in effect obliterate it altogether, and bring within the meaning of the act any entry made by the payment of less than the amount of duty legally due thereon, though such entry was made through ignorance or mistake, and with no intention to defraud the revenue. To sustain this view, the attorney for the United States adduces a decision of the district court of the United States, for the Eastern district of Michigan, in a case arising under the same act of congress and the same section of the act, as the case here under consideration. U. S. v. Ballard [Case No. 14,506].

Before referring to this decision it may be well to dispose of some of the positions asserted in the argument as just stated. It is clear that the supreme court in the case of U. S. v. Mills, above cited, and which is relied upon to sustain the position that certainty and particularity are no longer necessary in charging the matter of the offense, does not sustain that position, but quite the contrary, as has been shown above; that it changed in no respect the rule laid down by Chitty, as the exponent of the most learned, wise and just tribunals of England, making a distinction between formal and technical nicities in words, and the statement of substantial matters—and that is certainly substantial matter which is descriptive of the offense, and which must be proved as laid—and nothing can be proved to sustain the indictment which is not charged therein.

The reason given for not having set out the circumstances of the offense, that it was impossible because they could not be known, is untenable, because the grand jury could find no bill without proof of such facts, and they must be within the knowledge of the prosecuting officer before he can conclude that such offense has been committed, and before he will consent to lay a bill before the grand jury, unless the position be true that the words "or otherwise," in the statute, must be construed to create an offense under the act, in which there is neither intent nor ingredient of fraud. If such be the correct construction of those words, then the indictment need not charge that the entry was effected by false sample, false representation or device, or by collusion, but simply that the entry was effected at less than the true weight or measure thereof, for that would be otherwise than by false representation or device. But the rule that effect must be given to all the words of an act, and that none of the provisions of an act must fail unless so repugnant that they cannot be reconciled, must not be overlooked. Congress surely meant something by the words, "by the exhibition of any false sample, or by means of any false representation or device, or by collusion with any officer of the revenue;" and also meant something by the words "or otherwise." Congress intended to make any fraudulent means, whether by sample, representation, device, collusion or otherwise, an ingredient of the offense; and if the fraudulent entry were effected by any other means than by false sample, false representation or device, or collusion with an officer of the revenue, such fraudulent means would be included in the words "or otherwise" in the act. There is no other reasonable construction by which all the provisions of the act can stand together. The words, "or otherwise," must be interpreted to mean, or by any other fraudulent means whatsoever, or they mean

nothing and are mere surplusage. The construction which gives them effect, and does not destroy the effect of the other provisions of this section of the act, is clearly correct. The means used in effecting the entry is made by the act the very gist of the offense, and without which no offense can be committed, and if so, the means by which it was effected must be set out and clearly stated in the indictment. Such facts and circumstances as will show that a false sample was exhibited, in what false and to whom exhibited, what false representations were made, and to whom, what false device was used and how, with what officer of the revenue the collusion was had, or how or by what other fraudulent means, if any, the entry was effected. It is admitted by the learned judge, in the case of U. S. v. Ballard, supra, that the means adopted to commit the offense would inevitably constitute one of its elements, but for the concluding clause, "or otherwise," that "these words render that unlimited and general, which by the preceding clauses, without these words, would be limited and specific," and that that clause does not, like what precedes it, relate simply to the means by which the offense is committed, but also to the manner in which the entry is made, and that, therefore, "the facts answering to the preliminary clauses of the section may or may not be alleged in the indictment at the option of the pleader;" and as a consequence, if not alleged, they need none of them to be proved in order to convict the defendant. With this view I cannot agree, as it would seem entirely to change the rule above stated for the construction of statutes, and introduce into the criminal practice a laxity and uncertainty always carefully avoided by the purest and wisest tribunals in the administration of criminal justice.

It is evident, by reference to and comparison of some of the decisions of the ablest judges both in England and this country, that the rule as to certainty of the matter charged has not been changed or modified. Rex v. Holland, 5 Term R. 623; Com. v. McAtee, 8 Dana, 29; People v. Taylor, 3 Denio, 91; Biggs v. People, 8 Barb. 547. All the counts in the indictment, which profess to charge an offense to have been committed under the section and act above referred to are defective in not having set out the circumstances required, as I have shown above. And this is in accordance with the ruling of this court in the cases of U. S. v. Conant [Cases Nos. 14,843, 14,844], and has been the uniform ruling in all similar cases. Upon a thorough reexamination of the authorities, I see no reason for changing or reversing those decisions or for adopting a different rule. Other defects have been pointed out in this indictment, but I do not deem it necessary to examine it further, as the question discussed disposes of the case. The indictment must be quashed.

Case No. 14,588.

UNITED STATES v. BEVAN et al.

[1 Crabbe, 324.] [1]

District Court, E. D. Pennsylvania. March 5, 1840.

PRINCIPAL AND AGENT—CUSTOMS DUTIES—ACTION FOR DUTIES AGAINST AGENT.

Where importers employ agents to pass goods through a custom-house, and the agents, known so to be, obtain certain goods free of duty, if a mistake of the revenue officers is afterwards discovered, by which the goods appear to have been chargeable, the agents are not liable for the sum so due.

This was a suit founded on an alleged mistake of the officers of the custom-house at Philadelphia. It appeared that the defendants [Mathew L. Bevan and May Humphries, trading under the firm of Bevan & Humphries] had acted as agents of Deforest and Sons, of New York, in passing certain packages of wool through the custom-house at Philadelphia, in March, 1836; that the revenue officers had reported the wool to be free of duty, under the second section of the act of July 14, 1832 (4 Story's Laws, 2318 [4 Stat. 583]) and that it had thereupon been delivered to the defendants, who at once transferred it to their principals. Subsequently an error of the revenue officers was discovered, which, when corrected, showed the goods to have been chargeable; and suit was thereupon commenced against Bevan and Humphries.

Mr. Read, U. S. Dist. Atty.

After the evidence, Mr. Read, for plaintiffs, contended, that the duties having accrued on the importation, they might be sued for at any time, if they had been before omitted from mistake or accident. U. S. v. Lyman [Case No. 15,647].

Mr. Meredith, for defendants.

The defendants are not the owners or importers of the wool, and the question is whether they are responsible as agents. The law gives a remedy against the importer or owner, but not against an agent who declares himself to be such. The custom-house knew that the defendants, were no more than special agents for this transaction. As soon as the goods were sent to Deforest and Sons the defendants had nothing more to do with them.

HOPKINSON, District Judge (charging jury). Several questions of law and fact have been discussed in this case. The view I have of the preliminary question raised for the defence will render an examination of the other points unnecessary. The question is this: Supposing the weight of this wool to have been such as is alleged by the plaintiffs, and, of course, that its value was greater than eight cents a pound, thereby render-

[1] [Reported by William H. Crabbe, Esq.]

ing it liable to duty; and granting also, that the duty might now be received from the importers, notwithstanding the action of the officers of the custom-house, declaring the goods to be free, and as such delivering them to the defendants, as the agents of the importers; are the present defendants, no fraud being alleged, liable for these duties?

If an agent conceals his agency and is dealt with as the principal, he is liable in his own person for the contract? The defendants went to the custom-house as the declared agents of Deforest and Sons, for the special purpose of entering this wool for them and on their account, and had no further interest in it. When the entry was made they received a permit, the goods were delivered to them as agents, and were at once sent, by them, to their principals, the whole agency being thereby discharged and ended. So they remained for more than a year, and then, after they had parted with the goods, under the written order or permit of the proper officer of the United States, they are called upon, in an action of debt, to pay this duty, under the allegation that a mistake was made, by the officers of the United States, in the value of the articles. What remedy the plaintiffs may have against the principals in this transaction, the true owners and importers of the wool, we are not called upon to decide, nor to anticipate the decision of the questions of law and fact which will then arise. I am of opinion that this action cannot be maintained against the present defendants.

Verdict for the defendants.

Case No. 14,589.

UNITED STATES v. BEVANS.

Circuit Court, D. Massachusetts. Dec. 16, 1816.

JURISDICTION OF FEDERAL COURTS — OFFENCES ON THE HIGH SEAS — KILLING BY MARINE ON NAVAL VESSEL—ORDERS OF SUPERIOR—POWER OF NAVAL OFFICERS—MURDER AND MANSLAUGHTER—EVIDENCE—PRESUMPTIONS.

[1. An offence committed on a United States naval vessel, while lying in the channel of the harbor of Boston, at a considerable distance from the shore, and outside of low-water mark, is committed upon the "high seas," and consequently is within the jurisdiction of the federal courts.]

[2. The "high seas" are in legal contemplation that portion of the waters of the sea and of the arms of the sea which lies without low-water mark.]

[3. A naval officer in command of a ship has no authority to direct a sentry on duty aboard the vessel to run through the body any man who should abuse the sentry by words alone, however opprobrious; and if any such order should be given it would be unlawful, and could not justify or excuse a homicide committed by the sentry under such circumstances.]

[4. Where a prisoner charged with murder is proved to have killed the deceased, the law presumes that the act was founded in malice until the contrary appears; and the prisoner has the burden of proving that the act was done under circumstances which excuse or justify it, or abate its malignity.]

[5. If upon slight provocation one inflicts with a deadly weapon a punishment outrageous in its nature, and beyond all proportion to the offence, and death results, the law presumes that the act was inspired rather by malignity and a depraved spirit recklessly bent on mischief, than by human frailty.]

[6. Where a sentry on duty on board a United States naval vessel ran through the body with his bayonet one who merely used abusive language to him, *held*, that if the sentry intended only to strike the deceased with the back of his bayonet or to prick him slightly, and had no intention of killing him, the crime was manslaughter; but that if he meant to kill, or to do some enormous bodily harm, he was guilty of murder.]

STORY, Circuit Justice. Gentlemen of the jury: The prisoner at the bar stands indicted by the grand inquest of the United States for the murder of Peter Lunstrum. To this indictment he has pleaded not guilty, and you are sworn to return your verdict as to his guilt or innocence. The evidence is so simple, and as to the material facts so consistent, and the cause has been argued so fully, candidly, and ably by the learned counsel, that little remains for the court but to sum up, in a brief manner, the general facts, and to state the general principles of law applicable to the facts.

Before, however, I proceed to a statement of the case, there are some preliminary remarks which it is my duty to make in consequence of the suggestion which has fallen from the counsel that you are the judges of the law as well as of the fact. This suggestion requires some explanation and qualification. As the issue in this case is a general issue in which you are to decide the guilt or innocence of the prisoner, it necessarily involves considerations of law as well as facts; and you consequently have the power to decide on both. But you are bound by your oaths to return a verdict according to law and the evidence given you; and the court are bound by their oaths of office to instruct you as to the law. And when the law is stated to you under this solemn, strong and painful obligation, you are as much bound to find your verdicts in conformity to it as you are in any other case which is tried before a jury. It is a great mistake that jurors are at liberty in matters of law to disregard the opinion of the court, upon fanciful distinctions, or opinions of their own; and they may, by such conduct, bring their consciences into peril, and their fellow citizens into jeopardy. Fost. Crown Law, 255.

I will now proceed to a summary of the facts. (Here the judge summed up the facts.) It is in this trial, incumbent upon the United States to establish two things to entitle themselves to your verdict: First, that the crime was committed by the prisoner; and, secondly, that it was committed on the high seas, or in a haven out of the jurisdiction of any particular state. In respect to the last question, it is clear from the evidence that the offence was committed on board the United States ship Inde-

pendence, while lying in the channel of the harbour of Boston, at a considerable distance from the shore, and without low-water mark. Under these circumstances, the court are of opinion that the offence was committed on the "high seas," the high seas being in legal contemplation that portion of the waters of the sea and of the arms of the sea which lies without low-water mark. It is, however, our determination to reserve this question, in case of a conviction, for the decision of the supreme court of the United States, and for this reason it is not necessary particularly to expound the ground of the opinion, which we have expressed.

In considering the other question, it is material to observe that the proof of the crime rests in the first instance, on the United States; but if it is proved that the prisoner killed the deceased all the circumstances of accident, necessity or infirmity which justify or excuse it are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumes the fact to have been founded in malice, until the contrary appears. In the present case there is no question but that the prisoner killed the deceased; he is therefore bound to prove that it was done under circumstances which excuse or justify the act or abate its malignity. It is contended by his counsel, in the first place, that the prisoner stands excused or justified, because he acted under orders, or under a supposition that orders were given to him to kill any person that should insult him by opprobrious words when on his duty or post. There is no direct proof in the case that any such orders were ever given. The course of proceedings on board of ships of war in our service, as testified by the witnesses, in respect to mariners on board, is that the commanding officer of marines gives his orders to the sergeant of the guard, the sergeant to the corporal, and the latter gives the orders to the private when he is put on post. The orders are given in general terms to the sentry, to keep silence within his post, to allow no quarrelling or noise; and where, as in this case, the post comprehends the galley, to suffer no interference with the cooks of the galley. Mr. Legge, the commanding officer of marines on board the Independence, expressly states these to be the general orders given by the superior officers to the sergeants of the guard, and in this statement he is confirmed by Lieut. Freeman. Mr. Legge states that no orders were ever given on board of the Independence by the officer of marines, that authorized any sentry to take the life of any person who should insult him by words, while on duty. There does arise from this testimony a strong presumption that no such orders as those contended for in argument ever were given even by the sergeant or corporal, for it is always presumed that all officers act within the line of their duty, until the contrary is proved; and it is not lightly to be presumed that sergeants or corporals would violate the orders given to them by their superior officers. Mr. Freeman, however, says that he has known instances in other ships, where corporals have directed sentries when put on post, to run any man through the body for abusive language; and that it is generally understood that the sentry is at liberty to use his arms in case of opposition; and Myers, who is a corporal in the service, declares that he always received orders from the sergeant of the guard, when he put a sentry on post, to run any man through the body who made a noise or disturbance while he was on post. Rutter, another corporal of marines, says that he never understood that such authority was given, unless where there was some weapon used by the offending party. It is for the jury to decide upon this evidence whether they can reasonably infer, that on board of the Independence the prisoner had received orders to the effect contended for; and if they can infer it against the express testimony of Mr. Legge, and the natural presumption that his orders were duly communicated by the subordinate officers, then it becomes our duty to instruct you as to the legality of such orders, and the effect which they ought to have upon your verdict.

It is argued by the counsel for the prisoner, that it is indispensable for the discipline of the naval service that such orders should be given, and should be instantly executed, and that a power of unlimited and arbitrary discretion resides in the officers of the ship to compel obedience of all commands, at all times, and under all circumstances, even by taking away life. I confess that it never occurred to me until this trial that any person in this country ever dreamed of the existence of such an arbitrary power. This is emphatically a government of laws, and not of men. The military and naval forces are created by the laws, and regulated by a code which ascertains their powers and enforces their duties. The officers and privates of the navy, and the corps of marines, when acting in the naval service, are bound by the rules and regulations enacted for the service by the acts of congress; and whoever overleaps the power given to him is responsible for his conduct, either to the civil or military tribunals, according as the acts fall within the cognizance of the one or the other. The arbitrary power of life and death is not committed even to the president of the United States, who is commander in chief of the army and navy, much less is it confided to a commander of a ship, and, least of all, to a mere private sentry upon duty. Let me read to you a few of the articles in the act of congress of the 23d of April, 1800, c. 33 [2 Stat. 45.] (Here the judge read the third, thirteenth, fourteenth, fifteenth, and thirti-

eth articles of the act.) You cannot but observe that these articles, which are selected from a larger number, contain rules for the punishment of a great many crimes, some of which are of a very slight and trivial character; and that in every instance in which the life of the offender can be taken away it is expressly provided for in the statute. The fifteenth article is particularly pointed to the present case. It declares that "no person in the navy, shall quarrel with any other person in the navy, nor use provoking or reproachful words, gestures and menaces, on pain of such punishment as a court martial shall adjudge." And by the thirteenth article no commanding officer shall, of his own authority, inflict a punishment on any private, beyond twelve lashes with a cat of nine tails; and if the offence requires severer punishment, it can be adjudged only by a court martial. Can it be possible that when these articles have so sedulously guarded against an arbitrary discretion in punishment in a commanding officer, that an inferior officer, or mere private, may, of his own accord, inflict the punishment of death? Or that, when the act has declared that quarrelling, or using reproachful words, shall be punished as a court martial shall adjudge (which cannot, in this instance, be by death), that any officer is yet at liberty for the same offence to inflict the punishment of death? It cannot be. The law is perfectly clear upon this subject. Such an order would be illegal and void, and not binding upon any person; and the party who should give the order, equally with the party who should execute it, would be involved in the guilt of murder. No person can respect the officers of the navy more than myself, or more honour their gallant and glorious achievements. They are justly the pride of our country, and its safeguard and protection. But they are not above the law; and if they possessed the tyrannical power now contended for (which they do not pretend to) they would soon become the objects of odium among the people, and the safety and usefulness of their patriotism would be materially impaired. Civil tribunals are not practically acquainted with all the necessities of the naval service; and they cannot but be sensible of the importance of rigid discipline and prompt obedience, upon which the safety and efficiency of the service must materially depend. We should not, therefore, scrutinize with any jealous eyes the rules and orders established to enforce that discipline and obedience. We should cheerfully aid in their execution. But this can only be when those rules and orders are consistent with law, and not when they are against the express provisions of law, and against natural justice. It is not to be imagined from this that officers in the navy are not in any case authorized to take away life in enforcing the duties of their stations. They stand in this particular upon the same grounds as civil officers. They have a right, in case of necessity, to enforce obedience to orders and a performance of duties by the punishment of death. But the necessity must be a clear and urgent one. The orders must be of a nature that require instant obedience, and the force employed must be such as the occasion indispensably requires. If, for instance, as in the case put at the bar, where the ship is on fire, and the fire is advancing to the magazine, the party refuses to assist, or to obey the lawful orders of his officer, the latter may enforce obedience at the point of the bayonet, if it cannot be otherwise compelled. In the present case, it is the decided opinion of the court that if orders were given to the sentry to run a man through the body who should abuse the sentry by reproachful words only, those orders were unlawful, and cannot justify or excuse the homicide.

The next consideration is whether the offence upon the facts in this case was murder or manslaughter. Murder is the unlawful killing of another with malice aforethought. Manslaughter is the unlawful killing of another without malice aforethought. In this view it is important to ascertain what the law intends by malice. It would be a great mistake to suppose that by malice aforethought the law intended only that cool, deliberate purpose of killing another which is accompanied by dark schemes and secret contrivances, such as producing death by the administration of poison, or by midnight assassination. Nor does malice necessarily imply a principle of malevolence to particular individuals. It embraces all those cases where the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; or, as Sir Michael Foster has expressed it, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. Fost. Crown Law, 257. If therefore the provocation be slight, and the punishment be outrageous in its nature or continuance, and beyond all proportion to the offence, and it be inflicted with a deadly weapon, under the like circumstances, and the party dies, the offence is considered as rather the effort of a brutal and diabolical malignity than of human frailty. It is one of the true symptoms of what the law denominates malice, and therefore the crime will amount to murder, notwithstanding such provocation. 1 East, P. C. 234; Fost. Crown Law, 291. In the present case the provocation was merely by words; words indeed of a gross and unjustifiable nature, and which deserve the severest reprehension. There is not the slightest proof that any blow was struck or intended to be struck by the deceased. Indeed, his situation at the time of the fatal wound, he at that time leaning on his arms over the harness cask, seems to repel any such presumption. The wound, too, was inflicted by a dangerous and mortal weapon. It is my duty to declare to you what the law

is, under these circumstances, and I will do it in the words of one of the ablest and most merciful judges that ever adorned the bench. Sir Michael Foster states (Fost. Crown Law, 290), and his opinion is the undoubted law, that "words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder; nor are indecent, provoking actions or gestures expressive of contempt or reproach, without an assault upon the person. This rule will, I conceive, govern every case where the party killing upon such provocation maketh use of a deadly weapon, or otherwise manifesteth an intention to kill or to do some great bodily harm. And it ought to be remembered that in all other cases of homicide upon slight provocation, if it may be reasonably collected from the weapon made use of, or from any other circumstance, that the party intended to kill, or to do some great bodily harm, such homicide will be murder." In this connection it will be proper for you to consider whether it was the intention of the prisoner to kill or inflict a great bodily harm with his bayonet, or only to inflict a slight chastisement, and, aside from his purpose, the instrument inflicted a mortal wound. This is one of the pivots on which this case must turn. For if the prisoner intended only to strike with the back of his bayonet, or only slightly to prick the deceased in a part not liable to be attended with dangerous consequences, and was not guilty of such intention, then the crime may be mitigated into manslaughter; but if he meant to kill or to do some enormous bodily harm, it amounts to murder. You will consider his conduct before, at, and after the fatal wound was given. You will judge of the violence of his threats that if the deceased repeated the offensive words again he would run him through. You will consider the situation of the parties at the time of the wound, the one armed and leaning on a cask, the other approaching him with a moderate walk, not raising his arm to strike until the moment the wound was given; the oblique manner in which the stroke was given; the force, with which it was given, the bayonet, after glancing on the ribs, having penetrated to the depth of five inches and the circumstances that the prisoner, after the death, exhibited no contrition, and expressed no sorrow for what he had done, or that he had done more than he intended. Upon weighing all these circumstances and all others which may occur to you, if you are satisfied that the prisoner intended to kill, or to do a great bodily harm, then the offence was, if you believe the facts, murder; otherwise it may be only manslaughter.

In weighing the evidence and circumstances, if you have reasonable doubts, those should operate in favor of the prisoner. But the doubts should be reasonable, and you should not suffer yourselves to be led astray by visionary doubts, or by a false tenderness for human life, which may pervert your judgments. If you give a verdict conformable to the dictates of your consciences, you cannot have serious reason here or hereafter to regret it. If, on the other hand, you suffer yourselves from any motives whatsoever to give a verdict which your consciences do not approve, you cannot be justified hereafter.

The trial continued till about two o'clock, when the jury retired, and a little before five o'clock, brought in a verdict of "Guilty."

[NOTE. Upon certificate of division of opinion the supreme court decided that in the case above the circuit court had not jurisdiction to try the offense. Mr. Chief Justice Marshall delivered the opinion. 3 Wheat. (16 U. S.) 336.]

Case No. 14,590.

UNITED STATES v. BICKET et al.

[16 Int. Rev. Rec. 85; 4 Chi. Leg. News, 452.]

District Court, N. D. Illinois. July Term, 1872.

INTERNAL REVENUE—ACTION ON DISTILLER'S BOND—ACTUAL PRODUCT — SURVEY—CAPACITY TAX —BACK TAXES—SURETIES—AGREEMENT.

1. If a distiller pays tax on the actual product of the distillery, even though that falls short of 80 per cent. of its estimated capacity, he cannot be made liable for a larger amount.

2. What is known as the "capacity tax," assessed under the thirteenth section of the act of July 20, 1868 [15 Stat. 130], does not come within this principle, but is in the nature of a license for the privilege of distilling in that establishment.

3. It is not a tax upon the product of the distillery, but a tax upon each distillery according to its capacity, and is therefore to be determined by its capability of producing according to the survey.

4. Where the period of fermentation has been fixed at forty-eight hours by the officers of the government upon survey, it is not a valid objection that the distillery uses a longer time in fermentation.

5. The survey and return having been made, the distiller has the right to appeal to the commissioner of internal revenue. If he does not do this, or if on appeal the survey is sustained, then his liability as to the capacity tax is inexorably fixed.

6. It then becomes a part of the license under which he operates, and it only remains for him to decide whether upon the conditions thus imposed he can undertake the business of distilling.

7. This court will not revise the survey made by the officers of the government, nor entertain objections founded upon the overestimated capacity of the distillery.

8. When at the time of the execution of the bond there were back taxes assessed against the distillery, and afterward moneys paid to the collector without specific appropriation were applied by him in liquidation of these back taxes, these moneys were rightly applied, and in a suit upon the bond cannot be set-off against taxes subsequently accrued.

9. It is the duty of the distiller and his sureties to see that the taxes are paid as they accrue, and if they are not paid government has its remedy upon the bond, even though the wines produced during the time the bond was in force may have been more than sufficient to pay the taxes.

10. The case is not analogous to suits upon collector's and receiver's bonds, they being public officers whose duty is to receive government moneys and pay them over to the government.

11. Nor is it a valid objection that at the time the sureties signed the bond the distillery was, by agreement between the distiller and his creditors, under the control of the trustee, who was

also a deputy collector, and who was to receive the proceeds of the wines and pay the expenses and taxes, and that he at the time agreed with the sureties that he would see to it that they were protected.

12. The government is not bound by any such agreement, nor is it competent for a public officer to vary or in any way change the terms of the distiller's bonds required by law; though such an agreement or pledge may bind him individually, it is as to the government inoperative and void.

At law.

BLODGETT, District Judge. This is an action upon a distiller's bond in the penal sum of $101,000, signed by the defendants William A. Bicket, George A. Sellars and Benjamin Buckley, and conditioned for the performance by Bicket of all the provisions of the law in relation to the duties and business of a distiller at Lodi, in this district, and for the payment of all penalties and fines imposed upon him for the violation of any provisions of the law applicable to him as such distiller. It is averred on the part of the plaintiff, that Bicket did not faithfully observe all the provisions of the law in regard to the duties of a distiller, in that he did not pay the tax which accrued against said distillery and upon the highwines manufactured by him therein, for the months of January, February, March and April, following the date of said bond amounting in the aggregate to $49,060.31.

It appears from the evidence in the case that the tax remaining unpaid is what is known as the deficiency tax, and the capacity tax on the distillery, and the barrel tax—the tax of fifty cents per gallon, the storekeeper's salary, and the special tax having been paid. It also further appears that the government has issued a distress warrant which was levied upon the property of Bicket, and from the sale of the property thus levied upon, the sum of $20,635 has been made, leaving a balance of $28,424.96. Of this sum $5,242.19 is what is called the "deficiency tax," that is to say, the tax which was assessed on the assumption that the distillery had produced 80 per cent. in highwines of its estimated capacity, it appearing that the difference in the tax between the actual product of the distillery and 80 per cent. of its estimated capacity amounts to this item of $5,242.19. In the decision rendered by my learned predecessor, Judge Drummond, some years since, upon the section of the statute under which this assessment is made (U. S. v. Singer [Case No. 16,292]), it was held that it could not have been the intention of congress to levy a tax upon wines which were not produced, which never had an existence, and that therefore if a distiller pays the gallon tax on the actual product of the distillery, he cannot be made liable for any larger amount to be assessed against its product, although he may fall short of producing 80 per cent. of the estimated capacity of the distillery, and following the rule laid down in that case, I shall deduct at once from this assessment the $5,242.19 deficiency tax, which leaves a balance of $23,182.77 for the consideration of the court.

It is shown by the proof on the part of the defendant, that a large proportion of this tax is what is known as the "capacity tax" and defendants insist that it comes within the same general principle as the "deficiency tax," and that the distiller ought not to pay a "capacity tax" on a greater amount of highwines than are actually produced. By the tenth section of the act of July 20, 1868 (15 Stat. 129), it is provided in substance that a survey shall be made by the assessor of each district, and some competent assistant, of the capacity of all distilleries within his district, and by the thirteenth section of the same act (15 Stat. 130), a tax of two dollars per day is imposed upon every distillery capable of mashing twenty bushels of grain in twenty-four hours, and a further tax of two dollars per day for every 20 bushels of additional mashing capacity of such distillery in excess of said first 20 bushels. It is urged on the part of the defendants in this case, that this distillery did not mash grain to the extent of the survey, and that therefore the capacity tax should be assessed in accordance with the quantity of grain actually mashed, and not in accordance with what the distillery was capable of mashing during the time it was in operation, and the counsel for defendants urged that the principle decided in the deficiency tax case should govern in regard to the capacity tax. But I am of the opinion that the capacity tax stands upon widely different grounds from the deficiency tax. The capacity tax seems to me to be a tax imposed in the nature of a license upon the distillery for the right or privilege of distilling in that establishment. It is not a tax like the deficiency tax, upon the product of the distillery, but it is a tax upon each distillery according to its capacity to produce, and is to be determined, not by the actual product of the distillery, but by what it is capable of producing, according to the survey.

It is also urged in the same connection that the capacity tax is not rightly assessed, because the officers of the government, in making the estimate for the purpose of determining the capacity tax, have assumed the period of fermentation at forty-eight hours, when in fact Bicket for a part of the time at least, while this bond was in force, used a fermenting period of seventy-two hours. By the rules of the department of internal revenue promulgated some time in 1869 for the government of distilleries and the assessment of taxes thereon, it is provided that the capacity shall be estimated upon the basis of forty-eight hours' fermentation; or, in other words, it is claimed for the defendants that this tax should be assessed upon the basis of the actual time used in fermentation, and that the court has a supervisory or controlling power over the assessment in this regard.

My understanding of the law is that when the officer whose duty it is to make the survey of the distillery makes his return, which must be before the distiller starts in the business of distilling, and fixes the fermentation period shorter than the distiller is satisfied that he can comply with, he has a right to appeal to the commissioner of internal revenue for a revision of the survey, and if he does not take an appeal, or if on taking an appeal the survey is sustained, then it seems to me his liability, so far as his capacity tax is concerned, is fixed. It falls into the same category of liabilities as the barrel tax, the special license tax, or any other fixed items which the distiller is bound to pay as a condition upon which he is to run his distillery, and it does not lie in the province of the court to revise the survey which is made by the officers of the government for the purpose of determining the capacity of the distillery. It is for the distiller to say after the survey whether he can afford to run under the survey, and upon the conditions thus imposed upon him, and if he cannot afford it he must not undertake the business of distilling; if he can afford it, then he must comply with the law in that regard, because the law fixes the capacity tax upon the survey being made as inexorably as it does the special license tax or the barrel tax. It becomes a part of the license which the distiller must pay for operating his distillery. I therefore come to the conclusion that this capacity tax must be sustained, and that the objections founded upon the alleged overestimated capacity of the distillery, or the fact that the distillery used a longer fermenting period than that fixed by the survey, cannot be sustained by this court. The liability of the distiller for the payment of the tax was settled by the survey, and the court cannot revise it.

It is further urged as a defence in this case that during the time this distillery was running the moneys paid by the distiller to the government on account of taxes were applied to the payment of certain taxes which had accrued against the same distillery at a former time, and the facts bearing upon that portion of the defence seem to be substantially these: This distillery had been in operation prior to the execution of this bond, and there was a large amount of taxes then due from Bicket, who had run the distillery. After the distillery started under the bond in question a large amount of money was paid into the hands of the collector of internal revenue for the district without any specific appropriation by Bicket as to what account they should be applied upon, and the collector applied the moneys thus paid to him to the liquidation of the balance standing against Bicket for taxes which had accrued prior to the execution of this bond, and for the collection of which the collector held a warrant.

It is urged that the collector had no right to make this application, but that he should have applied the money upon the taxes which were accruing from time to time against the distillery under this bond, and the court has been cited to the cases of U. S. v. January, 7 Cranch [11 U. S.] 572; U. S. v. Giles, 9 Cranch [13 U. S.] 212; U. S. v. Ecford, 1 How. [42 U. S.] 250; U. S. v. Jones, 7 How. [48 U. S.] 681, and U. S. v. Linn [Case No. 15,606], in support of this position. But it will be noticed on examination that those suits were brought upon bonds given by public officers whose duty it was to receive government moneys and pay them over to the government. The money was at all times the money of the government, and the bond was given for the faithful performance by the receiving officer of the government of the duties of his office; one important duty of which was to pay to the government the money received in the due course of his official duty. Now if the money which the distiller received from the sales of his highwines belonged to the government these cases might be in point. But a distiller has the right to use the proceeds of his highwines for any purpose to which he chooses to apply them. He is under no obligation to sell his highwines if he chooses to pay his taxes from other resources. The bond of the distiller provides that he shall pay the duties upon the wines which are made at his manufactory, but I think it cannot be successfully claimed that after the distiller has sold the wines the proceeds are specifically chargeable with the payment of the tax. The distiller is not bound to pay the specific money which he receives, from the sale of the highwines, to the government. He may pay his taxes in other money. He may use or appropriate the proceeds of the distillery to the payment of the taxes, or he may rely upon other resources for that purpose as may best subserve his interest, and is not compelled to apply the specific moneys which he receives from the sales of his wines to the payment of the government duties. In other words, it is not the government money, therefore, I do not consider the cases referred to as controlling in this suit. The government relies upon the bond, and it is for the distiller and his surety to see to it that the taxes are paid as they accrue. These payments seem to have been made without any direction by Bicket, as to which account they should be applied upon, and come clearly within the familiar principle, that if a debtor owing the same creditor several debts makes a general payment without directing to which it shall be applied, the creditor may apply it as he pleases. The collector held several warrants against Bicket for taxes against this distillery, and as no appropriation was made by the debtor he had the right to apply the payments to the liquidation of the elder. For these reasons I do not think the defence upon that point is sustained by the authorities cited.

It is further claimed in connection with the same point that at the time the sureties signed this bond this distillery was in point of fact under the control of one Warren, who was also deputy collector of the district, as trustee by an agreement made between Bicket and certain of his creditors, by which Warren was to receive the proceeds of the wines manufactured, and pay the expenses of the distillery and taxes, and that at the time this bond was executed Warren told the sureties that he would see to it that they were protected; and it is urged that it was Warren's duty therefore to pay these taxes as they accrued out of the moneys which came into his hands from the sale of the highwines, and it undoubtedly was as between Warren and the owner of this distillery. Warren had undoubtedly accepted the trust, but government has nothing to do with any private arrangement which Warren made as to the trusteeship which he had accepted in relation to the business of this distillery. Government is not bound by the pledge which Warren made to the sureties in this bond at the time they signed the bond. It is not competent for a public officer to vary or in any way change the terms of the official bond or bonds which the law requires that a distiller should give as a condition precedent to his entering upon the business of a distiller. And further than that, the testimony offered upon this branch of the case is obnoxious to the fatal objection that it is an attempt to vary a written contract by parol testimony of the contemporaneous statements between the parties. But even if the contract between Warren and the surety had been in writing, it would have only bound Warren individually, and would not have bound the government. It was no part of his official duty to make such a stipulation as this, or in any way vary the terms of the distiller's bond, as fixed by law, and if he had attempted to do it, it would have been a gross violation of his duty, and would have been inoperative and void, even if he had done it in such a manner that the evidence could be read in court.

I am therefore constrained to overrule all the points of the defence, and render judgment for the amount shown by the evidence to be due upon this bond.

Case No. 14,591.

UNITED STATES v. BICKFORD.

[4 Blatchf. 337;[1] 22 Law Rep. 273; 7 Pittsb. Leg. J. 119.]

Circuit Court, D. Vermont. July, 1859.

INDICTMENT—JOINDER OF DISTINCT FELONIES — PRACTICE—COPY OF INDICTMENT—TRANSMITTING FALSE PAPERS—TRIAL—ELECTION.

1. An indictment founded on the act of March 3, 1823 (3 Stat. 771), and charging the defendant with knowingly transmitting false papers to the pension office, in support of applications for bounty land under section 9 of the act of March 3d, 1855 (10 Stat. 702), and containing 138 counts, each for a distinct felony, and some of which charged subornation of perjury, was objected to, on a motion to quash, because of the joinder in it of distinct felonies, and also of felonies of different grades: *Held*, that the indictment was warranted by the act of February 26th, 1853 (10 Stat. 162), but that the counts for subornation of perjury must be stricken out.

2. A prisoner is not entitled to have a copy of the indictment against him furnished to him at the expense of the government.

[Cited in U. S. v. Van Duzee, 140 U. S. 173, 11 Sup. Ct. 760.]

3. It is an offence, under the said act of March 3d, 1823, to transmit false papers, for the purpose of obtaining from the United States a bounty land warrant.

4. Declarations and affidavits subscribed and sworn to by the signers, are "papers," within said act.

5. If the papers are transmitted from Vermont to Washington City, the offence is committed in Vermont.

[Cited in Re Palliser, 136 U. S. 257, 10 Sup. Ct. 1036.]

6. On a motion by the defendant that the government elect upon which of 100 counts in an indictment it would proceed, the court refused to interfere.

7. It is not necessary, under the said act of March 3d, 1823, to show that the prisoner actually transmitted the papers. It is an offence to procure the papers, with a view to their transmission by another.

8. Where a prisoner demurs to an indictment, and the demurrer is heard and overruled, and he is then required to plead to it without having it read to him, and it is not read to the jury, the reading of it not being, in either case, demanded by him, such omissions to read the indictment furnish no ground for a motion in arrest of judgment.

Before NELSON, Circuit Justice, and SMALLEY, District Judge.

This was an indictment founded on the act of March 3d, 1823 (3 Stat. 771), in which the defendant was charged with knowingly "transmitting false papers" to the pension office at Washington, in support of applications for bounty land, under section 9 of the act of March 3d, 1855 (10 Stat. 702), in behalf of those who "served as volunteers at the invasion of Plattsburg." The indictment was found at the July term, 1858, and contained one hundred and thirty-eight counts, each one being for a distinct felony. Some of the counts charged subornation of perjury.

At the October term, 1858, the defendant's counsel filed a motion to quash the indictment, because of the joinder in the same indictment, of distinct felonies, and also of felonies of different grades, and relied on the case of U. S. v. Peterson [Case No. 16,037], and cases there cited. The court overruled the motion to quash, and upheld the indictment, as being warranted by the act of February 26, 1853 (10 Stat. 162), which contains this provision: "Whenever there are, or shall be, several charges against any person or persons, for the same act or transaction, or for two or more acts or transactions connect-

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

ed together, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts." The court, however, ordered all counts for subornation of perjury to be stricken out of the indictment, thus reducing the number of counts to about one hundred, each of which was for transmitting "false writings."

The defendant applied to the court for an order that a copy of the indictment be furnished to him by the government, and before trial, and relied upon article 6 of the amendments to the constitution of the United States, which requires that, in all criminal prosecutions, the accused shall "be informed of the nature and cause of the accusation." The court held, that no copy of the indictment could be furnished at the expense of the government, inasmuch as the law had made no provision therefor. The cause stood over for trial at the July term, 1859.

The defendant now demurred to the indictment, upon the following grounds: (1) That the offences charged did not come within the act of March 3d, 1823, as the act expressly referred to the making and transmitting of false papers, for the purpose of obtaining from the United States, or their officers, "any sum, or sums of money," and could not be extended to the case of an application for a bounty land warrant; (2) that the papers alleged to contain false statements were not such as were enumerated in the act, but were merely declarations and affidavits, subscribed and sworn to by the signers; (3) that no offence was charged to have been committed in the district of Vermont, but only an offence in the District of Columbia. The demurrer was overruled by the court, the last two points being regarded by the court as virtually decided in the case of U. S. v. Staats, 8 How. [49 U. S.] 41.

The defendant was then called by the clerk, by direction of the court, and, having appeared at the bar, the district attorney observed to the court, that he supposed it was unnecessary to read the indictment to the prisoner. The court replied, "Certainly not; let him plead." The clerk then put this inquiry to the prisoner: "To this indictment, do you plead guilty or not guilty?" The prisoner pleaded "not guilty." The indictment was very voluminous, containing several hundred pages. The jury having been impannelled and sworn, the district attorney submitted to the court, that it was not necessary that the indictment be read to the jury, and the court directed that it should not be read to the jury, saying to the district attorney, that he could state to the jury, in substance, the matters charged, and the proofs expected to be introduced. The opening statement was then made to the jury by the district attorney. Before the trial commenced, the defendant's counsel moved the court that the government be required to elect upon which of the counts they would proceed, but the court refused to interfere. The district attorney gave notice, however, two or three days before the trial, to the defendant's counsel, of his purpose to offer testimony upon only about twenty different counts, embracing only fifteen different cases of application for bounty lands. Many of the witnesses for the government testified that they signed and made oath to the declarations and affidavits before the defendant, as a notary public, but that they were, in some respects, materially false, and different from what they stated to the defendant at the time he wrote them, and from their understanding of their contents when they signed them. Others testified, that their affidavits, although signed and certified as sworn to before the defendant, were never in fact sworn to. The defendant proved, that in doing the business of making out the applications, he was in the employ of another person, to whom he sent or delivered the papers, when completed, and that, for this service, he received a compensation for his time and expenses. It appeared, that most of the papers described in the indictment were transmitted to the pension office by the defendant's employer. The counsel for the defendant requested the court to charge the jury, that, for papers so transmitted, the defendant was not liable. The court declined so to charge, but charged as follows: "It is insisted, by the counsel for prisoner, that, as the papers were not transmitted to the department by the hand of the prisoner, the prisoner is not liable, if the papers are false—that the prisoner's guilt requires the element of transmission. It appears, that the prisoner was in the employment of Buswell; that the papers were sent to Buswell, by the prisoner, to enable Buswell to transmit them; and that the prisoner was employed by Buswell, (on some terms, and it is difficult to ascertain precisely what,) to aid Buswell to procure land warrants. It further appears, that, although not directly interested in getting these warrants, still, the prisoner was engaged in speculations in land warrants and claims, and thus had a kind of interest. It is, evidently, not necessary, under the act, to show that the prisoner actually transmitted the papers. Any party participating in the crime, co-operating in the crime, aiding or assisting in the crime, is liable. The prisoner aided and assisted and participated in one of the elements of the crime, to wit, in procuring these papers, to enable Buswell to complete the crime, by transmitting the papers to Washington. It is not at all material that the government should show that the prisoner transmitted the papers himself, for, if he procured them for Buswell to transmit, he is as guilty as if he had himself transmitted them."

The jury returned a verdict of guilty, after which the defendant moved in arrest of judg-

ment, assigning, among other causes:—(1) That the prisoner was required to plead without having the indictment read to him; (2) that the indictment was not read to the jury. On these points the motion was overruled, on the ground that a demurrer to the indictment had been filed and heard, and that the reading was not demanded.

[The respondent was sentenced for the term of four years to the state prison, and the payment of a fine of five hundred dollars.] [2]

Case No. 14,592.

UNITED STATES v. BIDWELL.

[Hoff. Op. 54; Hoff. Dec. 5.]

District Court, N. D. California. Oct. 7, 1859.

MEXICAN LAND GRANT—SURVEY—CONTEST BY THIRD PERSON.

[1. A survey made by the surveyor general on the confirmation of a Mexican grant cannot be contested by a purchaser from the claimant of a tract which is within the location as made by the surveyor general, and which would be included within any survey that could be made.]

[2. A person alleging that any of the land included in a survey of a rancho is public land of the United States must urge his objection in the name of the United States, and through the district attorney.]

At law.

HOFFMAN, District Judge. The claim in this case having been confirmed, a survey was made by the surveyor general, and, on motion of the district attorney, returned to this court. On examining the surveys that officer was of opinion that no objections could properly be taken, and therefore declined to offer any opposition to the approval of it by the court. The claimant thereupon moved for a confirmation, which was opposed by Mr. Cornwall, who asked leave to intervene on behalf of other parties, and to contest the survey. The application is based on certain affidavits, which set forth the interests of the parties who desire to be admitted to intervene. These parties are one I. M. Speegle and one J. De Lancy, both of whom make affidavits stating their interests in the suit, and praying that they may be permitted to appear by Mr. Cornwall, as their attorney. Speegle states that in July, 1853, the claimant, John Bidwell, conveyed to him and one Chancy 160 acres of land, of which he is now in possession, and that the claimant also agreed to convey to him 160 acres more whenever he should obtain a patent for his land; but whether this last agreement was in writing he does not state. He further alleges that the survey is "erroneous," and that the affiant "is dissatisfied with it, and desires to contest it," etc. Henry Chancy, in an affidavit submitted on the part of the claimant, swears that the 160 acres of land was purchased by himself and Speegle, but that subsequently Speegle has conveyed to him (Chancy), by deed, all his interest in and to the said land, "since which time Speegle has not, to his knowledge, owned any land, and he has reason to believe has never purchased any land from Bidwell, or any other person, but that he and others are now living on the said grant, and, affiant has reason to believe, are using every means to resist and defeat, if possible, the survey and patent of said grant."

Without attempting to determine the disputed question of fact raised by these affidavits, it will be sufficient for our present purpose to consider the application of Speegle on the facts set forth in his own affidavit. It appears, then, that he is the owner of 160 acres, and has a contract for the purchase of 160 acres more. It is admitted that the tract purchased by him is within the location as made by the surveyor general, and would be included within any survey that could be made. He has, therefore, no interest whatsoever in this controversy, and no right to appear and contest this survey, even if it were permitted to subgrantees to do so in any case. The affidavit of John De Lancy sets forth that John Bidwell made a contract with Daniel De Lancy to convey to him one hundred and sixty acres of land whenever the patent should be issued, and that Daniel De Lancy conveyed his interest in this contract to the affiant, that he is in possession of said land, and that the same is included within the survey which has been made. It is not averred that the contract with Bidwell was in writing, and one W. W. Davis, in an affidavit exhibited by the claimant, swears that Daniel De Lancy "distinctly stated to him that he had no deed or other writing from Bidwell for the land." It appears, therefore, that De Lancy can have no interest in this controversy. If he has bought and owns the land, his rights are secured and protected by the location as made, for the land is included within it. If he does not own the land, and has merely contracted to buy it, then it is to his interest that a patent including it be issued, so that his contract may be carried into effect. In no view has he a right to be heard in this proceeding.

The foregoing statement of the interest of these parties in the controversy, as disclosed by themselves, is sufficient to show that they do not seek to be heard with a view of protecting any rights acquired by them from the original claimant, but that they are endeavoring to avail themselves of those rights to contest and delay the final location of this rancho, in the interest of other persons, and of themselves, who have settled upon it. This fact is positively sworn to in an affidavit presented by the claimants. A. H. Barber swears that "the said Speegle and others are making great efforts to induce persons to join with them to take possession of lands in the aforesaid grant, and are

[2] [From 22 Law Rep. 273.]

now actually taking possession of new locations in the very middle of said grant, and are holding public meetings and collecting funds to accomplish their ends. The lands of which they are taking possession have, to my knowledge, been considered since the year 1851 as the property of John Bidwell, and occupied by him, and are still occupied by him, as a part of the aforesaid grant." From the case, therefore, as presented by themselves, as well as from this affidavit, the nature of this application is evident. In this, as in all other cases, all persons who allege that any of the land included in a survey of a rancho is public land of the United States must urge their objections in the name of the United States, and through the district attorney. To that officer is committed the duty of seeing that no public land is improperly embraced within a survey of a private claim. When he has no objections to interpose, the settler cannot be permitted to intervene in the proceeding. When he settled upon the land, and, notwithstanding that it was claimed under a Mexican title, chose to assume it to be public land, he was aware that the United States would assert her rights through her proper officers, and that the judgment of the courts, declaring that the land was not public, but private, land, would be final and conclusive on the rights of the United States, and all claiming under them. When, therefore, the United States, through her officers, admits that the survey is properly made, or decline to make objections to it, no settler can be heard to contest it. The application is therefore denied, and a decree confirming the land, as surveyed and located by the surveyor general, to the claimant, must be entered.

Case No. 14,593.

UNITED STATES v. BILL.

[2 Cranch, C. C. 202.] [1]

Circuit Court, District of Columbia. June Term, 1820.

CONSTABLE — SACRIFICING PROPERTY — CORRUPT MOTIVE.

In a prosecution against a constable for wantonly sacrificing property taken under execution, the jury cannot find him guilty, unless they should be satisfied that he acted from a corrupt motive.

The defendant [A. T. F. Bill], who was a constable, was presented for wantonly sacrificing a carpet taken by him in execution, and sold at a time and place different from the time and place mentioned in the notice of sale.

At the motion of Mr. Law, the defendant's counsel, THE COURT instructed the jury that before they could find him guilty, they must be satisfied that he acted from a corrupt motive.

Verdict for the defendant.

[See Cases Nos. 1,405 and 14,594.]

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

Case No. 14,594.

UNITED STATES v. BILL.

[2 Cranch, C. C. 518.] [1]

Circuit Court, District of Columbia. Dec. Term, 1824.

CONSTABLE—BOND—REMOVAL FROM OFFICE.

A constable's official bond is not vacated, or rendered void, by his temporary removal from office, but covers his official conduct after his reinstatement in office as well as before the suspension of his functions.

The defendant [A. T. F. Bill] had been appointed by the court, a constable for the county of Washington, and gave bond in 1818. The suit was brought to recover the amount which he had received upon two writs of fieri facias, in favor of A. and J. B. Holmead.

The court, on the 20th of January, 1819, upon the request of the grand jury, ordered that "he be removed" from the office of constable. On the 27th of the same month, the court, for reasons stated on the minutes, ordered "that he be reinstated in his office of constable, and that the former order, dismissing him from that office, be rescinded." The two writs of fieri facias, for the amount of which he was now charged, and which he had returned "Satisfied," were dated in April, 1819, and returnable on the first Monday of May following. The defendant demurred to the evidence, and contended that his bond was vacated by his removal from office, and that it did not cover his official acts done after the order for his removal was rescinded.

But THE COURT was of opinion, that the order for his removal having been rescinded at the same term, it is as if it had never been made, and did not release his sureties from responsibility for his subsequent official acts.

[See Cases Nos. 1,405 and 14,594.]

Case No. 14,595.

UNITED STATES v. BIRCH.

[1 Cranch, C. C. 571.] [1]

Circuit Court, District of Columbia. Nov. Term, 1809.

WITNESS — PROSECUTOR — LIABILITY FOR COSTS — SELLING LIQUOR WITHOUT LICENSE — SALE BY WIFE.

1. The prosecutor, whose name is indorsed on the indictment for a misdemeanor, is not a competent witness for the prosecution.

2. A selling by the wife with the assent of the husband, is a selling by the husband. The day is not material.

Indictment for selling spirituous liquors without license.

Alexander Simms, the prosecutor, whose name was indorsed on the indictment, was offered by the United States, as a witness.

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

E. J. Lee, for defendant [James Birch], objected that he was interested; being liable to pay the costs, according to the act of Virginia of November 13, 1792, § 25, p. 105.

Mr. Jones. It is every-day's practice in England to examine prosecutors.

THE COURT said that the interest was direct and that the witness was incompetent.

E. J. Lee contended that evidence that the defendant's wife sold, is not evidence that the defendant sold, and that the day must be proved as laid.

THE COURT said, if the selling by the wife was with the assent of the husband, it is to be considered as the selling by the husband.

Mr. Lee abandoned the point as to the day.

But THE COURT thought the day was not material.

Case No. 14,596.

UNITED STATES v. BIRCH et al.

[3 Cranch, C. C 180.] [1]

Circuit Court, District of Columbia. Nov. Term, 1827.

WITNESS—NEGRO—JOINT INDICTMENT.

A colored man is not a competent witness in Alexandria against a colored man indicted jointly with white men for a riot.

James Birch, a white man, was indicted jointly with others for a riot. One of the defendants, William Bill, was a colored man.

Mr. Swann, for the United States, offered Wilfred Mortimer, a colored man, born of a white woman, as a witness for the prosecution against the colored defendant, William Bill.

Mr. Mason, for defendants, objected.

By the 5th section of the Virginia act of 7th of December, 1792 (page 187), it is enacted that "no negro or mulatto shall be a witness, except in pleas of the commonwealth against negroes or mulattoes; or in civil pleas where negroes or mulattoes alone shall be parties."

THE COURT (THRUSTON, Circuit Judge, absent), rejected the witness; because it was a joint indictment, and the defendants had pleaded jointly; and the testimony, if given against one, would operate against all.

Case No. 14,597.

UNITED STATES v. BIRD.

[1 Spr. 299.] [2]

District Court, D. Massachusetts. July, 1855.

CRIMINAL LAW — LOCUS OF OFFENCE — WITHOUT LIMITS OF UNITED STATES—BRINGING WITHIN DISTRICT.

1. An offence, committed within the United States, must be tried in the state and judicial district, within which it was committed.

2. If committed without the limits of the United States, on the high seas, it must be tried in the district where the offender is apprehended, or into which he may be first brought.

3. By being brought within a district, is meant, brought in legal custody, and not merely being conveyed thither by the ship in which the offender first arrives.

This indictment alleged an offence to have been committed on the high seas, and that the prisoner was first brought into the district of Massachusetts. Questions of jurisdiction arose upon the evidence. The counsel for the prisoner contended, that the offence, if any, was committed on the Mississippi river, and within the state of Louisiana; and further, that if committed beyond the limits of that state, the prisoner was not first brought into this district.

B. F. Hallett, U. S. Dist. Atty.

J. H. Prince, for prisoner.

SPRAGUE, District Judge, said that if an offence be committed within the United States, it must be tried in the state and district within which it was committed. Const. Amend. 6. If the offence be committed without the limits of the United States, on the high seas, or in a foreign port, the trial must be had in the district "where the offender is apprehended, or into which he may be first brought." St. 1790, c. 9, § 8 (1 Stat. 113, 114); St. 1825, c. 65, § 14 (4 Stat. 118). By being brought within a district, is not meant merely being conveyed thither by the ship in which the offender may first arrive; but the statute contemplates two classes of cases, one in which the offender shall have been apprehended without the limits of the United States, and brought, in custody, into some judicial district; the other, in which he shall not have been so apprehended and brought, but shall have been first taken into legal custody, after his arrival within some district of the United States, and provides in what district each of these classes shall be tried. It does not contemplate, that the government shall have the election, in which of two districts to proceed to trial. It is true, that in U. S. v. Thompson [Case No. 16,492], Judge Story seems to think that a prisoner might be tried either in the district where he is apprehended, or in the district into which he was first brought. But the objection in that case did not call for any careful consideration of the meaning of the word "brought," as used in the statute; nor does he discuss the question whether the accused, having come in his own ship, satisfies that requisition. In that case, the party had not been apprehended abroad, and the decision was clearly right, as the first arrest was in the district of Massachusetts. The statute of 1819, c. 101, § 1 (3 Stat. 532), for the suppression of the slave trade, is an example of a case in which an offender may be apprehended without the limits of the United States, and sent to the United States for trial. Ex parte Bollman and Swartwout, 4 Cranch [8 U. S.] 136.

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

[2] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

Case No. 14,598.

UNITED STATES v. BITTINGER.

[15 Am. Law Reg. (N. S.) 49.]

District Court, W. D. Missouri. 1876.

OFFENCES AGAINST ADMINISTRATION OF JUSTICE—INFLUENCING OR IMPEDING WITNESS.

[1. A witness whom it is made a crime, by the first clause of Rev. St. § 5399, to endeavor, corruptly, or by threats or force, to influence, intimidate or impede, is one who has been designated by the United States attorney, or by a commissioner, as a witness, either by issuing a subpœna for him, or by indorsing his name on a complaint; and a case is pending in a court of the United States within the contemplation of the statute, when a complaint is lodged with a commissioner, charging a violation of the laws of the United States.]

[2. It is an offence under the statute to corruptly influence such a witness to secrete or so dispose of himself as to prevent service of process upon him.]

This was an indictment drawn under section 5399 of the Revised Statutes: "Every person who corruptly, or by threats or force, endeavors to influence, intimidate or impede any witness or officer in any court of the United States in the discharge of his duty, or corruptly or by threats or force obstructs or impedes; or endeavors to obstruct or impede, the due administration of justice therein, shall be punished," &c.

James S. Botsford and H. B. Johnson, for the United States.

Willard P. Hall and Jeff. C. Chandler, for defendant.

KREKEL, District Judge (charging jury). The statute aims at defining two classes of offences:

First, the endeavor to improperly influence, intimidate, or impede a witness or officer in the discharge of a duty in any court of the United States by corrupt means, such as bribery, or by threats or force. It contemplates a case in which an attempt is made to directly interfere with a witness, and to improperly and illegally influence him. A witness, in the meaning of the statute and under the evidence in this case, will be taken by you to be a person for whom a subpœna had issued on part of the United States to appear before a United States commissioner to testify on a charge for violation of the laws of the United States. A case, under the evidence before you, is pending in a court of the United States, when a complaint is lodged with a United States commissioner charging a violation of the laws of the United States. Before any one can be said to have endeavored to corruptly influence a witness, he must have known that the witness had been designated by the United States district attorney, or the commissioner, as one to be used as a witness. The designation may be by the issuing of a subpœna, or by the endorsement of his name on a complaint, designating the witness by name, as such. If the jury shall be satisfied from the evidence, that defendant Bittinger knew that a subpœna had been issued for Ferdinand Rendelman, or that Rendelman's name was endorsed on a complaint charging the defendant named therein with an offence against the laws of the United States, and if they shall further find that he corruptly influenced the said Rendelman to secrete, or so dispose of himself as to prevent process to be served on him, and if the jury shall further find that Rendelman had knowledge that such was the intention and object of the defendant, they should find the defendant guilty under the first count of the indictment. If the jury shall find that no steps had been taken, either by the United States district attorney or the United States commissioner, to designate said Rendelman as a witness, either by an endorsement of his name on the complaint, or the issuing of a subpœna, or that the defendant had no knowledge that said Rendelman had been so designated as a witness, before the alleged interference, you should find the defendant not guilty under said first count.

The second class of offences which the section of the law cited denounces, is "corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice." No particular class of persons are named in this last clause. The words "influence and intimidate," employed in the first clause, are dropped, and "due administration of justice in court" added, showing an intention to extend the application of the statute. Applying the provisions last quoted to the second, third, fourth and fifth counts of the indictment, it will be necessary for you to find that the defendant, Bittinger, did some act or acts which obstructed or impeded the due administration of justice. We have seen, so far as an interference with a witness who had a duty in the United States court to discharge is concerned, the offence comes within the first subdivision of the act. This being the case, the defendant, in order to be found guilty of obstructing the due administration of justice in any court of the United States, must have done, if not more, at least some act or acts in addition to those specified in the first subdivision of the statute we are considering, in order to find him guilty of having corruptly obstructed the due administration of justice. There seems to be no other act of the defendant interfering with the due administration of justice testified to, than his interference with the witness Rendelman, and unless this interference can be construed into an obstruction of the due administration of justice, there would seem to be no evidence supporting the last four counts of the indictment. It would be, to say the least, a very doubtful construction, to seek to bring the offence from under the first and more definite description, for the purpose of applying the more general

provision to the second class of offences, and you are not to do so unless you are satisfied the testimony in the case will justify it. You will have to determine from the evidence whether a case is made out against the defendant on the first, or the second, third, fourth and fifth counts of the indictment. These last four counts charge the corruptly endeavoring to obstruct and impede the due administration of justice before the United States commissioner and in the district court.

There is but one offence charged to have been committed, and it is your duty to say, if you find the defendant guilty, under what count of the indictment, bearing in mind, that the first count charges the corrupt interference with the witness, and the four last the corrupt obstruction of the administration of justice in the district court.

Verdict, "Guilty on all the counts."

Case No. 14,599.

UNITED STATES v. BITTINGER.

[21 Int. Rev. Rec. 342.]

District Court, W. D. Missouri. 1875.

FRAUDULENT CLAIMS—SCIENTER—INTERNAL REVENUE—GAUGERS.

1. Making a claim against the government of the United States consists in asking or demanding payment for services. The object of the statute is to prohibit and punish the drawing of money from the treasury of the United States without having rendered legal and recognized equivalents

2. The terms "false," "fictitious," and "fraudulent," used in the statute, have no special legal signification. By the word "knowing" is meant having a certain and clear perception of the falsity of the claim made.

3. Under the authority of the law the commissioner of internal revenue has a right to make regulations concerning gauging and in relation to gaugers, and these regulations are binding and obligatory upon gaugers.

4. Section 3290 of the Revised Statutes does not authorize a gauger to delegate his authority, or to have his duties performed for him; nor do the statutes or regulations anywhere authorize such a delegation or substitution.

The defendant [John L. Bittinger] was indicted for making in due and legal form certain false, fictitious, and fraudulent claims against the government of the United States, as set forth in twenty-three counts, one for each of twenty-three gaugers' monthly bills rendered by defendant for services as internal revenue gauger, knowing the claim and bill to be false, fictitious, and fraudulent in this: that none of the services charged for had ever been performed by the defendant as stated and claimed. The evidence showed that defendant presented for payment twenty-three "internal revenue gaugers' monthly bills," one for each of twenty-three months from July, 1873, to May, 1875, inclusive; that these bills were for fees for gauging and not in any part for expenses; that defendant had received pay as demanded by the bills; that defendant had never done any of the gauging, but it was all done by Borngesser, another gauger, who himself received pay for a part of the work which he did, and for the remainder defendant had claimed and received pay the same as though the services had been actually performed by defendant himself.

Botsford & Johnson, for the United States.
Hall & Chandler, for defendant.

KREKEL, District Judge (charging jury). The indictment charges the defendant with having made false claims against the United States, knowing them to be false, fictitious, and fraudulent. Section 5438 of the United States statutes, under which the indictment is drawn, provides: "Every person who makes or causes to be made or presents or causes to be presented for payment or approval . . . any claim upon or against the government of the United States, or any department thereof, knowing such claim to be false, fictitious or fraudulent, shall be imprisoned," etc. By making a claim, as defined in this statute, is meant the asking or demanding on part of the defendant of the government payment for services. The term "false," used, means "unfounded" or "unjust"; by "fictitious" is meant "not real"; by "fraudulent," "wrong" or "deceitful." These terms have no special legal signification in their use in this statute, but are to be taken by you in their ordinary and well-understood sense. The language of the statute and indictment is, "knowing such claim to be false, fictitious, and fraudulent." By the word "knowing," as here used, is meant the having a certain and clear perception of the falsity of the claim made. The object of the statute is to prohibit and punish the drawing of money from the treasury of the United States without having rendered legal and recognized equivalents.

Regarding the appointment of gaugers, the statute of the United States provides: "The secretary of the treasury shall appoint in every collection district where there may be necessary one or more internal revenue gaugers, who shall each take an oath faithfully to perform his duties, and shall give bond with one or more securities . . . for the faithful discharge of the duties assigned to him by law or regulation." In reference to regulations, the law has this provision: The commissioner of internal revenue "may prescribe rules and regulations to secure a uniform and correct system of inspection, weighing, marking and gauging of spirits." Under the authority thus conferred on the commissioner, he has made the following regulations as to gaugers: "United States revenue gaugers are specially directed to personally gauge the packages and determine the volume and the true per cent. of proof of their contents. They will also with their own hands put upon each cask or package

gauged by them, all the marks, brands and stamps required by law and regulation. . . . Under no circumstances will gaugers be permitted to delegate these duties to an assistant." This regulation is one which, under the authority of law, the commissioner of internal revenue had a right to make, and is binding and obligatory upon the gauger, and bears upon the question of knowledge which the defendant had, whether the claims testified to when presented were false, fictitious, and fraudulent. Another provision similarly affecting the defendant is found under the heading, "Special Instructions to Gaugers. When drawn into casks, spirits must be gauged and proved by the gauger himself, with his own hands, and in no case can he deputize another person to do it for him."

These regulations, made under and according to law, plainly speak for themselves, and need no comment. Section 3290 of the statute has been commented on for the purpose of showing authority in the gauger to have his duties performed for him. This section reads as follows: "Whenever any gauger employs any owner, agent, or superintendent of any distillery or warehouse, or any person in the service of such owner, agent or superintendent, or any rectifier or wholesale dealer to use his brands, or to discharge any of the duties imposed upon him by law, he shall for each offence so committed pay a fine." These provisions do not authorize a gauger to delegate his authority, or have his duties performed for him, nor do the statutes or regulations anywhere give such a delegation or substitution, or authorize the charging of fees for work done by others in the discharge of a duty which the law requires to be performed by the gauger in person.

There is no dispute as to who did the gauging for which the defendant claimed and obtained pay from the government. The work was all done by Borngesser, another gauger, in St. Joseph. How the interest of the government was affected by reporting a subdivision of the work done by Borngesser, partly in his own name and partly in name of Bittenger, and the amounts of money thus drawn from the treasury, is before you. If you shall find from the evidence that the manner in which the business of gauging testified to was done was for the purpose of drawing illegal fees, and that the defendant was a party thereto, and presented claims to the government for part of such illegal fees with full knowledge of their illegality, you should find the defendant guilty. By "knowledge" is meant, the having a certain and clear perception of the falsity of the claim made.

If, upon the considering of the case, you have a reasonable doubt arising from the facts and circumstances testified to, you should acquit. By "reasonable doubt" is meant a state of mind hesitating in coming to a conclusion as to the guilt or innocence of the defendant. If you have such a doubt, arising from the facts and circumstances of the case, you should acquit; otherwise convict.

With the question of punishment you have nothing to do, as the law has left that to be determined by the court, in case of a conviction. The offences charged in the various counts of the indictment are the making of false claims, knowing them to be false, fictitious, and fraudulent. You can find the defendant guilty or acquit on all or on as many of the counts of the indictment, as you may find yourself justified in doing from the evidence and the law applicable thereto as given you by the court.

The jury found the defendant guilty on the last count in the indictment, and not guilty on all the others.

Case No. 14,600.

UNITED STATES v. BLACK et al.

[11 Blatchf. 538; [1] 19 Int. Rev. Rec. 116.]

Circuit Court, S. D. New York. April 2, 1874.

INTERNAL REVENUE—ACTION ON DISTILLER'S BOND—ERRORS IN ASSESSMENT—ADDITIONAL TAX—ASSESSOR'S AUTHORITY—SURVEY.

1. In a suit brought by the United States against a distiller, as principal, and his sureties, on a bond conditioned that the principal "shall, in all respects, faithfully comply with all the provisions of law in relation to the duties and business of distillers," to recover the balance of the amount of an assessment, and the amount of a reassessment, made by the assessor upon the principal, as a tax due by him as a distiller, the sureties cannot show that there were errors in the assessment and the reassessment, whereby the amounts thereof were made too large.

2. The only remedy of the sureties is to pay the amount under constraint, and appeal to the commissioner of internal revenue, and, if the appeal is denied, bring a suit against the collector to recover the amount unjustly exacted.

[Disapproved in U. S. v. Myers, Case No. 15,846. Cited in Alkan v. Bean, Id. 202; Kensett v. Stivers, 10 Fed. 525; Snyder v. Marks, 109 U. S. 193, 3 Sup. Ct. 160.]

[Cited in Eddy v. Township of Lee, 73 Mich. 131, 40 N. W. 796.]

3. Such an assessment, if too small, is not rendered invalid by the fact that the assessor, under section 20 of the internal revenue act of June 30th, 1864, as amended by section 9 of the act of July 13th, 1866 (14 Stat. 103), afterwards makes an assessment of the additional tax for which the distiller is liable.

4. Such assessment of such additional tax may be made by the assessor, solely because he determines that an error was made by him or his predecessor in the first assessment, as well as because he determines that an error was made by the distiller in his returns.

5. The assessor derives his authority to assess such additional tax, not from the fact that an error existed, but from his determination on the question of error.

6. A distiller is liable to pay an assessed tax, although it is not shown affirmatively by the government, in an action upon his bond, that the survey required by the 10th section of the act of July 20th, 1868 (15 Stat. 129), has been made, and a copy of it been served upon him, and although it is not shown that a demand for the payment of such tax has been made upon him.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

At law.

Edmund H. Smith, Asst. U. S. Dist. Atty.

Samuel G. Jelliffe and E. Luther Hamilton, for defendants.

SHIPMAN, District Judge. This action was, by written stipulation of the parties, tried by the court, a jury having been waived. All the material facts are as follows: Joseph Black was a distiller in the city of New York, from October, 1868, to February, 1869. On October 1st, 1868, said Black, as principal, with the other defendants, Miner and Groh, as sureties, executed a bond to the United States, in the penal sum of $27,000, conditioned that said Black "shall, in all respects, faithfullly comply with all the provisions of law in relation to the duties and business of distillers." Said bond was approved by the proper officer. Said Black made the returns required by statute, for each of said months to the assessor of his district, Homer Franklin. Said assessor made an assessment for each of said months, and returned to the proper collector duly certified lists containing said assessments, which were as follows: For October, 1868, $3.175.50; for November, 1868, $2,223.50; for December, 1868, $1,123; and for January, 1869, $868.50; making a total of $7,390.50. Upon these assessments said Black paid, prior to January 28th, 1869, for October, 1868, $1,936.50; for November, 1868, $2,223.50; and for December, 1868, $1,123; making a total of $5,283, and leaving due the sum of $2,107.50. In June, 1870, Mr. A. P. Ketcham, the successor of Assessor Franklin, made, by direction of the commissioner of internal revenue, a supplementary assessment, or reassessment, upon said Black, for each of said months, and forwarded a duly certified list containing said reassessment to the proper collector, in conformity with the statute. The total amount added to the original assessment by this reassessment was the sum of $11,004.10. The increase for the month of October was $4,330.70, for the month of November, $2,354.20, and for the month of December, $4,367.50; and the diminution for the month of January was $48.30. The errors which Mr. Ketcham and the commissioner ascertained, or thought they ascertained, to have existed in the original assessment, were threefold: 1st. That said Black should have been assessed for a greater number of working days in the aggregate. 2d. That the per diem tax, for the last eight days in October, should have been assessed at $58, instead of $48. 3d. That the per diem tax, for November and December, should have been assessed at $58, instead of $32, and the estimate of producing capacity should have been increased in like proportion. In June, 1870, when this reassessment was made, said Black had left the city of New York, has never since returned, and his place of residence is unknown to the plaintiff and to the sureties. No demand was ever made upon him for the payment of the tax assessed by Mr. Ketcham, and he was not served with process in this suit. No demand was made upon the sureties for the payment of any taxes, except the demand implied by the service of process. Neither Black nor the sureties have ever paid any portion of the reassessed tax, or of the $2,107.50 due upon the original assessment. This suit is brought upon the bond, against the sureties, to recover from them the amount of taxes due from Black.

Upon the trial of the cause, evidence was offered by the defendants to show that, in the original assessment for the month of October, 1868, Black was assessed for too many working days, and that the amounts added by Mr. Ketcham to the original assessments were entirely erroneous. No evidence was offered in regard to the distiller's returns, but, from an examination of all the other papers, I am of opinion that the assessment of Mr. Franklin was probably in accordance with the returns. The evidence of the defendants, in regard to the errors in the two assessments, was objected to by the government, but was received subject to the objection. All the questions have now been elaborately argued, both as to the admissibility of the evidence, and as to the questions of fact and law involved in the case. Inasmuch as all the evidence was heard by me, and, in the event of a new trial, it might be difficult to reobtain the attendance of the witnesses, I have deemed it advisable to pass specifically upon the questions of fact.

1st. In regard to the assessment of Mr. Franklin for the month of October, 1868, some testimony was presented by the defendants, tending to show that too many working days were assessed by Franklin during this month. It is possible that such was the case, but, in view of the fact that the assessment was probably based upon the return of Black, and apparently acquiesced in by him, and that the evidence of a suspension for a longer time than that allowed is not very satisfactory, I prefer to let the Franklin assessment for this month stand without diminution.

The only other attack made by the defendants upon the amount of the Franklin assessments, is for the month of January, 1869. The Ketcham assessment for this month is $48.30 less than that made by Franklin, the chief difference being that Franklin assessed for two more working days. No facts have been detailed in the testimony, to aid either assessment in respect to this item. I, therefore, give the preference to the earlier assessment, as the more reliable one.

2d. In regard to the additions to the tax made by the assessment of Mr. Ketcham, I find as follows: Mr. Franklin assessed for 18 days, and Mr. Ketcham for 24 days, in

the month of October. Said Black suspended work on October 23d, in consequence of an accident to the still, of which suspension he gave due written notice to the proper assistant assessor, who duly reported the same to the assessor, who locked and fastened the still in accordance with the requirements of the statute, but neglected to report the suspension to the commissioner of internal revenue. The still was locked, and all work suspended, until about the 1st of November, and was not in operation more than eighteen days during the month of October. The first survey of the distillery taken in October, duly made and deposited in the office of the commissioner, indicated a per diem tax of $48. Prior to the last eight days in October, a new survey was taken of the intended capacity of the distillery, by which survey new tubs were added, sufficient to raise the per diem tax to $58, but the new tubs were never put in use. The assessor, knowing that the capacity had not been actually increased, and that no change had been made, assessed under the original survey, for the month of October. The new survey was forwarded to the commissioner, but the fact that these tubs were not used was not communicated to him. On the 1st of November, Black notified the proper officer that he desired to diminish the capacity of his distillery one-third from the previous actual capacity, and requested the assessor to make such reduction and seal up the tubs, which was accordingly done, and the proper number of tubs was actually closed and sealed up by the assessor. These tubs remained sealed until Black stopped work entirely. The assessor did not inform the commissioner of this reduction until December 21st. Mr. Ketcham assessed for the months of November and December at the capacity indicated by the second survey. The producing capacity was, after November 1st, in fact reduced one-third from the capacity stated in the first survey.

Under the principles laid down in Daniels v. Tarbox [Case No. 3,568], I find that the additional tax imposed by Mr. Ketcham for the months of October, November, and December was in excess of the sum actually due, and that, at the time of said reassessment, the amount which ought to have been assessed against Black was only the sum of $2,107.50, being the unpaid amount of the Franklin assessments.

But, the main question of law in the case is, whether this evidence is admissible—whether the incorrectness of the assessment is a valid defence in an action upon a distiller's bond, or whether the defendants' sole remedy is to pay under constraint, appeal to the commissioner of internal revenue, and, if the appeal is denied, bring a suit to recover the money unjustly exacted. In order to answer this question, it is necessary to consider the character and object of the portions of the internal revenue laws relating to distillers, the duties imposed upon the distiller, and the position and obligation of the sureties upon his bond.

The sections of the revenue laws relating to distillers, which were in force in the year 1868, contained complex and minute provisions, in all of which the twofold object of that portion of the revenue acts was manifest, viz., to prevent evasion and fraud on the part of the distiller, and to enforce prompt and certain payment of the tax. Experience had apparently proved that the temptations to fraud were great, and that all conceivable precautions must be taken to prevent it. The statutes were passed at a time when the exigencies of the government demanded prompt payment of all its revenues, and congress apparently looked with no leniency upon the distiller. It was provided, that, before commencing business, he should give a satisfactory bond, with the condition that he should, in all respects, faithfully comply with all the provisions of law in relation to the duties and business of distillers; that the United States should have a first lien upon the distillery, for the payment of taxes; that, at least monthly returns should be made to the assessor; and that the taxes should be due and payable on the last day of each month. The statutes also provide that collection of the tax may be made by distraint; that no suit for the purpose of restraining the assessment or collection of the tax can be maintained in any court (Act March 2, 1867, § 10; 14 Stat. 475); and that no suit can be maintained in any court for the recovery of any tax, until appeal has been made to the commissioner of internal revenue (Act July 13, 1866, § 19; 14 Stat. 152). The action brought to recover the tax from the collector, after its payment, seems to be the only mode in which the amount of the tax can be determined by any court. By the provision that no suit can be maintained for the purpose of restraining either the assessment or the collection of the tax, the statute has, in fact, provided that payment must be made at all events, whether the tax was justly or unjustly levied, and that redress for an unjust exaction must be sought subsequently. The distiller is thus obliged to pay his taxes as they are assessed and when they mature. If he neglects to pay, payment can be enforced by distraint, in which event his remedy is to pay the tax and appeal to the commissioner. If the appeal is denied, he can then resort to the courts to obtain repayment. When the government seeks to enforce payment by a suit upon the bond, the same reasons of public policy exist for regarding the assessment as, for the time being, and for the purposes of that suit, conclusive. It is not regarded as conclusive because its correctness cannot be inquired into any where or at any time, but because the legislature has prohibited its correctness from being inquired into until after payment has been made. The assessment is conclusive for the

purpose of collecting the tax. U. S. v. Hodson [Case No. 15,376].

Again, the duties of the assessor are, in their nature, judicial. The assessment has been determined by an exercise of powers to a certain extent judicial in their character. It is not meant that the assessment is a judgment against the distiller, because, as has been said, the tax-payer has a remedy, by bringing a suit in his own behalf, in which suit the assessment is not conclusive, and all the questions of fact involved are open to adjudication, upon evidence presented to the court. But, the judicial nature of the assessor's acts is an additional reason for construing the statute in accordance with its evident intent and purposes. That the distiller is bound by the assessment until a suit is brought in his own behalf for its recovery, after payment, is held in U. S. v. Hodson [supra], a decision concurred in by Mr. Justice Davis, where it is said: "That" (i. e., the suit of the distiller) "is the only mode provided by law for correcting or testing the legality of the assessment, and the decision of the assessor, fixing the amount of the tax, when brought under consideration in any other way, is conclusive."

But, it is said, that while this may be true in regard to the distiller, the sureties stand in a different position; and that the law has ever regarded guarantors with peculiar favor, and has ever been rigorous towards the party who was endeavoring to enforce payment from a surety. What, then, is the position, and what are the obligations, of the sureties, under this bond? The condition of the bond is, that the principal shall, in all respects, comply with the law relating to his business. The law relating to the business of a distiller compels him to pay the assessed taxes at the end of each month. Upon failure of payment, the condition of the bond is broken, and the only question is one of damages. If the conclusions heretofore reached are correct, the measure, and the only measure, of damages must be the assessment, for, until payment is made, the assessment is unalterable, and is conclusive.

It is true, that the common law has ever been lenient towards guarantors, or sureties, but the leniency of the common law is, in this case, controlled by the intent of the statutes which we are considering. That intent was, as has been seen, to enforce prompt payment of the assessed taxes, and, for that purpose, to make the assessment conclusive for the time being. It is as important for the government to receive payment promptly from the sureties as from the principal.

It is also true, that sureties have been permitted to interpose defences which were not open to their principals; but, in general, these defences relate to matter affecting the rights of the surety alone, and not affecting the pecuniary rights of the principal, as where the conduct of the creditor towards the principal has been such as would tend to the injury of the surety. But, the defence here is, that the principal is not indebted. It is not, that, although the principal may be liable, the sureties are not indebted by reason of the conduct of the government, which renders payment by them unjust; but is simply a claim that the conditions of the bond have been fully performed. As has been seen, the claim is unfounded, for, only payment of the assessed taxes can be a compliance with the requirements of the statute or of the bond. In case of non-payment by the distiller, the surety stands precisely in the position of his principal. The duty of the surety is to pay the tax under such constraint that the payment cannot be deemed a voluntary one, and appeal to the commissioner. If the appeal is not successful his remedy is by suit in his own name. Had the sureties pursued this course, I think they would have been entitled to recover the entire sum paid upon Mr. Ketcham's assessment I do not think that they are precluded from adopting such a course now.

I am, therefore, constrained to decide, that the evidence offered by the sureties is inadmissible here, but must be reserved for another suit.

It is claimed by the sureties that no taxes have ever been duly assessed against Black, and, therefore, no recovery can be had against them. Their propositions are threefold: 1st. That the Franklin assessment is void, inasmuch as there cannot be two valid assessments for the same tax; and that the government, by ordering a new assessment, has asserted the incorrectness of the Franklin assessment, and, therefore, should not be permitted to claim that it is valid in any particular. The fallacy of the argument consists in the assumption that, because one assessment is not large enough, it is, therefore, void. There is no invalidity in such an assessment; and the reassessment is not to take its place, but simply to supplement and add to it. The assessor, in making his reassessment, is to ascertain "the amounts for which such persons may be liable, over and above the amount for which they may have been or shall be assessed, upon any return or returns made as aforesaid." In this case, Mr. Ketcham's assessment was for the excess of taxes which he supposed Mr. Black was liable to pay, over and above the amount assessed by Mr. Franklin. The original assessment is not made invalid or inoperative by the additional assessment.

2d. That an assessor has no authority, under the 20th section of the act of June 30th, 1864, as amended by the 9th section of the act of July 13th, 1866 (14 Stat. 103), to make a reassessment in order to correct any errors, omissions or undervaluations of his own, or of his predecessor. The proposition assumes that the original errors, if any there were, existed simply in the assessor's list, or statements, and not in the distiller's returns. Had the errors in the Franklin assessment, which

were supposed by his successor to exist, actually existed, such errors would, undoubtedly, have been the result of corresponding errors in the distiller's return, for there can be little doubt that Mr. Franklin's assessment was in harmony with the returns.

But, the question made by the sureties has been fully considered at the present term of this court, in the case of Barker v. White [Case No. 996], where the errors were those of the assessor alone, and not of the distiller. In the opinion given in that case it is held, that the power of the assessor to make a supplementary list and assessment, is not limited to cases where the distiller's returns are erroneous, but that he is authorized to make a supplementary assessment, within the time specified in the statute, whenever it has been ascertained by him that the original assessment is erroneous from any cause, whether from his own mistake or from that of the distiller. It is further held, that the reassessment is not presumed to be correct, until the existence of the jurisdictional fact necessary to enable the assessor to make a new assessment has been affirmatively proved, viz., the determination or decision of the assessor that a mistake had been made in the original assessment. In this case, the existence of this fact, from which Mr. Ketcham derived his power to make a supplementary assessment, was affirmatively shown. It is true that, in the opinion of this court, Mr. Ketcham's decision was incorrect; but he derived his authority to reassess not from the fact that an error existed, but from his determination or adjudication upon the question of error.

3d. That the distiller is not liable for any tax, unless the survey required by the 10th section of the act of July 20th, 1868 (15 Stat. 129), has been made, and a copy of it has been served upon the distiller; and that there is no proof that this was done. The defendants cite the case of Peabody v. Stark, 16 Wall. [83 U. S.] 240, which was an action by a distiller against a collector of internal revenue, to recover a tax paid by the plaintiff, upon the ground that it was illegal. The tax complained of as illegal was a reassessment upon the plaintiff as a distiller, in which he was assessed to the amount of 80 per cent. of the producing capacity of his distillery, although he had not made that amount of spirits, and notwithstanding the fact that no copy of the survey of his distillery, fixing its producing capacity, had ever been filed with him or delivered to him. The court held, that the distiller does not become liable, under the 80 per cent. clause, until a copy of the survey has been delivered to him, and that, having shown affirmatively that no copy was left with him, he was entitled to recover. But the court did not decide that, in an action upon a bond, it was necessary for the government, in making their prima facie case, to prove affirmatively the performance of all the acts, other than those conferring jurisdiction upon the assessor, required by the statute prior to the making of the assessment. In this case, no evidence was offered by the defendants, in regard to the delivery of the survey to the distiller. As the case stands, it will be presumed that the duties imposed by the statute upon public officers were properly performed.

It is also claimed by the sureties that Black is not liable for the reassessed tax, because demand of payment was never made upon him. The distiller's taxes are due and payable on the last day of each month. Act July 13, 1866, § 11 (14 Stat. 150). No notice is necessary, to the distiller, unless a penalty is added, which penalty is not sought to be enforced in this suit. By the 9th section of the same act (page 104,) it is provided, that all provisions of law for the assessment or collection of any tax "shall be held to apply, as far as may be necessary, to the proceedings herein authorized and directed" in regard to reassessments. The taxes due upon the supplementary list or reassessment are, therefore, due at the expiration of the month when the certified list is returned to the collector.

The result is, that the evidence offered by the defendants is inadmissible in this action, and that the sureties are legally liable to pay the amount unpaid upon the two assessments, and to seek their remedy for any amount improperly assessed, by an independent suit, if an appeal to the commissioner shall fail to give relief.

Let judgment be entered for the plaintiff, for $13,111.60, and interest from the commencement of this suit.

Case No. 14,601.

UNITED STATES v. BLACK.

[2 Crauch, C. C. 195.] [1]

Circuit Court, District of Columbia. Dec. Term, 1819.

LARCENY—DISTRICT OF COLUMBIA—ACTS OF MARYLAND—HORSE-STEALING—TRIAL—PEREMPTORY CHALLENGE.

1. Horse-stealing, in the District of Columbia, is punishable as an ordinary larceny, under the act of congress of 1790 [1 Stat. 112], for the punishment of certain crimes; although, by Act Md. 1793, c. 57, § 10, and Act Md. 1799, c. 61, §§ 1, 3, the punishment is death, or labor on the roads in Baltimore county.

2. Where the punishment may be death, the court will allow peremptory challenge.

Indictment for stealing two horses of Coote and Hunter, respectively.

Mr. Jones, for the United States, contended that it was a capital offence, and punishable with death, or labor upon the roads, under the laws of Maryland, 1793, c. 57, § 10, and 1799, c. 61, §§ 1 and 3, and therefore the court, without deciding that point, allowed

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

the prisoner [Samuel Black] the right of peremptory challenge.

The jury found the prisoner guilty, and recommended him to mercy. On a subsequent day, Mr. Jones, U. S. Atty., moved the court to pass sentence of death, or confinement to hard labor, under the laws of Maryland, adopted by congress as the law of this part of the District of Columbia.

Mr. Key, for prisoner, contra. By the act of congress of April 30, 1790 (1 Stat. 112), larceny committed in any of the places under the sole and exclusive jurisdiction of the United States, is punishable by fine and whipping. This court has a discretion; and if the only alternative be death, or the punishment under the act of congress, the court will take the milder law; especially as the jury has recommended the prisoner to mercy. The court cannot send him to work on the roads in Baltimore county, as required or permitted by the Maryland law, in lieu of the punishment by death. Nor can the court condemn the prisoner to any other kind of labor, or at any other place. The law must be strictly pursued. This court has never sentenced a person under that law.

Mr. Jones, in reply, admitted the weight of use and practice of the court, in a doubtful case; but not if the law be clear and imperative. The adopted acts of Maryland are as much acts of congress as the act of 1790, for the punishment of certain crimes against the United States. That act was not made expressly for this district. It was made for forts and arsenals, before this district existed. The act of congress, adopting the laws of Maryland for this part of the district, was long subsequent to the act for the punishment of certain crimes, and quoad hoc repeals it. But, if both had been passed on the same day, the act of Maryland, providing, specifically, for horse-stealing, must prevail, and must be considered as an exception of that species of crime from the general law for the punishment of larceny. In Alexandria county, the particular case of stealing out of a store, is specifically punished. So, in the case of Nathan Way, who was indicted for stealing goods from a store, contrary to Act Md. 1729, c. 4, § 3, which takes away the benefit of clergy from the offence. The court may condemn the prisoner to hard labor, which is the essence of the punishment. The place and manner are accidental circumstances only. The inapplicability of the law to the circumstances of the district, if strictly considered, would abrogate a great part of the law of Maryland, in this district. The court must take the substance and apply it to the condition of this part of the district, or the law of Maryland cannot continue in force here.

THE COURT (nem. con.) was of opinion that this court cannot execute that part of the Maryland law which authorizes the courts of that state to commute the punishment of death for hard labor on the public roads of Baltimore county, etc. And if the court should decide that so much of the law is adopted as inflicts the punishment of death, without the alternative of hard labor, the law of Maryland would not be continued in force here, as required by the act of February 27, 1801 (2 Stat. 103), concerning the District of Columbia. Therefore, as the offence was punishable under the act of congress applicable to all places under the sole and exclusive jurisdiction of the United States, the court sentenced the prisoner to pay a fine and be publicly whipped, according to the 16th section of the act of congress of April 30, 1790 (1 Stat. 116).

Case No. 14,602.

UNITED STATES v. BLACK et al.

[1 Hask. 570; 12 N. B. R. 340; 1 N. Y. Wkly. Dig. 77.] [1]

Circuit Court, D. Massachusetts. July, 1875.

WITNESS—COMPETENCY OF DEFENDANT—PROSECUTION UNDER BANKRUPT ACTS.

The defendants are not competent witnesses in their own behalf in their trial on indictment for violation of section 44 of the bankrupt act of 1867 [14 Stat. 539], nor does the act of 1874, c. 390, § 8 [18 Stat. 180], amendatory of section 26 of the same, remove the disability.

Indictment for violating section 44 of the bankrupt act. The defendants [James B. Black and others] pleaded not guilty, and upon their trial offered to testify on their own behalf, but were not allowed to so testify by the court. The verdict was guilty and they move for a new trial for error in excluding them as witnesses.

George P. Sanger, U. S. Dist. Atty.

FOX, District Judge. The defendants doing business at Lynn, as copartners with one Osgood, under the style of Black, Conner & Osgood, having been adjudged bankrupt, at the present term were indicted for violations of the provisions of the forty-fourth section of the bankrupt act, by secreting and concealing a large amount of money belonging to their estate, and also, by fraudulently omitting the same from their schedules. At the trial the defendants were called as witnesses, but being objected to were excluded, and having been found guilty, they now move for a new trial, claiming that they were wrongfully excluded.

Reliance is placed by the learned counsel of the defendants, on a provision found in the act, amendatory of the bankrupt law, approved June 22, 1874, c. 390, § 8, by which it is declared "that the following words shall be added to section 26 of said act. That in all causes and trials, arising or ordered under this act, the alleged bankrupt and any party thereto shall be a competent witness."

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission. 1 N. Y. Wkly. Dig. 77, contains only a partial report.]

[In [Doe v. Winn] 11 Wheat. [24 U. S.] 385, the supreme court decided "that all acts in pari materia are to be taken into consideration, and considered one act, in explaining their meaning and import."] [2]

In Brewer v. Blougher, 14 Pet. [39 U. S.] 198, Taney, C. J., says: "It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

The rules of the common law, as to the competency of witnesses in the federal courts, were first modified by the act of congress, approved July 16, 1862, c. 189 [12 Stat. 588], by which it was provided, "that the laws of the states, in which the court shall be held, shall be the rules of decision, as to the competency of witnesses, in the courts of the United States, in trials at common law, in equity and admiralty;" and in 1864, by chapter 210, § 3 [13 Stat. 351], congress further enacted, "that in the courts of the United States, there shall be no exclusion of any witness on account of color, nor in any civil action, because he is a party to or interested in the issue tried;" and these provisions were re-enacted, by section 858 of the Revised Statutes.

It was held, in this circuit, by Mr. Justice Clifford, soon after the passage of these acts, that the law was not thereby changed as to the competency of defendants as witnesses in criminal causes, and they have never been received as witnesses; and this view was sanctioned by the supreme court of the United States, in Green v. U. S., 9 Wall. [76 U. S.] 655. It is also well understood, that the attempt has been repeatedly made, but without success, to induce congress to modify the law in this behalf, and allow persons under indictment, to be examined as witnesses on the trial.

Soon after the passage of the bankrupt law of 1867, the question arose in various districts, as to the competency of the alleged bankrupt, in trials relating to his bankruptcy, and it was claimed with force and plausibility, that the modifications of the law, as to the competency of parties as witnesses, were not broad enough to reach parties to proceedings in bankruptcy, as it was urged, that a petition in bankruptcy with the proceedings under it was not, either a case at common law or in equity or admiralty, and so was not within the operation of the act of 1862, nor was it strictly a civil action so as to fall within the act of 1864. The argument was, that it was in fact a matter sui generis, a proceeding in bankruptcy under the constitution of the United States, and the bankrupt act passed in pursuance thereof, and that the provisions of law, under which these proceedings in bankruptcy were instituted, not being in force when the modifications of the rules of evidence were established by the acts of congress, proceedings in bankruptcy were not within the provisions of the acts or subject to their operation.

I am advised, that in this district, it was frequently claimed that bankrupts were not competent witnesses in their proceedings in bankruptcy, but it never received the sanction of the court, some of the trials in the administration of the bankrupt law, being considered as coming within the provisions of the act relative to trials at common law, while others perhaps, more properly fell under the class of trials in equity. It is well known that this construction of the law did not meet with the ready approval of all of the courts administering the bankrupt act, and it is believed that in some districts, alleged bankrupts were not received as witnesses.

It appears from the congressional record of the senate, of February 3, 1874, that the chairman of the committee which reported the act, amendatory of the bankrupt law, in explanation of the provisions, now under consideration stated, as follows: "In the third section of our amendments, we have provided merely for the competency of all parties as witnesses in suits by or against the assignee or bankrupt, respecting disputes touching the estate. The rule of law upon this subject in the different states is different, and it was open to some question, whether the existing statutes of the United States, making parties witnesses in all cases, would necessarily cover all these bankrupt questions, and this therefore is a mere formal enunciation of what probably the law is now."

Such being the averred design of congress, and it not being its intent to so modify the law as to admit the defendant to testify in a criminal cause, but merely to make certain and clear of doubt, by a declaratory enactment, the law on this subject, as it then was, is it incumbent on the court by reason of the language employed by congress in the act, to extend it beyond what congress in fact intended to accomplish? Congress had never been willing to admit defendants in criminal cases to testify, and no good reason is apparent why any exception should be made in criminal trials arising under the bankrupt law. It was claimed at the argument that the present case demonstrated the occasion and propriety of the charge, as these defendants alone had full knowledge of the appropriation and use made by them of the money they were charged with secreting and concealing from their assignee; but in all cases, when a party is indicted for a violation of the law, he might with equal propriety claim, that by his own testimony he could afford the most satisfactory explanation of

[2] [From 12 N. B. R. 340.]

the circumstances presented against him as proofs of his guilt, and to this extent congress has never been willing to yield its assent.

It will be observed, that the provision now under consideration was designed by congress expressly as an amendment to section 26 of the bankrupt act. This section it appears relates to the examination of bankrupts, and also authorizes compulsory process for the attendance of other parties as witnesses in the course of the proceedings in bankruptcy, but no where is there found contained in it, any provision which can in any way be made applicable to criminal proceedings. These are all provided for in the forty-fourth section, and from the collocation of this amendment by adding it to the twenty-sixth section which wholly refers to matters not criminal in their character, it may well be inferred as intended to have reference solely to matters ejusdem generis, that of a civil nature, and not in any respect as designed to have relation to criminal proceedings. It is said, that the usual ordinary signification of the language found in this amendment, viz.: "That in all causes and trials arising or ordered under this act, the alleged bankrupt and any party thereto shall be a competent witness" embraces the case of a defendant in a criminal prosecution under the forty-fourth section of the law; it is quite manifest that the words "trials ordered under this act" were designed to apply to the various trials which the act itself specially contemplates may be ordered by the court, in the course of the proceeding in bankruptcy, such as whether an act of bankruptcy has or not been committed by the party, or whether under the thirty-first section he is entitled to a discharge when opposed by his creditors. In these cases a jury trial may be ordered by the court, and this amendment would allow the party to be examined as a witness.

It is also declared by the amendment, "that in all causes arising under this act the alleged bankrupt and any party thereto may be a witness." A cause may undoubtedly be either of a civil or criminal nature, and the present indictment not only arises from a violation of the forty-fourth section of the act, but it derives its entire stay and support from that section, and from none other whatever. It must therefore be admitted, that those words are sufficient to include the present cause, and that without any forced construction, the letter of the amendment would have authorized the court to receive the defendants as witnesses; but as was said by Parks, B., in Lyde v. Barnard, 1 Mees. & W. 113: "Words may be construed in a sense different from their ordinary one, when the act is intended to remedy some existing mischief; and such a construction is required to render the remedy effectual, for we must always construe an act, so as to suppress the mischief and advance the remedy. We must therefore endeavor to ascertain what the mischief intended to be remedied was. The framer of the act has not enabled us to determine this by any recital in the section itself, and we are therefore left to infer it from our knowledge of the state of the law at the time, and of the practical grievances generally complained of." It appearing that uncertainties previously did exist on this matter, and that the purpose of congress was to remove these uncertainties, and in the language of Senator Edwards "to provide merely for the competency of all the parties as witnesses, in suits respecting disputes concerning the estate," the court feels fully authorized to limit the operation and effect of the language found in the act, to the suppression of the mischief contemplated by congress, and not to so extend it, as to reach a class of cases which congress had on various occasions refused to relieve and provide for, by any such legislative sanction as it is now claimed this amendment has afforded them.

The construction of this provision of the act being novel and important, I have felt authorized to consult with Mr. Justice CLIFFORD in relation to it, and am authorized by him to say that he concurs in this opinion. Motion overruled.

[For another case involving this bankruptcy, see Case No. 1,459.]

Case No. 14,603.

UNITED STATES v. BLACKBURN et al.

[8 Chi. Leg. News, 26; 1 N. Y. Wkly. Dig. 276.] [1]

District Court, W. D. Missouri. Oct. 11, 1874.

CONSPIRACY — NEGROES — EQUAL PROTECTION OF LAWS — PRIVILEGES — IMMUNITIES — WITNESSES—ALIBI.

[1. On a prosecution for conspiring together for the purpose of depriving colored citizens of the equal protection of the laws and equal privileges thereunder, it is no defense that such colored persons were charged by defendants or others with illegal acts or crimes.]

[2. Such charge is sustained by evidence that the colored people of that township were entitled to a public school, and that defendants, or some of them, conspired by illegal means to deprive the colored persons, as a class and on account of their color, of such school by intimidation.]

[3. If the outrages and crimes committed by defendants were known to the community at large, and that community and the officers of the law willfully failed to employ legal means to bring the offenders to trial because of the color of the victims, there was a deprivation of the equal protection of the laws.]

This was an indictment against James Blackburn and others, charged with conspiring and going in disguise on the highway for the purpose of depriving Frank Lucas and others, as a class of persons, and because of their being colored citizens of the United States of African descent, of the

[1] [1 N. Y. Wkly. Dig. 276, contains only a partial report.]

equal protection of the laws, and of the equal privileges and immunities under the laws.

KREKEL, District Judge (charging jury). The defendants are indicted for conspiring together and going in disguise on the highway, and on the premises of Lucas and others, for the purpose of depriving them, as a class of persons, and because of their being colored citizens of the United States of African descent, of the equal protection of the laws, and of equal privileges and immunities under the laws. The offenses charged consist in the conspiring together, for the purpose of depriving colored citizens, as a class, of equal protection of the laws, and of equal privileges and immunities, to which they are entitled. At the present stage of the proceedings the indictment must be treated, not only as charging an offense against the laws of the United States, but as doing so in due form of law. No inquiry or suggestion as to the constitutionality of the law will therefore be proper, or indulged in. In the first place, the indictment charges a conspiracy, which is defined to be a combination of two or more persons, to commit the crime charged in the indictment, namely, the depriving colored citizens, as a class, and because of their being colored, of the equal protection of the law, and of equal privileges and immunities, to which they are entitled. It is not necessary that there should be direct proof of a conspiracy, but such as may be inferred from acts of the parties, such as going together, in disguise, in the nighttime, the doing of illegal acts, in which two or more unite, using language in the hearing of each other indicating a common purpose; in fine, anything satisfying your mind that they acted in harmony, with a common design, and for a common illegal purpose. The indictment further charges, and you must be satisfied from the evidence in the case, that the object in the conspiracy was against the persons named in the indictment, or some one or more of them, as a class, and because of their being colored citizens. You cannot find these defendants guilty of any offense, under this indictment, if you shall come to the conclusion that their acts, however criminal, were crimes committed without any design and purpose to deprive the colored citizens named in the indictment, or some of them, because they were colored, of the equal protection of the law, or equal privileges and immunities, which the law guaranties to them. Acts such as entering the houses of colored persons only, while on their nightly, illegal, and criminal errands; talk such as, "We will give you a touch of the civil rights bill"; notices such as indicate hostility to colored schools,—more or less tend to lead you to proper conclusion in reference to their object, design and intention. Crimes, however, such as these defendants are charged with, when committed without any design to affect particular persons, or a particular class, are punishable under state laws only.

The law guaranties equal protection to all. It is no defense, or even a mitigation, in the legal sense, that the colored persons named in the indictment were charged by the perpetrators of the outrages, or other parties, with illegal acts or crimes; for, if they had been guilty of any such, they were entitled to trials in the courts ordained for that purpose. The failing to resort to them strongly tends to show that the wrongs pretended to have been committed were private, rather than public, wrongs, and that the charges against them were invented to palliate, if not justify, their illegal acts. Further, if you shall find, from the evidence, that the colored people of the township in which the colored persons named in the indictment resided, were, under the law, by virtue of the number of children of suitable school age, entitled to have a public school, and that the defendants, or any two or more of them, conspired by illegal means to deprive them, as a class, and on account of their color, of such school, either by driving them off, or intimidating them, in order to prevent them from availing themselves of the benefit of the law, such acts tend to show, in the language of the indictment, that their object was the depriving them, as a class of persons, and because of their being colored, of their legal rights. By the equal protection of the laws, spoken of in the indictment, is meant that the ordinary means and appliances which the law has provided shall be used and put in operation alike in all cases of violation of law. Hence, if the outrages and crimes shown to have been committed in the case before you were well known to the community at large, and that community and the officers of the law willfully failed to employ the means provided by law to ferret out and bring to trial the offenders, because of the victims being colored, it is a depriving them of the equal protection of the law.

Aside from the depriving of colored persons, as a class, of the equal protection of the laws, charged in the indictment, it also charges that they were deprived of equal privileges and immunities under the laws. The privileges and immunities here spoken of are defined, in an early decision by Justice Washington, to be such as "belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states, and comprehend the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." The enjoyment of life and liberty implies safety to person and property. The illegal and criminal interference with either by the defendants, or two or more of them, is to deprive the person or persons so interfered with of equal privileges

and immunities, and if such interference was with the intent to solely affect the colored persons named in the indictment, as a class, and on account of their color, this charge of the indictment is made out.

The government, through a grand jury, has accused the defendants of the crime charged. For the purpose of the trial, the defendants are considered innocent. The government must prove the charges, and satisfy your minds as to the guilt of the defendants, or two or more of them, beyond a reasonable doubt. By a reasonable doubt is meant the wavering of the mind in coming to a conclusion, from the evidence, as to the guilt or innocence of the party charged. If, on a careful examination of the whole testimony in the case, your mind shall be in hesitation or doubt as to the guilt or innocence of all or any of the parties, you shall acquit all, or such regarding whom you have such doubt. If you are satisfied beyond such doubt of the guilt of two or more of the defendants, you should find a verdict of guilty as to such, about whom you have no doubt.

You are the sole judges of the weight, under the law as laid down by the court, you will give to the facts testified to, and of the credibility of the witnesses. Of the credibility of the witnesses, you must judge as men who are familiar with the affairs of life. Before you, on the one side, is a class of witnesses who, but a short time since, were denied the right to testify against their former masters, the whites. As witnesses, we have had but little experience with them. Whether flaws in their moral character will similarly affect their character as to truth and veracity when upon the witness stand, as we suppose of whites, you must judge. Their conduct on the witness stand, the promptness and directness, the intelligence with which they answered or failed to answer inquiries made of them in your presence, are proper to be considered in estimating their credibility. On the other hand, you have their former masters, whites, testifying against them. How far they may, unknown to themselves, possibly be influenced by prevailing prejudices, you are to judge. I can but ask you to give these matters the most careful consideration.

In reference to the alibi undertaken to be shown by the defendants, I call your attention to the fact that it is a defense which is set up by the defendants, and must be made out by them to your satisfaction. The law regarding the strength or weakness of the alibi made out by the facts and circumstances testified to has been so fairly presented, on both sides, in the arguments of counsel, that I need not further allude to it. You are authorized to find all or as many of the defendants guilty, or not guilty, as you, in your judgment, in the application of the law as given you by the court, applied to the facts and circumstances testified to, may determine.

Case No. 14,604.

UNITED STATES v. BLACKLOCK.

[2 Cranch, C. C. 166.] [1]

Circuit Court, District of Columbia. April Term, 1819.

UNITED STATES—RIGHT TO SUMMARY JUDGMENT—RECEIVERS OF PUBLIC MONEY.

The right of the United States to summary judgment, under the act of congress of the 3d of March, 1797, c. 74, § 3 [1 Story's Laws, 464; 1 Stat. 514, c. 20], "to provide more effectually for the settlement of accounts between the United States and receivers of public money," does not extend to suits brought by the United States as indorsees of promissory notes.

Assumpsit by the United States against the defendant as indorser of a promissory note.

Mr. Jones, for the United States, claimed a summary judgment, at the return term, upon motion, according to the 3d section of the act of congress of the 3d of March, 1797 (1 Stat. 512), to provide more effectually for the settlement of accounts between the United States and receivers of public money.

Mr. Taylor, for defendant, objected that the act relates only to such receivers of public money as are accountable agents, such as have been intrusted with public money to account therefor, whose accounts are to be adjusted at the treasury of the United States, who may be entitled to commissions, and whose commissions may be forfeited. The third section refers only to such receivers of public money as are designated by the first section.

And THE COURT (THRUSTON, Circuit Judge, absent), being of that opinion, overruled the motion.

Case No. 14,605.

UNITED STATES v. BLADEN.

[1 Cranch, C. C. 548.] [1]

Circuit Court, District of Columbia. July Term, 1809.

HOMICIDE—DEATH OUT OF JURISDICTION.

If the mortal stroke be given in Alexandria, and the death happen in Maryland, this court has not jurisdiction of the offence as a homicide, but has jurisdiction of the assault and battery.

[Cited in U. S. v. Mortimer, Case No. 15,821.]

Indictment for manslaughter. The right of peremptory challenge was allowed.

The mortal blow was given in Alexandria, the death happened in St. Mary's county, in Maryland.

E. J. Lee and R. J. Taylor, for prisoner, contended that the crime was not punishable here, and cited 1 East, P. C. 361; 1 Hawk. P. C. c 31. §§ 12. 13; Va. Law, Nov. 29, 1792, p. 104, c. 73, § 16.

Mr. Jones, for the United States. There is no evidence of the defect of the common law, but the recital of the statute of 2 & 3 Edw. VI. c. 24. And the common law was

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

not as recited in that act. The statute of Virginia was made to repeal the statute of Edward, which was then in force in Virginia, and is not confined to counties in the state of Virginia, but speaks of contracts generally. The statute of Virginia is no evidence that the common law was defective; it was a substitute for the statute of Edw. VI.

The statute of Virginia speaks of any county, in Virginia, or elsewhere, as in the statute respecting conveyances. Va. Law, Dec. 13, 1792, p. 157, c. 90, § 5, and Dec. 25, 1794, p. 327, c. 179, § 1.

The counsel agreed to save the point of law.

Verdict, "Guilty."

THE COURT, upon consideration of the point reserved, was of opinion that as the death happened in St. Mary's county, in Maryland, although the fatal stroke was given here, the judgment must be for the prisoner. the offence not being complete within our jurisdiction. Heydon's Case, 4 Coke, 41a; Hume v. Ogle, Id. 42b; 2 Inst. 318, 320; 3 Inst. 48, 49. 73.

The prisouer being also indicted for an assault and battery, was bound over to appear to answer to that indictment, and in the mean time to be of good behavior.

Case No. 14,606.

UNITED STATES v. BLADEN.

[1 Pet. C. C. 213.] [1]

Circuit Court, D. Pennsylvania. April Term, 1816.

SEAMEN—INDICTMENT FOR CONFINING MASTER—WHAT IS CONFINEMENT—JUSTIFICATION.

1. If the master of a vessel is restrained from performing the duties of his station, by such mutinous conduct of the crew, as would reasonably intimidate a firm man; this is a confinement, within the meaning of the act of congress [1 Stat. 112]. The master going armed, to every part of the vessel, if it was necessary for his safety that he should so protect himself, does not alter the case.

[Cited in U. S. v. Smith, Case No. 16,345; U. S. v. Hemmer, Id. 15,345; U. S. v. Huff, 13 Fed. 641.]

2. Seizing the person of the master, although the restraint be but momentary, is a confinement, prohibited by the law, and such conduct is not excused or justified by a previous battery on the seamen; whose duty it was to have obeyed the command of the captain, which was enforced by such battery.

Indictment for "confining the captain of a merchant vessel, and endeavoring to make a revolt," upon the 12th section of the act of congress entitled "An act for the punishment of certain crimes against the United States." 2 Laws U. S. 93.

The amount of the evidence given on the part of the prosecution was that the crew of this vessel, during the voyage, came in a tumultuous manner to the quarter deck, where the captain was, and with great insolence demanded of the captain why he had the preceding evening spoken to them in harsh language; and threatened not to go to their duty, unless they should receive some assurance of better treatment. The captain, from the conduct of the crew, on this occasion, went below and armed himself, and returned to the quarter deck, where he found the defendant and another of the crew still remaining. On a subsequent day, the master ordered the crew aft, when the defendant alleging himself to be sick, the captain ordered physic to be administered, which, with insolent language, he refused to take. The captain took up a chair and pushed him away, ordering him at the same time to go forward. The defendant immediately seized the captain, and got him to the quarter railing, whence he would have quickly precipitated him overboard, if he had not been rescued by the second officer and one of the crew. The captain stated, that during the greater part of the voyage, he went armed, not thinking himself safe otherwise, whilst going about his business.

WASHINGTON, Circuit Justice, charged the jury to direct their attention exclusively to the count for confining the captain; and advised an acquittal upon the other count, in case the jury should find the defendant guilty on the first count. See the case of U. S. v. Sharp [Case No. 16,264].

He stated to them, that if the captain was restrained from performing the duties of his station, by such mutinous conduct of his crew, as might reasonably intimidate a firm man; this would amount to a constructive confinement, within the meaning of the law; and that it made no difference in this respect, that the master did, in fact, go unmolested to every part of his vessel, whenever he pleased; if he was compelled, by a regard for his own safety, to go armed; and if in the opinion of the jury, from all the circumstances of the case, it was necessary or prudent for him to do so.

But secondly, that the seizing the captain by the defendant, amounted to an actual confinement, although the restraint continued only a minute or two; the law making no distinction as to the duration of the confinement. That the raising of the chair by the captain, and pushing the defendant from him, did not justify the defendant in seizing the captain; it was his duty to have gone forward, as he was ordered to do, and which this act was only intended to enforce.[2]

Verdict, "Guilty."

[1] [Reported by Richard Peters, Jr., Esq.]

[2] U. S. v. Smith [Case No. 16,337]. An endeavour to make a revolt, within the act of 30th April, 1790 [1 Stat. 112], is an endeavour to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is, in effect, an endeavour to make a mutiny in the ship.

U. S. v. Hamilton [Case No. 15,291]. On an indictment for an endeavour to make a revolt in a ship, founded on the 12th section of the act of the 30th April, 1790, c. 9, it is not necessary to prove that the act was committed on the high seas.

Case No. 14,607.

UNITED STATES v. BLAIR.

[3 Int. Rev. Rec. 67.]

District Court, D. New Jersey. 1866.

INTERNAL REVENUE—ILLEGAL DISTILLATION—FORFEITURE OF DISTILLERY.

[Knowledge on the part of the owner of a distillery that his lessees are using the same for the fraudulent manufacture of liquors and evading payment of taxes thereon, is sufficient to warrant a forfeiture of the property.]

[This was a libel of forfeiture filed against a distillery of David Blair of Woodbridge, Middlesex county, N. J.] This distillery and the stills, boilers, machinery, and a quantity of distilled spirits, were seized on the 18th of December last, by Elston Marsh, collector of internal revenue, for violations of the tax law. An information was filed by the United States district attorney, charging that the whole property was liable to forfeiture for having been used in the fraudulent manufacture of liquors. David Blair filed an answer, claiming that he was the owner of the distillery and the stills, boilers, and machinery, and setting forth that he had leased the same to one George W. Knight, who, with George Mountjoy, had conducted the business. He did not deny the fraudulent use of the distillery, or that liquors had been made and removed without inspection or payment of taxes, but alleged that he had no interest or complicity in the business, and insisted that his property could not be forfeited for the fraud of others. Testimony was taken, clearly showing the fraudulent manufacture of spirits by Knight and Mountjoy, and Blair's knowledge of such fraudulent use of the property. But Messrs. Shreve and E. W. Scudder, the counsel of Mr. Blair, earnestly contended that, since he was merely the owner of the distillery, and was not the acting distiller, nor interested in the business, nor engaged in the perpetration of the frauds, his property was not subject to forfeiture.

Mr. Keasby, on behalf of the government, insisted that the use of the distillery for fraudulent manufacture worked an absolute forfeiture of the property so used, entirely irrespective of the claims of the owner or his complicity in the transaction, and that every owner of such property was bound to see that it was not put to a fraudulent use on pain of forfeiture, his only remedy being by application to the secretary of the treasury for remission, which is authorized by law in cases of hardship where the owner is entirely without fault.

FIELD, District Judge, sustained the view of the district attorney, and charged the jury that the law provided in plain terms that the owner, agent, or superintendent, or any person using a distillery, must see that all the requirements of the statute are fulfilled; that such stringent provision was necessary in order to secure compliance with the law in a business offering such temptations to fraud, and to guard against invasion; that the very purpose of the act was to make the owner of the property responsible for its lawful use; and that otherwise any owner of a distillery might put it into the hands of irresponsible parties, and enable them to perpetrate frauds, with no risk but that of the loss of such liquors as they happened to have on hand at the time of seizure. The judge explained to the jury in forcible terms the necessity and wisdom of these apparently harsh provisions of the law, and directed them, if they believed the evidence of fraud on the part of the distiller, to render a verdict in favor of the government. Such verdict was rendered and a decree of forfeiture entered against the entire property.

Case No. 14,608.

UNITED STATES v. BLAISDELL et al.

[3 Ben. 132.[1] 9 Int. Rev. Rec. 82.]

District Court, S. D. New York. Jan. 22, 1869.

INTERNAL REVENUE — FRAUDULENT REMOVAL OF SPIRITS—AIDING AND ABETTING—EVIDENCE OF ACCOMPLICES — PLEDGES OF PROTECTION — DISTRICT ATTORNEY—SENTENCE.

1. Under the 45th section of the internal revenue act of July 13, 1866 (14 Stat. 163), the "place where spirits are distilled" is the distillery premises.

2. Under that section, a person cannot be convicted as a principal in removing spirits, and also as an aider and abettor in the same offence.

3. Under that section, any one who had an interest in the distillery, if he directed, ordered or set on foot the removal of spirits, may be convicted of such removal, though not personally present.

4. Any one personally concerned in handling the means of removing spirits is guilty of removing spirits, whether he is interested in them or not.

5. Any help or assistance, other than what is a removal, is an aiding in a removal; and giving any encouragement or instigation to commit a removal, other than what is defined to be a removal or an aiding in a removal, is an abetting in a removal.

6. Unless the date, stated in an indictment, is of the essence of the crime, it need not be proved as alleged.

7. It is never safe to convict upon the uncorroborated evidence of a single accomplice.

8. Affidavits and statements previously made by witnesses, which contradict their evidence given on the stand, are to be considered by the jury for the purpose of finding out what is the truth; but the evidence of the witnesses on the stand is not necessarily to be rejected on account of such contradiction. If, after having ascertained what is the truth, the jury find that a witness has wilfully told a falsehood on the stand, as to a material fact, they have a right to believe that he is not worthy of credit in any particular.

9. Courts of the United States cannot be called upon to redeem pledges of protection which have been given to criminals by the executive de-

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

partment. Such pledges must be redeemed by the executive department.

10. The court can communicate with the executive authorities of the government, only through the district attorney as the recognized officer of the government.

[Cited in U. S. v. Lawrence, Case No. 15,573; U. S v. Stone, 8 Fed. 261.]

11. Where a criminal is convicted of several offences, under several counts of an indictment, he may be sentenced under the first count, and sentence may be suspended upon the conviction under the other counts till after the first sentence has been fully executed.

These defendants [Alvah Blaisdell, John J. Eckel and John McClaren] were indicted under the forty-fifth section of the internal revenue act of July 13th, 1866, for violations of that law in connection with a distillery in Christopher street, New York. The distillery ran during August, September and October, 1867, and was seized on November 3d, 1867. After being condemned it was sold and ran again during April and May, 1868, when it was again seized. The indictment in this case contained eight counts, three founded upon a removal of spirits from the place where they were distilled to a place other than a bonded warehouse, (one of them during the first run, and two under the second run, of the distillery,) three for aiding and abetting in such removal, (two under the first run and one under the second,) and two for failing to keep proper books. These last, however, were not sustained by evidence and were not submitted to the jury.

BLATCHFORD, District Judge. [2] [Gentlemen of the Jury: The case now before you, which has occupied your attention for the last six or seven days, is a case which, in the judgment of the court, is as important in the public principles involved in it, and in its materiality to the cause of justice and the public order and well-being of the community, as any case that has ever come before a judicial tribunal in the United States. The reason why I make this remark is this, that in the present condition of the affairs of this country, the collection of the internal revenue, and particularly the collection of the internal revenue upon distilled spirits, is as important as any question connected with the collection of the revenue; and the question of the collection of its revenue, the preservation of its credit, and the punctual payment of its debt, is the great question that concerns these United States, and every one living in them, and every one of you, gentlemen of the jury, more than any other public question that now exists in this country. It was suggested to you, in the course of the summing up in this case, that it could not be understood, and was not seen, why this cause attracted so much public attention. It is because, gentlemen, even now, with the imperfect collection that we have of the revenue from distilled spirits, the revenue from distilled spirits and tobacco is almost one-half of all the internal revenue that is collected in the United States, and therefore, any illicit means that are resorted to to defraud the government of its tax upon distilled spirits strikes at the very vitals of its revenue system. There is another reason why this cause is one of such large public importance. It is, that notwithstanding there have been many prosecutions, both civil and criminal, tried in this court, and in the circuit court for this district, and in the courts of the United States in other districts, under the internal revenue laws, yet this cause, so far as my recollection extends, has developed an exposure of the machinery, the fraud, the perjury, by which this business of the illicit removal of spirits has been carried on, more completely than any other cause that has ever been tried under those laws in any court of the United States. The whole modus operandi has been laid bare, so that the court, and the jury, and the community, understand exactly how the thing has been done, and what has been long understood to be the system of running spirits from distilleries to rectifying houses in close juxtaposition, has been fully and thoroughly developed. In this connection, I refer to some of the affidavits which were read in this case, made by some of the witnesses who have been examined upon the stand on this trial, and made for use in the civil action against the distillery for its forfeiture, by which it appears, that when this distillery in 45th street was seized on the first occasion, the 3d of November, 1867, under the instructions of Mr. Bailey, the collector of the Fourth collection district of this city, the public officers were entirely satisfied that whiskey was carried from the distillery to the rectifying house adjoining by means of a hose attached to the pipe which was found running under ground, beneath the distillery yard, from the distillery to the rectifying house, but yet the means whereby the whiskey was taken from the receiving-cisterns in the cistern-room was not ascertained. The idea was, that it was taken out by a hole in the top of the cistern, and was thence carried by a hose through the window down to the pipe before-named, and through that to the rectifying house. It was supposed that it was raised from the cistern by a pump or a syphon, or some apparatus of that sort, by which it reached a level from which it started to go down by the force of gravity to the rectifying house. That idea, if the testimony on this trial is to be believed, was an erroneous one. It was not suggested in the affidavits referred to, or during the prosecution of the civil suit, that the way in which the spirits were removed out of the cistern-room was, by opening the door of that room and attaching the hose to a cock which was properly there, and was placed there to be used for drawing off into barrel spirits to be inspected by government officers, and to be

[2] [From 9 Int. Rev. Rec. 82.]

branded by them and put into the market for sale. In that respect, this case is important; for, if the evidence is to be believed, we now see precisely how the thing was done.

[I have referred to the prosecutions that have taken place under the internal revenue laws in this and other districts, and by reason of what has been stated on this trial, I deem it proper to say, that this is by no means the first whiskey prosecution, civil or criminal, that has passed under the cognizance of this court. I have sat here for nearly nine months, since I commenced my official term, trying cases with a jury. I have tried, during that period, forty-four cases of prosecutions connected with violations of the law in regard to distilled spirits. Of those forty-four cases, twenty-nine were civil and fifteen were criminal cases. Fifteen persons have been tried by me, in this court alone, for offences connected with distilled spirits. Of that number, thirteen have been convicted and two have been acquitted; and of the twenty-nine civil cases, twenty-seven have resulted in a verdict for the government, and two in a verdict for the claimants. One of the civil cases tried before me, and which resulted in a verdict for the government, was the prosecution of this distillery, on the seizure of it which took place on the 3d of November, 1867, called the "first seizure," after what is called the "first run." There were several other large and important seizures for violations of the provisions of the internal revenue laws in regard to distilled spirits among the cases to which I have referred. Besides all these, there have been a large number of condemnations by default.

[Now, gentlemen, to come to the case directly under consideration, I shall first call your attention to the indictment in this case. It consists of eight counts, and I must ask you to bear in mind carefully what I shall say on the subject of the indictment; because it may become of importance to you in your deliberations. There are three counts in the indictment founded upon a removal of spirits from the place where they were distilled to a place other than a bonded warehouse, as provided by law. There are also three counts for aiding and abetting in the removal of distilled spirits from a distillery to a place other than a bonded warehouse. Of the three counts for a removal, one is under the first run and two are under the second run. By the "first run" you will understand the run in August, September and October, 1867, which was terminated by the seizure of the 3d of November, 1867. By the "second run" you will understand the run embracing portions of the months of April and May, 1868, after the distillery had been sold on its condemnation on its first seizure. In regard to the counts for aiding and abetting in a removal, there are two counts for aiding and abetting during the first run, and one count for aiding and abetting during the second run. There are two other counts in the indictment, the third and the seventh, one under the first run and the other under the second run, for neglecting to keep, as rectifiers, the books required by law. Those two counts you will lay entirely out of view. I instruct you that the evidence will not warrant a conviction of the defendants under either of those counts; and, if a verdict of guilty were to be found on either of them, the court would deem it its duty to grant a new trial. You will, therefore, direct your attention wholly to the counts in regard to the removal of spirits, and the aiding and abetting in the removal of spirits.][2]

The question of time and date, as specified in the indictment, is of no consequence at all in this case. The date alleged in the indictment, in respect of the first run, is the 27th of October, 1867. The dates of removal during the second run are alleged in the indictment to be, one of them, the 1st of April, 1868, and the other the 1st of May, 1868. The date of the aiding and abetting during the second run is alleged to be the 1st of April, 1868. It is necessary, in an indictment, to allege a date, but, unless the date is of the essence of the crime, it need not be proved as alleged. In this case, the dates alleged in the indictment are not at all of the essence of the crime, provided the offence was committed within the statutory time within which a prosecution must be had, which is two years in regard to these offences.

None of the defendants can be convicted of a larger number of single offences than are laid in the indictment; and each count must be considered as charging a single offence. Thus, the first count, that on such a day the defendants removed spirits, is supported by testimony that on any day during the first run they removed spirits from the distillery otherwise than into a bonded warehouse, with intent to defraud the United States. The same is true in regard to the counts for aiding and abetting.

In the investigation of all crimes, the fact that the crime could be committed, that the circumstances surrounding the place where it is alleged to have been committed, were such that the crime could be committed, is always an important circumstance, and is the first subject of inquiry. Thus, in the present case, if it was impossible that whiskey could be conveyed by any means in regard to which testimony is given, no crime could be committed in respect of the illicit conveyance of whiskey, and, therefore, nobody could commit such a crime. Hence, your first inquiry must be directed to the question, whether the means, the facility, the opportunity and the location, existed, so that the crime charged could be committed.

[2] [From 9 Int. Rev. Rec. 82.]

When I speak of "the crime charged," I confine my attention, and you will confine your attention, so far as this case is concerned, wholly to the question of the removal of whiskey through the hose and the pipe under ground across the yard, in the manner before named.

If you are satisfied. from the evidence, that the means, facilities, and opportunities existed for the commission of the crime, the next question is, whether the crime was committed, and, if it was, whether these defendants were concerned in it.

In regard to the question whether a defendant was concerned in a crime, it is always an important inquiry, and it is so in this case, whether there was a motive or an interest on the part of the defendant to commit the crime, and whether he had the opportunity to commit it. The interest of these defendants in this distillery, as furnishing a motive to them to remove whiskey from it illicitly. is, therefore, to be taken into consideration by you, as you shall, from the evidence, believe that interest to be.

[2] [There have been brought before you in this case, twelve witnesses who may be considered as implicated, to a greater or less extent, in the transactions that have been detailed before you. There are other witnesses who are not at all implicated. Necessarily, in transactions of this kind, in the removal of whiskey in the way in which this whiskey was removed, the witnesses to the transaction—unless the testimony be as to confessions or statements made by the parties concerned to third parties—the ocular witnesses must necessarily be the parties concerned, the parties inside of the establishment. When whiskey is run off clandestinely between the hours of nine to ten o'clock at night and five to six o'clock in the morning, unless the officers of justice rush in at once and seize the parties flagrante delicto, the witnesses must necessarily be those in and about the establishment and concerned in the clandestine business. Therefore, in this case, as in many cases of the kind, there are two classes of testimony—the testimony that comes from inside, from witnesses implicated to a greater or less degree in the matter, either as actors, or as spectators silently or otherwise encouraging the thing, such as paid workmen acting under superior orders; and a second class, the witnesses from outside.

[I shall first direct your attention in this case to the facts that are testified to by witnesses who are not at all implicated in this matter. The first of such witnesses is Mr. Barrows, the revenue officer who went in with the other officers on the night of the 3d of November, 1867, and made the seizure under the direction of Mr. Bailey. I shall call your attention briefly to the facts and circumstances brought out by the testimony of Mr. Barrows. It is, of course, for you to say, gentlemen, whether you believe these things to be facts. My duty is only to call your attention to what the witness has testified to; and it is your duty to say what degree of credibility you will give to him and to all other witnesses. When Mr. Barrows went to this place and seized it, on Sunday night the 3d of November, the establishment was lit up and running. Mr. Barrows testifies, that he found a lock on the cistern-room door, the inner hasp of which was open, in the manner described by him, and which appeared by the lock that was exhibited to you as a lock in a similar condition. Mr. Barrows found the rectifying establishment near to the distillery, with an interval of fifty feet, or less, between them. He also found a pipe under ground, leading from near the distillery wall, under the yard, over to the rectifying house, and through the wall of the rectifying house, a pipe two inches in diameter, with a screw on its end upon which a nozzle could be screwed. He traced this pipe into the rectifying house, and found that it there turned up against an upright post. On the floor of the rectifying house he found, a foot from the pipe, a trap-door. He took up that trap-door, and found that the pipe below was tapped to run out to the Croton water pipe in the street, and had a cock in it which would admit of letting on and shutting off the Croton water from the street. He states, that when the Croton water was shut off from the street, the pipe would be empty and would form a communication from the place where it came out of the ground near the distillery wall, in the yard, to the orifice against the upright post in the rectifying house. He also found that a tub underneath where this pipe came out against the distillery wall, in the yard, at what is called the hydrant, smelt of high wines at that time. He also found a hose in the rectifying place, that smelt of high wines; and, in the stable near the hydrant, he found, in a hogshead of water, a cut hose which smelt of high wines, and which he stated appeared to him to have been freshly cut. He also found in the distillery, in front of the door of the cistern room, a small trap opening to the door below. He found warm mash in the still, fire under every boiler, and men engaged in mashing at the mash tubs.

[In addition to this testimony, public records have been produced in this case, showing that two of the defendants, Blaisdell and Eckel, became bondsmen for Schuyler, the nominal distiller during the first run, and for Connolly, the nominal distiller during the second run. There is also the testimony of Mr. Wheaton, an outside witness, as to the capacity of the distillery, which he states as being, during the first run, from 2,400 to 2,500 gallons in twenty-four hours. He says that they had machinery enough, exclusive of their boiler power, to make more

[2] [From 9 Int. Rev. Rec. 82.]

whiskey than this in twenty-four hours, but that they had not boiler power enough; that they had one boiler not in use; and that, when they got to work during the second run, he found this disused boiler put in use, and a new additional boiler also put in use, which, with the other machinery, was sufficient to give a capacity of 4,000 gallons in twenty-four hours. You also have the records showing that the entire tax paid by this establishment to the government for the whiskey made there during the time it ran—portions of the five months namely, August, September, and October, 1867, and April and May, 1868—was a little over $42,000, covering a little more than 24,000 gallons of spirits—exceeding but slightly the capacity of the distillery during ten days' run, at the lowest figure given by Mr. Wheaton. You have heard the calculation submitted to you by the district attorney as to the amount of tax that the government ought to have received from the spirits distilled at this distillery; and, whether it be taken at the figures stated by him, over $500,000, or at figures very much less, it is quite manifest that the discrepancy between the tax actually paid and the amount that ought to have been paid is enormous.

[There is, also, the testimony of Marshal Murray, as to what took place between him and Blaisdell after the sale of the distillery in March or April, 1868, on its condemnation in February. He says, that after that sale Blaisdell came into his office and said: "You have sold my distillery. These internal revenue men have robbed me, and I am short of funds. I will pay you $4,000 now, on account, and give you my check for the balance"—the balance being $2,000, I believe—"and I want to go to work and make some money."

[Now, gentlemen, with this distillery situated, as the evidence shows, upon higher ground than the rectifying house, with the rectifying house closely adjacent to it, with the trap-door in the floor in front of the door of the cistern room, with the pipe under ground communicating with the rectifying house, you will perceive, even in the absence of all testimony as to the actual running off of spirits from the distillery, that there existed, with a hose stretched, in the distillery, from the cistern room to the pipe in the yard, the means of running off whiskey illicitly, if any person desired to do so. In the investigation of all crimes, the fact that the crime could be committed, that the circumstances surrounding the place where it is alleged to have been committed, were such, that the crime could be committed, is always an important circumstance, and is the first inquiry. Thus, in the present case, if it was impossible that whiskey could be conveyed by any means in regard to which testimony is given, no crime could be committed in respect of the illicit conveyance of whiskey, and, therefore, nobody could commit such a crime. Hence your first inquiry must be directed to the question, whether the means, the facility, the opportunity and the location, existed, so that the crime charged could be committed. When I speak of "the crime charged," I confine my attention, and you will confine your attention, so far as this case is concerned, wholly to the question of the removal of whiskey through the hose and the pipe underground across the yard, in the manner before named.

[If you are satisfied, from the evidence, that the means, facilities and opportunities existed for the commission of the crime, the next question is, whether the crime was committed, and, if it was, whether these defendants were concerned in it.

[In regard to the question whether a defendant was concerned in a crime, it is always an important inquiry, and it is so in this case, whether there was a motive or an interest on the part of the defendant to commit the crime, and whether he had the opportunity to commit it. I shall call your attention briefly to the testimony in regard to the positions of the defendants Blaisdell, Eckel, and McClaren in connection with this establishment, and it will be for you to draw the proper conclusions from the testimony.

[The first class of testimony is in regard to the interest of Blaisdell and Eckel in this establishment during both the runs, as being concerned in running it, as the real parties engaged in operating it, and therefore interested to remove whiskey away from it. Upon that subject you will consider the testimony in regard to the employment and payment by Blaisdell and Eckel of the hands who worked there, and in regard to their being at the establishment while it was running, and giving instructions to the men. You will also bear in mind what Blaisdell told Barrows, as the latter testifies, on the morning after the seizure—that he was the owner, and that it was a personal warfare on him because it was his place; and the fact testified to by Barrows, that Blaisdell opened for him that morning, with a key, the door of an inside office, and opened, with another key, a desk in that office, to get access to papers to be examined by Barrows. You will also consider the testimony in regard to the payment of men during the last run. One of the witnesses, Nunan, I think, testifies to being paid wages during the last run, at different times, by Blaisdell, Tisdale, Leipsiger, and McClaren, and says that, after the second seizure, Leipsiger paid him once in Blaisdell's house. You will also weigh the testimony of Schuyler and Connolly showing that Blaisdell and Eckel became bondsmen for Schuyler on the first run, and for Connolly on the second run. Schuyler testifies, that they told him they would take out a license in his name and become bondsmen themselves. Schuyler tes-

tifies that this was done; and the record shows that Schuyler was the principal in the bond, and that Blaisdell and Eckel were the sureties. Connolly testifies to substantially the same thing in regard to the second run. Schuyler testifies, also, that he had no interest whatever in the distillery, except his wages, of $3,000 a year from Blaisdell and Eckel, and a promise of $500 a year more from Eckel, individually. That was during the first run. Schuyler testifies that he had no interest in the manufacture or the sale of the spirits distilled, and that Blaisdell and Eckel received the proceeds of sales. Connolly testifies that he had no interest in the establishment, save his weekly wages, and that he was employed on the second run; that he was spoken to first by Blaisdell, and then had a conversation with Eckel at his hotel about wages, and refused his offer of $35 a week, and finally agreed with Green for $50; and that he went there under that arrangement. On this question of interest, you will also recollect what Blaisdell said to Marshal Murray. The interest of the defendants in this distillery, as furnishing a motive to them to remove whiskey from it illicitly, is, therefore, to be taken into consideration by you, as you shall, from the evidence believe that interest to be.

[I shall next call your attention, gentlemen, to the testimony of the witnesses, twelve in number, from inside of this establishment, to whom I have already referred, for the purpose, in view of the mass of testimony that has been taken, of leading your minds distinctly to what that testimony is.

[The first witness is Patrick Campbell, the millwright. He testifies, that he was hired by Blaisdell and Eckel; that he saw Diezendorf open the door of the cistern-room on an occasion when Blaisdell and Eckel were both of them there, during the first run, about a week after the distillery first started, in August, 1867; that he saw the hose running through the floor, through the trap, out of the window and across the yard towards the rectifying house; that, on another occasion, in August, on a Sunday, he saw Blaisdell open the cistern-room door with a key; that, on another occasion, while Eckel was there, he saw Blaisdell, in September, open the cistern-room door with a key; that at that time he saw the hose screwed upon the pipe, after it had been put through the floor; that the pipe in the yard had then been laid, and the hose was screwed on the nozzle of the hydrant; and that, three or four nights before the seizure of the establishment on the 3d of November, he saw Diezendorf open the door of the cistern-room while Blaisdell was there, and it was open the greater part of the night. That is, in substance, his testimony in regard to the first run. In regard to the second run, he says that in April he saw McClaren open the cistern-room door with a key, Blaisdell being present; that he saw McClaren screw the hose on the tap in the cistern-room; that it was on about four hours, and the other end of it was attached to the pipe in the yard; that he saw the cistern-room door opened twice in May in the night; that on the first occasion McClaren opened it and attached the hose to the cistern; that the other end of the hose was fixed to the pipe in the yard; and that the cistern-room door was open the most of the night. He also says, that always when he saw the cistern-room open in this way at night, the distillery was in operation. He says that the second time in May that he saw the cistern-room door open at night, was two or three days before the May seizure, and that then McClaren opened it with a key.

[The next witness is John Nunan, the carpenter. He says that he saw the cistern-room door open about a week after they started, in August, 1867; that Diezendorf opened it, Blaisdell and Eckel being present; that that time it was opened not with a key, but by the staple being drawn; that the hose was attached to the tap and put down through the trap-door in the floor; that he himself cut that trap near the cistern-room door, by the direction of Blaisdell and Eckel; that they told him to cut a hole and fit a piece in so that it would not be noticed; that the next time he saw the door open Blaisdell opened it with a key, Eckel being present; that this was at night; that Blaisdell himself carried the hose into the room and attached it to the tap; that he saw the door open on Sunday, the 5th of April, during the second run, when Blaisdell, Eckel and McClaren were all of them there; and that McClaren at that time opened it with a key and attached the hose to the cistern.

[The next witness is Hugh Carr, the cartman and watchman, who was first an outside watchman, and then an inside watchman. He states that McClaren came there about a week before the first seizure. On that subject I may as well here remark, that all the testimony in the case shows conclusively, I think, that McClaren was not at all in or about these premises until about a week before the first seizure. The exact time is not specified, but it was about a week. He afterwards makes his appearance during the second run as a foreman or superintendent of the establishment. Carr says that he saw the cistern-room open three or four times before the first seizure; that on one Sunday evening before the first seizure, at Blaisdell's house, Blaisdell asked him to go on the night watch inside and mind the hose; that on another night he saw Blaisdell open the door of the cistern-room with a key and put the hose on the tap at the cistern; that that was an occasion on which Blaisdell and the witness were alone; that the hose was then attached to the pipe in the yard; that he, the witness, then went with Blaisdell to the rectifying house; that Blaisdell opened the door of the rectifying

house with a key, and he, Carr, went in and filled four or five barrels with whiskey that came from the distillery through the hose and the pipe; that Blaisdell remained a little while and then went away, and he, Carr, stayed behind; that Blaisdell told him, on one occasion, to keep an eye out especially for revenue officers; that while he was on the outside watch he saw the hose in position attached to the hydrant, and saw whiskey running in the rectifying place; that he has seen the tap turned on the cistern in the receiving room when the hose was on, and has then gone to rectifying house and put his hand under something that was running into the tubs there, and tasted it, and found it to be high wines or whiskey; that, in his capacity as cartman, he has carried whiskey on his cart from the rectifying house and the distillery, and that he never saw any whiskey go into the rectifying house except from the distillery; that, on the night of the first seizure, the hose was attached to the hydrant in the yard, at the time he heard that Mr. Bailey's men were coming; that he then went to the receiving room where the hose was attached, got the door open, turned off the tap, cut the hose there, and then ran down stairs and cut the hose at the hydrant in the yard and threw the hose into a hogshead of water in the wagon house; and that after he cut the hose in the cistern-room, he took the lock, which was upon a beam near by, shut the cistern-room door, and made an attempt to lock it, but there was another man there who hit the lock and spoiled the spring, so that the upper catch would not lie down. Upon the subject of this lock and of the hose found in the hogshead of water, you will compare the testimony of Barrows, as to finding the lock there in a certain condition, and as to finding a hose smelling of whiskey in a hogshead in the stable, with this testimony of Carr. In regard to the second run, Carr states, that during the last week of the second run he saw McClaren open the door of the cistern-room, and saw the hose put on; and that, during the last week of that run, he saw the cistern-room door open on three or four nights.

[The next witness is William Farmer. He worked there solely during the second run, from some time in April until the 16th of May. He says that he assisted Diezendorf, in the rectifying house, in receiving whiskey from the distillery, which ran through the pipe across the yard and then into the leach-tubs in the rectifying house; that there was a hose attached to what he calls a hydrant, in the centre of the floor of the rectifying house, in the basement; that he saw this operation going on a night or two after he went to work there in April; that, on one occasion, in the beginning of May, he saw the cistern-room door open; that at that time he saw Yates, Carr, Nunan and McClaren there; that he has seen the hose attached in the rectifying house several times, and high wines running; that he has seen the hose running from the cistern-room through the floor to the pipe in the yard of the distillery; that he himself has screwed it on to a gooseneck on the hydrant in the yard; and that, after such attachment was made, he has gone into the rectifying house and seen high wines coming into the rectifying house through the pipe. He also states the fact that McClaren was employed there as foreman or superintendent.

[The fifth witness is Walter Squires, the engineer. He was there during the first run. He saw the cistern-room open a week after they began to run. The hose was on and was carried across the yard. He saw the cistern-room open at night, and the hose thus arranged, several times when the still was running, and he also saw the hose, when it was attached to the receiving cistern, connected with the hydrant in the yard, after the pipe was laid.

[The sixth witness is Henry Fleisner, who was the masher and cooler. During the first run, he saw Diezendorf open the cistern-room door, on one occasion, when Blaisdell and Eckel were present. He then saw Diezendorf put on the hose, which went through the hole, and was then carried to the yard and over to the rectifying house. He says, that the tap was then opened, by turning the cock, to run whiskey; that this arrangement, when it was on at night, was generally on from ten or eleven o'clock at night to five or six o'clock in the morning; that, after this hose was taken off, there was whiskey in it; that he tasted it on one occasion; that there was nothing in the cistern-room but whiskey; that the cistern-room was so open very frequently; that he saw it so open the night before the first seizure; that at the commencement of this business Blaisdell and Eckel were there every night, but later they were not; and that he has seen Blaisdell and Eckel there when Diezendorf made the attachment of the hose to the receiving cistern.

[The seventh witness is Warren Moore, who was a fireman there. He was there the night of the first seizure. He says that the distillery was running when the officers came; that the hose from the cistern-room was attached that night to the gooseneck in the yard; that he saw it on himself; that on the second run he saw the same arrangement on two or three times a week; that the first time, on the second run, that he saw this arrangement on, McClaren was there; that he saw it on two nights before the last seizure; that McClaren was there then and Carr; and that he saw the attachment that night in the yard at the hydrant, and tasted the whiskey that night where it leaked at the gooseneck.

[The eighth witness is Moses J. Decker, the night watchman. He was there the night of the first seizure, and saw the cis-

tern-room door open, as he went up stairs to notify Lippe that some one was seeking admittance. He says that Blaisdell was there that night a short time in the evening, and left between eight and nine o'clock; and that the distillery was running when the officers come.

[The ninth witness is Ludwig Klein, a workman there. He says that he has seen the cistern room open at night; that he saw it open first at night three or four days after the distillery first started on the first run; that he saw Diezendorf open it; that Blaisdell and Eckel were present; that he saw Diezendorf put on the hose; that he saw the other end of the hose; and that it went to the rectifying house; that, during the first run, he saw Blaisdell open the cistern room door three times with a key; that the last time was about eight days before the first seizure, and about nine o'clock at night; and that, on one occasion, he tasted the whiskey in the hose a very few minutes after it had been taken off from the attachment. He was not at the distillery during the second run. He says that, in addition to the three times when he saw Blaisdell open the door with a key during the first run he saw Blaisdell present several times when the cistern room door was open at night during the first run, on occasions when Blaisdell himself did not open the door; and that he has seen Eckel there when the cistern room door was open after eight o'clock at night, and Blaisdell after nine o'clock.

[The tenth witness is Isaac S. Schuyler. He says that during the first run, Blaisdell used to tell him, almost every morning, about his running off whiskey at night, and took him, Schuyler, to task for not staying and doing it himself, alleging that it was part of his business. This was all during the first run, for Schuyler had nothing to do with the place during the second run. He says that Blaisdell told him, at one time, that the process by the hose over the surface of the ground was not quick enough, that it leaked, and that he was going to have a pipe laid in the yard, and that two or three days after that the pipe was laid. He says that he has been in the rectifying place at night, and seen the tubs empty, and has gone in there in the morning and seen them two-thirds full, and this more than once. He then states that he procured, by Eckel's direction, the hose which has been referred to; that Eckel told him to get a hose that would fit all the cocks, and could be connected in one line; and that he did get such a hose in lengths of twenty-five feet each. He also described the pipe, and the goose-neck.

[The eleventh witness is James F. Diezendorf. It appears that he had been in the drug business with Blaisdell before this distillery was started, that neither of them had ever been in the spirit business in any way, and that the way in which Diezendorf came to go into this business and to be placed in charge of the rectifying house was from his previous acquaintance with Blaisdell. He says that he had no interest in either of the establishments or in the whiskey; that he was a hired man at $50 a week; that Blaisdell and Eckel paid the special tax for him as a rectifier; that the receipt therefor was brought to him by them, or one of them, and that he was put in charge of the rectifying place under them. It appears that from the time the establishment was started on the second run until it was closed up was about four weeks. How much of those four weeks it ran does not distinctly appear. Diezendorf states that during that period, so far as he is aware of—and he was in charge of the rectifying place—no spirits whatever were received there from any source, except what came from the distillery. Hall, the clerk in the office of the collector of the Ninth district, says that during that time the whole return of spirits from the distillery was 3,380 gallons, less than its capacity for one day, as testified to by Wheaton. Diezendorf also states that sometimes they received whiskey in this way every night—sometimes one or two times a week, and sometimes not for a week, during the second run; that the hose was screwed on the cistern and then laid under the floor and then attached to the hydrant in the yard; that then the spirits ran through the pipe to the rectifying house and came out against the upright post and were carried thence through a hose to the leach-tubs; that spirits were taken away from the rectifying house during April and May, and that he himself did not receive any of the money for those spirits. He also mentions the fact that the distillery was on higher ground than the rectifying house, so as to allow of the passage of whiskey, by gravity, from the former to the latter. He says that in April and May McClaren was there when spirits were received in this way; that he himself saw the cistern-room opened once or twice in April and May by McClaren with a key, and that that key was a key which Blaisdell had given to him, the witness.

[The twelfth and last of the witnesses from inside of the establishment is Michael J. Connolly. He was the nominal distiller during the second run, and states how he came to go there. He says that before he went to work, in April, Blaisdell on one occasion told him that he, Blaisdell, intended to get the distillery out of trouble soon, and promised him, Connolly, employment as a bookkeeper in the distillery when it should be got out of trouble; that he had two or three interviews with Eckel in regard to wages, and finally agreed with Green for $50 a week; that Blaisdell and Eckel went with him to the assessor's office to take out the license for the distillery in his name: that he, Connolly, became principal in the bond, and Blaisdell and Eckel the sureties; that he

had no interest in the distillery except his wages, and remained there four or five weeks, probably from the time they started until the place was seized; and that in April, on one occasion, in the night time, he saw the cistern room opened by McClaren with a key, and saw McClaren attach the hose to the faucet on the cistern. He also testifies as to the cordon of whisky police which was established around the block on which the distillery was situated, and says that on one night Blaisdell watched an hour with him for the revenue officers, and that this watching was kept up for several nights when it was supposed there were revenue officers about.] [2]

This testimony is attacked on the part of the defence. The defence has consisted almost entirely of evidence in regard to former affidavits and statements made by more or less in number of these twelve witnesses. Some of the witnesses have been attacked with great vehemence with regard to their former affidavits and statements. There are some of them who are not attacked specifically, but only generally. These twelve witnesses were undoubtedly, to a greater or less extent, accomplices in this removal of whiskey in this way, if you shall believe that it was so removed. The evidence of accomplices is always to be closely scrutinized by a jury. It is to be looked into closely and examined carefully. A jury is always told that it is never safe to convict upon the uncorroborated evidence of a single accomplice. That is a correct and safe rule. But the rule loses its force very much when the number of witnesses is very large and they all testify to the same state of facts, under circumstances where the jury can see that they must have had an opportunity for observing what they testify to, and particularly when some of the material circumstances in the case are corroborated by the unimpeachable testimony of persons not concerned as accomplices. In this case, the instruction which I am desired by the defence to give is not correct—namely, that the testimony of these twelve persons, who appear to be accomplices, is unworthy of belief unless it is corroborated. But the jury should scrutinize such testimony carefully, and should reject such of it as they do not believe to be entirely founded upon the truth of the facts in the case. Former statements and affidavits made by any of these witnesses, to the contrary of what they have testified here on the stand, are to be looked at by the jury solely in this point of view—"What is the truth?" If, as between the former statements and the present testimony, the jury believe, upon the whole, that the one or the other is the truth, they are to act accordingly. If they believe that the former testimony was the truth, then they are not to believe the present testimony, if the two conflict. But if, as between the two, upon the whole case, they believe that the former statement or testimony was not true, and that the present testimony is true, then they are to believe the present testimony. It is in that point of view alone—for the purpose of arriving at what is true, that the jury are to take into consideration the former statements and affidavits; and if, in regard to any witness, they find, upon weighing the former statement or affidavit against the present testimony, that the present testimony is true, then, having arrived at that conclusion, they are to throw out entirely the former statement and the former affidavit. Because the two contradict each other, it does not follow that the jury are to reject both of them. The sole object of putting in a former statement or a former affidavit is to arrive at the truth; and when the jury arrive at what they believe to be the truth on a given point, on which there is a contradiction of that kind, they are to act upon such truth. I make this remark because I am asked by the defence to charge you that the testimony of witnesses who have given testimony on the same matter should be rejected, if it is contradictory, in material matters, to itself. That is not true, either in regard to contradictions in the testimony given by a witness here on the stand, or in regard to contradictions between his testimony and a former statement made by him. You are to weigh the fact of contradiction; and, in thus weighing the testimony of a given witness, you are to take into consideration contradictions of all kinds made by him. After such investigation, after you have ascertained from the evidence what is the truth, if you find that any witness has wilfully and deliberately told a falsehood here upon the stand as to a material fact, you have the right to believe that he is not worthy of credit in any particular.

Having thus gone over the evidence, and the principles of law which govern its application, I shall call your attention to the statute on which the indictment is founded; and you will, from the review which I have made of the evidence, be the better able to apply it to the statute. The two classes of offences counted on in the indictment are embraced in the 45th section of the act of July 13th, 1866. The one offence is, removing distilled spirits from the place where the same are distilled, otherwise than into a bonded warehouse, as provided by law. The other offence is, aiding and abetting in the removal of distilled spirits from a distillery otherwise than to a bonded warehouse, as provided by law. The former provision uses the expression, removing "any distilled spirits from the place where the same are distilled," while the latter provision uses the expression, removing "distilled spirits from any distillery." So far as this case is concerned, the place where spirits are distilled is the distillery, not the tail of the worm, or the still

[2] [From 9 Int. Rev. Rec. 82.]

itself, but the distillery premises; and, therefore, the removal which, for the purposes of this case, is made a crime by the statute, is the removal of spirits from the distillery building otherwise than into a bonded warehouse.

A distinction is made by the statute between the two classes of offences—removing, and aiding or abetting in removing. The punishment of them is different. The removal of spirits is made a higher offence, if we may judge from the punishment bestowed upon it, than the aiding or abetting in their removal; and it is true, as I am requested to charge by the defence, that you cannot find the defendants guilty as principals, and, also, as aiders and abettors in the same offence. You cannot find them guilty of removing spirits, and of aiding and abetting in the removal of spirits, at the same instant. That is, if Blaisdell goes to the cistern-room, opens the door with a key, and attaches the hose, and the tap is opened and the spirits run through to the rectifying house, he cannot, for that act, be convicted both of removing the spirits and of aiding and abetting in their removal. He cannot, for the one act, be convicted of the two offences, so as to accumulate upon him, for that one act, the two punishments; and so, with regard to any other one of the defendants. Therefore, if, under the instructions which I shall give to you in a moment, you shall find that, on a particular occasion, Blaisdell, or Eckel, or McClaren, was guilty, by a certain act done on a certain night, of removing spirits, he is not guilty of aiding and abetting also, by that same act, although he may be found guilty of aiding and abetting by a different act on the same or some other night. As I stated before, there is one count for removal during the first run, and two counts for removal during the second run. There are but three removals of spirits counted on in the indictment. You can find each of the defendants guilty of but one removal of spirits during the first run; and, if you find that each of the defendants, on any occasion during the first run, was guilty of the removal of spirits, with intent to defraud the United States, then they are liable to conviction on the first count, and you will find such of them guilty on the first count as you find to have been engaged in such removal. But they cannot be convicted, any one of them, of more than one removal during the first run. In like manner, each of them may be convicted of two removals during the second run; and each of them may be convicted of two aidings and abettings in removal during the first run, and of one aiding and abetting in removal during the second run, provided always that you bear in mind what I just now stated to you, that you cannot convict them, for the same specific act on the same night, of a removal, and also of aiding and abetting in a removal.

I will now proceed to instruct you as to what is, under this statute, a removal of spirits, and what is an aiding in the removal of spirits, and what is an abetting in the removal of spirits. If you shall believe, from the evidence, that any one of these defendants, who had an interest in this establishment, and in the profits of working it, directed, prescribed, ordered, or set on foot the removal of spirits in the way described, then he may be convicted of such removal, even though he was not personally present; and, if any one of them, whether he had a personal interest in the spirits or not, was personally concerned in handling, on any occasion, the means of removing the spirits—if he opened the door with the key, or if he handled the hose, or if he screwed on the hose, and that was followed by the transportation of spirits by those means to the rectifying house, then he is guilty of removing spirits, and not merely of aiding and abetting in their removal. Any other help or assistance, other than what I have stated to be a removal, is an aiding in a removal; and giving any encouragement or instigation to commit a removal, other than what I have defined to be a removal, or an aiding in a removal, is an abetting in a removal.

The first count being for a removal during the first run, and the fifth and sixth counts being each of them for a separate removal during the second run, if, under the instructions which I have given you in regard to what is a removal, you find that each of the defendants was engaged in removing whiskey once during the first run, you are authorized to convict each of them under the first count. If you find that each of them was engaged twice in removing whiskey during the second run, you are authorized to convict each of them of two removals during the second run, one under the fifth count and one under the sixth count. If you find that each of them committed the offence of removal but once during the second run, they can be convicted on only one of the counts for a removal during the second run, and must be acquitted on the other. So, also, you may find any one or two of them, and not all, guilty of a removal on the one occasion during the first run, or on the two occasions, or either one of the two occasions, during the second run. For instance, you may find Blaisdell and Eckel guilty on any count, and McClaren not guilty on the same count. It is not necessary that the defendants should be jointly guilty of any one act. The indictment is not for a conspiracy. Although they are indicted together, the offences are distributive, and each defendant is responsible before you only for his own participation and his own act. Thus, you may convict Blaisdell alone, or Blaisdell and Eckel, of removing spirits on the first count, and acquit McClaren on that count, upon the evidence, as you shall find it to be; and the same view applies to the counts respecting aiding and abetting. On that subject I would call your attention again to the

fact, that McClaren did not make his appearance at the establishment, so far as the evidence shows, until about a week before the first seizure; and my recollection of the testimony to connect McClaren with anything done there during the last week of the first run, is, that it is of a very slight character, and perhaps not sufficient to warrant a jury in finding him guilty of anything charged in the indictment during the first run.

You will also bear in mind this principle, which applies to all criminal cases—that if you have any reasonable doubt, founded upon the evidence, of the guilt of any one of the defendants, under any one of the counts, you will give to him the benefit of that doubt. You will not decide the question upon a preponderance of evidence as being more against him than for him; but if you have a reasonable doubt, founded upon the testimony—not a caprice, or a notion, or a theory—you will give to the defendant in regard to whom it exists, in reference to any specific offence or offences charged in any of the counts, the benefit of that doubt, and the benefit of an acquittal.

I now commit this important case to your consideration. You will not convict any one of these defendants because others as guilty or more guilty have not been prosecuted and convicted, nor will you acquit them because others as guilty or more guilty have escaped punishment. These are considerations with which the court and the jury have nothing to do. Nor have you anything to do with the consequences which may follow a conviction. The law has prescribed what those consequences shall be, and has confided to the jury solely the determination of the question, under the charge of the court, whether the defendants are or are not guilty of the offences which the law has defined. The punishment that shall be inflicted, within the discretion which the law has confided to the court, and the exercise of the pardoning power afterwards by the executive department of the government, are questions with which the jury, when they retire to consider, under their oaths, the question of the guilt or innocence of the defendants, have nothing to do.

I doubt not, gentlemen, from the patient attention you have given to this case, from the thorough manner in which it has been tried, by the examination and cross-examination of the witnesses on both sides, and by the summing up of the counsel on both sides, and from the review which the court has given to you, of the voluminous testimony, that your minds are fully impressed with all the points of the case, and that you will do justice between the United States of America and these defendants.

The jury rendered a verdict of guilty against the defendant Blaisdell, on all the counts except the third and the seventh; a verdict of guilty against the defendant Eckel, on all the counts except the third and the seventh; and a verdict against the defendant McClaren, on the eighth count, with a recommendation to mercy.

The district attorney, S. G. Courtney, having, on the third day after the trial, moved for the judgment of the court on the defendants, Mr. Knox, of counsel for the defendants, asked for a delay of judgment, on the ground that, in consideration of disclosures which the defendants had made to the government, in regard to frauds on the revenue, in connection with distilled spirits, the pledge of the government had been given to them that they should not be prosecuted for the offences of which they had been found guilty. The district attorney opposed any delay.

BLATCHFORD, District Judge. I have listened to every thing that has been said on both sides in regard to this matter. Very much of what has been said has no relevancy whatever to the question before the court, but has reference to matters in regard to which there is evidently a very great degree of feeling between the respective counsel, and with which this court has nothing to do.

The considerations which have been presented by the counsel for the defence, I accept, upon his statement, as fully, to all intents and purposes, as they could be presented by the most solemn affidavits. I will assume that the president of the United States and the attorney-general, through parties with whom they have communicated, have promised protection, or pardon, to these defendants, to the fullest extent. But that is a matter with which this court has nothing whatever to do. Any promises or pledges of the government in that regard, if made, will undoubtedly be redeemed. It is for the executive department of the government to exercise the power of pardon, either independently, or in consequence of previous assurances to that effect. If the government, in its wisdom, acting through the president and the attorney-general, thought that this case was a case which ought not to be prosecuted, because of those assurances, they had the power, at any time, to prevent its prosecution, by directing the district attorney not to prosecute it. This court can only have communication with the executive authorities of the government, through the district attorney, as the recognized officer of the government. When there is no district attorney in commission, the government cannot prosecute in this court. It is only through the presentation to the court of the commission of the district attorney, so that the court may know who is the proper legal officer to represent the United States, that the court can have any communication with the executive department of the government. In this case, in particular, the court knows, officially, that for a time the prosecution of this case was suspended, on the motion of the district attorney, who stated that he acted by direc-

tion of the attorney-general, and that afterwards the district attorney moved that the case proceed, stating that the inhibition upon its prosecution was withdrawn, and that he was directed to prosecute the case. The court, therefore, can know nothing of the action of the executive department of the government, except through the officer who is recognized by the statute as the proper officer to communicate with the court, on the part of the United States, and to direct the prosecution of the case. If, in the prosecution of the case, the district attorney has used, as evidence, testimony that has been produced in violation of any previous pledge, or testimony that has been procured through disclosures made by these defendants in such a manner as to entitle them to the exercise of the executive clemency, the promise is one which must be redeemed by the executive department alone, and in which this court has no part whatever. This court, in the exercise of its judicial functions, can only know that an indictment was found by a grand jury, which has been fully, thoroughly, and fairly investigated by an impartial petit jury, resulting in a conviction; and it is the duty of the court to impose the sentence of the law according to the facts, as developed on the trial. One of the great features of our system of government, derived from our English ancestors, is the entire separation of the functions of the judiciary from the functions of the executive—not merely an independent judiciary, but the separation of the functions of the two departments of the government. The administration of the judicial functions of the government, under the constitution of the United States, is entirely separate from the administration of the executive functions of the government; and to call upon a court of the United States to redeem, or perform, or fulfil, in any way, in this case, pledges, even the most extensive, the most absolute, and the most thoroughly proved, on the part of the executive department of the government, is to depart entirely from the true theory and the wise practice of our system of government, and to violate the fundamental principles of the constitution of the United States. Pledges of the character of those spoken of here, and which it is alleged have been made in this case, are sometimes made by the government, and, whenever they are made, the executive officers of the United States undoubtedly redeem them; and they will redeem such as may have been made in this case, if it be proper to do so. But this court has no concern with any such stipulations.

I, therefore, see no reason why the court should not proceed to pass the sentence which follows from this conviction, leaving the responsibilities, which will then fall upon the executive departments of the government, to be discharged by those departments, according to their own judgment.

[2] [THE COURT then pronounced judgment on the defendants, as follows:

[Alvah Blaisdell and John J. Eckel, you have been convicted, after a very full, thorough and fair trial, by an impartial jury, sifted by your counsel, by examination, before they were empanelled, upon testimony which the jury and the court have regarded as perfectly conclusive, of the offences for which you were indicted. You have been convicted, each of you, upon three counts, of three distinct offences—of removing distilled spirits from the place where they were distilled otherwise than into a bonded warehouse, as provided by law; and you have also, each of you, been convicted upon three counts, of three distinct offences, of aiding and abetting in the removal of distilled spirits from a distillery otherwise than into a bonded warehouse, as provided by law. The circumstances, as developed on the trial, are circumstances of very great aggravation, and of continued persistence in this illegal business. After the distillery had been seized in November, 1867, and condemned in the following February, for the illicit running off of whiskey, it was sold by the government, and you became again connected with it, more or less intimately, and you again entered upon the same course of illicitly removing spirits, although your precise relations to the establishment, in a business point of view, may not have been the same during the second run that they were during the first run. The punishment for the offences of removing, and of aiding and abetting in the removal of whiskey, under the 45th section of the act of July 13th, 1866, under which you have been indicted and convicted, is somewhat different from the punishment prescribed by the law of July 20th, 1868 [15 Stat. 125], for the same offences. In one respect, the punishment now is more severe, and in other respects it is less severe. So far as the offence of removing distilled spirits is concerned, of which you have been convicted on two counts, the punishment provided by the statute under which you have been convicted, is a fine of double the amount of the tax imposed on the distilled spirits removed, or imprisonment for not less than three months. The punishment provided for the same offence by the law of 1868, is a penalty of double the tax imposed on the spirits so removed, and a fine of not less than two hundred dollars nor more than five thousand dollars, and imprisonment for not less than three months nor more than three years. Under the present law, the limitation of the imprisonment is to not less than three months, but there is no limitation in the other direction. It is not limited to three years, as it is in the law of 1868. The punishment for the offence of aiding or abetting in the removal of spirits, by the statute under which you have been convicted, is a fine

[2] [From 9 Int. Rev. Rec. 82.]

of not less than two hundred nor more than one thousand dollars, or imprisonment for not less than three nor more than twelve months. Under the law of 1868, now in force, the punishment for aiding and abetting in the removal of spirits is precisely the same as the punishment for their removal. Taking into account the fact that, for the offence of removing spirits, the extreme punishment by the statute of 1868 is limited to three years, although there is no limitation in the act under which you have been convicted, the court regards it as a proper interpretation of the 45th section of the act of 1866, in view of the punishment imposed by the act of 1868 for the same offence, not to inflict an imprisonment now, on a conviction under the act of 1866, for a longer period than three years. But, in this case, the court feels, from the evidence in the case, and all the circumstances surrounding it, as deduced solely from that evidence, because the court can act and does act upon nothing else, that it ought to impose the extreme sentence of the law in the way of imprisonment. I shall impose that sentence under the first count of the indictment, for removing spirits from the distillery otherwise than into a bonded warehouse, and I shall suspend sentence on the other counts of the indictment on which you have been convicted, until the execution of the sentence imposed under the first count shall have been fully performed. The offence set forth in that count is a separate and distinct offence, the same as if it were found in a separate indictment. The judgment and sentence of the court upon you, Alvah Blaisdell, under the first count of the indictment, on which you have been convicted, is, that you be imprisoned for three years in the state prison at Sing Sing. The judgment and sentence of the court upon you, John J. Eckel, under the first count of the indictment, on which you have been convicted, is, that you be imprisoned for three years in the penitentiary at Albany. The court suspends judgment and sentence, in each of your cases, upon the second, fourth, fifth, sixth and eighth counts of the indictment, until after the judgment and sentence imposed under the first count shall have been fully executed.

[You, John McClaren, have been convicted, on the eighth count of the indictment, of aiding and abetting in the removal of spirits from a distillery otherwise than into a bonded warehouse, as provided by law. The punishment affixed, by the statute under which you have been convicted, to that offence, is a fine of not less than two hundred dollars nor more than one thousand dollars, or imprisonment for not less than three nor more than twelve months. If you had been convicted of that offence under the law of 1868, the punishment would have been very much more severe, because that imposes a penalty of double the tax on the spirits removed, and a fine of not less than two hundred dollars nor more than one thousand dollars, and imprisonment for not less than three months nor more than three years. The jury have strongly recommended you to mercy, and the court recognizes the fact that you were in this matter only a subordinate and an employee of others, and were led into it by others; and, in view of the recommendation of the jury and of all the circumstances of the case, the court sentences you, upon the eighth count of the indictment, on which you have been convicted, to an imprisonment of four months.] [2]

Case No. 14,609.

UNITED STATES v. BLOCK.

[4 Sawy. 211; [1] 15 N. B. R. 325; 9 Chi. Leg. News, 234.]

District Court, D. Oregon. March 19, 1877.

INFORMATION — CONSTITUTIONAL LAW — CRIMINAL PROCEDURE—INFAMOUS CRIMES—BANKRUPTCY—OMITTING PROPERTY.

1. The crime defined in subdivision 6 of section 5132 of the Revised Statutes is not an infamous one within the meaning of that term at common law, and as used in the fifth amendment to the constitution, and therefore a party committing it may be prosecuted by information.

[Cited in Re Spenser, Case No. 13,234; U. S. v. Watkinds, 6 Fed. 155; U. S. v. Yates, Id. 863; Re Wilson, 18 Fed. 34; U. S. v. Reilley, 20 Fed. 46; U. S. v. Smith, 40 Fed. 757; Ex parte Wilson, 114 U. S. 425, 5 Sup. Ct. 939.]

[Cited in Butler v. Wentworth, 84 Me. 31, 24 Atl. 458; State v. Nolan (R. I.) 10 Atl. 482; Green v. Superior Court, 78 Cal. 566, 21 Pac. 307, 541.]

2. In the absence of constitutional and statutory provisions, the common law furnishes the rule as to the mode of procedure in criminal cases in national courts

[Cited in U. S. v. Coppersmith, 4 Fed. 205; U. S. v. Clark, 46 Fed. 639; Re Acker, 66 Fed. 293.]

Application for leave to file information against the defendant for omitting property from inventory of bankrupts' estate, contrary to section 5132 of the Revised Statutes.

Rufus Mallory, U. S. Atty.

John W. Whalley and M. W. Fechheimer, for defendant.

DEADY, District Judge. The information sought to be filed charges the defendant with "willfully and fraudulently omitting from the inventory of the effects of Abraham I. Block and M. S. Block, partners" and bankrupts, on July 14, 1876, the sum of $2500 in money, belonging to the estate of said bankrupts, contrary to subdivision 6 of section 5132 of the Revised Statutes.

In pursuance of a rule granted at the time of making the application, the defendant, by his counsel, showed cause against the motion; that the crime charged in the information was "infamous," and therefore within the prohibi-

[2] [From 9 Int. Rev. Rec. 82.]

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

tion contained in the fifth amendment to the national constitution.

The term "infamous"—without fame or good report—was applied at common law to certain crimes, upon the conviction of which a person became incompetent to testify as a witness. This was so, upon the theory that a person would not commit a crime of such heinous character, unless he was so depraved as to be altogether insensible to the obligation of an oath, and therefore was unworthy of credit. 1 Greenl. Ev. § 372. These crimes are said to be treason, felony, and the crimen falsi. Id. § 373; 1 Phil. Ev. 28; Barker v. People, 20 Johns. 460. As to treason and felony, the authorities are agreed, but as to what or whether all species of the crimen falsi are to be considered infamous there is some apparent disagreement among them. The term is borrowed from the civil law, where, as it implies, it included every species of fraud and deceit or wrong involving falsehood. But the better opinion seems to be that the common law has not used the term in this connection in so extensive a sense; and that, therefore, a crime is not infamous within the meaning of the prohibition contained in said fifth amendment, unless it not only involves the charge of falsehood, but may also injuriously affect the public administration of justice, by the introduction therein of falsehood and fraud. 1 Greenl. Ev. § 373; 1 Phil. Ev. 28. The following have been determined to be such crimes: "forgery perjury, subornation of perjury, suppression of testimony by bribery, or conspiracy to procure the absence of a witness, or other conspiracy to accuse one of a crime, and barratry." 1 Greenl. Ev. § 373. And upon the principle, I suppose, that "a receiver is as bad as a thief," it was held in Com. v. Rogers, 7 Metc. [Mass.] 501, that a person convicted of receiving stolen goods, knowing them to have been stolen, was thereby rendered infamous. But in Utley v. Merrick, 11 Metc. [Mass.] 302, it was held that obtaining goods by false pretenses was not an infamous crime; and in U. S. v. Sheppard [Case No. 16,273] the same rule was applied to the crime of smuggling goods into the United States, as defined by section 4 of the act of July 18, 1866 (14 Stat. 179). In U. S. v. Waller [Case No. 16,634], before Mr. Justice Field and Sawyer, Circuit Judge, the district attorney was allowed to file an information charging the defendant with introducing distilled spirits into Alaska contrary to the statute. Indeed, the opinion in this case may be cited as authority for the proceeding by information in the cases of "misdemeanors committed against all laws of the United States." But I do not think it ought to be so construed; and that the expression quoted ought to be taken in connection with the case before the court. For it is certain that perjury, conspiracies, and other infamous crimes, were only misdemeanors at common law (4 Bl. Comm. 5, note 5), and the fifth amendment prohibits any proceeding other than by indictment in all cases of "infamous" crimes, whether they are misdemeanors or not.

The modern code definition of felony and misdemeanor, which makes the distinction between them rest upon the character of the punishment imposed for their commission, has not yet been incorporated into the laws of the United States, and if it had it is not perceived how it could affect the question. The word "infamous," as used in the fifth amendment, must be taken in the sense in which it was used and understood at the common law, from which it was taken. That is the sense in which it was used and understood by those who made and adopted the constitution and the amendments to it. Bains v. The James & Catharine [Case No. 756]. As has been shown, at common law this term was only applicable to certain crimes which from their nature implied a total want of truth in the person committing them, without reference to the fact of whether they were otherwise distinguished as felonies or misdemeanors. Neither was it the punishment, but the nature of the act constituting the crime, which made it infamous. "Ex delicto non ex supplicio emergit infamia." 1 Greenl. Ev. § 372, note 1; 1 Phil. Ev. 30; People v. Whipple, 9 Cow. 707; People v. Herrick, 13 Johns. 84; U. S. v. Brokius [Case No. 14,652].

The crime charged in the information is created by statute, and was unknown to the common law. The punishment is "imprisonment, with or without hard labor, for not more than three years." Rev. St. § 5132. The section defining it does not declare it a felony or misdemeanor, but elsewhere in the same title ("Bankruptcy," Rev. St. § 5110, subd. 10) it is referred to as a misdemeanor.

The law having required the defendant to make an "accurate statement" of the estate of the bankrupts (Rev. St. §§ 5016, 5030), and the charge being that he has willfully and fraudulently omitted a material portion of the same from the inventory, there is ground for saying that the crime involves the charge of falsehood. But as was said in Utley v. Merrick, supra, any falsehood does not make a party infamous, nor is a crime infamous because its commission involves a falsehood of any kind or degree. On the contrary, the nature and purpose of the falsehood must be such as makes it probable that the party committing it is void of truth and insensible to the obligation of an oath. And even this is not enough; it must also appear that the falsehood is calculated to injuriously affect the public administration of justice, as perjury or the suppression of testimony.

Tried by this test, I do not think that this crime can be considered infamous, or within the category of the crimen falsi at common law. It has also been suggested that the proceeding by information not having been specially authorized by congress will not lie in any case in the national courts. Until the supreme court decides otherwise, the case of U. S. v. Waller, supra, must be considered suffi-

cient authority in this court for the prosecution of crimes not "capital or otherwise infamous" by information.

The case of U. S. v. Joe [Case No. 15,478] is the only one I know to the contrary, while the case of U. S. v. Sheppard, supra, is unqualifiedly in support of the authority to entertain the proceeding.

There can be no doubt but that at common law from the most ancient time all misdemeanors, unless it was misprision of treason, might be prosecuted by information filed by the attorney-general, or the master of the crown office. 3 Bl. Comm. 308; 4 Bac. Abr. 402.

The ruling in U. S. v. Joe, supra, is based upon the theory that the common law as to procedure or remedy is not in force in the United States. But this seems contrary to the authorities and the practice. In Kneass v. Schuylkill Bank [Case No. 7,876] it was held that where an act of congress gives a right without providing a specific remedy, the latter "may be drawn from the abundant stores of the common law." And although there are no common law crimes in the United States, yet where congress declares an act a crime, a person charged with the commission of the same may be prosecuted therefor according to the course of the common law, unless the constitution or congress has otherwise provided. In discussing this subject, Conkling, in his treatise, says: "The national courts are unquestionably to look to the common law in the absence of statutable provisions, for rules to guide them in the exercise of their functions in criminal as well as civil cases." Conk Prac. (3d Ed.) 167. And, again, at page 613, he says: "While no resort can be had to the common law as a source of criminal jurisdiction, it nevertheless furnishes the proper, and as the state laws are here inoperative, the only guide in the absence of constitutional or statutory regulations, as to the principles and rules of procedure in the exercise of this branch of jurisdiction." And such is substantially the ruling of the supreme court in U. S. v. Reid, 12 How. [53 U. S.] 365. A casual remark in Story's Commentaries (volume 2, § 1786), to the effect that the proceeding by information is rarely used in America, and had not, in the case of mere misdemeanors, been formally put into operation by any positive authority of congress, ought not to be considered as bearing materially upon the question. Besides, the very prohibition contained in said fifth amendment, by a strong and almost necessary implication, asserts that the proceeding by information in all cases not "capital or otherwise infamous," was well known and lawful. Again, congress, by the enactment of section 32 of the act of April 30, 1790 (section 1044, Rev. St. [1 Stat. 119]), and section 3 of the act of March 26, 1804 (section 1046, Rev. St. [2 Stat. 290]), has recognized the right to proceed in the national courts in a certain class of crimes by information. Taken together, these sections provide that no person shall be prosecuted for any "offense" or "crime" not capital, "unless the indictment is found, or the information instituted," within a certain time after the commission of such offense or crime. By section 8 of the act of May 31, 1870 (section 1022, Rev. St. [16 Stat. 142]), congress formally recognized the right to prosecute all crimes against the elective franchise and the civil right of citizens that are not infamous by information. There is no good reason why this proceeding, when confined to mala prohibita, should be regarded at this day with disfavor. Within the past quarter of a century the proceeding has been substantially revived in many of the states as a substitute for the more cumbersome, costly and dilatory one by a grand jury. Without it, a defendant would often be compelled to remain in prison awaiting the coming of a grand jury for a period of time longer than that imposed as a punishment for the crime with which he may be charged

The proceeding is a cheap and convenient one, and when allowed only upon leave of the court, and the information is made upon oath, and the official responsibility of the district attorney, it is not any more likely to be abused or become oppressive than accusations found by a grand jury.

Let the information be filed.

Case No. 14,610.

UNITED STATES v. BLOCK 121.

[3 Biss. 208; [1] 5 Chi. Leg. News, 302.]

Circuit Court, N. D. Illinois. June, 1872.

EMINENT DOMAIN — CONDEMNATION — BY WHOM PROCEEDINGS INSTITUTED—CONFLICTING CLAIMANTS—COURTS—FEDERAL JURISDICTION.

1. A proceeding under an act of congress to condemn property is a "suit of a civil nature at common law or in equity," within the meaning of the judiciary act [1 Stat. 73].

[Cited in A Quantity of Manufactured Tobacco, Case No. 11,499.]

[Cited in State v. Jennings, 56 Wis. 120, 14 N. W. 30.]

2. The construction of that clause cannot be limited to such suits as were known at the time of the passage of the act. Whenever an act is passed which authorizes the commencement of a suit, jurisdiction of the case is thereby vested in the federal courts, if the character of the parties warrants it, and it comes within the meaning of the statute. The grant of power in this act is prospective.

3. The clause, "suits of a civil nature at common law or in equity," was used in contradistinction to admiralty and criminal cases. It does not restrict the jurisdiction to old and settled forms, but includes all suits in which legal rights are to be ascertained and determined.

4. Congress has power to clothe the federal courts with authority to proceed for the condemnation of property in conformity with a particular state statute.

5. It was the intention of congress in this act to give this court jurisdiction of the condemnation proceedings therein contemplated.

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

6. Though the officers of the government had stated to the owners of the ground the price which the government was willing to give, yet if other parties had liens and claims against the property, which they were not willing to surrender, condemnation proceedings are necessary.

7. The secretary of the treasury being the mere officer of the government, when proceedings are instituted by him under a special law they become necessarily proceedings on the part of the United States; and although the petition be filed by the district attorney, it is within not only the spirit, but the letter of the acts of congress.

This was a petition filed by the district attorney, in the name of the United States, for the condemnation of block 121, school section addition to Chicago, commonly called the "Bigelow Block." The various parties claiming an interest in the land or any part of it, whether as owners of the fee, tenants, or by mortgages, judgments, liens, or otherwise, were made parties defendant, and commissioners appointed by the court, in conformity with the state statutes, who heard the evidence as to the value of the property, the damages to be assessed, and the rights and interests of the respective parties. On the coming in of this report some of the parties in interest moved to dismiss the proceedings on the ground that the court had no jurisdiction. These proceedings were instituted for the purpose of obtaining ground for the erection of a custom-house and government buildings in Chicago, in pursuance of the act of the legislature of Illinois of December 14th, 1871, and the act of congress of December 21st, 1871.

The act of the legislature of Illinois (2 Gross' St. p. 438) is as follows:

"Section 1. The United States shall have power to purchase or condemn, in the manner prescribed by law, upon making just compensation therefor, any land in the state of Illinois required for custom-houses, arsenals, light-houses, national cemeteries, or for other purposes of the government of the United States.

"Sec. 2. The United States may enter upon and occupy any land which may have been or may be purchased, or condemned, or otherwise acquired, and shall have the right of exclusive legislation and concurrent jurisdiction together with the state of Illinois, over such land and the structures thereon, and shall hold the same exempt from all state, county and municipal taxation."

The act of congress of December 21, 1871 (17 Stat. 24), provides, "that the secretary of the treasury be, and he hereby is authorized and directed to purchase, at private sale or by condemnation, in pursuance of the statutes of the state of Illinois, the remainder of the square of ground not now belonging to the United States, on which the custom-house and post-office building, lately destroyed by fire in the city of Chicago, was situated, if the same can be obtained either by private purchase or condemnation, at what, in his judgment, is a fair and reasonable price for the ground; but if not, then it shall be his duty to purchase, in one of the ways aforesaid, one of the twenty-four squares of ground nearest to and immediately surrounding the square on which said building destroyed by fire was located. * * * * Provided, that no money hereby appropriated shall be used or applied for the purpose until a valid title to the land for the site of such building shall be vested in the United States, and until the state of Illinois shall cede its jurisdiction over said site, and shall also duly release and relinquish to the United States the right to tax or in any way assess said site or the property of the United States that may be thereon during the time that the United States shall be or remain the owner thereof."

Edward Roby, for the motion.

There are large classes of cases wholly within this judicial power, which it is held the courts of original jurisdiction cannot entertain, notwithstanding the clear implication of the constitution. Cary v. Curtis, 3 How. [44 U. S.] 245; Insurance Co. v. Ritchie, 5 Wall. [72 U. S.] 541; McIntire v. Wood, 7 Cranch [11 U. S.] 504; McClung v. Silliman, 6 Wheat. [19 U. S.] 604. Though state forms may sometimes be adopted by the courts for convenience, state laws cannot confer jurisdiction, nor prescribe the modes or forms of proceeding in federal courts. Riggs v. Johnson Co., 6 Wall. [73 U. S.] 178, 179, 195; Bronson v. Kinzie, 1 How. [42 U. S.] 314; cases cited in Brightly, Fed. Dig. tit. "Execution," 1; Boyle v. Zacharie, 6 Pet. [31 U. S.] 648, 658.

J. O. Glover, U. S. Dist. Atty., and L. H. Boutell, Asst. U. S. Dist. Atty.

The United States circuit court has original cognizance of all suits of a civil nature at common law, when the United States are plaintiffs or petitioners. Act Sept. 24, 1789, § 11 (1 Stat. 78); Const. U. S. art. 3, § 2; Act March 3, 1815, § 4 (3 Stat. 245). The act of March 3, 1815, gives the United States jurisdiction to sue, irrespective of the amount in controversy. Postmaster General v. Early, 12 Wheat. [25 U. S.] 136. By cases in law are to be understood suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are to be recognized, and equitable remedies administered, or where the proceeding is in the admiralty. Parsons v. Bedford, 3 Pet. [28 U. S.] 447; Robinson v. Campbell, 3 Wheat. [16 U. S.] 212. Parties entitled to sue in the courts of the United States, are in general entitled to pursue, in such courts, all the remedies for the vindication of their rights which the local laws of the state authorize to be pursued in its own courts. Such is a statutory proceeding for partition. Ex parte Biddle [Case No. 1,391], Story, J.; Mason v. Boom Co. [Id. 9,232]; Bank of Hamilton v. Dudley, 2 Pet. [27 U. S.] 492. The legislature of a state can-

not, by enacting a special remedy in their own county courts, take away the privilege conferred by the constitution and laws of the Union upon citizens of other states, to sue in the courts of the United States. Mason v. Boom Co. [supra]. Consult also on the general question of jurisdiction, 1 Abb. U. S. Prac. 230–234; Parsons v. Lyman, 32 Conn. 566; The St. Lawrence, 1 Black [66 U. S.] 522; The Orleans v. Phobus, 11 Pet. [36 U. S.] 175; Le Roy v. Nathan, 22 How. [63 U. S.] 132; Toland v. Sprague, 12 Pet. [37 U. S.] 300; Watson v. Tarpley, 18 How. [59 U. S.] 517; U. S. v. Peters, 5 Cranch [9 U. S.] 115; Clark v. Smith, 13 Pet. [38 U. S.] 195; Parker v. Overman, 18 How. [59 U. S.] 137; Clark v. Sohier [Case No. 2,835]; Lorman v. Clarke [Id. 8,516]; Strachen v. Clyburn [Id. 13,520].

Before DRUMMOND, Circuit Judge, and BLODGETT, District Judge.

DRUMMOND, Circuit Judge. It may be conceded that there must be an act of congress which has given the court jurisdiction, either by express words or by necessary implication. The second section of the third article of the constitution states that the judicial power shall extend, among other cases, "to controversies to which the United States shall be a party." This is undoubtedly a controversy to which the United States is a party. Under this grant of power congress legislated at a very early day, and by the act of September 24th, 1789, commonly called the judiciary act, declared that the circuit court should have cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds the sum of $500, and the United States are plaintiffs or petitioners. This grant was undoubtedly prospective. At that time there was very little jurisdiction given by express enactment to the courts of the United States, and in fact this act created the courts of the United States, and by virtue of it the courts have, up to this time, cognizance of many cases.

So that this act was intended, whenever it occurred that a suit at law or in equity could be commenced, and the matter in dispute, exclusive of costs, amounted to the sum of $500, to allow the United States, as plaintiffs or petitioners, to bring it in the circuit court of the United States. Therefore, irrespective of the act of March 3, 1815, the effect of which it is not necessary for us here to consider, the only question is, whether this is, within the meaning of this statute, a suit of a civil nature at common law or in equity, and of the value of $500, and the United States are plaintiffs or petitioners. The value, of course, is greater than the amount indicated. The United States are petitioners, and thus two of the conditions of the statute are complied with. The only remaining condition is, is it a suit of a civil nature at common law or in equity? It is contended that the act does not comprehend any other suit of a civil nature at common law or in equity, except such suits as were known at the time of its passage. If that is the true construction of the statute, then there might be some doubt whether the court would have jurisdiction. But that has not been the construction which has been given to the statute. For it must be now considered as the settled doctrine of the supreme court of the United States, that whenever any statute is passed which authorizes the commencement of a civil suit, and under which a suit can be maintained, that then, although it may not have been known in precisely that form to the common law, this statute vests in the circuit court jurisdiction of the case, and it comes within the meaning of the law, being a suit of a civil nature at common law or in equity. Take the case of an action brought on a bond; it may be that the action is of such a character that at common law it could not be maintained; but if the statute authorizes the maintenance of the action, then the act of 1789 vests in the court jurisdiction of the case, without any express words; and so liberal has been the construction given to this statute, in cases of even criminal procedure, where, by that act, the circuit courts have concurrent jurisdiction with the district courts; and by subsequent legislation—as by the act of February 13, 1862 (12 Stat. 339), the district court, by the language of the statute, was alone clothed with jurisdiction of such cases; that the supreme court of the United States held that they could go back to the act of 1789, and sustain jurisdiction by virtue of that law in the circuit courts. U. S. v. Holliday, 3 Wall. [70 U. S.] 407.

A question in principle similar to the one arising in this case was discussed in a case cited at the argument,—Ex parte Biddle [Case No. 1,391]. That was a proceeding by partition confessedly existing only by virtue of the laws of Massachusetts, and the court uses this language: "Parties entitled to sue in the courts of the United States are, in general, entitled to pursue in such courts all the remedies for the vindication of their rights which the local laws of the state authorize to be pursued in its own courts."

This has been sanctioned by the supreme court of the United States (Parsons v. Bedford, 3 Pet. [28 U. S.] 433); and we cite it for the purpose of showing what is the meaning of the words used in the act of 1789, "suits at common law." The court is commenting on an amendment to the constitution proposed by congress at its first session, where those words are used: "When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was

present to the minds of the framers of the amendment. By common law, they meant what the constitution denominated in the third article 'law,' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit," etc.

Now, it would follow, if this reasoning is correct, that the language in the 11th section of the act of 1789, "all suits of a civil nature at common law or in equity," is used in contradistinction to suits in admiralty, the exclusive jurisdiction of which was vested by the same act in the district court, and also to criminal cases, jurisdiction of which was conferred by other sections. So that if this be true, and by a suit of a civil nature at common law or in equity is meant not the old and settled proceedings as recognized at common law or in equity, but suits in which legal rights are to be ascertained and determined, in contradistinction to cases in admiralty or criminal law, then this application is within the meaning of the 11th section of the act of 1789. It is a controversy to which the United States is a party and petitioner, and it is immaterial for the purposes of jurisdiction whether the forms of proceeding are those in ancient use, for they may be changed by statute or moulded as a court of chancery will always mould the forms of proceedings to suit the exigencies of the case.

If it be a suit at common law, and the 7th amendment to the constitution applies to it, then it is competent for the court to provide that there shall be a trial by jury. The fact that there must be a trial by jury can have no influence upon the question of the jurisdiction of the court, provided it is fairly deducible from the section itself to which reference has been made, because the court in various ways, either as a court at common law or a court exercising exceptional jurisdiction under statutes, can provide for the protection of the rights of the citizen, which that section giving trial by jury was intended to secure.

Again, what was the intention of the act of congress and of the legislature? Was it contemplated that there was to be no remedy under these acts? Did the act of congress mean nothing when it said that the secretary of the treasury might purchase, at private sale or by condemnation, a site suitable for the public buildings, and when the legislature said the United States might so purchase or condemn? How so purchase or condemn? The language of both statutes must necessarily be construed, and the words of the act of congress are, "in pursuance of the statutes of Illinois;" it is in that way that it must be done. And there can be do doubt of the power of congress to clothe the courts of the United States with authority to proceed in conformity with a particular statute of a state for the condemnation of property. The counsel who made the objection, and who argued the motion with zeal and ability, conceded that the United States had what is called the right of eminent domain; that is to say, that it was competent for the United States to condemn land for public use. However this may be, there can be no question of the right, when it is conferred, not only by an act of congress, but by an act of the legislature, both having the same general meaning and intent. Then if this be so, it certainly was never supposed by the law-maker, either state or national, that acts were passed which had no operation or effect. There must be somewhere the right to proceed in conformity with these statutes to condemn land for the public use, and it must exist either by procedure in the state court or in the courts of the United States. It was insisted by counsel that there was no authority to proceed in the state court. If so, and there was no authority to proceed in the courts of the United States, then these acts were merely nugatory, having no sort of effect upon the question of condemnation. But it was intended there should be a proceeding either in the state court or in the courts of the United States. If in the state court, then the language of the 11th section of the act of 1789 applies: "The circuit court shall have original cognizance concurrent with the courts of the same states." So that, upon the whole, we can not doubt that it was the intention to give to some court jurisdiction of this proceeding; and whether it was the state or national court, is immaterial. By virtue of the 11th section of the act of 1789, jurisdiction is given, not by express language, but it follows as a necessary means to accomplish the ends which congress had in view. But it is said that the language of the local law requires that the particular lot of ground shall be, in the first place, selected; and that has not been done by the secretary of the treasury.

In one sense that is true. It has not been located, but we apprehend that when the act of the legislature was passed, authorizing the United States to purchase or condemn land, it meant in conformity with the law which was in force at the time. It will be recollected that the act of the 7th of March, 1872, recapitulated the act of the 4th of February, and at the time that this amendment was passed the act of congress was in force, and this act of congress did not make it compulsory upon the secretary of the treasury to take the land where he had commenced proceedings for condemnation. It gave him the option. The proceedings, therefore, must be instituted and carried on subject to the previous act of congress, and subject to the power of the secretary of the treasury to

declare that he would not take a particular lot or tract of land at the price designated. And the discretion this act of congress gave the secretary of the treasury has, as a matter of fact, been exercised already in the proceedings relative to the other block, and he has refused to take the property at the price fixed.

It is urged that this block has been obtained by purchase, and that the secretary of the treasury has stated to the owners of the land that the United States is willing to give a particular price. That may be, but by the terms of the law it is necessary that the United States should have complete title to the land, and the proceedings show that there are many incumbrances upon the land which confer rights which the owners have no authority in any way to interfere with. Parties have rights under contract with the owners of the block which even this act of congress could not affect, and therefore, conceding that the government has agreed to give for this block a particular price, still proceedings for condemnation were necessary in order to foreclose the rights of all the parties. If they had agreed to the price which the government was willing to give them, there would be no necessity for the proceedings by condemnation. But they have not manifested that willingness, and even now, after the commissioners have fixed upon the price for each interest, they are not content. How much can they possibly get out of the government? That is the question in all these cases.

Then it was indispensable, we think, in order that there should be a perfect title to the United States, that proceedings for condemnation should be initiated and should go on. Where so many interests are comprehended under the law, we do not see how it was possible to obtain title without proceedings for condemnation.

Some objection was taken to the form of the proceedings, on account of the technical phraseology of the act of congress: "That the secretary of the treasury be, and he hereby is, authorized to purchase at private sale, or by condemnation, in pursuance of the statute of Illinois," a particular tract of land. Now the secretary of the treasury is the mere officer of the government, and when proceedings are instituted by him under this law, they become necessarily, from the very nature of the case, proceedings on the part of the United States, and the United States are the petitioners; and although the petition is filed by the district attorney, it is filed in the name of the United States, and for their benefit, and therefore it is within not only the spirit but the letter of the act of congress. The owners resist the right of the United States to have this land at the price which the government is willing to pay them for it. That is the controversy this court is called upon to determine, and we state in conclusion, that the principles which have several times been decided by the supreme court of the United States, are re-affirmed in a very recent case: Railway Co. v. Whitton, 13 Wall. [80 U. S.] 270. So that if it be conceded that the United States has the right of eminent domain to condemn land for public use, then, if there were nothing but the statutes of the state in force, there would seem to be not much question as to the jurisdiction of the court; but in connection with the act of congress, there can be no room for doubt. The motion to dismiss will, therefore, be overruled.

Case No. 14,611.

UNITED STATES v. BLODGETT.

[35 Ga. 336.]

[See Append. Fed. Cas.]

Case No. 14,612.

UNITED STATES v. BLOOMGART.

[2 Ben. 356;[1] 7 Int. Rev. Rec. 148.]

District Court, S. D. New York. April, 1868.

CRIMINAL PROCEDURE—EXAMINATION BEFORE A UNITED STATES COMMISSIONER—CONFESSIONS—OFFICER OF THE UNITED STATES.

1. On an examination, before a United States commissioner, of a person charged with crime, his confession of the crime, without any proof of the corpus delicti, is sufficient to warrant his being held for trial.

[Cited in U. S. v. Brawner, 7 Fed. 87.]

2. A clerk, appointed by the direction and with the approbation of the secretary of the treasury, for the fractional currency counter of the treasury department, at Louisville, is an officer of the United States, within the meaning of the constitution of the United States, and of the statutes of the United States in regard to officers charged with the safe keeping of the public money.

BLATCHFORD, District Judge. This case comes before the court on a writ of habeas corpus, and a writ of certiorari, the habeas corpus being issued to the marshal of this district, directing him to bring up the prisoner, and the certiorari being issued to John A. Osborn, a commissioner of the circuit court of the United States for this district, to bring before the court the proceedings before him under which the prisoner was committed. It appears that, on the 23d of March, 1868, a warrant was issued by Mr. Osborn, as such commissioner, to the marshal of this district, against Joseph Bloomgart, reciting that complaint on oath had been made, charging Bloomgart with having, on the 7th of December, 1867, in the district of Kentucky, knowingly, willfully, and feloniously taken and converted to his own use, and embezzled, the sum of $12,275, the property of the United States, he being then an officer of the United States, and intrusted with the depositing and safe keeping of the

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

public money. That warrant commanded the marshal to apprehend Bloomgart, if found in this district, and bring him before the commissioner, and appears to have been issued by the commissioner on an affidavit made by Mr. Hervey, acting United States depositary at Louisville, Kentucky, and sworn to in the district of Kentucky, before a United States commissioner there, on the 3d of February, 1868. Mr. Hervey states, on oath, that, during the past eight months, one Joseph Bloomgart, a clerk at the fractional currency counter of the treasury department, at Louisville, did take and convert to his own use $12,275 of the public money intrusted to him, contrary to the act of congress in such case made and provided. On this warrant, Bloomgart was arrested and taken before Commissioner Osborn, and the commissioner had an examination of him, in which testimony was introduced on the part of the government, and the commissioner, on the 10th of April, 1868, committed the prisoner for trial in the district of Kentucky, the place where the offence was committed, and directed that he should be committed to the custody of the marshal of this district, to be by him held until this court should order his removal, or otherwise to be dealt with according to law. His discharge is now applied for, under the habeas corpus, on the ground that sufficient evidence was not produced before the commissioner to warrant his committal, or to warrant his being sent to Kentucky for trial, under the act of congress.

It appeared in evidence, before the commissioner, that a warrant was issued in Kentucky, on the 28th of March last, by a United States commissioner there, to the marshal of Kentucky, reciting that information upon oath had been given to him, that Bloomgart had committed an offence in the district of Kentucky, to wit, that he, being an officer of the United States, at the fractional currency counter of the treasury department, in Louisville, and intrusted with the safe keeping of the public money of the United States, did, while intrusted with such charge, convert a large sum of the same to his own use, contrary to the statutes of the United States. Such warrant commanded the marshal to arrest him, and bring him before the commissioner.

An official letter of appointment from the treasury department, signed by the assistant secretary of the treasury, was put in evidence before Commissioner Osborn, showing that Bloomgart was appointed a clerk at the fractional currency counter of the treasury department in Louisville, on the 10th of October, 1866, by the direction and with the approbation of the secretary of the treasury. Under the decision of the supreme court in the case of U. S. v. Hartwell, 6 Wall. [73 U. S.] 385, this appointment constituted Bloomgart an officer of the United States. Where, with the sanction of the head of a department, a person is appointed an officer of the United States for the safe keeping of public money, such appointment constitutes him such officer, within the meaning of the constitution of the United States, and of the statutes of the United States in regard to officers charged with the safe keeping of the public money.

The only question now is, whether probable cause was shown for his commitment,—probable cause to show that he is guilty of the offence charged against him. In addition to the affidavit of Mr. Hervey, the evidence, and, it may be said, the only evidence on the subject, appears to be two papers, which are proved to be in the handwriting of Bloomgart himself, in which he enters with great particularity into the details and circumstances of the embezzlement, showing when it commenced, how it was carried on, and the purpose for which it was committed. They are both signed by Bloomgart, they are autographic manuscripts, and, if they are to be believed, they clearly show that he has been guilty of the offence charged. His discharge is claimed on the ground, that, if he were on trial under an indictment before a jury, the same rule of law would apply to his case as to all other criminal cases—that the corpus delicti, the fact that an offence was committed, the stealing of the government money, must be proved independently of the confession of the prisoner. People v. Hennessey, 15 Wend. 147. But, whatever the principle of law is, as regards a trial before a jury, I have come to the conclusion, after a careful examination of the authorities, and looking at the case as if I myself were the examining and committing magistrate, that the principle invoked does not apply to the question of a commitment, and that this is a proper case in which to hold the prisoner for trial, and send him to Kentucky. I do this on the decision of the most learned and eminent judge, who has adorned the bench in this country—Chief Justice Marshall—and on the authority of the most important criminal case which the federal judiciary has ever had to deal with—the Case of Aaron Burr [Case No. 14,692a]—in which the evidence on which the prisoner was held for trial was identical with that in this case. As this is an important question, I have thought that the law should be carefully laid down for the guidance of United States commissioners, because the doctrine urged in this case on the part of the prisoner is not sound, as respects the question of commitment.

In the Case of Burr, an application was made at Richmond, before the chief justice, sitting as a committing magistrate, and acting, so to speak, as a United States commissioner, to commit Colonel Burr for trial, on two charges. One charge was, setting on foot and providing the means for an expedition against the territories of a nation at peace with the United States. The other charge was a charge of high treason. The sole evidence on which the

district attorney asked to have Colonel Burr committed on the first charge—that of setting on foot and providing the means for an expedition against the territories of a nation at peace with the United States—was an affidavit made by General Wilkinson, setting forth, in very general terms, that Colonel Burr had been guilty of the offence; and he embodied in his affidavit, as the main piece of evidence against Colonel Burr, an interpretation or translation of a letter in cypher received from Colonel Burr. The original letter in cypher was not produced, nor a copy of it, nor the key to the cypher, but merely the translation. The affidavit of General Wilkinson is to be found at length in the appendix to the fourth volume of Cranch's Reports. [Case No. 14, 692a.] There was no proof of any expedition having been undertaken or set on foot, except what was contained in the affidavit of General Wilkinson. The attorney for the United States urged the commitment of Colonel Burr on the strength of this letter addressed to General Wilkinson, and insisted that it showed probable cause to suspect him of having committed the offence. The counsel for Colonel Burr contested the propriety and effect of the evidence relied on by the attorney for the United States, and Colonel Burr himself, also, argued on his own behalf. The attorney general of the United States said, that the counsel for Colonel Burr had argued as if they were then before a jury upon the principal trial, but that the law required no such plenary testimony in the incipient stage of the proceedings; that, to show probable cause to authorize a commitment, ex parte testimony and ex parte evidence of a confession were admissible, and, unles it manifestly appeared that he was innocent, he ought to be committed; whereas, before a jury, such testimony would be excluded, and his innocence would be presumed till his guilt appeared. Chief Justice Marshall, in the opinion delivered by him on the question, after reciting the two charges, uses, in regard to the first charge, the following language (U. S. v. Burr, [Case No. 14,-694a]): "On an application of this kind, I certainly should not require that proof which would be necessary to convict the person to be committed, on a trial in chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused; but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof, furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it." He then proceeds to discuss the evidence in the case as to the first charge, and says, of the affidavit of General Wilkinson: "To make the testimony of General Wilkinson bear on Colonel Burr, it is necessary to consider as genuine the letter stated by the former to be, as nearly as he can make it, an interpretation of one received in cypher from the latter. Exclude this letter, and nothing remains in the testimony which can, in the most remote degree, affect Colonel Burr." He then held, that, upon a mere question whether the accused should be brought to trial or not, upon an inquiry not into the guilt, but into the probable cause, the affidavit of General Wilkinson, embracing the letter from Colonel Burr, was sufficient to warrant the commitment of the accused for trial. This decision was put by him solely on the ground that the expressions in that letter furnished probable cause for believing that the means for the expedition had been provided by the accused.

The evidence in the present case is quite as full, to show that there is probable cause for supposing the prisoner to be guilty of the charge, on this written confession. The confession is very circumstantial and detailed. It shows that he took the government money, and for what purpose he took it. I have no doubt that this is a proper case in which to hold the accused for trial. If the offence had been committed in this district, the evidence would be sufficient to commit him to await the action of a grand jury. The only place where he can be tried is the district of Kentucky, where the offence was committed. The application to discharge the prisoner is refused, the writ of habeas corpus is vacated, and a warrant must be issued, under the thirty-third section of the act of September 24th, 1789 (1 Stat. 91), to the marshal of this district, to remove the prisoner to the district of Kentucky.

[Subsequently, upon a removal of the cause to the district court for the district of Kentucky, the prisoner was convicted. See Case No. 14,-613.]

Case No. 14,613.

UNITED STATES v. BLOOMGART.

[8 Int. Rev. Rec. 3.]

District Court, D. Kentucky. June 24, 1868.

EMBEZZLEMENT—FINE AND IMPRISONMENT.

Joseph Bloomgart was indicted and convicted of embezzlement whilst engaged as a clerk in the United States depository in this city. The conviction was had under the decision of the supreme court in the case of U. S. v. Hartwell [6 Wall. (73 U. S.) 385]. [Case No. 14,612]. The court sentenced accused to confinement in the penitentiary at hard labor for the term of six years, and ordered him to pay a fine to the United States of $14,838.77. This sum was ascertained to be the amount embezzled by the accused, and that he be confined until the same is paid.

THE COURT said this was the first time he was called on to pronounce judgment against an acquaintance, and that motives of friendship inclined him to leniency, but that he had a duty to perform which he could not overlook, and that the security of the government required that such an offense should be punished, as the only security the govern-

ment had was the integrity of its officers. In answer to the usual question, Bloomgart replied that he had no objections to the verdict of the jury—that he was guilty—but asked the court to save his family from disgrace attaching to them.

It is understood that Bloomgart's friends will ask the president to pardon him.

Case No. 14,614.

UNITED STATES v. BLUM.

[See Case No. 15,922.]

Case No. 14,615.

UNITED STATES v. BLUNT et al.

[7 Chi. Leg. News, 258.]

Circuit Court, W. D. North Carolina. April, 1875.

INDICTMENT—CONSPIRACY—OVERT ACT—LIMITATION OF PROSECUTION.

This was an indictment against [James Blunt and J. T. Deweese] the defendants under the act of March 2d, 1867, found at Asheville, in the Western district of North Carolina, in November, 1872, and brought to trial in October, 1874, at Statesville, before Hon. ROBERT P. DICK, District Judge. The defendant Blunt was the only party on trial. Pleas not guilty, and statute of limitations. Verdict, guilty. Motion for a new trial and motion in arrest, were entered by the defendant's counsel, and adjourned by consent of parties to the April term, 1875, to be heard at Greensboro. The facts in the case are briefly these:

Under a treaty between the United States and the Cherokee Indians, made at New Echota, Ga., in 1835, the government obtained for a stipulated price, all the lands of the Cherokees, east of the Mississippi river, and among other things stipulated, the government agreed to pay to each head of a family the sum of $20 and one year's provisions, or if he chose, in lieu thereof, the sum of $33.33, and the Indians were to be removed to the western reservations. In the year 1836, there was a supplemental treaty, by which a sum of money equal to $53.33 per capita was to be set apart, upon which interest should be paid from the treasury annually at the rate of six per centum to those Indians who remained east of the Mississippi, until such Indians "shall remove west," when the whole amount of $53.33, shall be paid to them. In the year 1868, an act was passed by congress to transfer from the secretary of the treasury to the department of interior, certain duties connected with Indian affairs, and providing that a new census roll of the Cherokee Indians in western North Carolina, should be taken, upon which payments of accrued interest should be made (no interest having been paid them since the beginning of the war.) Under this act one Swetland was appointed to make the census roll, which was made and approved by the defendant in 1868. Swetland was then appointed special agent to make the payments according to the roll; the defendants Blunt and Deweese were his bondsmen. Upon the proper requisition, the sum of $48,500.96 was paid to the special agent, who immediately paid over to Blunt the sum of $12,000, it being twenty-five per cent. claimed by Blunt, under a contract previously made with the Indians. This money was paid to Blunt before the agent had received special instructions from the commissioner with regard to payments and disbursements. After this payment was made to Blunt, the agent proceeded to North Carolina and paid each Indian his per capita share, to wit: $32.00, but immediately after the agent so paid, a man by the name of Askew, who pretended to represent Blunt, claimed from the Indians the sum of $800, his proportionate part of the $12,000—which sum of $800 was handed by Askew to Swetland and paid out again by him to other claimants, thus making the vouchers correspond with the roll. Some of the Indians paid without much objection, others declined to pay at all. When Swetland filed his vouchers with the defendant in 1869, there was a deficit of $6,771.00, on his part. Some of the Indians were not paid anything. In March, 1868, Blunt and Deweese were appointed by the Cherokees to prosecute all claims, of whatsoever nature, in their behalf, before the department at Washington. And under this power of attorney, Blunt succeeded in having their claims put in such a shape as to enable them to secure their accumulated interest fund. No amounts for services were specified in that power of attorney; but subsequently, December, 1868, this power of attorney was revoked, and another to Blunt alone was executed, by which he was to receive various amounts for services, and under this subsequent contract Blunt claimed the $12,000, out of the interest fund. The Indians denied that he was to receive anything for services in that regard, but the contract so entitled him.

The bill of indictment had six counts, but none of them set out in specific terms any overt act. Upon the trial at Statesville, the counsel for the defendants moved to quash the bill, which motion was refused by the district judge. The defendants then pleaded the statute of limitations, and alleged that more than five years having elapsed from the obtaining the $12,000 by Blunt, until the finding of the bill, the prosecution was barred, which motion was also overruled, the judge charging the jury that this was a continuous conspiracy, until Blunt paid back the $12,000, and the statute would not bar it.

The jury returned a verdict of guilty, and hearing of the motions for a new trial and in arrest, was adjourned to the April term, at Greensboro.

The case was brought on a hearing before

BOND, Circuit Judge, and DICK, District Judge.

All but the three counts in the bill of indictment were abandoned, to wit: (1) A general allegation, that the defendants conspired to defraud the government. (2) That the defendants conspired to make out a false census roll, etc., with intent to defraud the government, etc., without alleging that they did make a false roll, etc. (3) That it was the duty of Swetland to receive and pay out the $48,800.96, and that he did so receive it, and that afterwards the defendants conspired to defraud the government out of that sum, without stating in what manner or that the government was defrauded out of that amount or any part of it.

Upon the trial of this case, at Statesville, before DICK, District Judge, the government was represented by District Attorney Lusk and Assistant Attorneys Marcus Erwin and W. S. Ball, and also by Thomas B. Keogh, of Greensboro, and N. Woodfin, of Asheville, N. C. The defendant was represented by Hon. James M. Leach, of Lexington, N. C., and John N. Staples, of Mendenhall, and Staples, of Greensboro.

The motion was argued before BOND, Circuit Judge, by M. Erwin and N. Woodfin, for the government, and John N. Staples and Ex-Senator Matt H. Carpenter, of Wisconsin, for defendant.

The defendant, Blunt, was a major general in the Union army.

The COURT held:

1. That the bill was defective, in that it alleged no overt act; the act of March 2nd, 1867, requires some overt act to be committed, before the offense is complete.

2. That the motion for a new trial is allowed, and

3. That the prosecution is bound by the statute of limitations.

The defendant, Blunt, was ordered to be discharged.

UNITED STATES (BLY v.). See Case No. 1,581.

Case No. 14,616.

UNITED STATES v. BOGART.

[3 Ben. 257.] [1]

District Court, E. D. New York. May, 1869.

NAVY—PAYMASTER'S CLERK—EMBEZZLEMENT.

A paymaster's clerk in the navy is "a person in the naval forces of the United States," within the meaning of the first section of the act of March 2d, 1863 (12 Stat. 696), and if he embezzles funds of the United States, he is not liable to the penalty provided in the third section of that act, but is liable for the amount embezzled.

[This was an action at law by the United States against Robert D. Bogart.]

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

BENEDICT, District Judge. This case comes before the court on a motion for judgment on a verdict, taken subject to the opinion of the court. The action is brought in behalf of the United States, against the defendant, who was a paymaster's clerk in the United States navy, and a recovery is claimed under the provisions of the act of March 2d, 1863 (12 Stat. 696).

This statute provides, in the 1st section, among other things, that any person in the land or naval forces of the United States, or in the militia in actual service, who shall steal, embezzle, or knowingly and willfully misappropriate, or apply to his own use or benefit, any money or other property of the United States, shall be deemed guilty of a criminal offence, and shall be subject to trial and punishment by a court-martial, in the manner provided by the act. In the 3d section of the act, it is further provided, that any person not in the military or naval forces of the United States, nor in the militia called into or actively employed in the service of the United States, who shall do or commit any of the acts prohibited in the 1st section, shall forfeit and pay to the United States, the sum of $2,000, and, in addition, double the amount of damages, which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

Upon the trial of the cause, evidence was given on the part of the government, showing that the defendant was a paymaster's clerk, on board the receiving ship Vermont, and that, while acting in that capacity, he converted to his own use certain moneys belonging to the United States; and the jury, under objections on the part of the defendant, were instructed to bring in a verdict for the sum of $2,000, and, in addition, double the amount of damages which they found the government to have sustained by reason of the acts of the defendant; reserving for the opinion of the court the question of the applicability of the 3d section of the act of March 2d, 1863, to a person holding the position which the defendant did.

The question thus reserved I have now considered, and am of the opinion that the ruling at the trial cannot be sustained.

The defendant was shown to be a paymaster's clerk, regularly appointed as such, and at the time in question in actual service on board the national ship Vermont. In this capacity, he had charge of certain funds of the United States, to be used by him in payment of seamen and other persons on the pay rolls of the navy, which he converted to his own use.

Persons holding such positions, are appointed by virtue of a statute providing for the organization of the navy. They are required to wear the uniform of the navy.

They are upon the pay rolls of the navy, and draw pay as part of the naval forces. They have a rank in the navy. They are compelled to bind themselves to be governed by the laws and regulations for the government of the navy, and I cannot doubt that they would be held liable to trial by court-martial.

The 3d section of the act of 1863, is only applicable to persons not in the military or naval forces of the United States, and cannot be held applicable to persons who would be liable to trial by court-martial, under the 1st section.

In the case of a paymaster's clerk in the army, arrested for trial before a court-martial, for acts prohibited by the 1st section of the act of March 2d, 1863, it has been held that such a person was in the military service, and liable to trial by a military tribunal, and not entitled to be discharged on habeas corpus. In re Thomas [Case No. 13,888].

I can see no ground for a distinction between the army and the navy, in regard to the status of this officer, and must hold that the defendant was in the naval forces of the United States, and liable to trial by court-martial as such. If the defendant was in the naval forces, he is not liable to the penalties prescribed by the 3d section of the act of March 2d, 1863, and the verdict therefore being for $2,000, and, in addition, double the amount of damages proved, according to the provisions of the 3d section of that act, does not warrant judgment for that amount.

There must, accordingly, be a new trial, unless the government consent to reduce the verdict to the amount of actual damages, as proved.

Case No. 14,617.

UNITED STATES v. BOGART.

[9 Ben. 314;[1] 24 Int. Rev. Rec. 46.]

District Court, N. D. New York. Jan., 1878.

COUNTERFEITING — UTTERING A TOKEN — COIN — CRIMINAL OFFENCE.

1. A person who passes pieces of metal, apparently gold, octagon in form, on one side of which is the device of an Indian, and on the other the inscription "¼ dollar," cannot be convicted of a crime, under section 5461 of the Revised Statutes.

2. That section does not extend to the uttering of a token which does not purport to be an imitation, or in substitution, of any coin known to the law.

[This was an indictment against James B. Bogart.]

WALLACE, District Judge. This case presents the question, whether a conviction can be sustained, under section 5461 of the Revised Statutes of the United States, where the defendant passed certain pieces of metal, apparently gold, octagon in form, on one side of which was the device of an Indian, and on the other the inscription "¼ dollar, Cal."

The section under which the indictment is found was originally in an act passed June 8th, 1864, and entitled "An act to punish and prevent the counterfeiting of coin of the United States," and read as follows: "Every person who, except as authorized by law, makes or causes to be made, or utters or passes, or attempts to utter or pass, any coins of gold or silver or other metal, or alloys of metals, intended for the use and purpose of current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design, shall be punished by a fine of not more than three thousand dollars, or by imprisonment not more than five years, or both." On first impression, this language seems sufficiently comprehensive to cover the present case; but, giving it that strict construction which is always to be applied to penal statutes, my conclusion is, that the language is satisfied by a much narrower application.

(1) The pieces of metal passed by the defendant do not purport to be coins, in the legal definition of the word, but are tokens.

(2) If it should be held that the section makes it a crime to make or utter any pieces of metal, with the intent that the pieces shall serve as a substitute for money, an offence is created which is new and foreign to the law of counterfeiting.

A coin is a piece of metal stamped and made legally current as money. A counterfeit coin is one in imitation of the genuine. The coins known to the law are those authorized to be issued from the mints of the United States, and those of foreign countries current here. The pieces in question are not in imitation of our own coin or of any foreign coin. They are calculated to impose upon the ignorant or unwary, and, if this purpose is effected, the utterer may be guilty of false pretences. If they were passed upon the sole representation that they were issued by the state of California, it is doubtful if a conviction for false pretences could be had, because every person is bound to know that the state of California cannot issue coins. If, instead of the pieces in question, the defendant had passed pieces purporting to bear the stamp of Plato's Republic, he would have been equally as guilty of a criminal offence as he now is.

One of the rules applicable to the offence of counterfeiting is, that the resemblance of the spurious to the genuine coin must be such as that it might deceive a person using ordinary caution, and a conviction cannot be had for uttering pieces of metal which are not in the likeness or similitude of genuine coins. It is not to be presumed that congress overlooked these familiar rules, when legislating "to punish and prevent the coun-

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

terfeiting of coin;" and the title of the act is inconsistent with the idea that an offence radically differing from that of counterfeiting was the subject of legislative consideration. Full effect can be given to the language used, without indulging in such a conclusion; and that is, by limiting it to meet cases which frequently occurred, where persons making or uttering coins which purported to be in imitation or similitude of current money of the country could not be convicted because the designs or devices were not those which the law prescribes as the devices or legends which shall be stamped upon the coin issued from the mints of the United States. These devices or legends are made by statute the authentic evidence of the genuineness of the coins. Where different ones were substituted, the utterer often escaped because the spurious coin was such that it ought not to have deceived, and, theoretically, could not have deceived, a person using ordinary prudence. The act in question remedies this difficulty, and, if the spurious piece purports to be coin of the United States, or of foreign countries, it is one within the statute, although the devices with which it is impressed are so far from a similitude to the genuine as to be of original design.

This conclusion is in harmony with the language employed, and is consistent with the nature of the offence which was the subject of legislation. It is also sustained by the several other acts of congress in pari materia. These all relate to the forging of coin in resemblance or similitude of the gold or silver coins coined or stamped at the mints of the United States, or of any foreign gold or silver coin which by law is current in the United States; and the last act of congress upon the subject, and one which was passed subsequent to the act now under consideration, is one which makes it a crime "to make, issue, or pass any coin, token, or device, in metal or its compounds, which may be intended to be used as money, for any one-cent, two-cent, three-cent, or five-cent piece now or hereafter authorized by law, or for coin of equal value"—an act which was entirely unnecessary if the one in question is to be construed as is now insisted by the counsel for the government. Under the last act a conviction could not be had for uttering a token intended to be used as money, for a four-cent piece or for a coin of equal value. No such coin is known to the coinage of the United States, and, because of this, congress did not attempt to make it an offence to utter such a token. In view of this, the latest, exposition of legislative intent, it would be unreasonable to hold that congress intended, by the former act, to make it a crime to utter a token which does not purport to be in imitation or in substitution of any coin known to the law. For these reasons the defendant must be discharged.

Case No. 14,618.

UNITED STATES v. BOGGS.

[Hoff. Land Cas. 109.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT—VALIDITY OF CLAIM.

No objections urged to the confirmation of this claim.

Claim [by L. W. Boggs] for six hundred and forty acres in Napa county, confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

Halleck, Peachy & Billings, for appellee.

HOFFMAN, District Judge. The claim in this case is for a portion of the tract called "Napa," originally granted to Salvador Vallejo by Governor Alvarado on the twenty-first of September, 1838. The claim was confirmed by the board, and the case has been submitted to this court without argument or the statement of any objection on the part of the United States. The documentary and other evidence shows that the original grant was duly issued by the governor, and approved by the departmental assembly on the twenty-third of September, 1838. Judicial possession of the tract was given to the grantee in 1844, but before that time, and at or about the period he obtained his grant, he occupied the land, built a house upon it and corrals, and had cattle and horses upon it. Shortly after the war, the appellee purchased of the original grantee the portion now claimed. He immediately commenced making improvements, and has continued to occupy until the present time. There seems to be no doubt as to the validity of this claim. A decree of confirmation must therefore be entered.

Case No. 14,619.

UNITED STATES v. BOICE.

[2 McLean, 352.] [2]

Circuit Court, D. Indiana. May Term, 1841.

PARTIES—UNITED STATES—NOTE.

On a note given to an agent of the United States, for their benefit, suit may be brought in their name.

[Cited in Bay Co. v. Brock, 44 Mich. 53, 6 N. W. 105.]

At law.

Mr. Pettit, U. S. Dist. Atty.

Lockwood & Gregory, for defendant.

HOLMAN, District Judge. This is an action of debt for three promissory notes, made by the defendant, payable to Levi Woodbury, secretary of the United States treasury, or to his successors in office. The suit is in the

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

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

name of the United States. The declaration states that the defendant made the notes, and delivered them to the plaintiffs, and thereby promised to pay said plaintiffs, by the name and description of Levi Woodbury, secretary of the United States treasury, or to his successors in office, and alledges a failure to pay in the usual form. To this declaration the defendant has demurred, on the ground that the suit should have been in the name of Levi Woodbury, and that the United States can not maintain an action in their own name upon these notes. It is not pretended that the notes are not the property of the United States, nor that the money due on them is, in fact, due to the United States; but that no action can be maintained on them but in the name of Levi Woodbury, the nominal payee, or his successor in office, or his representatives. The form in which the interest of the United States in the notes is alledged in the declaration, is unimportant. The question presented by the demurrer for the consideration of the court, is, can the United States maintain an action on the notes in their own name? Taking it, then, for granted that the United States alone are entitled to the money due on these notes, there can be no question but that they can maintain an action for it in their own name.

Without any reference to the various cases where a principal may sue in his own name, on a contract made in the name of his agent, the court is satisfied that the positions taken by the supreme court, in the case of Dugan v. U. S., 3 Wheat. [16 U. S.] 173, clearly establish the right of the United States to maintain this action. That was a case where a bill of exchange had been indorsed to Thomas T. Tucker, Esq., treasurer of the United States, or order. It had been indorsed by him to another, but came back to his hands, in consequence of a protest for nonpayment; and a suit was instituted on it against a prior indorser, in the name of the United States. And, on a special verdict finding all the facts, the court determined that the action was well brought, and that the United States had a right to sue and recover in their own name. "If," say the court in their opinion, "it be generally true that, where a bill is indorsed to the agent of another for the use of his principal, an action can not be maintained in the name of such principal, (on which point no opinion is given,) the government should form an exception to such rule, and the United States be permitted to sue in their own name, whenever it appears, not only on the face of the instrument, but from all the evidence, that they alone are interested in the subject matter of the controversy." In the case before the court, the allegations in the declaration clearly show that the United States alone are interested in the subject matter of this action, and, consequently, they have a right to maintain the action in their own name. "There is," say the court, in the case here cited, "a fitness that the public, by its own officers, should conduct all actions in which it is interested, and in its own name; and the inconveniences to which individuals may be exposed in this way, if any, are light, when weighed against those which would result from its being always forced to bring an action in the name of an agent. Not only the death or bankruptcy of an agent may create difficulties, but setoffs may be interposed against the individual who is plaintiff, unless the court will take notice of the interest of the United States; and, if they can do this to prevent a setoff, which courts of law have done, why not at once permit an action to be instituted in the name of the United States?" The reasoning in this case is so clear, and the doctrine established so conducive to public justice, without imposing any hardship on public debtors, that, independently of its authoritative character, as the supreme law of the land, the court do not hesitate to decide this case in accordance with its principles; though the cause of action in this case is not the same, in terms, that it was in that, and the interest of the United States does not appear in the same way. There it appeared in a special verdict, here by the averments in the declaration: yet the interest here, for the purposes of settling the right of action, is as unquestionable as it was there; and, therefore, this action is clearly maintainable in the name of the United States. Demurrer overruled.

Case No. 14,620.

UNITED STATES v. BOJORQUES.

[Hoff. Op. 55; Hoff. Dec. 2.]

District Court, N. D. California. 1859.

MEXICAN LAND GRANT — SURVEY — BOUNDARIES — PETITION.

[Before the court will disturb or set aside a survey made by the surveyor general under the law of 1851, it must be satisfied that the decree of confirmation has been plainly departed from, or that some clear and obvious error has been committed.]

[This was a claim by Bartholomeo Bojorques to the rancho of Laguna de San Antonio. Heard upon objections to survey.]

HOFFMAN, District Judge. This case comes up on objections filed to the survey of the rancho of Laguna de San Antonio made by the surveyor general. The land granted is described in the petition and grant as of six leagues in extent, and bordering towards the southeast on Juan Martin, towards the northwest on the two rocks (Las Dos Piedras), towards the southwest on Las Tomales, and towards the northeast on Juan Miranda. The diseño, which is drawn with somewhat more than usual skill, shows that the tract solicited was a right-angled parallelogram, three leagues in length and two leagues in width.

The survey returned into court preserves the form of the tract indicated by the diseño, with the exception of a deflection in the eastern line, which is made to run along the Arroyo de San Antonio, and along the margin of the laguna of the same name, so as to correspond with the western boundary of Juan Miranda, as indicated on the diseño of the latter. The survey is objected to on the ground that the southern line is improperly located; that it should be run more to the south or less to the west; and as it is admitted that the tract must be a parallelogram, with all its angles right angles, that it must be two leagues wide by three leagues long, and that its northerly line must pass through the noted natural object, known as "Las Dos Piedras," the only mode in which the survey could be altered to meet the objection would be to swing round the parallelogram on Las Dos Piedras, as on a pivot, in such a way as to preserve the parallelism of the boundaries, but to give the proposed direction to the southern line,—to which, by the location suggested, the northern line would be made parallel, and the eastern and western lines perpendicular. The reasons for this change are chiefly contained in the deposition of Mr. Benitz. This witness testifies that he made the diseño presented by the claimant. That the southern line was desired by him and intended by the witness. He represented it as a range of hills the general direction of which is considerably to the south of the direction of the southern line as run by the surveyor general. He further states that the compass used by him was defective, and that the points of the compass, as laid down on the diseño, are inaccurate.

On this testimony the court is asked to adopt the range of hills as the southern boundary; and preserving, as before stated, the dimensions of the tract and the directions of the lines relatively to each other, to locate the surveys by adopting the range of hills as a base, and erecting the parallelogram upon it. It has already been stated that the tract is described in the grant as bordering towards the S. E. on Juan Martin. The range of hills is not mentioned as the southern or southeastern boundary. In Juan Martin's grant the northern boundary is described as "a narrow cañada adjacent to the low hills," and Mr. Matthewson, a witness called in opposition to the survey, states that the sobrante between the Juan Martin, Bajorque, Mivanda and Olimpale ranches has been granted, and that all the land, if any, which lies between Juan Martin and Bajorque, would be embraced by it. It appears, therefore, that the range of hills claimed to be the southern boundary of this tract is not called for by the grant itself, or the accompanying diseño, nor by the grant or diseño in the case of Juan Martin, and that a sobrante grant has been made, which will include what low land may be found between the southern boundary of Bajorque and the northern boundary of Juan Martin; thus indicating that, although the grant to the former was described as bordering on the lands of the latter, it was not contemplated that the southern boundary of the one should necessarily be identical with the northern boundary of the other, but that when the lands were measured a sobrante might result, which could be granted to a third party. If, however, the evidence of Mr. Benitez were the only means of arriving at the true direction of the southern boundary, it ought, perhaps, to be located in accordance with his statement as to the desires of Bajorque, and his own intentions in drawing the diseño. But the diseño itself seems to afford indications of the true direction of that line, which I think should outweigh the evidence of Mr. Benitez as to his intentions in drawing it. In the first place, the lines, as surveyed, precisely correspond with the direction as shown by the arrow or compass mark on the diseñó. But to this indication perhaps little importance should be attached, and especially in this case, in view of the statement of Mr. Benitz that his compass was probably inaccurate. 2d. The eastern extremity of the southern line, as surveyed, or the southeastern corner of the tract, is placed at a distance to the south of the Arroyo de San Antonio, nearly exactly corresponding with the position of the corresponding corner of the tract delineated on the diseño. The eastern line, moreover, starting from this corner, and running northwardly, strikes as located by the survey, the arroyo, at some distance from the laguna, out of which it issues,—corresponding in this respect, also, to the indication on the diseño. Whereas, if the southern line was depressed as proposed, the southeast corner would be at a distance from the arroyo far greater than is represented on the diseño; and the eastern line would not strike the arroyo, but the laguna, or would strike the arroyo, if at all, at or near the point where it issues from the laguna. 3d. It is evident that the northern line must pass through the point called "Las Dos Piedras." It must also be at right angles to the eastern boundary. It is also clear that the tract intended to be delineated was three leagues in length by two in width. If, then, the range of hills be taken as the southern boundary, and the eastern boundary to be drawn from the eastern extremity of the southern line so located, and be produced until it reaches a point from which the northern line may be drawn at right angles to it, so as to pass through the Las Dos Piedras, the length of such eastern line would be about four leagues,—contrary to the obvious and clear indications of the diseño which shows, as before stated, the length of the tract to be only three leagues.

For these reasons I am of opinion that it has not been so satisfactorily shown that the location is erroneous as to justify me in set-

ting it aside. In this, as in similar cases, it is difficult and almost impossible for the court, obliged to learn through depositions the natural features of a tract which it has never seen, and of which no topographical map is exhibited, to arrive at any certain or satisfactory conclusions as to the true locality of various lines. That duty is properly confided to the surveyor, who, on the ground, compares the calls of the grant and the indications of the diseño with the natural monuments or the country before him, and who, assisted by information obtained on the spot, and such as may be derived from consulting the grants and diseños of colindantes or adjoining proprietors, is able to give a more just location to the survey than this court can hope to arrive at. In the case of Haydel v. Du Fresne, 17 How. [58 U. S.] 30, it is remarked by the supreme court: "Great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done, and divisions more equitably made, than the department of public lands could do." These observations apply with much force to the cases which are now being brought before this court. By the law of 1851 [9 Stat. 631], as well as by the nature and circumstances of the case, much discretion is confided to the surveyor general. Before the court should disturb or set aside a survey made by him, it ought to be satisfied that the decree of confirmation has been plainly departed from, or that some clear and obvious error has been committed. I do not consider that the evidence justifies such a conclusion with regard to the survey and location before the court. An order overruling the objections and approving the survey must therefore be entered.

Case No. 14,621.

UNITED STATES v. BOLING.

[4 Cranch, C. C. 579.] [1]

Circuit Court, District of Columbia. Oct. Term, 1835.

INDICTMENT—CONCLUSION.

An indictment must conclude against the government of the United States.

[Suit by the United States against Joseph Boling.]

Indictment for robbery; against the peace of the United States.

Motion in arrest of judgment, because the indictment did not conclude against the government of the United States. See Act Cong. March 3, 1801, § 2 (2 Stat. 115), "supplementary," &c.

THE COURT (nem. con.) arrested the judgment.

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

Case No. 14,622.

UNITED STATES v. BOLLMAN et al.

[1 Cranch, C. C. 373.] [1]

Circuit Court, District of Columbia. Jan. 30, 1807.

CRIMINAL PROCEDURE—BENCH WARRANT—INDICTMENT—MESSAGES FROM PRESIDENT—ATTACHMENT—MOTION TO COMMIT—TREASON.

1. This court will issue a bench warrant against a person charged with treason, upon ex parte affidavits, before any presentment or indictment made or found by a grand jury; and, when arrested, will commit him to the prison of this court, without stating when or where he is to answer for the offence.

[Cited in Re McDonald, Case No. 8,751; Ex parte Morrill, 35 Fed. 267.]

[Cited in U. S. v. Eldredge (Utah) 13 Pac. 676.]

2. Upon an application for a bench-warrant on a charge of treason as well as upon a motion to commit for the same cause, messages from the president of the United States to congress may be read.

3. An attachment for not returning a writ of habeas corpus at the appointed time, will not be issued until three days shall have expired after the service of the writ.

4. Upon the motion to commit for trial, the party accused may be heard by counsel.

[Cited in U. S. v. Anon., 21 Fed. 768.]

[5. Cited in State v. Boulter (Wyo.) 39 Pac. 884, to the point that an information verified on information and belief by the prosecuting attorney does not of itself constitute "probable cause supported by affidavit," as provided by Const. art. 1, § 4.]

Mr. Jones, the attorney of the United States for the district of Columbia, moved the court to issue a bench-warrant upon a charge of treason against Erick Bollman and Samuel Swartwout, who had been brought, by a military force, from New Orleans, and detained here under a military guard. This motion was founded upon the affidavit of General Wilkinson, made in New Orleans, and a printed copy of the president's message to congress of the 22d of January, 1807. See 4 Cranch [8 U. S.] Append. note a.

Mr. Jones stated that he made the motion in obedience to instructions received from the president of the United States, whose wish was that they should be surrendered to the civil authority.

Mr. Jones, in support of the motion for a warrant to arrest the prisoners upon the charge of treason, contended that, although the ultimate object of the contemplated expedition might be the conquest of the Spanish province of Mexico, yet if it was also intended to seize and plunder New Orleans to supply the means of accomplishing the ultimate object, such intent would be treasonable, and the embodying and marching of a military force, with that intent, would be an overt act of levying war against the United States. And that if the prisoners,

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

with a view to carry that intent into effect, endeavored to seduce the commander of the United States troops, they were confederates, and liable as principals in the treason, although they themselves should not have personally committed any overt act of levying war.

Mr. Jones read the president's message without any objection by the court.

CRANCH, Chief Judge, expressed a doubt whether the message did in fact announce a levying of war, and if it did, whether the court could proceed in any manner upon such information, without violating the 6th article of the amendments to the constitution of the United States, which declares that no warrants shall issue but upon probable cause supported by oath or affirmation.

Mr. Jones observed that the message announces the actual assemblage of one hundred to three hundred men, and their descent of the river towards the place of their destination; the preparation of warlike stores; and above all it announces that the president has called forth the militia to suppress this enterprise. The calling forth of the militia by the president implies a levying of war against the United States, for he is only authorized to call it forth in case of actual invasion or insurrection. As to the admissibility of the president's message, he observed, that it was not offered as evidence upon the trial, but merely as a matter of public notoriety, of which the court might take notice, and prima facie presume the existence of such a state of things for the preliminary purpose of issuing a warrant or other process initiative to a prosecution by indictment. Such information is probable cause, and having been given to congress by the president, in the discharge of his official duty, is upon oath.

THE COURT, having some doubt as to the nature of the offence, as it appeared in the affidavit of General Wilkinson, took time until the next day to consider.

On Saturday, the 24th of January, Mr. Caldwell, in behalf of the prisoners, filed a petition for a habeas corpus, stating that they were confined in the city of Washington, at the marine barracks, under a military guard, without just and legal cause, and deprived of the benefit of counsel, or being confronted with their accusers, or of being informed of the nature of their offence; or of the cause of their commitment. This petition was opposed by Mr. Jones, on the ground of its collision with the motion for a warrant of arrest, which was still pending, and which, if granted, would produce the same effect as the habeas corpus.

CRANCH, Chief Judge, stated the opinion of the court to be that, in strictness, before a right existed, to claim a writ of habeas corpus, a copy of the commitment should be produced, or an affidavit that it had been demanded and refused, according to the requisition of the habeas corpus act of 31 Car. II., which the courts have considered as a proper rule to follow in such cases.

Mr. Caldwell, afterwards, on the same day, made affidavit that he had called on Colonel Wharton, the commandant of the marine corps, and requested a copy of the warrant or cause of commitment, who replied that he had no warrant of commitment, but that the prisoners were delivered in the usual military mode, and that they were merely under his care for safe keeping.

Mr. Caldwell stated that he had not seen Mr. Bollman, and should then apply for a habeas corpus for Mr. Swartwout only.

THE COURT ordered the writ returnable on Monday, the 26th of January, at 1 o'clock, p. m.

On Monday, the 26th of January, the habeas corpus, which was ordered on Saturday, not being returned at the time appointed, namely, at 1 o'clock this day, Mr. Caldwell moved for an attachment, and cited the case of Rex v. Winton, 5 Term R. 91, that the court will grant an attachment immediately for want of a return to the first writ. 6 Bac. Abr. 602, tit. "Habeas Corpus"; 3 Tuck. Bl. Comm. 135, and Rex v. Wright, Strange, 915.

Mr. Jones, contra. If the writ be returnable "immediately," yet a reasonable time must be allowed to write the return. If the statute of 31 Car. II has altered the practice by giving an attachment in the first instance, it has altered it also by allowing three days (after service) for making the return. No contempt is intended by Colonel Wharton, for he (Mr. Jones) was occupied on the 25th in assisting him in writing the return, which is not yet finished.

THE COURT (nem. con.) was of opinion that although the practice at common law, before the statute of 31 Car. II., was that an alias and pluries should issue before an attachment, yet that the practice since the statute has been to issue an attachment without an alias and pluries, in cases not within the statute. That this practice has been founded upon the statute, the judges having considered it as furnishing a good rule of proceeding in all cases; and that in adopting the statute as a guide in one respect, viz., in dispensing with the alias and pluries, they also adopted it as a rule in regard to the time of return, viz., in allowing three days to make it; and that, therefore, in the present case, an attachment ought not to be issued until the expiration of three days after the service of the writ.

On the 27th of January, THE COURT (CRANCH, Chief Judge, contra) was of opinion that a bench-warrant should be issued to arrest Erick Bollman and Samuel Swartwout, on the charge of treason.

CRANCH, Chief Judge, said: "I differ from the majority of the court in that opinion, because I do not think that the facts before us, supported by oath, show probable cause to believe that either Dr. Bollman or Mr.

Swartwout has levied war against the United States."

On the 29th of January, Mr. Jones moved that the prisoners, who were now brought in upon the bench-warrant, should be committed for trial upon the charge of treason.

Mr. Rodney, the attorney-general of the United States, objected to the prisoners being heard by counsel, to show cause why they ought not to be committed. He said he objected to it upon principles of humanity, because it would excite a public prejudice against them, if they should be committed after being heard by counsel. The 4th and 8th articles of the amendments of the constitution guaranteed to them an impartial trial. It would be a usurpation, by the court, of the province of the jury. It would be an innovation upon the common practice of the country. This preliminary proceeding is always ex parte. The prisoners might with as much propriety insist on being heard before the grand jury. Respublica v. Shaffer, 1 Dall. [1 U. S.] 236.

C. Lee, contra. To deny a man to be heard by counsel is to deny him a hearing. By the eighth article of the amendments of the constitution of the United States, in all criminal prosecutions, the accused has a right to the assistance of counsel for his defence. It is a serious injury to an innocent man to be committed to prison on a charge of treason. He ought to be permitted to show that, in law, the facts proved do not amount to treason; and that the offence is bailable. In Hamilton's Case, 3 Dall. [3 U. S.] 17, upon habeas corpus, it appeared that he was the only one of the insurgents who had been committed without a hearing, and the attorney-general endeavored to excuse it by the state of the country, and the urgency of the occasion. It would indeed be a great innovation if the prisoners should not be permitted to be heard by counsel. If their counsel can be heard they will contend that the prisoners ought not to be committed at all; and that if they are guilty of any offence, it is bailable.

Mr. Rodney, in reply, lamented the unfortunate situation of the intrepid rescuer of La Fayette, &c., and contended that the court ought not to shut their eyes to the executive communication.

THE COURT permitted the prisoners to be heard by counsel, although FITZHUGH, Circuit Judge, and DUCKETT, Circuit Judge, doubted, as the general practice was to commit in the absence of counsel; but as this was an important case, and a new question, (at least no authority had been cited where an accused person had been denied this privilege,) they inclined to the side of lenity.

CRANCH, Chief Judge, had no doubt upon the question.[2]

C. Lee and F. S. Key, for prisoners, contended that the president's communications to congress, although made in the discharge of his official duty, are not evidence to criminate any person in a court of justice. The court must draw its own inferences from facts stated upon oath. This court is in possession of all the facts which the president had before him. This appears from the message itself. But the message itself does not expressly aver that treason has been committed, nor state facts which amount to treason. In all the evidence laid before the court, (the messages of the president of the 22d and 28th of January, 1807, the affidavits

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[2] The following note appears in Judge Fitzhugh's note-book: "The grounds of doubt of N. F. and A. B. D., were, that the inquiry for the purpose of committing is different from that to convict. A probable cause to believe that the party is guilty, if supported by oath or affirmation, will justify commitment. This inquiry is to be before a court, and not a jury. This is, therefore, not the stage when the constitution gives him the privilege of counsel as a matter of right, and this may be inferred from comparing the 7th and 8th articles of amendments to the constitution. By the 7th article, 'No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger,' &c. By article 8th, 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, &c., and to have the assistance of counsel for his defence.' These two articles, evidently, cannot apply to the stages of prosecution previous to the impanelling a grand jury, and consequently the personal rights secured by them can extend only to the cases embraced by those articles. The counsel for the prisoners have not contended that the court should now call in the aid of a grand or petit jury, to ascertain their guilt or innocence; and yet the crime with which they are charged is capital and highly infamous. If the constitution does not apply, it is a case unprovided for and is left as it stands by the state laws and practice, and the laws and practice in England. As far as a deduction can be drawn from practice, it is directly opposed to the present application; and no statutory provision on the subject is recollected; nor have the counsel mentioned any. The parties are not now on their trial, nor (in the language of the article cited) are they called upon to answer; but the object of the inquiry is, whether their conduct has been such as would justify the impanelling a grand jury. But if this dilatory mode of proceeding was to prevail, public inconvenience might arise. An accused person would evade even an arrest, by employing counsel to protract the time of a justice, or of the court in attempting to prove that they have no right to issue a warrant; or after arrest there would be frequent opportunities to escape if several days might be consumed in discussing the propriety of discharging, admitting to bail, or committing, and this too in offences of the blackest dye and where bail is not allowable. In this case the court have issued a bench-warrant to arrest the accused, grounded on an affidavit, in preference to vivâ voce testimony; and no doubt was intimated by the bench or the bar; and yet, if the 8th article of the constitution applies, they should have been confronted with the witnesses against them. From all which we infer that the persons accused are not entitled to those privileges to which they are in a more advanced stage of the trial, when innocence or guilt is to be decided by a jury. However, if it is the wish of Dr. Bollman and M. Swartwout to be heard by counsel, we have no strong objections, as it will be the most orderly and decent way of conducting the inquiry.

of Wilkinson, Donaldson, Eaton, Meade, and Wilson,) it does not appear that any person has seen any armed force, any military array, or any embodying and march of troops, or any other overt act of levying of war against the United States; nor is there any evidence of an intent to commit treason. If the projected scheme was to invade Mexico, and for that purpose to seize and plunder New Orleans, and hold it for a short time, and then to give it up to the United States, and to seduce the commander of the United States army to engage in a foreign expedition, it would not be treason. If the prisoners are guilty of any offence, where are they to be tried? No treason is provided; no overt act committed in any place. They have committed no offence here. This court cannot try them. In what court shall they be bound to appear? If it be doubtful whether any treason has been committed, the prisoners are entitled to bail.

Mr. Jones and Mr. Rodney, for the United States, contended that the president's message was evidence of matters of common report, and furnished probable cause. And although the affidavits do not show that war had been levied, yet that defect is supplied by the message, which, being an official message, was under oath, and proved the treasonable intent of seizing upon New Orleans, and that war had been levied; and they relied upon the deposition of General Wilkinson to prove that the prisoners were confederates in the treason. They contended that if the prisoners were guilty of any crime, it was treason, and that therefore they ought not to be admitted to bail.

CRANCH, Chief Judge, delivered the following opinion:

It is the opinion of a majority of the judges that Erick Bollman and Samuel Swartwout should be committed for trial for the crime with which they are charged. It is also the opinion of a majority of the judges that they should not be admitted to bail at present.

Upon the motion heretofore made to this court, by the attorney of the United States, for a warrant to arrest Dr. Bollman and Mr. Swartwout upon the charge of treason against the United States, I thought myself bound to dissent from the opinion of my brethren on the bench, because I did not think that the facts before us, supported by oath or affirmation, showed probable cause to believe that either of the prisoners had levied war against the United States. After further deliberation, and a more mature examination, both of the evidence and the law, my doubts are very much confirmed.

In times like these, when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from the best of motives. We ought to be upon our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for although we may thereby bring one criminal to punishment, we may furnish the means by which an hundred innocent persons may suffer. The constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude. Whenever an application is made to us in our judicial character, we are bound, not only by the nature of our office, but by our solemn oaths, to administer justice, according to the laws and constitution of the United States. No political motives, no reasons of state, can justify a disregard of that solemn injunction. In cases of emergency it is for the executive department of the government to act upon its own responsibility, and to rely upon the necessity of the case for its justification; but this court is bound by the law and the constitution in all events. When, therefore, the constitution declares that "the right of the people to be secure in their persons" "against unreasonable seizures," "shall not be violated," and that "no warrants shall issue but upon probable cause, supported by oath or affirmation," this court is as much bound as any individual magistrate to obey its command.

The cause of issuing a warrant of arrest, is a crime committed by the person charged. Probable cause, therefore, is a probability that the crime has been committed by that person. Of this probability the court or magistrate issuing the warrant must be satisfied, by facts supported by oath or affirmation. The facts therefore, which are stated upon oath, must induce a reasonable probability that all the acts have been done which constitute the offence charged. The question whether a crime has been committed is a question partly of law and partly of fact. What acts constitute the crime, is a question of law. Whether those acts have been done, is a question of fact. The crime charged, in the present case, is treason against the United States.

The question of law is, what acts constitute that crime? The third section of the third article of the constitution of the United States, says, that "treason against the United States shall consist only in levying war against them, or, in adhering to their enemies, giving them aid and comfort." As it is not contended that the prisoners are guilty under the second clause of the definition, if guilty at all, it must be of treason in levying war against the United States. To a man of

plain understanding it would seem to be a matter of little difficulty to decide what was meant in the constitution by levying of war; but the subtleties of lawyers and judges, invented in times of heat and turbulence, have involved the question in some obscurity. It is not my intention, at this time, to say how far the expression ought to be limited, nor how far it has been extended. It is, however, to be hoped, that we shall never, in this country, adopt the long list of constructive treasons invented in England, by the worst of judges in the worst of times. It is sufficient to say that the most comprehensive definition of levying war against the king, or against the United States, which I have seen, requires an assemblage of men, ready to act, and with an intent to do some treasonable act, and armed in warlike manner, or else assembled in such numbers, as to supersede the necessity of arms. The advocates for the prosecution have not, as I understand, contended for a more unlimited definition than this.

It is unnecessary, and perhaps would be improper, for me, at this time, to say more on the question of fact, than that, in my opinion, there is no probable cause, supported by oath or affirmation, within the meaning of the constitution, to charge either Dr. Bollman or Mr. Swartwout with treason, by levying war against the United States. From some of the doctrines urged on the part of the prosecution, I must, most explicitly, declare my dissent. I can never agree that executive communications not on oath or affirmation, can, under the words of our constitution, be received as sufficient evidence in a court of justice, to charge a man with treason, much less to commit him for trial. If such doctrines can be supported, there is no necessity of a suspension of the privilege of the writ of habeas corpus, by the authority of the legislature. As it is admitted that such communications can not be evidence on the trial, and as an opinion on that point, therefore, cannot be considered as prejudging any question which can occur in a subsequent stage of the prosecution, I have thought proper to be thus explicit on that point. To have said less, I should have deemed a dereliction of duty.

DUCKETT, Circuit Judge, delivered his opinion to the following effect:

He should not make many observations, in addition to what he had remarked on granting the district attorney's motion for a warrant to arrest the prisoners on the charge of treason. Nor should he make any professions of scrupulous attachment to the right of personal liberty in the citizens of our country; because, if the whole tenor of his conduct through life had not evinced such attachment, he felt assured that no professions on his part could, on this point, secure the confidence of the public. He concurred in the sentiment, that no reasons of state, no political motive, should be suffered to influence, in the slightest degree, the decision of the present question; but while, on the one hand, a due regard should be paid to the right of personal liberty in the citizen, we should not be entirely forgetful of the duty we owe to the public, of preserving the constitution and government of the country. That on the question then before the court, he would observe, as he had done when the warrant issued, that he would at that time give no opinion as to what constituted a levying of war within the definition of treason in the constitution of the United States. That it appeared to him unnecessary, if not improper to do so, as he might be called upon to decide the law, in reference to the facts that might appear on the trial of the prisoners. That the only question then to be decided was, whether there was probable cause, supported by oath or affirmation, as required by the 6th article of the amendments to the constitution, to induce a belief that the prisoners were guilty of the crime for which they had been arrested. This question, he said, had been deliberately considered by the court, before the warrant issued, and he thought every thing in this inceptive state of the business, was regularly an ex parte proceeding; he, therefore, had been against permitting counsel to argue on any question, except whether the offence was bailable, and whether, under the circumstances, the court, in their discretion, ought to bail. They had, however, been allowed to argue, in effect, to the utmost latitude, against the propriety of having issued the warrant. To this argument he had given the strictest attention, and could observe with Mr. Fitzhugh, that it would have been well addressed to the jury, if the prisoners had been upon their trial. It had, however, produced no alteration in his opinion, as he still thought there was probable cause appearing to the court to authorize the commitment of the prisoners for trial.

To determine this question, he said let us take a short view of the evidence. The depositions of General Wilkinson prove, unquestionably, the connection of the prisoners with Colonel Burr, in carrying into effect one common intent or plan, and their knowledge of this view. They indeed show, from the acts of the prisoners and their own confessions, their immediate agency in the furtherance of this scheme. If, then, it can be shown that Mr. Burr has probably committed treason, their agency and connection with him, while possessing this knowledge of his treasonable views, create the same probability against them, as in the same treason all in this stage of the business must be considered principals.

What, then, was the intention, the quo animo, with which Mr. Burr's expedition was undertaken? This, by General Eaton's deposition, is proved to be the separation of the Western from the Atlantic states, and the

establishment of a monarchy there, of which Mr. B. was to be the sovereign. It is probable he had another object also in view, the invasion of Mexico; but this does not appear to be distinct from his treasonable plan of dismembering the Union. This treasonable intention is also stated in the confessions made to General Wilkinson, by one of the prisoners. In the pursuit, then, of this object, we find that Mr. B. had actually commenced the expedition, and that he expected to be at Natchez with an armed force at a certain period. It appears, too, from the confessions of the prisoners themselves, that Mr. B. was levying a large body of armed men; and, what may go far to prove their knowledge of, and agency in that business is, that the officer who was to command the first five hundred men, is stated by name. One of the prisoners, also, says that he had written to Colonel Burr for provisions. Should these circumstances, of themselves, not amount to overt acts of levying war, upon which question the judge said he should at that time say nothing, yet when taken in connection with the situation of the country, the state of alarm existing among the people, and the active preparations of defence against an expected attack, they furnished strong primâ facie evidence that they had been followed up by the commission of other acts on the part of Mr. Burr and the prisoners, that would amount to a levying of war within the strictest definition of the terms. Nor is there any thing in the testimony that can positively exclude the inference of an active coöperation on the part of the prisoners in the different measures that are probably imputable to Mr. Burr.

The judge then remarked, that an observation made by himself, on issuing the warrant, seemed not to have been correctly understood by the prisoner's counsel. He had not said, that in the present case, it was necessary to resort to public documents to aid the depositions in furnishing probable cause for the arrest; but he would now observe, as he had then done, that although the depositions did, to his mind, establish a probable cause, on which he could act, yet that this probability was strongly corroborated by the message of the president, and other public documents on the subject. That even admitting that the 6th article of the amendments to the constitution, which provides against general warrants, may require an oath or affirmation, before any warrant can issue, yet he could not subscribe to the doctrine, that the circumstances showing the probable cause, must, in all cases, be contained in the oath or affirmation itself. If this principle be once considered correct, it would, indeed, when taken in connection with the necessity contended for in the present case, of proving, on a question of commitment, the positive existence of the offence charged, be the worst precedent, as it regarded the public safety, that could possibly be established, though at the same time it might be the most convenient cloak for treason that could be invented. Under this doctrine, even an authenticated record, showing the conviction of Mr. Burr of treason, could it be produced, on the present question would be deemed inadmissible in corroboration of the probable cause contained in the affidavits.

The judge concluded, by observing, that he was opposed to bailing the prisoners; for although the evidence might also have charged them with a misdemeanor, in setting on foot an expedition against a nation at amity with the United States, yet as they had been arrested on a charge of the highest offence against their country, nothing but their persons could be considered an adequate security to the public.

FITZHUGH, Circuit Judge. My extreme indisposition has prevented me from preparing any remarks in support of the opinion which I am called on to give; but since it has been thought proper, by the members of the court, to assign our reasons for the course which has been pursued, I shall express those sentiments which at present occur to me. This question has been argued, as if it were now before a jury who were called on to convict or acquit the prisoners, without recollecting that we are at that stage where, in the language of the constitution, probable cause, supported by oath or affirmation, is sufficient. This remark is necessary to show that many of the conclusions of counsel are incorrect. In this incipient state the evidence is always ex parte, and such as would be inadmissible at the final trial. A warrant goes forth to apprehend and afterwards to commit, on the suggestion of an individual, supported by oath, that a crime has been committed. The affidavit is made in the absence of the supposed offender, and no more certainty is required than probable cause. By a law of the United States (1 Stat. 112), there must be the confession in open court, or the testimony of two witnesses to the same overt act, to convict one of treason. Whereas, probable cause, supported by oath or affirmation, will authorize issuing a warrant. In no case, whether criminal or civil, is an affidavit evidence at the trial, because taken in the absence of the party against whom it is intended to operate; and yet it has always been considered as sufficient to justify issuing a warrant to arrest. These inquiries obviously occur: 1st. Is there probable cause to believe, that any treason has been committed against the United States, and this supported by oath, &c.? 2d. Are the prisoners implicated in the treason? And 3d, how, whether as principals, or as only guilty of misprision of treason? That there is probable cause to believe that treason has been committed by Colonel Burr, the public rumor and universal alarm, which seems to have convulsed our country from the extremity to the centre, the president's

communications to congress and to the court, afford at least ground of suspicion, and this is supported by the positive oaths of General Eaton, General Wilkinson, Mr. Donaldson, Mr. Meade, and Mr. Wilson, all going to show the origin, existence and progress of Burr's treasonable projects and acts. But here the counsel for the prisoners have insisted that none of this mass of evidence criminates Burr, and have contended that the president's communications are inadmissible. It is not generally by detached parts of evidence, but by a well-connected chain of circumstances, that we arrive at proof; nor can a crime be made out, by the proof of any solitary fact. In a charge of murder, it would not be sufficient to show, that a blow was given from which death ensued; but it is necessary to prove and disclose a particular state of mind. There must be deliberate resentment or ill-will; there must be malice prepense. So in treason, (the case now under consideration,) no degree of violence, however atrocious, no enlisting or marching men, no injury, if limited in its object to personal rivalship, or even extensive enough in point of locality to contemplate or threaten the opposition and destruction of the laws or government of any one of the United States, will amount to treason against the United States. It is the intention, alone, which fixes the grade of the offence. This intention is only to be collected from circumstances; and though the communications of the president do not, of themselves, furnish full evidence of Burr's treason against the United States, yet they must be considered entitled to some weight in leading to the conclusion, that there is probable cause; but when, in addition to this, it is considered that the most solemn obligation is imposed by the constitution on the president, to make communications of this nature to congress, and that he has, also, in further discharge of his constitutional duties, ordered out the militia, which on ordinary and trivial occasions, he is not justified in doing, a person must be strangely incredulous who will not admit that there is probable cause of suspicion, that a dangerous insurrection or treason exists in our country. A report thus sanctioned by duty and oath, if made to this court, by one of its officers, would be respected, and why shall not a communication from the first executive officer of the Union be credited, when he announces to the nation, information in the line of his duty? But this general ground of alarm is rendered more specific by the affidavits which have been exhibited to us. If the persons who have been sworn on this occasion are to be believed, (and no one has yet questioned their credibility,) they prove a scheme laid by Burr to usurp the government of the United States; to sever the Western states from the Union; to establish an empire west of the Alleghany Mountains, of which he, Burr, was to be the sovereign, and New Orleans the emporium, and to invade and revolutionize Mexico. That in prosecution of those projects, he wrote a letter to General Wilkinson, the commander-in-chief of the American army, with the avowed object and design of alienating him from his duty, and inviting him to embark in the undertaking, and holding out to him the most flattering and sanguine assurances and prospects of success. Horrid as this attempt was, yet if the information had reached no further, I should have no hesitation in saying, that it would have been nothing more than a conspiracy to commit treason, or some other offence. But when Burr assures Wilkinson that he had obtained funds, and actually commenced the enterprise; that detachments from various points, and under different pretences, would rendezvous on the Ohio the 1st of November, with the first five hundred or one thousand men in light boats, now constructing for that purpose;—when, in addition to this, Wilson and Meade swear that when they left New Orleans, the one the 15th, the other the 19th December, the strongest apprehension and belief universally prevailed among the inhabitants that Burr and his confederates had prepared an armed force, and were marching to attack and plunder the city; and that they knew that Wilkinson was decidedly of opinion, from the most satisfactory information, that Burr was advancing, and, under that belief, he was putting the place in a posture of defence. When this coincidence of circumstances, and this strength of testimony appear, there can be little doubt of the existence and the extent of Burr's views, and of his having embodied and enlisted men, with views hostile to the government of his country, and that he had done acts which amount to levying war on the United States.

Burr's treason, then, being established, we are to inquire whether the prisoners were his confederates. They are represented, under oath, to have been bearers of the duplicates of Burr's letters, in cipher, to Wilkinson, and to possess Burr's confidence; they use arguments in addition to those in the letter, to invite Wilkinson to accede to their views; admit that they have corresponded with Burr on the subject, since their delivery of the letter, that Swartwout informed Wilkinson that Burr, with a powerful association, extending from New York to New Orleans, was levying an armed body of seven thousand men from New York, and the Western states and territories, with a view to carry an expedition against the Mexican provinces, and that five hundred men, under Colonel Swartwout and Major Tyler, were to descend the Alleghany, for whose accommodation light boats had been built and were ready; said that New Orleans would be revolutionized, when the people were ready to join them, and that there would be some seizing.

Here, then, is evidence of a connection

with Colonel Burr of a treasonable nature. What is it? The act of congress defines misprision of treason to be, a neglect to disclose the knowledge of a treason. But the prisoners have not only known of the treason, but carried a treasonable letter, knowing its contents; endeavored to further Burr's views and wishes, and to seduce Wilkinson from his duty. The offence exceeds misprision of treason, and as there is no intermediate class of offences of a treasonable nature between misprision and treason, it must be treason.

It has been observed, by the counsel for the prisoners, that no judge could commit on an affidavit made before any other judge. This distinction is certainly new, and I believe unprecedented. In all general warrants for arresting a supposed offender, the direction to the officer is, to bring the party before the person issuing the warrant, or some other justice of peace, &c., which would be, at least, nugatory, if no person could inspect or regard the affidavit, except the person before whom it was made. Therefore, I conclude, that Wilkinson's affidavits, made before justices of the peace of New Orleans, whose commissions appear to be properly authenticated by the secretary of state, are evidence at this stage of our inquiry.

I am, therefore, of opinion, that the prisoners should be committed for treason against the United States, in levying war against them.

NOTE. The order for the commitment of the prisoners was in these words: "The prisoners, Erick Bollman, and Samuel Swartwout, were brought up to court, in custody of the marshal, arrested on a charge of treason against the United States, on the oaths of General James Wilkinson, General William Eaton, James L. Donaldson, Lieutenant William Wilson, and Ensign W. C. Meade, and the court went into further examination of the charge. Whereupon it is ordered, that the said Erick Bollman and Samuel Swartwout be committed to the prison of this court, to take their trial for treason against the United States, by levying war against them, to be there kept in safe custody, until they shall be discharged in due course of law."

The bench-warrant for arresting the prisoners, was in these words: "District of Columbia, to wit: The United States of America, to the Marshal of the District of Columbia, greeting:—[L. S.] Whereas there is probable cause, supported by the oath of James Wilkinson, William Eaton, James Lowrie Donaldson, William C. Meade, and William Wilson, to believe that Erick Bollman, commonly called Doctor Erick Bollman, late of the city of Philadelphia, in the state of Pennsylvania, gentleman, and Samuel Swartwout, late of the city of New York, in the state of New York, gentleman, are guilty of the crime of treason against the United States of America:—These are, therefore, in the name of the said United States, to command you that you take the bodies of the said Erick Bollman and Samuel Swartwout, if they shall be found in the county of Washington, in your said district, and them safely keep, so that you shall have their bodies before the circuit court of the district of Columbia, for the county of Washington, now sitting at the capitol, in the city of Washington, immediately to answer unto the United States of America, of and concerning the charge aforesaid. Hereof, fail not at your peril, and have you then and there this writ. Witness the Honorable William Cranch, Esq., chief judge of the said court, this 27th day of January, 1807. William Brent, Clerk. Issued 27th day of January, 1807."

Upon habeas corpus issued by the supreme court of the United States, at February term, 1807, the prisoners were discharged. 4 Cranch [8 U. S.] 75.

[For the trials of Aaron Burr for treason, see Cases 14,692–14,694a.]

Case No. 14,623.

UNITED STATES v. BOLTON et al.

[Hoff. Op. 44; Hoff. Dec. 93.]

District Court, D. California. Aug. 17, 1858.[1]

SPANISH LAND GRANT—DETERMINATION OF VALIDITY—METHOD OF PROCEDURE—BILL OF REVIEW.

[The acts of 1851, 1852, and 1855, authorizing the district court to review the action of the board of commissioners instituted to try and determine the validity of claims based on titles derived from the Mexican or Spanish government, conferred an entirely new jurisdiction; and the rules of equity allowing the filing of a bill of review are not applicable in such proceedings.]

[This was a motion for leave to file a bill of review by the United States in the case of the claim of James R. Bolton. The claim had been confirmed. Case unreported.]

HOFFMAN, District Judge. This is a motion for leave to file a bill of review. No motion for a rehearing was made during the term at which the original decree was rendered, and a petition for leave to file a bill of review is now presented in accordance with the rules of courts of chancery. The questions to be determined are of great importance, not only from the magnitude of the interest involved in this case, but because the decision of the court will, in effect, determine whether all the decrees made by this court on appeals from the board of land commissioners, and not passed upon by the supreme court, are, and for five years from the date of the decree will continue to be, liable to revision and reversal.

The first question to be determined is, has this court jurisdiction to entertain a bill of review in this class of cases? It is urged on the part of the United States that these cases are essentially suits in chancery, that the court in its decision is required to be governed by the principles of equity, and that, as the power to entertain a bill of review, to revise its own decrees, is admitted to be within the jurisdiction of a court of chancery, this court must have the like authority. That these cases, or such of them, at least, as are founded on inchoate or equitable titles, bear much analogy to suits in equity, may be admitted. But neither the general rules of chancery practice, nor those prescribed by the supreme court for suits in equity, furnish the guides by which they are to be conducted. The jurisdiction of this court over them is

[1] [Reversed in 23 How. (64 U. S.) 341.]

solely derived from the act of 1851 [9 Stat. 631] and that of 1852 [10 Stat. 76]. By the act of 1851 a board of commissioners was instituted to try and determine the validity of claims to lands in California, by virtue of any right or title derived from the Mexican or Spanish government. Their decisions, with the reasons on which they were founded, were to be certified to the district court within 30 days after the same were rendered. To entitle either the claimant or the United States to a review of the proceedings and decision of the commissioners, a notice of the intention of the party to file a petition in the district court for the purpose was required to be entered on the journals or record of the commissioners within 60 days after the making of their decision, and the petition was to be filed in the district court within six months after the decision of the board was rendered. By the ninth section special provision was made as to what the petition to be presented to the district court should set forth,—that it should contain, if presented by the claimant, a transcript of the report of the board, and of the documentary and other evidence on which it was founded; and if presented on behalf of the United States, that it should be accompanied by a like transcript, and should set forth the grounds on which the claim was alleged to be invalid, and a copy of the petition was to be served on the opposite side. Further provisions were made as to what should be set forth in the answers to the petitions. By the tenth section it is made the duty of the district court to proceed and render judgment upon the pleadings and evidence in the case, and upon such further evidence as might be taken by order of the court; and on application of the party against whom judgment should be rendered, to grant an appeal to the supreme court, etc. And by the thirteenth section, for all claims finally confirmed by the commissioners, or the district or supreme courts, patents were to issue. The mode above described for removing the case from the board of commissioners to the district court was subsequently changed by the twelfth section of the act of 1852, and provisions of a still more exceptional and special character were made. By that section the mere filing of the transcript of the proceedings of the board was, ipso facto, to operate as an appeal to this court, which, however, was to be regarded as dismissed unless the party against whom the decision had been rendered gave notice, within six months, of his intention to prosecute it. Finally, by the act of 1855 [10 Stat. 631], the district court for the trial of these cases was organized in a special manner, and it was provided that "the circuit judge, when in his opinion the business of his own court should permit, or that of the district courts require," should form part of and preside over the district court when engaged in the discharge of their appellate jurisdiction in land cases.

It is apparent, from the foregoing summary of the statutory provisions as to these cases, that the jurisdiction conferred on the court is new, and to be exercised in a special manner, prescribed by law. It is special and extraordinary as to the subject-matter, for it embraces only claims to lands within a state, derived from a particular source—the Spanish or Mexican government; as to the parties, for in these proceedings the United States consents to be sued, and to have its rights determined: as to the mode of proceeding, for the claim is in the first instance to be presented to a tribunal, not a court of justice, and the mere filing of a transcript of their proceedings is the initiation of a suit in this court, to be tried upon the evidence taken before the board, and such other testimony as may be taken by order of this court; and, finally, as to the organization of the court, for it is composed, in these cases alone, of the circuit as well as the district judge. If these provisions are not to be regarded as conferring a new, extraordinary, and special jurisdiction, I confess myself unable to imagine what statutory enactments would have that effect. That they were so considered by congress is apparent from the language of the act of 1855, which provides that thereafter the district courts of California shall exercise only the ordinary duties and powers of the district courts of the United States, "except the special" jurisdiction vested in said district courts over the decisions of the board of commissioners. If, then, the judisdiction conferred on this court be a new jurisdiction, to be exercised in a special manner; prescribed by law, are not the powers of the court and the remedies it can afford, limited by the provisions of the act conferring the jurisdiction? Or can the court exercise jurisdiction in a new proceeding not expressly allowed by the acts of congress, though admissible if the original cause had been decided by a court of chancery in the exercise of its ordinary jurisdiction? Upon the determination of this point the decision of the case must depend.

A somewhat similar case is reported in Cro. Car. 40. Upon a decree made by commissioners under St. 43 Eliz. c. 4, a re-examination was sought upon a bill of review, as other bills of review upon decrees in chancery; but it was resolved "that this bill of review is not allowable, but the decree in chancery is conclusive and not to be further examined, because it takes its authority by the act of parliament, and the act doth mention but one examination; and it is not to be resembled to the case where a decree is made by the chancellor under his ordinary authority, and Jones said so it was upon a decree made upon the statute." 37 Hen. VIII. The supreme court of the United States have established substantially the same principle. By the act of May 15, 1820 [3 Stat. 592], the agent of the treasury was authorized to issue a warrant of distress against certain officers failing to pay over public moneys. The fourth

section provided that any person aggrieved might prefer a bill of complaint to any district judge, and the judge was empowered to grant an injunction to stay proceedings on the warrant. A right of appeal from the decision of the judge refusing to grant or perpetuate the injunction was given to the party aggrieved by such decision, upon the allowance of a judge of the supreme court. Under these provisions a warrant was issued against Nourse, who applied for an injunction; and after a reference and other proceedings, the injunction was made perpetual. The United States appealed to the circuit and supreme courts. But the court decided that, no right of appeal having been given to the United States by the act, no such right existed by virtue of the general laws allowing and regulating appeals in ordinary cases, and the court says: "It may be admitted that an enlargement of the powers of the district court, by giving a new remedy, would not require a special provision to secure the right of appeal; but if a new jurisdiction be conferred, and a special mode be provided by which it shall be exercised, it is clear that the remedy cannot be extended beyond the provisions of the act." U. S. v. Nourse, 6 Pet. [31 U. S.] 494. The force of this decision is felt by the counsel of the government. It is attempted to be met by the suggestion that, in that case, the jurisdiction was conferred upon the judge and not upon the court. But, in the first place, it is to be observed that the decision of the supreme court in no respect proceeds upon such a distinction, and the extract above quoted unmistakably affirms the general principle enunciated, with reference to a new jurisdiction conferred upon a court as distinguished from a mere enlargement of the powers of the same court by giving a new remedy. That the jurisdiction conferred upon this court over land cases is new, extraordinary, and exceptional, and that a special mode of exercising it has been provided, has already been abundantly shown.

In the second place, it was expressly decided in Porter v. U. S. [Case No. 11,290], that the act of congress prescribing a mode of relief against a treasury warrant of distress confers a power on the court, and not upon the judge as an individual. And in U. S. v. Cox. 11 Pet. [36 U S.] 165, the supreme court says that the jurisdiction given to the judge may be exercised by him while holding court or at any other time. In U. S. v. Nourse, 9 Pet. [34 U. S.] 8, it was decided by the supreme court, Chief Justice Marshall delivering the opinion, that the judgment in Nourse's favor in the proceedings under the treasury warrant of distress was a conclusive bar to a subsequent suit by the United States for the same demand, and this on the general principle "that the judgment of a court of competent jurisdiction, while unreversed, concludes the subject-matter, as between the same parties. They cannot bring it again into litigation." It appears, therefore, that the suggestion that the principle established in [U. S. v. Nourse] 6 Pet. [31 U. S.] 470 refers only to a jurisdiction conferred upon a judge as an individual cannot be supported. But the report of the Case of Nourse furnishes a still more decisive authority. A note to that case contains a report of the case of U. S. v. Bullock, 6 Pet. [31 U. S.] 486, in the district court of Georgia. A treasury warrant of distress had issued against Bullock, who filed his bill for an injunction. On the hearing of that case, a certain amount was adjudged to be due to the United States, which was paid by the defendant. The United States subsequently filed their petition for leave to file a bill of review, alleging that new and other evidence had been discovered since the hearing, which it was not in their power to produce at that time. This application was refused because, as stated in the statement of the case, "the act of May 15, 1820, did not vest in the district court general and unlimited equity powers, but merely gave a special authority, which, having been executed, could not be reviewed by that court." The principle affirmed in the Case of Nourse is impliedly recognized by the supreme court in Ex parte Christy, 4 How. [45 U. S.] 317. The question before the court related to the jurisdiction of the district court in cases of bankruptcy; and it was objected that its summary jurisdiction ought not to be extended to the case before the court, as it was without appeal to any higher court. "This," say the court, "we readily admit. But this was a matter for the consideration of congress, in framing the act." And it seems, on all sides, to have been considered that, as the act conferring the special jurisdiction gave no right of appeal, none such existed.

But the question raised in the case at the bar, in the case of Sampeyreac v. U. S., 8 Pet. [33 U. S.] 222, was distinctly presented to the supreme court. In that case, a title to land had been confirmed to one Sampeyreac by the superior court of Arkansas, under the act of 1824 [4 Stat. 52]. A bill of review was subsequently filed by the United States, under the provisions of the act of 1830 [4 Stat. 399], authorizing a bill of review to be filed by the United States in cases where the warrant concession, or other evidence of title, was alleged to be a forgery; and empowering the court to revise and annul any prior decree or adjudication on such claim, and declaring that thereupon, such prior decree or adjudication should be deemed and held null and void, etc. The grant, at the argument, was admitted to be a forgery; but it was contended (1) that, under the act of 1824, the court had no authority to entertain a bill of review: and (2) that the act of 1830 giving such authority, was unconstitutional, the rights of an innocent person having become vested. The court say: "We think it unnecessary to go into an examination of the questions made under the first point. Although the act of 1824 directs that every peti-

tion presented under its provisions shall be conducted according to the rules of a court of equity, it may admit of doubt whether all the powers of a court of equity in relation to bills of review are vested in that court," etc. The case was determined on the second point. The act of 1824, referred to by the court, unequivocally provided, not merely that cases under it should be determined according to the principles of equity, but that they should be conducted according to the rules and practice of courts of equity; and the court was authorized to direct disputed facts to be found by a jury, "according to the regulations and practice of the court when directing issues in chancery before the same court." Act May 26, 1824, § 2. Even under these provisions, the supreme court doubted, as has been seen, whether all the powers of a court of chancery in relation to bills of review were vested in the court. But the act of 1851 contains no similar provisions. It has never been supposed that the general rules of equity practice are the rules of proceeding of this court in these cases, nor has it been suggested that the court possesses the ordinary powers of a court of chancery to direct issues of fact to be tried by a jury.

The jurisdiction to entertain bills of review must, if at all, be possessed by this court, either by virtue of an express authority conferred by the statute, or by virtue of its general equity powers conferred upon it by law, and which, though not expressly authorized in this class of cases, may, nevertheless, be exercised with regard to them. It is admitted that the act confers no express authority to entertain bills of review, and this court, since the act of 1855, establishing a circuit court, possesses no special chancery jurisdiction whatever; but it is urged by the district attorney that, at the date of the passage of the act of 1851, this court did possess the full equity jurisdiction of the circuit court, and that congress, in committing this class of cases to the jurisdiction of the court, intended that it should exercise with regard to them, the general equitable jurisdiction conferred upon it in ordinary cases. The argument is ingenious, but cannot, I think, be maintained; for—First, it admits that, unless the court had possessed, in 1851, general jurisdiction as a court of chancery, or if it had originally been constituted as it now is, a bill of review could not be entertained. The power to entertain such a bill is thus derived, not from the statute conferring the new jurisdiction in these cases, but from the fact that the jurisdiction was conferred upon a court exercising the powers of a court of chancery. But the decision above cited of the supreme court is clear that when a new jurisdiction is conferred, and a special mode for its exercise provided, the remedies cannot be extended beyond the provisions of the act by virtue of any general laws regulating the ordinary jurisdiction of the court. Had the supreme court thought otherwise, appeals from the district court sitting in bankruptcy, or under the provisions of the act of May 15, 1820, would have been allowed, if authorized by general laws regulating appeals. Second. The general chancery jurisdiction formerly possessed by this court it no longer retains. If, then, the power to entertain bills of review in land cases was derived from the laws giving to the court the ordinary jurisdiction of a court of equity, it would seem that the power contended for cannot survive, in this court, the loss of the jurisdiction to which it owed its existence. Thirdly. In the case of Sampeyreac v. U. S., 8 Pet. [33 U. S.] 222, the doubt expressed by the supreme court was whether or not the statute conferring the new jurisdiction vested in the superior court all the powers of a court of chancery in relation to bills of review; the provisions of that statute being, as we have seen, susceptible of being construed to confer general equity powers upon the court with reference to land cases. And the court, by the expression of a doubt as to the construction of a statute, negative the idea that the jurisdiction contended for was to be sought in any other general laws regulating the ordinary jurisdiction of the Arkansas court. In the case of U. S. v. Cox, 11 Pet. [36 U. S.] 162, a similar argument was made by the attorney general, but overruled by the supreme court. A treasury warrant of distress had issued against Cox, who applied to the district judge for an injunction, which, on a final hearing, was made perpetual. The United States appealed, and the attorney general attempted to distinguish the case from that of U. S. v. Nourse, by the fact that the district court which granted the injunction possessed circuit court jurisdiction. The case was therefore, he contended, a case of chancery jurisdiction. Appeals in chancery cases were authorized by the laws establishing the court. But the supreme court refused to recognize the distinction, and decided, as in Nourse's Case, that, as no appeal was given to the government by the statute conferring the new jurisdiction, the decree of the district judge must be held final. If the consequences of exercising the jurisdiction contended for be considered, additional arguments against its existence will be furnished.

It is admitted, or rather contended, by the counsel of the government, that a bill of review must (on a proper showing) be entertained by this court, in these cases, at any time within five years from the time of rendering the decree, unless a decision on appeal has in the meantime been had in the supreme court. The bill may, of course, be filed by the claimants, as well as by the United States. It needs no argument to show that it was the policy, the duty, and the intention of congress to secure the speedy settlement of land titles in this state. The pernicious effect of the prevailing uncertain-

ty of titles is universally recognized. But if every case, whether decided in favor of the United States or of the claimants, is liable to be reviewed, and reversed at any time within five years from the rendering of the decree, unless finally decided on appeal, and even then, if permission be given by the supreme court, the policy of the act of congress so strongly enforced by the condition of the country would be wholly defeated. No confirmation or rejection of a claim to land heretofore made by this court could in such case be deemed "final," and the majority of land titles in this state would, for at least four or five years, be involved in the same uncertainty from which it has hitherto been supposed they were at last emerging. But suppose, before the bill of review is filed, that a patent has issued to the claimant, or, if the decision was in favor of the United States, that the land has been surveyed and settled upon as public land; are the rights of the patentee, or of innocent purchasers under him, or are the rights of pre-emptioners under our general laws, to be divested by a decree of the court, reversing, after the lapse of four or five years, its former decree? The operation of the act of 1830, which allowed bills of review to be filed before the supreme court of Arkansas, was limited to a period less than 14 months from the date of its passage, and only embraced cases where the title was alleged to have been forged. It was also provided, by that act, that no entries of land should be made in Arkansas under the provisions of the act of 1824, until the further directions of congress, and that no patents should issue in any case unless the commissioner of the land office should be satisfied of the genuineness of the original title, or unless it had been determined, on the hearing of the bill of review, to be genuine. The fifth section provided that, in case the court should, on the hearing of the bill of review, annul its prior decree, all lands entered under such prior decree should be subject to sale or entry, as other public lands of the United States.

If this court is to take jurisdiction of bills of review, a limitation of its power to entertain them to some period less than five years, as well as legislation similar to that above cited, to give effect to and define the operation of its decrees of reversal, is obviously necessary to escape embarrassments and injustice more serious than those which the bill of review is filed to prevent. Again: The filing of a bill of review is the commencement of a new suit to be prosecuted according to the rules of equity practice. The defendant must of course be subpœnaed to appear. But how, in case the bill is filed by a claimant against the United States, can the latter be compelled to appear? The government has consented to be sued, but in the particular mode specially pointed out, viz. by the filing of a petition and claim before the board of commissioners. The United States have not consented to become parties defendant to a suit in chancery brought in this court. Again: It will not be denied that a court of chancery has power to entertain a bill filed to obtain a review of a decree reversing a former decree. Will it be contended that this court could entertain such a bill, and compel by subpœna the United States to appear to it? And yet, if it has, in these cases, the general equity powers attributed to it, it must possess as much authority to entertain such a bill as it had to entertain an ordinary bill of review. The bill of review may, of course, be answered or demurred to, and a formal decree must be made in the suit. To what court is an appeal from that decree to be taken? To the circuit or supreme court? The act provides for an appeal from the decree in the original suit, but is silent as to appeals from a decree on a bill of review. The act of 1830, already cited, expressly provided (section 7) for an appeal to the supreme court from all judgments or decrees of the court of Arkansas on the bills of review which it authorized to be brought. Congress thus seems to have considered such a provision to be necessary to give a right of appeal from decrees on bills of review, notwithstanding that the act of 1824, like that of 1851, gave an appeal to either party from the final decree in the original suit. In whatever light the question of jurisdiction be regarded, whether on principle or authority, or with reference to the consequences which would follow any attempt to exercise it, the objections are insurmountable. I am clear that the court does not possess it.

Having arrived at the conclusion that this court has no jurisdiction to entertain a bill of review in any case, a particular examination of the merits of this application is unnecessary. Some observations, however, with respect to them, may not be inappropriate. The bill of review is sought, in this case, to be filed on the ground of newly-discovered evidence. It has uniformly been held that the evidence sought to be given should be such as, if unanswered, will procure the reversal of former decree, or at least present a case of so much nicety and difficulty as to be a fit subject for judicial determination. In the language of the supreme court, it should be "of a decided and controlling character." [Southard v. Russell] 16 How. [57 U. S.] 569. The application in this case rests substantially on the affidavit or an information derived from one Alfred A. Green. This witness swears that Santillan, the alleged grantee of the original grant, admitted and confessed to him that the same was fraudulent and forged, and that he is ready to testify to that effect. He also states that Santillan made a declaration of these facts before the United States consul, which the former district attorney states he has seen. Mr.

Green further swears that there is now within reach of the process of this court a witness who will prove the same facts. No affidavit on the part of Santillan is produced, nor is even the alleged declaration before the consul exhibited. No affidavit by the other witness is offered, nor is even his name given. The truth of the facts sought to be proved is thus unsworn to by any witness whatever, and the court must rely upon the statement of Mr. Green that Santillan has confessed them and will swear to them, and that another anonymous witness is ready to do the like. It would seem that, in applications of this kind, the court has a right to expect that the existence of the facts sought to be given in evidence should be shown by the oath of at least one witness. If, however, the new evidence proposed is not that of Santillan himself, but of Mr. Green that Santillan has recently made a parol confession to him, its admissibility may be doubtful. On the part of the claimants an affidavit has been presented, from which it appears that Santillan, on the 11th of March, 1857, appointed Mr. Alfred A. Green his attorney in fact, and that, since his return from Mazatlan with the alleged declaration of Santillan, that the claim was a fraud and a forgery, in his possession, Mr. Green has conveyed, as the attorney of Santillan, to two different persons portions of the very land to which, according to his own affidavit, he was aware Santillan had not the slightest pretension. Under such circumstances, it is certainly not clearly the duty of the court to grant an application solely sustained by the oath of Mr. Green.

It is the uniform rule of courts of equity that the testimony on which a bill of review is allowed must be newly-discovered, and such as by reasonable diligence could not have been before procured. It is alleged in the petition that testimony was produced before the board of commissioners, on the part of the United States, in support of the allegation that the grant was simulated, and made subsequent to the time of the American occupation of the county. It could not have been unknown to the government that the two individuals best acquainted with the facts were Pio Pico, the alleged grantor, and Santillan, the alleged grantee. Neither was examined by the United States, from an apprehension, probably, that their testimony would not be favorable to the government. The United States are now informed that Santillan will testify to the facts alleged by them. It is at least doubtful whether such testimony can be deemed "newly-discovered," within the meaning of the rule. I am not aware of any case where a court of law has granted a new trial, or a court of equity has entertained a bill of review, where a person known to possess the fullest knowledge of all the facts in controversy, and who has not been examined, because it was supposed he would commit perjury, has, after the decision of the cause, been offered as a witness, because the party calling him is advised that he might originally have been, or may now be, trusted on the stand.

Again: It is stated, in the petition, "that the material issue of fact in this case is whether the signature of Gov. Pio Pico to the grant is genuine, and, if genuine, whether he signed it at the time it purports to have been made." It is apparent that the evidence of Santillan and the other unnamed witness is to facts originally in issue, and cumulative and corroborative of the witnesses already examined by the United States. It is unnecessary to review or cite the cases upon the point thus presented. A reference to a recent decision of the supreme court will be sufficient; for the law, as declared by that court, is the rule of decision in this. In Southard v. Russell 16 How. [57 U. S.] 547, which was an appeal from a decree on a bill of review, the supreme court, in speaking of the newly-discovered evidence offered in that case, say: "Without expressing any opinion as to the influence this fact, if produced on the original hearing, might have had, it is sufficient to say that it does not come within any rule of chancery proceedings, as laying a foundation for, much less as evidence in support of, a bill of review. The rule, as laid down by Mr. Chancellor Kent, is, that newly-discovered evidence, which goes to impeach the character of witnesses examined in the original suit, or the discovery of cumulative witnesses to a litigated fact, is not sufficient. It must be different, and of a very decided and controlling character. The soundness of this rule is too apparent to require argument, for, if otherwise, there would scarcely be an end to litigation in chancery cases, and a temptation would be held out to tamper with witnesses, for the purpose of supplying defects of proof in the original cause." [Southard v. Russell] 16 How. [57 U. S.] 570. A bill of review may, however, be permitted, where the new evidence is in writing, or matter of record. In this case it is alleged, in the petition and affidavit of Mr. Green, that Santillan delivered to him (Green) papers which he (Santillan) informed him were part of the records of the court of first instance of this district, which papers show that Santillan, at the time of the pendency of certain suits in the court of first instance, claimed and testified that his right to the land alleged to have been granted to him was merely by virtue of his office as curate of the mission. But this documentary proof has not been exhibited to the court. Whether or not the effect of the proof is such as is attributed to it, the court is wholly unable to determine. The authorities are clear and uniform that the court, before allowing a bill of review to be filed, should be satisfied that the new evidence offered is of a "very decided and controlling character," and such as, if unanswered, would cause the original decree to be reversed, or would present a case for judicial doubt and decision.

It is unnecessary to pursue this inquiry fur-

ther. I desire to be understood as resting my decision of this motion on the ground that this court has no jurisdiction to entertain a bill filed to review its decrees in land cases, and as declining to pass upon the merits of this application. If I should be in error as to the question of jurisdiction, the supreme court will probably compel, by mandamus, this court to entertain and pass upon the merits of this or any future application for leave to file a bill of review in land cases. I have examined the questions presented in this case at perhaps unnecessary length. I have thought fit, however, in view of their great importance, to state fully the reasons upon which the decision is founded.

[Upon an appeal, by the United States, to the supreme court, the above decision was reversed, and the cause remanded to the district court, directing a dismissal of the claim. 23 How. (64 U. S.) 341.]

UNITED STATES (BOODY v.). See Case No. 1,636.

Case No. 14,624.

UNITED STATES v. BOOK.

[2 Cranch, C. C. 294.] [1]

Circuit Court, District of Columbia. April Term, 1822.

CRIMINAL LAW—FORMER ACQUITTAL.—FORGERY—DRAFT.

1. An acquittal upon an indictment for forging an order with intent to defraud John Lang, is no bar to an indictment for forging the same order with intent to defraud William Lang.

2. An order in these words: "Sir: Please let the bearer have one pair boots. Yours &c., Levin Stewart," is a draft for the delivery of goods, within the act of Maryland of 1799, c. 75, § 2.

[Cited in Garmire v. State, 104 Ind. 445, 4 N. E. 55; Long v. Straus, 107 Ind. 103, 6 N. E. 123, 7 N. E. 766.]

Indictment for forging and uttering the following order: "Sir: Please let the bearer have one pair pair boots. Yours &c., Levin Stewart. Mr. Lang. Geo'town, December 31, 1821,"—with intent to defraud one William Lang.

The prisoner [Book, alias Bush] had been indicted before, at the present term, for forging and uttering the same order with intent to defraud one John Lang; but it appearing upon the trial that the name of the person intended to be defrauded was William, and not John, and an exception having been taken by the prisoner's counsel to the variance, he was acquitted on that ground. Upon the present indictment it was agreed by the prisoner's counsel and the attorney for the United States, that the prisoner should have the benefit of the plea of autrefois acquit, upon the plea of not guilty, in the same manner as if he had pleaded it specially.

THE COURT decided that the acquittal upon the former indictment was not a bar to the present; being of opinion that the exception taken to the former indictment was fatal. See 1 Chit. Cr. Law, 455.

The prisoner's counsel also contended that the instrument forged was not an order within the English decisions upon the English statute of 7 Geo. II. c. 22; Mitchell's Case, cited in 2 East, P. C. 936, and William's Case, 1 Leach, 114; and Ellor's Case, Id. 323.

But THE COURT said, that upon that point he might move in arrest of judgment if the prisoner should be convicted. See U. S. v. Bates [Case No. 14,542] in this court, June term, 1810, upon the act of Maryland of 1799, c. 75, § 2, in which the court decided that the words "draft for the payment of money or delivery of goods," included such an order as the present.

Verdict, "Guilty."

Motion in arrest of judgment overruled.

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

UNITED STATES v. The BONITA. See Cases Nos. 15,793 and 15,794.

Case No. 14,625.

UNITED STATES v. BORDEN et al.

[1 Spr. 374; [1] 21 Law Rep. 100.]

District Court, D. Massachusetts. Sept., 1857.

SEAMEN—INDICTMENT FOR REVOLT—INTIMIDATION—COMBINATION—REASONABLE MEASURES FOR PROTECTION—MASTER'S AUTHORITY.

1. A master is prevented in the free and lawful exercise of his authority, within the meaning of the act of 1835, c. 40 [4 Stat. 775], defining the crime of revolt, if he be prevented from carrying into effect any one lawful command; and a command to continue the business of whaling is prima facie lawful.

2. A combination to refuse to pursue such business is not, of itself, the intimidation required as an element to constitute the crime, but it may be the means of intimidation.

3. Such combination and intimidation may be lawful. If, from the improper conduct of the captain, the crew have good reason to believe, and do believe, that they will be subjected to unlawful and cruel or oppressive treatment, or that a great wrong is about to be inflicted on one of their number, they have a right to take reasonable measures for his, or their own protection.

4. What would be reasonable measures must depend upon the nature and extent of the wrong, and upon the means of prevention, having regard to the importance of preserving the authority of the master, as well as to the importance of protecting the crew.

This was an indictment against twelve of the crew of the whaling ship Huntress.

C. L. Woodbury, U. S. Dist. Atty.

J. H. Prince, for defendants.

SPRAGUE District Judge (charging jury). This indictment charges the prisoners at the bar, who were of the crew of the whaling ship Huntress, with having made a revolt.

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

The crime of making a revolt, or mutiny, is defined by the statute of 1835, c. 40, § 1, as follows: "That if any one or more of the crew of any American ship or vessel on the high seas, or on any other waters, within the admiralty and maritime jurisdiction of the United States, shall unlawfully, wilfully, and with force, or by fraud, threats, or other intimidations, usurp the command of such ship or vessel from the master, or other lawful commanding officer thereof, or deprive him of his authority and command on board thereof, or resist or prevent him in the free and lawful exercise thereof, or transfer such authority and command to any other person not lawfully entitled thereto, every such person so offending, his aiders or abettors, shall be deemed guilty of a revolt, or mutiny, and felony."

In this definition, besides the requirement that the ship should be American, and the prisoners should be of her crew, there are four other elements in the offence—1st. That a certain end must have been accomplished. 2d. That this must have been done by certain means. 3d. That it must have been done unlawfully, and 4th. Wilfully.

The end accomplished, must be either the having usurped the command of the vessel from the lawful commanding officer, or the having deprived him of his authority and command on board thereof, or resisted, or prevented him in the free and lawful exercise of such authority and command, or the having transferred such authority and command to any other person, not lawfully entitled thereto.

The means by which the end is accomplished must be either force or fraud, or threats, or other intimidations.

In this indictment the charge is, that the prisoners at the bar did prevent the master in the free and lawful exercise of his authority and command, by intimidations. The master is prevented in the free and lawful exercise of his authority, within the meaning of the statute, if he be prevented from carrying into effect any one lawful command. A command to continue the business of whaling is prima facie a lawful command, and if the prisoners at the bar, by their united refusal to obey such command, prevented the master from carrying on that business, they prevented him in the free and lawful exercise of his authority, unless there be some legal justification for such refusal. If this was done, was it by the means alleged in the indictment, that is, intimidation, or in other words, operating upon the fears of the master?

It appears by the evidence, that there was a combination by the prisoners to refuse to pursue the business of whaling, unless the master would comply with a certain request or demand. It is contended, in behalf of the government, that such combination is, of itself, the intimidation required by the statute; but that is not correct. The combination may never be made known to the captain, or if made known to him, it may be in such manner, and under such circumstances, that it could not operate upon his fears. A combination, therefore, is not, of itself, intimidation, but may be the means of intimidating. And if, by the array of numbers and union, the fears of the master are excited, and through such fear he is prevented in the free and lawful exercise of his authority, there is intimidation within the meaning of the statute. If the jury find that the master was prevented in the free and lawful exercise of his authority, by intimidations, the next inquiry is, whether it was done by the prisoners wilfully, that is, whether they accomplished that end by that means, knowingly and intentionally. If this also should be found against the prisoners, the next inquiry would be, whether, in doing this, the prisoners acted unlawfully; for there are cases in which it may be lawful for the crew to prevent the master in the free exercise of his authority, or even to deprive him of it altogether. This is implied by the statute itself. It is not the wilfully depriving the master of his authority, even by threats or intimidations, that is made a crime, but the doing so unlawfully; and if this indictment had alleged all those acts, without alleging that they were done unlawfully, it would have described no offence. It is insisted, in behalf of the prisoners in the present case, that they had a right to refuse further to continue the business of whaling, and to prevent by intimidation the master from exercising his authority, to compel them to carry on that business; it becomes, therefore, a most material inquiry, whether their conduct was lawful. I shall not undertake to state all the cases in which such conduct may be lawful, but confine myself to instructing you upon the questions raised by the evidence in the present case.

If, from the improper conduct of the captain, the men had good reason to believe, and did believe, that they should be subjected to unlawful and cruel or oppressive treatment, they had a right to take reasonable measures to protect themselves from such treatment.

If, from the improper conduct of the captain, the men had good reason to believe, and did believe, that a great wrong was about to be inflicted upon one of the crew, they had a right to take reasonable measures to protect him therefrom.

What would be reasonable measures, must depend upon the nature and extent of the wrong, and upon the means of prevention, having regard to the importance of preserving the authority of the master, as well as to the importance of protecting the crew. (The judge then proceeded to remark upon the evidence, in connection with the rules of law.)

See U. S. v. Lunt [Case No. 15,643]; The Moslem [Id. 9,875]; The Mary Ann [Id., 9,194]; U. S. v. Givings [Id. 15,212]; U. S. v. Thompson [Id. 16,492].

Case No. 14,626.

UNITED STATES v. BOTT.

UNITED STATES v. WHITEHEAD.

[11 Blatchf. 346.] [1]

Circuit Court, S. D. New York. Oct. 30, 1873.

POST OFFICE — OFFENCE AGAINST POSTAL LAWS — PROHIBITED ARTICLES — DEFENCE.

1. Under an indictment founded on section 148 of the act of June 8th, 1872 (17 Stat. 302), as amended by section 2 of the act of March 3d, 1873 (17 Stat. 599), which provides, that no article or thing "designed or intended for the prevention of conception or procuring of abortion," shall be carried in the mail, and declares guilty of a misdemeanor any person who knowingly deposits, for mailing or delivery, any such article or thing, the defendant cannot show, in defence, that the article deposited in the mail would not in fact, have any tendency to prevent conception or procure abortion, and that its harmless character was known to him when he deposited it, it being sufficient that the article, when deposited, was put up in a form, and described in a manner, calculated to insure its use to prevent conception or procure abortion, by any one desiring to accomplish that result, and into whose hands it might fall.

[Cited in U. S. v. Pratt, Case No. 16,082; U. S. v. Whittier, Id. 16,688; U. S. v. Males, 51 Fed. 43; U. S. v. Adams, 59 Fed. 676.]

2. Under an indictment founded on the same section, which declares it to be a misdemeanor to knowingly deposit in the mail, for mailing or delivery, any advertisement or notice giving information where or of whom any such article or thing may be obtained, if it be shown such a notice was deposited, it is immaterial whether, in fact, the article or thing was at the place designated.

[Cited in U. S. v. Pratt, Case No. 16,082; U. S. v. Grimm, 50 Fed. 530.]

[Indictments against John Bott and against John Whitehead for depositing prohibited articles in the mails. Heard on motions for new trial.]

Ambrose H. Purdy, U. S. Asst. Dist. Atty.

James D. McClelland, for Bott.

Rufus F. Andrews, for Whitehead.

BENEDICT, District Judge. The above-named defendants were separately indicted, under section 148 of the act of June 8th, 1872 (17 Stat. 302), as amended by section 2 of the act of March 3d, 1873 (17 Stat. 599), which provides, "that no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for an indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means, either of the things before mentioned may be obtained or made, * * * shall be carried in the mail; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things, or any notice or paper containing any advertisement relating to the aforesaid articles or things, * * * shall be deemed guilty of a misdemeanor."

The first question which it is proposed to consider is, whether, upon an indictment charging the defendant Bott with depositing in the mail a certain powder designed and intended for the prevention of conception or procuring of abortion, he may show, as matter of defence, that the powder which he deposited in the mail would not, in fact, have any tendency to prevent conception or procure abortion, and that its harmless character was known to the defendant when he made the deposit in the mail. Upon this question my opinion is, that such facts do not constitute a defence. Congress has exclusive jurisdiction over the mails, and may prohibit the use of the mails for the transmission of any article. Any article of any description, whether harmless or not, may, therefore, be declared contraband in the mail, by act of congress, and its deposit there be made a crime. But, the protection of the mails is the limit of the power of congress over the matter in question, and the words of the statute under consideration must be construed with reference to this limitation. The prevention of abortion in the several states is not within the power which, under the constitution, belongs to the United States. That duty is upon the states. It cannot, therefore, be thought, that congress proposed, by the words, "designed or intended for the prevention of conception or procuring abortion," to make the intent to prevent conception or to procure abortion, an element of an offence against the United States. These words, consequently, should not be considered as intended to describe the intent which must be an element of the crime against the United States, but simply as descriptive of the article made contraband; and the phrase must be understood to indicate as contraband in the mail, any article or thing designed, in a manner calculated to secure its use by any one, for the purpose of preventing conception or procuring abortion. The crime against the United States relates only to matter in the mails. The unlawful act of depositing contraband matter, coupled with the intent to deposit such matter, constitutes the crime. The guilty intent appears from the fact of the deposit of such matter by one knowing what article he deposits. The evidence of the crime is, therefore, complete, when the act and the knowledge is shown. Whether the article would, in realty, accomplish the result represented to be its effect, or whether the defendant desired or expected such a result, thus appears immaterial.

If this view of the law be correct, evidence tending to show the harmless character of the powders, and, also, evidence that the powders were known to the defendant to have been ordered of him by a man, and for

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

the purpose of obtaining evidence on which to base a prosecution, and were made harmless in order to dupe, was properly excluded. If such facts were shown, it would still be true, that the defendant deposited in the mail powders which have been found to be put up in a form, and described in a manner, calculated to insure their use, for the prevention of conception, by any one desiring to accomplish that result, and into whose hands they might fall.

A similar question arises under the indictment against Whitehead, which charges the deposit of an advertisement or notice giving information where and of whom certain of the articles made contraband by the statute could be obtained. The evidence showed the deposit of a notice stating that certain articles contraband by the statute could be obtained at a designated place. This being shown, whether, in point of fact, the information in the notice was true, and whether such articles were at the place designated, is of no consequence. The paper in the mail is the same, whether its statements be true or false; and the object of the statute is to keep such papers out of the mails. Whether such articles should be procurable or not, it is not for congress to say, but congress can prohibit the transmission, in the mails, of papers containing such objectionable matter, as a notice that indecent pictures and articles, to be used for the purpose of procuring abortions, are obtainable at certain places. This power has been exercised in the enactment of the present statute, and the crime created by the statute is complete when such objectionable matter is knowingly deposited in the mail.

The same conclusion may be arrived at by giving to the word "designed," as used in this statute, the signification of "designated," which is one of the ordinary meanings of the word. The powders which the defendant Bott deposited in the mail were clearly designated as articles for the prevention of conception, and were, therefore, within the prohibition of the statute.

These views dispose of all the questions which have been raised in these cases, and the result is, that the motions for new trials are denied.

UNITED STATES (BOTTOMLEY v.). See Cases Nos. 1,688 and 1,689.

Case No. 14,627.

UNITED STATES v. BOUGHER.

[6 McLean, 277;[1] 2 Pittsb. Leg. J. 32.]

Circuit Court, D. Ohio. Nov. 25, 1854.

PENAL ACTION—UNITED STATES—INFORMER—DISTRICT COURTS.

1. The 41st section of the steamboat act of 1852 [10 Stat. 75], declaring that "all penalties imposed by this act, may be recovered in an action of debt, by any person who will sue therefor," does not preclude the United States from suing for a penalty in an action of debt.

[Cited in U. S. v. Willetts, Case No. 16,699. Distinguished in U. S. v. Laescki, 29 Fed. 701.]

[Cited in State v. Sinnott, 15 Neb. 472, 19 N. W. 613.]

2. The right to sue under this provision as an informer being limited to a person, the United States cannot sue in that character.

3. But when an act is declared to be unlawful by statute, and a penalty is prescribed, a person who violates the law may be proceeded against by indictment, or by an action of debt, if no mode of suing for the penalty is specially provided by the statute.

[Cited in Stockwell v. U. S., 13 Wall. (80 U. S.) 543; Re Rosey, Case No. 12,066; U. S. v. Craft, 43 Fed. 375.]

4. At common law, debt is a proper action to recover a pecuniary penalty imposed by statute.

5. By the 9th section of the judiciary act of 1789 [1 Stat. 76], the district courts have cognizance of all suits at common law, where the United States sue, and the matter in dispute amounts to one hundred dollars, exclusive of costs.

[This was an action of debt for a penalty by the United States against James Bougher. Heard on a demurrer to the declaration.]

Mr. Morton, U. S. Dist. Atty.

A. E. Gwynne, for defendant.

LEAVITT, District Judge. This is an action of debt prosecuted in the name of the United States. The declaration avers, in substance, that the defendant, being the master of a steamboat used for the transportation of passengers on the Ohio and Mississippi rivers, employed a pilot to serve on his boat, without being licensed for that purpose, as required by law; and that thereby he has incurred a penalty of one hundred dollars. A demurrer has been filed to the declaration; and it is insisted in argument, that the United States cannot maintain an action of debt for the penalty, and that it can only be recovered in a suit brought by an informer. The 10th sub-division of the 9th section of the act of the 30th of August, 1852 [10 Stat. 67], to amend the act "to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam" (Pamph. Laws, U. S. [1st Sess. 32d Cong.] p. 61) declares that "it shall be unlawful for any person to employ, or any person to serve as, an engineer or pilot on any steamboat" used for the conveyance of passengers, who has not procured a license from the proper inspectors for that purpose; and it provides that any one violating this provision, shall forfeit one hundred dollars for each offense. The 41st section of the act just referred to, provides that "all penalties imposed by this act may be recovered in an action of debt, by any person who will sue therefor, in any court of the United States." This is the only provision of the

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

statute, relating to the manner of enforcing the penalty for employing an unlicensed pilot, or serving as an unlicensed engineer. It is true the 1st section of the act, provides that the owner of a steamboat, for the offense of permitting a boat to be navigated with passengers on board, without complying with the terms of the act, shall be subject to the penalties contained in the 2nd section of the act of July, A. D. 1838 [5 Stat. 304]. But it is very clear this provision cannot, on any just principle of interpretation, include or apply to the case set out in the declaration in this action. And it is equally clear, that this action is not sustainable upon the 11th section of the act of 1838 [5 Stat. 306], which enacts that penalties imposed by that act, may be sued for and recovered, in the name of the United States, in the district or circuit court of the proper district. That provision is restricted in its terms to offenses created by the act of 1838, and cannot be held to extend to those created by the subsequent act, although in its title, the latter statute purports to be an amendment of the former. It was doubtless competent for congress, in the act of 1852, to have declared that all penalties incurred under it should be prosecuted in accordance with the 11th section of the act of 1838. But having failed to do so, it would violate all settled rules for the construction of penal statutes, to hold that the provisions of that section can be transferred to, and made a part of, the act of 1852. The 1st section of the latter act, adopting the provisions of the act of 1838, and prescribing the manner of prosecuting for violations of the act, must be restricted to the cases specified in that section. These, as before noticed, include only offenses by the owner of a steamboat, in fitting out and navigating the same, without complying with the requirements of the statute. Violations of the statute in the service or the employment of unlicensed pilots or engineers, are not specified in the 1st section of the act of 1852. In reference to the manner of enforcing the penalty against the defendant for the offense set out in the declaration, the act of 1838 must be wholly excluded from the consideration of the court. Having thus referred to the statutory enactments relating to this subject, the question raised on this demurrer is, whether the United States can sue in debt, for the penalty which it is alleged the defendant has incurred, under the 41st section of the act of 1852, before cited. The right to sue under this provision is limited to a person; and it is clear that the government, in its sovereign capacity, is not a person to whom this right attaches.

It was strenuously insisted in the argument, that under the provisions of the statute referred to, if the United States could not maintain this action, as an informer, it could not be sustained on any other basis. In other words, that as the 41st section of the act of 1852 provided that all penalties imposed by the act, may be recovered in an action of debt by any person who will sue therefor, in any court of the United States, every other mode of enforcing a penalty under the act is prohibited. On the other hand, it was contended by the counsel for the government, that this is merely a cumulative provision, not intended to abridge or deny the right of the government to proceed in any other mode known to the law, and usually resorted to in practice, but to sanction a remedy deemed necessary to the efficient enforcement of the law, and one which could exist only by express legislative enactment. The latter view is the one adopted by this court, as best suited to carry into effect the intention of the law, and not in conflict with either the provisions of the statute, or any just principles of construction. It is most obvious that the requirements of the statute in relation to steamboats, would have been wholly inefficient, if the enforcement of its penal provisions had been referred solely to the action or interposition of common informers. Such, clearly, was not the intention of congress in the provision referred to, giving an informer the right in all cases arising under the statute to prosecute for the penalties. The words of the statute are merely permissive to an informer to sue, and do not import that that is the sole remedy for its violation. This is also inferable by a reference to the 1st section of the act of 1852, from which it will be seen, as to one class of offenses, the penalties provided and the mode of proceeding authorized in the 11th section of the act of 1838, are expressly adopted.

The right of the United States to prosecute for violations of the act of 1852 is, therefore, in no way affected by the provision securing to an informer a right to sue for the penalties incurred under it. It is most obvious, that it was not designed to restrict the manner of prosecuting for a penalty to one particular form of proceeding, but as authorizing a supplemental or additional remedy.

In this view, the only remaining inquiry is, whether the United States can maintain the action of debt, for the penalty for the alleged offense, without an express statutory provision authorizing such mode of procedure. On this point no authorities were adduced in the argument, nor have I been able to recur to any bearing directly upon it. I suppose, however, that it is hardly a controvertible proposition, that upon the facts alleged in the declaration, the defendant could have been prosecuted by indictment, although the statute does not authorize it in terms. The statute makes it an offense for any one to employ an engineer or pilot on a steamboat, or for any person to serve in such capacity, without a license, and subjects the party offending to a penalty of one hundred dollars. It is silent as to the manner of prosecuting for penalties, except that the 41st section confers

upon an informer a right to sue in debt, in any case arising under the statute in which a penalty has been incurred. But if no one chooses to avail himself of this right by instituting a suit, the guilty person may be proceeded against by indictment. In all cases when an act is declared to be unlawful, and a punishment or penalty is annexed to the doing of the act, it pertains to the sovereignty of the state, through the agency of the judicial department, to punish it by indictment; and it does not require any express statutory authority as the warrant for such a proceeding. Is is not equally clear, upon the same principle, that if the government chooses to waive the right of proceeding in this way, and to adopt the milder form of an action of debt for the penalty, it is competent to do so? It is a long settled principle of the common law, that the action of debt is maintainable to recover a pecuniary penalty imposed by a statute, and when such a penalty is incurred by a violation of the statute of the United States, it accrues to the government, and may be sued for in its name; and it certainly can constitute no just ground of complaint on the part of the person implicated, that he is called upon to answer for the violation of a law, in a civil suit, instead of being arraigned for it, upon the finding of a grand jury.

In addition to these views, it may be stated, that the right of the United States to sue in this court, for the penalty alleged to have been incurred by the defendant, and the competency of the court to entertain the jurisdiction of the case, may be deduced from the clause in the 9th section of the judiciary act of 1789 [1 Stat. 76], relating to the jurisdiction of the district court; which declares that said court shall have cognizance of all suits at common law, where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum of one hundred dollars. 1 Laws U. S. p. 77. This case certainly meets all the conditions of this clause. It is a suit at common law, brought by the United States, and the matter in dispute amounts to one hundred dollars. Demurrer overruled.

Case No. 14,628.

UNITED STATES v. BOWEN.

[2 Cranch, C. C. 133.][1]

Circuit Court, District of Columbia. April Term, 1817.

LARCENY—GOODS AND CHATTELS—BANKNOTES.

Banknotes are not goods and chattels, nor money, and stealing them is no offence at common law.

[Cited in U. S. v. Carnot, Case No. 14,726.]

Indictment, at common law [against Henry Bowen, a negro], for stealing a banknote. Verdict, guilty.

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

Judgment arrested; THE COURT (THRUSTON, Circuit Judge, absent) being of opinion that it was no offence at common law to steal a banknote.

Case No. 14,629.

UNITED STATES v. BOWEN.

[4 Cranch, C. C. 604.][1]

Circuit Court, District of Columbia. Nov. Term, 1835.

ASSAULT WITH INTENT TO KILL—DRUNKENNESS—ACT OF VIOLENCE—BURGLARY—SLAVE.

1. If a slave in Washington, D. C., enters the sleeping-room of his mistress in the night time with an axe in his hand, with intent to kill her, she being then in bed in the room, and is prevented, by the waking and noise of the mistress and her servant, and by being seized and forced out of the room, he is guilty of an attempt to murder a person, under the Maryland act of assembly, 1751 (chapter 14, § 2). Drunkenness is no justification; but may be given in evidence to enable the jury to judge of the intent.

2. If a slave, lodging in the house, lifts the latch of his mistress's sleeping-room in the night time, and enters with an axe in his hand, and with intent to murder her, he is guilty of burglary; and, to constitute an attempt to murder, no further act of violence is necessary.

Indictment of a slave for an attempt to murder his mistress; and for burglary. The defendant [John Arthur Bowen] was the slave of Mrs. Anna Maria Thornton. The indictment contained three counts. The first was under the Maryland law of 1751 (chapter 14, § 2), which enacts that "slaves, convicted of attempting to murder any person, shall suffer death without benefit of clergy;" and charged the prisoner with an attempt to murder his mistress, Mrs. Thornton, without stating the means, or manner, of the attempt. The second charged the attempt to be with an axe. The third, was for burglary in breaking the dwelling-house of Mrs. Thornton in the night time, with intent to murder her.

Mr. Jones, for the prisoner, insisted that the first count was too general; as it charges the simple attempt to murder, without saying by what means, or in what manner. What is an attempt? An unexecuted intent is not punishable by human laws. There must be some overt act testifying the intent, and amounting to an attempt. The having a weapon is not sufficient. If I have a pistol and do not present it, it is no attempt to kill. If the prisoner had raised the axe in a violent and threatening manner, within striking distance, and had only been prevented by the interposition of some superior force, it would have been an attempt. As to the third count. There was no burglary. The prisoner was lawfully in the house; and the raising the latch of an inner door, is not such a breaking as is necessary to constitute burglary.

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

Mr. Key, U. S. Atty., contra, admits there must be an intent and an attempt to murder; but it is not necessary that he should raise the axe. It is sufficient that he took the axe and went into the chamber with intent to murder his mistress. It is an attempt; and drunkenness is no excuse; perhaps an aggravation. 3 Chit Cr. Law, 1107; 1 Hale, P. C. 554; Edmonds' Case, Hut. 20; Kel. 67; 3 Inst. 5, where a servant lodging in the same house, unlatched the door of his master's bedroom with intent to kill him, was hanged for the burglary.

Mr. Key, then prayed the jury: (1) "That if they believe from the evidence that the prisoner took the axe, and entered with it into his mistress's room, with the intent to murder her, and was prevented by the awakening of his mistress and her servant, and by their noise, and his being seized and forced out of the room, from executing his intention, then the prisoner is guilty under the act of assembly." (2) "That if the jury believe from the evidence that the prisoner was drunk when he formed and attempted to execute the above intention, it does not excuse the prisoner."

Which instructions THE COURT gave, but added (THRUSTON, Circuit Judge, contra) that the intoxication of the prisoner is a fact proper to be considered by the jury, in forming their opinion of the intent with which he took the axe and entered his mistress's chamber.

THE COURT, also, at the prayer of the United States attorney, instructed the jury, that if they believe from the evidence, that the prisoner, in the night time, unlatched his mistress's door, and with an axe, entered the room with intent to kill her, then he is guilty under the third count of the indictment.

Whereupon, Mr. Jones, for prisoner, prayed the court to instruct the jury as follows: (1) "But if the jury find that the prisoner did, in fact, nothing more, in execution, or towards the execution of his supposed felonious intent, than to enter the room with the axe in his hand; and that after he came into the room he made no motion or attempt whatever to raise the axe against his mistress, or to strike at her, and proceeded no further than merely to enter with such intent, then it is not an attempt to murder, within the meaning of the act of assembly, although expelled from the room immediately." (2) "But the intoxication and consequent mental excitement and derangement of the prisoner, is proper to be considered by the jury, as accounting for his misconduct, and inferring the absence of a malicious and felonious intent;" which two instructions the court refused to give.

The prisoner was convicted, and on the 23d of January, 1836, sentenced to be hanged on the 26th of February; but he was reprieved from time to time and finally pardoned at the instance of his mistress.

Case No. 14,630.

UNITED STATES v. BOWERMAN.

[14 Int. Rev. Rec. 122.]

District Court, D. Maryland. Oct. 7, 1871.

EMBEZZLEMENT BY PUBLIC OFFICERS—DEPUTY COLLECTORS.

[1. A deputy collector is a "public officer," within the meaning of the subtreasury act of 1846, relating to the embezzlement by public officers of public moneys entrusted to them.]

[2. Sums of money paid to a deputy collector at the custom house by inspectors of hulls and engines, as money received by them from engineers and pilots under the act of 1852, as well as the proceeds of the sale of goods forfeited to the government under the revenue laws, are "public moneys," within the meaning of the said statute.]

The trial of Richard N. Bowerman, late deputy collector of customs at Baltimore, on the charge of embezzlement, was commenced in that city on Wednesday, September 27, and concluded October 7 with a verdict of guilty on the part of the jury. The indictment contained five counts, the first one charging the accused with embezzling the funds of the government to the amount of $25,000, but failing to specify in what amounts and at what particular periods the defalcations were made. The second count charged him with appropriating to his own use, in July, 1870, the sum of $50, collected from John Menshaw, supervising inspector of steamboats. The third count charged him with appropriating the sum of $996, collected in March, 1870, as receipts of customs. The fourth count charged him with appropriating $180, collected in June, 1870, from Wm. O. Saville, of the local board of steamboat inspectors, and the fifth count with appropriating $294, collected in November, 1869, from John C. Hill, superintendent of public buildings. The defence objected, at the outset, to the indictment on the ground that it makes a charge of embezzlement without alleging from whom the money was received, and that the defence was at the mercy of the prosecution, and that the drawing up of the indictment debarred the prisoner from a chance of defence. This objection was overruled as coming too late.

A written statement was presented from John L. Thomas, collector, giving the particulars of his examination into the defalcations of the accused. He reported that he found that General R. N. Bowerman had taken a check from the back part of his gold check book (leaving no stub or margin), numbered it 72, dated June 2, 1869, and made payable to F. W. Brune & Sons, "or bearer," for $5,800, said check endorsed on its face by T. H. H. Leary, cashier of the depositary. This check was used by Gustav Toel, attorney for Messrs. F. W. Brune & Sons, on that day, in part payment of the duty on one hundred and fifty hogshead of sugar imported by them in the brig Sarah Crowell. Said sugar was drawn from warehouse on the 15th day of June, 1868, nearly twelve months before the

duty was paid. He also found that General Bowerman had received on adjustments of entries of copper ore imported into this port by the Baltimore Copper Company, Henry Martin, president, which he has not deposited with the cashier of customs of the port of Baltimore, between the 3d day of May, 1860, and the 3d day of June, 1870, $1,888 44. In the revenue marine account, eleven checks, amounting in all to $1,195 24, were found, signed by General Bowerman, special deputy collector, for which there are no vouchers; in the light-house account, eleven, amounting to $5,347 25. In the collector's account were found checks to the amount of $1,215 06, signed by General Bowerman, which were used to pay storekeepers during the months of May and June, 1869, for which there are no vouchers in this account. This amount was collected from proprietors of private bonded warehouses during those months, and has never been deposited to the credit of the storage account. Twenty-two other checks, for which there were no vouchers, were found, amounting to $4,509 69. Various other defalcations are also reported by the collector. At the close of the proceedings of the first day the bail of General Bowerman was surrendered, and the court not agreeing to permit the accused to remain under the surveillance of a bailiff until the close of the trial, ordered his committal to jail.

Mr. Thomas, the collector, in his testimony before the jury, stated the manner in which he became possessed of the papers implicating General Bowerman. In substance he said that while General Bowerman was absent on an excursion that he (witness) took charge of the desk and an iron safe used by the accused, and upon forcing open the doors of the safe he found in it a small tin box filled with papers, and he also obtained a quantity of papers from the desk. These papers were taken into the private office of the witness and there examined, and among them was a large bundle of warehouse entries showing that a vast quantity of copper ore that had been entered at the custom-house had not been properly accounted for by the accused. After he had examined the papers found in the safe and desk, he had placed them in the custody of Alexander Miller and Charles E. Suter, with instructions for them to examine into all the acts of General Bowerman from the date of his commission until the time he was removed. This occurred while General Bowerman was absent on a visit down the bay, and when he (General B.) returned to the city, Mr. Miller and Suter had ascertained that the defalcation amounted to upwards of $20,000. When General Bowerman arrived in the city he was requested by witness to call at his house. He complied with the request; and after attempting at first to explain the irregularities in his accounts, finally began crying, and said: "Mr. Thomas, I will make no concealment from you; I have abused your confidence, and all that you have charged against me is true." Mr. Thomas then at considerable length stated, as far as he was able, the exact conversation had between himself and General Bowerman, and which in substance is as follows: When asked what he had done with the embezzled money, General B. said that he had spent every dollar of it. The $1,120 drawn from the light-house check was deposited by him with the cashier of customs for the purpose of covering up a defalcation in that quarter. He acknowledged that his defalcations would amount to $14,000, and Mr. Thomas would be held responsible for the amount. He admitted that his peculations began shortly after he was appointed by Collector Webster, and continued until the day of his detection, and that which has been embezzled since Mr. Thomas has been collector has been used to cover up the defalcations made in Colonel Webster's time. He stated that following the induction of Collector Thomas into office, by a misrepresentation he caused Mr. Thomas to sign a special deposit for $500, asserting that the money had been collected from a fine. The fine had never been collected and the money was used by the accused. General Bowerman then said to Mr. Thomas: "I will do anything to relieve you of the responsibility that I have imposed upon you, and all I ask is that I may help you." Referring to the defalcation in general, he admitted that he had appropriated dues collected for the entries of copper ore and goods sold, and that he would induce his wife to make over her property to Mr. Thomas in part liquidation of the defalcation. To this tender Mr. Thomas answered that it would be a hard case to impoverish a wife for the misdeeds of a husband, but that as the government had demanded from him the amount of the defalcation, he (Mr. T.) would have to secure himself and accept the tender of property. After this conversation General Bowerman requested permission to go to his home, promising Mr. Thomas that he would report himself at the custom-house at eight o'clock on the following morning. To this Mr. Thomas consented, and on the following morning General Bowerman reported at the custom-house as promised. After stating the above, Mr. Thomas requested leave to relate other conversation which ensued, and which he had failed to make mention of at the proper time. It was to the effect that General Bowerman admitted that, in 1868, he used for his own benefit about $5,000, collected from F. W. Brune & Bro. as duties on sugar. Other admissions of guilt were made by General Bowerman.

The United States prayed the court to instruct the jury that if they shall find from the testimony that the prisoner heretofore (as given in evidence) was a deputy collector of the customs for the customs district of Baltimore, and that then and while he was such deputy received the several sums charged in the first four counts of the indictment—that is to say, the sum of $1,120 effectively char-

ged in the first count, and the several sums charged and specified in the second, third, and fourth counts—or any of said sums, or portions thereof, and that he thereupon converted the same to his own use in any manner whatever, then they shall find the prisoner guilty of the counts or count in respect to which they find such reception and conversion. That if the jury shall believe from the evidence that the prisoner was, at the time of the offences charged in the first, third, and fourth counts of the indictment, deputy collector of the customs for the customs district of Baltimore, then he was a receiver of public money within the intent of the acts of congress in the indictment mentioned; and if the jury shall find the several sums charged in the said counts to have been received by him and embezzled were in truth and fact received by him as such deputy collector of the customs, and were afterward by him in any manner whatever converted to his own use, then he is guilty of embezzlement in respect to the count or counts in respect whereof they may find such embezzlement. If the jury shall find the prisoner guilty of one or more counts of the indictment, then they shall ascertain what amount of money appertaining to the sum or sums in the said count or counts charged the prisoner in fact embezzled. That if the jury shall find that the prisoner drew the check under the first count given in evidence, and used the proceeds thereof to cover up a fraudulent indebtedness of him to the government, then he is guilty of the embezzlement of such proceeds in like manner as if he had appropriated said proceeds to any other use.

The prayers of the defence were as follows: The government having offered in evidence the appointment and commission of the defendant as special deputy collector under and by virtue of the act of 1799, § 22, as well as his nomination and appointment as deputy collector under and by virtue of the provisions of the act of 1817, § 9, and having alleged in the indictment and the several counts thereof that at the time of the alleged commission of the several acts of embezzlement, respectively, therein set forth that the said defendant was authorized to act and was acting as special deputy collector, the defendant prays the court to instruct the jury that the burden of proof, by reason of the premises, is upon the government to satisfy their minds as a matter of fact that, at the time and times of the alleged embezzlement or embezzlements set forth in the respective counts of the said indictment, the defendant was acting as special deputy collector on account of the necessary absence or sickness of the said collector and not otherwise, and that unless their minds are satisfied of such fact by proper proof, then their verdict must be for the defendant. If the jury shall find, from all the evidence in this cause, that the defendant was an officer of the United States, charged by the act of congress of August 6, 1846, mentioned in the indictment, with the safe-keeping, transferring, and disbursement of the public moneys, then, in order to their rendering of the verdict of guilty upon either or any of the several counts of the said indictment, they must further find that the money alleged to have been by him embezzled, as set forth in each and every respective count of said indictment, was public money of the United States, and that the same came into his hands in the ordinary and regular line of his duty, and was by him converted to his own use, with intent to defraud the government of the United States. That, in considering the first count in the indictment, the jury are limited to the sum of eleven hundred and twenty dollars, alleged to have been embezzled on the 22d day of September, 1869, and cannot take into consideration any other sum or sums of money alleged to have been embezzled at any other time or times. That the burden of proof is on the government to satisfy the jury that the defendant did receive and feloniously did take and convert to his own use the public money set forth in either counts of the indictment in order to warrant a verdict of guilty upon such counts. That the defendant at the time or times named in the indictment was not an officer or person charged by the act of August 6, 1846, with the safe-keeping, transfer, and disbursement of the public money.

GILES, District Judge (charging jury). I think I but say what every person who has been a witness of this trial will unite with me in saying, that no case was ever more faithfully tried: the indictment was drawn up with all the care and skill which characterizes the assistant United States district attorney, of whose indictments I have quashed but one of the many which he has drawn while serving the government in that office. As to this district, no matter what may be the fact elsewhere, this case is one of first importance (for the employees of the government for this district have been, so far as known, faithful officers), and hence it required careful consideration. Never since I have been on the bench has a prisoner been defended more ably; the learned counsel who last addressed the court (Mr. Mathews) has exhibited throughout this cause eminent ability, an ample preparation and a careful industry, which, if persevered in, must soon place him in the front rank of the profession; certainly the force and qualities which he has shown have proved him to be a worthy colleague of the other counsel (Mr. Whitney), in regard to whose characteristics in criminal cases it is unnecessary for the court to add one word of praise. He dissects a criminal case with the same coolness and skill with which Baron Larey or Surgeon Smith of this city would use the dissecting knife upon a patient strapped to his board. This case then being one of such great interest I have examined the

points involved in it with great care. The first question that arises is, "Was the prisoner an officer within the meaning of the act of 1846?" The learned counsel for the defence pressed the argument that he was not such an officer as would come under the provisions of that act, but a mere employee of the custom-house, with great earnestness, and to sustain it they quoted the act of 1799 and from the Opinions of the Attorneys-General (volume 4, p. 26); but I said then as I say to-day, that if any attorney-general had given such an opinion in view of the act of 1817, that it was not law, and I found upon examination last night that no such position had been taken by Mr. Legare, of South Carolina, whose opinion my friends referred to, and that they must have been misled by reading the headnote, for that opinion of his was based upon the 22d section of the act of 1799, and he says nothing in it of the act of 1817, and no doubt was not aware of it at the time. If my friends had read on a little further they would have found that upon page 163 that eminent attorney-general sustains me in the opinion I shall deliver to-day. Before quoting this opinion, however, I will say that I find upon reference to the acts of congress that the act giving the power to collectors to appoint inspectors is in the very words of the act of 1817, which gives him power to appoint deputies.

GILES, District Judge, then read from the act (3 Stat. 215), calling Mr. Whitney's attention to the fact that the word used was "employ," and not "appoint," after which he quoted at length from the opinion, which was in the form of a letter addressed to the secretary of the treasury, dated March 24, 1843, in relation to the character of inspectors, and which held that they were officers of the government, and came under the act of 1846. Then resuming, he said: Now, the act of 1817 gave this permanent power to the collector, and congress provided afterward an annual compensation for the officer, by the act of 1851. Therefore I look upon the deputy collector as a permanent officer of the government, who obtains his appointment from the secretary of the treasury, and remains in office after his superior goes out, until his (the deputy's) successor is appointed and qualified. But is he an officer within the meaning of the subtreasury act (the act of 1846)?

The judge then read the sixth section of the act, calling special attention to the general words used in it: "All public officers of whatsoever kind." These words embrace, said he, any officer of the government in whose possession the public funds may at any time be deposited, in whatever manner they be so deposited, and the sixteenth section declares it to be a felony for these officers to embezzle these funds. Now, this act makes it the duty of certain officers to keep accounts with the government, and afterward makes these accounts prima facie evidence against them on a charge like this; but it would be doing violence to the language of congress to suppose that this act was confined only to those officers who have to keep accounts with the government. I should myself have had no difficulty upon this point if it had been a new question, and should have arrived at a different conclusion upon it than the judges in Philadelphia; but it is not a new question, and I am bound by the decision of the supreme court in the case of U. S. v. Hartwell, 6 Wall. [73 U. S.] 385, and no one can have any doubt after that decision. The officer tried in that case stood upon the same footing as a deputy collector; he was appointed under the 23d section of the act of 1866; and the supreme court says he was a public officer, and a person charged with the safe-keeping of the public money. The judge then read from the opinion of the court, and showed where it applied to the case at bar. I am aware, said he, that Justice Grier, with two others, dissented, but the opinion of the majority, delivered by Justice Swayne, binds this court, and I have no doubt from it that the deputy collector is an officer who comes under the act of 1846.

I now come to another branch of the case, and the only one upon which the United States district attorney and myself differed. Here I agree with the counsel for the defence, that before there can be an embezzlement there must be trust and confidence; so says the act—"moneys entrusted." Hence I permitted the district attorney to give evidence of what the practice of the office had been at the time as to the fact that the deputy collector was permitted to receive the public money, and that as a public officer he was therefore entrusted with it.

One word more: There was some objection made to the indictment, that it charges that these offences were done by General B. both as a deputy collector and a special deputy; but that part of it is only descriptive and not material. The charging part does not charge him in both capacities.

One word, in conclusion: Something has been said in reference to the manner in which the affairs of the custom-house were conducted while the prisoner was there. All I can see, from the evidence, as to what the collector did, was that he placed unlimited confidence in a man who had bared his breast for his country in the shock of battle, and defended its flag amidst its smoke. This was a fault that we all might have fallen into.

GILES, District Judge, then read the instructions to the jury: "First. If the jury shall find from the evidence in the case that at the time of the alleged embezzlement of the several sums given in the evidence the prisoner was a deputy collector in the office of the collector of this port, and as such received the said sums of money, and so received them in furtherance of a practice then prevailing in said office, and that he subsequently converted them to his own use, he is

guilty upon the second, third, and fourth counts in the indictment, or under any one or more of them in respect to which the jury shall find such reception and conversion. Second. And if they shall further find that in pursuance of the said office he was authorized to draw checks on the depositary for the disbursements of the office, and that as such deputy collector he drew the check given in evidence under the first count, and appropriated the same to cover a similar amount of the public money unlawfully used by him, he is guilty of embezzlement under said count. Third. That when any sum or sums of money were paid by the inspectors of hulls and engines as money by them received from engineers and pilots, under the act of 1852, and proceeds of the sale of goods forfeited to the government under the revenue laws are paid at the custom-house to the deputy collector, the said sums are public moneys, within the meaning of the act of 1846; under which the indictment is drawn. Fourth. That in considering the first count in the indictment the jury are limited to the sum of $1,120 alleged to have been embezzled on the 22d of September, 1869, and cannot take into consideration any other sum or sums alleged to have been embezzled at any other time or times, except as the jury may find such alleged embezzlement may be evidence of the intent with which the prisoner drew and used the check for the said sum of $1,120. Fifth. That the burden of proof is on the government to satisfy the jury that the prisoner did receive and convert to his own use the public moneys set forth in the several counts in the indictment, in order to warrant a verdict of guilty upon one or more of said counts."

Subsequently, GILES, District Judge, gave the following additional instruction to the jury: "There being no evidence to sustain the fifth count in the indictment, the jury will acquit the prisoner under the count. If the jury shall find him guilty under any of the other counts, they will by their verdict ascertain the amount embezzled under such count."

The jury returned a verdict of "Guilty" upon the first count, as to the sum of $1,120; upon the second count, as to $996.72; upon the third count, as to $50; and upon the fourth count, as to $180. Upon the fifth count, "Not guilty." The verdict was recorded, and the court adjourned until this morning. After the adjournment, GILES, District Judge, said that sentence would be suspended until after the trial of the other cases, and that the case of the United States v. Colonel Wilson had been set for trial on the 16th, and the case of the United States v. Smyth for trial on the 17th. The penalty for the offence of which General Bowerman has been convicted is imprisonment for not less than six months nor more than ten years in the jail or penitentiary, as the court may direct, and a fine of double the amount of the verdict of the jury.

Case No. 14,631.

UNITED STATES v. BOWMAN.

[2 Wash. C. C. 328.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

PERJURY — INDICTMENT — AVERMENT OF TIME OF COMMITTING OFFENCE.

Where an indictment for perjury did not state the day upon which the trial took place, and on which the defendant was sworn in the case in which the perjury was alleged to have been committed, the court arrested the judgment.

[Cited in Rhodes v. Com., 78 Va. 696; Dill v. People (Colo. Sup.) 36 Pac. 231.]

The indictment states, that at a circuit court, held for the district of Pennsylvania, at Philadelphia, in said district, on the 11th of October, 1808, before the justices of that court, a certain indictment was found by the grand jury, then and there empannelled and sworn, to inquire against one J. S. Hutton, mariner, for that, on the 20th of September, 1807, a certain schooner, named the Matilda, a vessel of the United States, was unlawfully and voluntarily employed in the transportation and carrying of slaves from one foreign place to another, viz. from Bravo, a foreign place, to certain other foreign places mentioned in the indictment; and that the said J. S. Hutton, then and there mate of said schooner, did then and there voluntarily, &c., serve in the capacity of mate on board said vessel, the same being then and there, voluntarily and unlawfully employed in the carrying slaves from one foreign place to another, against the form, &c.; and the said J. S. Hutton, being in due form arraigned at the bar, in the said circuit court, upon the said indictment, pleaded not guilty; and issue being joined, the said J. S. Hutton was thereupon put on his trial, and was in due manner tried, at the said circuit court, by a jury, for the said misdemeanor, in said indictment alleged; that at the said trial, so then and there had as aforesaid, W. Bowman appeared as a witness on behalf of the United States upon said trial, and was sworn, and took his corporal oath before the said judges, (again naming them, and stating that they had authority to administer the oath,) and being so sworn, the said Bowman, intending to cause the said J. S. Hutton unjustly to be convicted of said misdemeanor, falsely, &c. did depose that (here follows a statement of his evidence, which fully supported the indictment against Hutton;) whereas, in truth and in fact, the said schooner Matilda never did proceed from, &c. (and so denying the whole of the defendant's testimony, and averring its falsity.)

The objections made in arrest of judgment, are, that the time when the offence was committed is not sufficiently averred; that it is not averred, that the testimony given by

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

the defendant was material; and that it is not averred, that Hutton was a citizen of the United States, without which, no offence was committed. Cases cited in support of this objection: 2 Hawk. P. C. c. 25, §§ 75, 78, 83; 1 Term R. 69; 5 Term R. 316; Doug. 193; Cowp. 230; 5 Esp. 259; Cro. Eliz. 148; 7 Mod. 101.

Mr. Dallas cited Cr. Cir. Comp. 202; 1 Lil. Ent. 297; 4 Wentw. Prec.—to show, that all that is material is alleged; and he contended, that if the oath appears on the face of the indictment, to have been material, an allegation is not necessary—aliter, if you wish to connect the oath with the point at issue. As to the time, it is sufficiently averred—the words "then and there," in the latter part of the indictment, sufficiently connecting the time of taking the oath, with the 11th October, the time of holding the court.

WASHINGTON, Circuit Justice. The time when the false oath was taken, is not sufficiently alleged. The indictment states, that the indictment against Hutton was found at a circuit court held on the 11th October, 1808, before BUSHROD WASHINGTON and RICHARD PETERS; that Hutton, against whom it was found, being in due form arraigned upon the indictment, (not saying when,) pleaded not guilty, and issue being joined, Hutton was put on his trial, (not saying on what day,) and was tried. The "then and there," afterwards mentioned as to the evidenc of Bowman, plainly refers to the trial, but that has no time to refer to. In the case of Rex v. Aylett [1 Term R. 63], the day on which the cause was heard, and when the oath was taken, is expressly stated. In the case of Rex v. Dowlin [5 Term R. 311], the indictment stated, that Kimber was tried on the 7th June, on an indictment, then and there depending against him, and that Dowlin, on said trial, on said 7th June, took a false oath, &c. For this reason, therefore, the judgment must be arrested.

Case No. 14,631a.

UNITED STATES v. BOX OF DRY GOODS.

[Cited in U. S. v. The Francis Hatch, Case No. 15,158. Nowhere reported; opinion not now accessible.]

UNITED STATES (BOYD v.). See Case No. 1,749.

Case No. 14,632.

UNITED STATES v. BOYDEN et al.

[1 Lowell, 266.] [1]

Circuit Court, D. Massachusetts. July, 1868.

INTERNAL REVENUE — CONSPIRACY TO DEFRAUD — INDICTMENT—DESCRIPTION—CAPTION—REVENUE OFFICER—NEW TRIAL—JUROR ASLEEP.

1. In an indictment under the act of March 2, 1867, § 30 (14 Stat. 484), for a conspiracy to defraud the United States, the subject-matter of the conspiracy is sufficiently described as, "the taxes arising from and imposed by law upon certain divers proof gallons and quantities of distilled spirits, distilled in the United States, then and there situated in certain bonded warehouses," describing the warehouses. The precise kinds, quantities, and qualities of spirits need not be stated, because the description is sufficient to show that the goods were liable to taxes.

[Cited in U. S. v. Sanche, 7 Fed. 720.]

2. The overt acts need not be laid as having been done "to effect the object" of the conspiracy, although these are the words of the statute; it is enough to say that they were done "in pursuance" thereof, which are the usual words in conspiracy.

[Cited in U. S. v. Bayer, Case No. 14,547; U. S. v. Rindskopf, Id. 16,165; U. S. v. Nunnemacher, Id. 15,903; U. S. v. Stevens, 44 Fed. 141.]

3. An officer of the revenue may be joined with other persons in such an indictment, without charging him as an officer, notwithstanding that by the act of March 31, 1868, § 6 (15 Stat. 60), such an officer is liable to a greater penalty than other persons. But under such an indictment he can only be sentenced to the lesser punishment.

4. The caption of the indictment may be referred to to show that the United States mentioned in the body of the indictment are the United States of America.

5. If a defendant is aware that one of the jurors is asleep during some part of the trial, he should call attention to the fact at the time. It is not ground for a new trial if first brought forward after verdict.

The defendants [J. A. Boyden and others] were indicted under Act March 2, 1867, § 30 (14 Stat. 484), for a conspiracy to defraud the United States of the taxes arising from and imposed by law upon certain divers proof gallons and quantities of distilled spirits, distilled in the United States, then and there situated in certain bonded warehouses (described). The indictment contained twelve counts, and filled sixty-two folio pages, reciting in great detail the mode in which the alleged conspiracy was carried into effect. After a general verdict of guilty against Boyden and Cleaves [Case No. 16,669], the former moved in arrest of judgment, and the latter in arrest and for a new trial. Cleaves was a revenue officer, but was not charged as such in the indictment.

H. W. Paine and R. M. Morse, Jr., for Boyden.

(1) The description of the goods is not sufficient; neither quantity nor quality is given, and nothing by which they can be identified. The decision in Reg. v. Blake, 6 Q. B. 126, which sustains such an indictment, has been doubted by the best text writers. And see Reg. v. King, 7 Q. B. 795.

(2) The overt acts are laid as having been done "in pursuance" of the conspiracy, while the language of the statute, which should have been strictly followed, is "to effect the object" of the conspiracy.

G. A. Somerby and L. S. Dabney, for Cleaves.

Besides the objections already taken, Cleaves relies upon others:

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

(1) The evidence showed him to be an officer of internal revenue. Now, by St. March 31, 1868, § 6 (15 Stat. 60), such an officer, who shall conspire or collude with any other person to defraud the United States, shall be held to be guilty of a misdemeanor, and on conviction, is liable to an imprisonment of three years, which exceeds the maximum of punishment under the act of 1867, and therefore repeals it so far as officers are concerned.

(2) The person whom it was intended to defraud is ill laid in the indictment, which charges that the "United States," instead of the United States of America, were the objects of the conspiracy.

(3) One of the jurors was asleep during a part of the trial.

G. S. Hilliard, U. S. Dist. Atty., and H. D. Hyde, Asst. U. S. Dist. Atty.

LOWELL, District Judge. The goods are sufficiently described to show that they were liable to a tax. The internal revenue laws tax all distilled spirits as such, without further description, and with a few trifling exceptions, which are strictly exceptions, so that even in an indictment for distilling without due authority, it is not essential to describe the particular kind of spirits. The case of Reg. v. Blake, 6 Q. B. 126, is remarked upon by Sir W. Russell, in the late edition of his work on Crimes (vol. 3, p. 152, note), on the ground taken at the argument of the case itself, that "certain goods" did not show that they were in fact dutiable. It was admitted in that argument that a description like the one in Rex v. Everett, 8 Barn. & C. 114, "certain goods and merchandises, to wit, spirituous liquors," would have been well enough. A more accurate description is not required, because the corrupt agreement is the gist of the offence, and it may be, as was the fact here, that the parties had not the precise bales or packages of goods in view when they made the agreement. Quantity and quality are not important in a case of this kind, and the description used in the statutes imposing the tax is sufficient. In the case cited from 7 Q. B., the persons intended to be defrauded were merely described as certain liege subjects of the queen, being tradesmen. The simple mode of describing a person is to name him, or if he is unknown, to allege the fact, but to designate goods by their statutory and commercial name is enough.

The rule of pleading which requires a crime created by statute to be laid in the very words of the statute, has perhaps been carried too far in some cases. But it has no proper bearing upon the second point taken here, because the acts set out are no part of the offence, and may in themselves be innocent. The purpose of the law is that a mere agreement, however corrupt, shall not be punished as a crime, unless it has led to some overt act; and any form of language which shows that such an act has been done to carry out the agreement, is sufficient. Thus in treason, the overt act is never charged to be an "open deed," nor is it usually alleged that the compassing, &c., were expressed in any "overt act or deed" in the exact language of 25 Ed. III., or 36 Geo. III., c. 7. So in New York and New Jersey, where the statutes require some act to be done to "effect the object" of the conspiracy, indictments follow the more usual language adopted in this case, and charge the acts as having been done "in pursuance" of the agreement: People v. Fisher, 14 Wend. 9; People v. Chase, 16 Barb. 495; State v. Norton, 3 Zab. [23 N. J. Law] 33.

In Cleaves's case, the fact that he is an officer does not require the government to charge him as such. He is still a person, and if the government is content with the lesser punishment, they may proceed under the general statute. It has been the practice in this court, under the post-office acts, which punish clerks and other persons employed by the department much more severely for tampering with the mails than persons not under any such engagement, to proceed against clerks, where justice seemed to require it, without charging them in their official capacity. Under St. 52 Geo. III. c. 143, a similar practice was upheld. Rex v. Salisbury, 5 Car. & P. 155; Rex v. Brown, cited Russ. & R. 32, note a, and more fully, 2 Russ. Crimes (4th Ed.) 570. So 7 & 8 Geo. IV. c. 29, § 46, punishes very severely servants who steal from their masters; and it was held that a servant might be convicted of a simple larceny. Reg. v. Jennings, Dearsley & B. Crown Cas. 447. Where the act may be charged as an offence against two different statutes, as, for instance, where the conspiracy and the completed offence are separate crimes, or where the crime charged includes in its definition one of less magnitude, the conviction may be of either crime. Bank Prosecutions, Russ. & R. 378; State v. Parmelee, 9 Conn. 259; Reg. v. Neale, 1 Car. & K. 591; 1 Denison, Crown Cas. 37. Indeed, in one case it appears to have been held that a defendant who has by one act contravened two statutes, may be convicted under both. State v. Sonnerkalb, 2 Nott & McC. 280. Moreover, in this case the offence must be laid under the act of 1867, which is the only statute of the United States defining conspiracy. The statute of 1868, which punishes officers for that crime, does not define it, but leaves us to the common law, or the statute of 1867, to ascertain what it is. It cannot be the common law, because this would make officers liable without an overt act, while the persons with whom they conspire are not guilty until something has been done to effect the object of the conspiracy; and this cannot be presumed to have been the intention of congress. So that the true construction of both statutes is, that if two

or more persons conspire to defraud the United States, and either of them commits an overt act, and one of them is an officer, the latter is liable to a more severe punishment. But he must be indicted under the earlier act, or under both together, and this is at the option of the prosecutor. If he elects not to charge the defendant as an officer, he can ask only the lighter sentence.

I have fully considered the evidence and arguments bearing upon the motion to set aside the verdict against Cleaves. It is not denied that he did several acts which were contrary to his duty as an officer; but it is urged that these may not have been done as part of the conspiracy, and that he may have been merely bribed. The acts being proved, and some of them having a tendency to aid the conspiracy, and no other probable or possible motive being shown but to aid it, the jury, under the instruction that any act done in furtherance of the corrupt agreement, with knowledge of its existence, would make the person doing it a conspirator, were well warranted in finding as they did.

Upon referring to the caption of the indictment, it seems that the United States mentioned in the body of that instrument are the United States of America.

If one of the jurors was asleep, the defendant should have called attention to the fact at the time. There is no suggestion that it is newly discovered, and I cannot now say that the defendant may not have thought his interests were promoted by the actual course of the trial in this respect. Motions denied.

Case No. 14,633.

UNITED STATES v. BOYER.

Circuit Court, D. Pennsylvania. April 25, 1829.

[This was an indictment against Jacob K. Boyer for counterfeiting. The charge of Mr. Justice Washington is nowhere reported; 3 Haz. Reg. Pa. 289, containing a mere newspaper account of the trial.]

Case No. 14,634.

UNITED STATES v. BOYLAN.

[6 Int. Rev. Rec. 132.]

Circuit Court, S. D. New York. March 27, 1867.[1]

INTERNAL REVENUE TAX—MANUFACTURED ARTICLES.

[The provision of the internal revenue act of 1864 (section 96) exempting from taxation under such act manufactured goods the increased value of which through manufacture does not exceed the amount of 5 per cent. ad valorem, applies only where duties have previously been paid on the articles before manufacture.]

It is agreed that an amicable action in this form be entered in the said court, to be of the same effect as if the process had been regularly issued, been served, and so returned by the marshal; and that the following statement of facts be submitted for the opinion and judgment of the said court, to be of the same effect as if the same had been found by special verdict.

The defendant [James B. Boylan,] is a manufacturer of clothing in the Fourth collection district of the state of New York, and within this judicial district. On the tenth day of May, Anno Domini 1864, defendant entered into a contract with the United States to manufacture for the United States, and to deliver at certain times therein specified, to the proper officer thereof, a certain number of pairs of "cavalry pantaloons," of materials, dimensions, and workmanship, described in said contract; and to receive therefor from the United States the price of four dollars and fifty-two cents for each pair. Under said contract, defendant did so manufacture, and deliver during the month of October, A. D. 1864, eighteen hundred pairs of such "cavalry pantaloons," and did receive for them from the United States the said price The said goods were manufactured of materials, the cash value of which, in the open market, at the said city of New York in the said month of October, A. D. 1864, was more than the price received by defendant for the said goods. But the cost of the process of manufacturing said cavalry pantaloons was more than five per cent. of the value of the pantaloons when manufactured. Defendant in his return of manufactures for the said month of October, A. D. 1864, under the internal revenue laws, made return of the said goods. The assessor of internal revenue for said district in due form assessed upon said goods an internal revenue tax of four hundred and six dollars and eighty cents, being five per centum ad valorem upon the price received by defendant for said goods, said assessor claiming to act under the 94th section of the excise law of June 30, A. D. 1864; and returned the said assessment to the collector of internal revenue for the said collection district of New York, to be by him collected from the said defendant for the use of the United States. For the said tax of four hundred and six dollars and eighty cents so assessed and so returned for collection this action is brought. If the court shall be of the opinion that the said assessment was made in accordance with the proper construction of the provisions of said act, then it is agreed that judgment shall be entered in favor of the United States, for the sum which shall be found to be due to the United States, from defendant. But if the court shall be of the opinion that the said assessment was not made in accordance with the proper construction of the provisions of said act, then it is agreed that judgment shall be entered for the defendant.

D. S. Dickenson,
U. S. District Attorney,
Southern District, N. Y.
Lewis & Cox,
Of Counsel for J. B. Boylan.

[1] [Affirmed in 10 Wall. (77 U. S.) 58.]

Lewis & Cox, for defendant.

Section 96 of the excise law of June 30, 1864 [13 Stat. 272], provides that when goods are manufactured from materials which have paid tax, and the increased value of the manufactures does not exceed five per centum ad valorem, they shall be exempt from duty. By section 86, and by all parallel provisions of the law, the basis of taxable value is that of actual sales, where a sale is made at the time the tax is levied. But where no sale is made at that time, as where goods are consumed by the manufacturer, or shipped to a foreign port for sale, the tax is levied on the basis of "the average of the market value of the like goods, wares, and merchandise at the time when the same became liable to duty." The taxable value of the manufactured goods in this case is the price obtained by actual sales: that is the contract price. The value of the materials for the purposes of this law is the average of the market value of the like materials at the time of these sales; and the "increased value," if any, is unquestionably the excess of the former over the latter. But since it is admitted that at the time when these goods "became liable to duty"—if liable at all—the materials were worth more in the market than the price received for the completed goods; the "increased value," therefore, does not exceed five per centum "ad valorem," and they are exempt. Had Mr. Boylan sold the materials in the market, instead of manufacturing and delivering them to the United States, he would have received more than he did receive. That is to say, by the process of manufacture he did not increase their value at all; and an increase of value by that process to the extent of more than five per centum is necessary to render the product taxable. But it is urged that "the defendant might have made a fair and even an enormous profit upon this transaction, and yet be allowed to obtain exemption." And in what would this profit consist? In the advance in value of materials held by him between the date of the contract and the delivery of the goods. The government desires to introduce a new element into the computation —that of time, and hold the defendant liable on the ground that the goods were increased in value, not by manufacturing them, but by the length of time during which he held them. Assuming this to be true, it could not render the goods taxable. If we suppose the tax itself levied on the increased value of any manufacture, no one would doubt that the increase of value by the process of manufacture is that which is to be taxed. The manufacturer might have held the materials for ten years, or forty: or might have obtained them by inheritance or by gift; still, the taxable increased value is the added value by the process of manufacture. In this case it is admitted that no value was added by this process. What has the tax claimed to do with any additions to their value made by other causes? Any application of such a principle as is here suggested by the government is quite impracticable. For example, let a dealer sell to-day two coats, precisely alike, the one made of cloth purchased recently at one dollar, the other of similar cloth purchased a year since at two dollars; the one would be taxable, the other exempt. Now government contractors must constantly deliver goods made thus at the same time and from similar materials, but the materials purchased at various times. Shall the liability to taxation depend on the accident of being made from one or another piece of precisely similar goods?

It is objected that the contract price, fixed in May, cannot be compared with the value of the materials in October. But we have nothing to do with the time at which the contract was made. Whether made in October, or May, or at any earlier time, it fixed the price, and at this price the goods were sold in October. The actual sale is the standard of the value, and nothing else can be substituted for it.

Does the government argue that the goods were sold in May? The argument implies it; yet nothing is better settled than that "an agreement to sell is not a sale; and therefore no mere promise to sell hereafter amounts to a present sale." 1 Pars. Cont. 528. No property can pass in that which does not exist; the law, therefore, holds that when goods are manufactured under contract the time of sale is the time of delivery and acceptance of the goods. In the present case, the materials used by defendant in October were his property, and had a recognized market value. He manufactured them for the government, and received for them a certain price, by "actual sales," this price being less than the value of the materials. Were the goods increased in value more than five per cent. by the manufacture? The counsel for the government has not attempted to lay down any other rule for determining the increased value, under section 96, than that upon which we claim exemption. No other method can be found which at once accords with legal principles and is susceptible of practical application. Shall the price of the manufactured goods be compared with the price of materials at the date of the contract? But the law fixes the time of sale, that is, of delivery, as the time at which the estimate shall be made. And shall a fact, the increase of value of goods by a certain person, be determined by figures arbitrarily agreed on months before? Or shall we assume that the contractor purchases his materials on the day on which he makes his contract? Contracts are constantly made for future delivery of goods at a price lower than the present value of the materials, in reliance on an intermediate decline. Shall all such contracts be exempted from taxation? The government, in orded to avoid the exemption of these goods,

attempts an explanation of the intent of section 96, as connected exclusively with section 95, which provides for the taxation of certain manufactures only on their increased value. "When the tax is levied only on the increased value of the article, and that is of slight amount, it is manifest that there will be a limit within which the taxation will be burdensome to the consumer while it is not remunerative to government," remarks counsel for the United States, and infers that the 96th section was inserted for the purpose of meeting this case. Unfortunately for this argument, it is directly contradicted by the facts. Section 96 with its proviso, is a part of the original excise law of 1863 [12 Stat. 729], while section 95 was inserted into the law in July, 1864, after the proviso on which we rest had been for nearly a year in operation.

Finally, it is urged that the construction placed by the government on this section "is based on the actual cost of production of the article, which is the true and substantial basis of all commercial dealings, and the only foundation on which a revenue system can safely rest." We simply answer that by a familiar principle of political economy, the actual cost of production of an article never was, nor can be, the basis of commercial dealings; but the price determined by the relations of demand and supply. And still less can it be the foundation of a revenue system. By fixing a standard for taxation which is within the knowledge of no one but the tax-payer himself, it would open a wide door to fraud. It would tax most heavily those who, by mistake or accident were most burdened by the manufacture—that is those least able to bear it. And it would reverse the intent of an excise on manufactures, which is everywhere declared a tax, not on cost, but on the price obtained by actual sales. The increased value under section 96 is doubtless to be estimated, as the government urges, in the discretion of the court. But it must be estimated according to the intent of the law, and by some method at once reasonable and capable of practical application. There is but one such method possible; it is to deduct from the price received for the completed goods the market value of the materials at the time of delivery. This method alone is legal, and accords with the received principle of law—that the time of sale of goods made under contract is the time of delivery; and with the principle of the tax law—that the time of sale is the time at which values are to be estimated. This method alone is definite, affording a fixed standard, readily intelligible, and accessible in all commercial newspapers. It admits of no disguise, concealment, or fraud. This method alone is practicable. It avoids the necessity of tracking out, by the evidence of interested parties, the dates of contracts, the actual cost of different lots of materials and other accidents of business. This method alone is just. The exemption turns upon the increased value of the goods by the process of manufacture, not their increased value by time. And to obtain this we must compare the value of the completed article with the value of its material at the same time. It is, therefore, respectfully claimed that the goods in question are exempt from taxation, and that judgment should be entered for the defendant.

NELSON, Circuit Justice. The defendant, a manufacturer of clothing, on the 10th May, 1864, entered into a contract with the government to make a certain number of cavalry pantaloons, and was to receive for the same $4.52 for each pair. Under this contract the defendant made and delivered in the month of October following 1,800 pairs, and was paid for the same. The internal revenue act of 1864 (section 94) imposes a duty on ready made clothing &c., a tax of 5 per cent. ad valorem. This suit is brought to recover the tax on these articles, assessed to the amount of $406.80.

It is admitted that the clothing was made out of materials of which, in the month of October, when the pantaloons were delivered, the market value exceeded the price paid by the government, but the cost of manufacture was more than 5 per cent. of the value of the pantaloons when manufactured. The tax imposed was 5 per cent. on the price received by the defendant for the goods. The 96th section of the act, among other things, provides, "all goods, wares and merchandize, and articles made or manufactured from materials which have been subject to, and upon which internal duties have been actually paid; or materials imported upon which no duties have been paid or upon which no duties have been imposed by law, where the increased value of such goods and articles so manufactured, shall not exceed the amount of 5 per cent. ad valorem, shall be exempt from duty." It is insisted on the part of the defendant that this clause in the section exempts the articles in question from duty. But, on looking at the clause, it will be seen, that the defendant has not brought himself within it. The manufactured goods or clothing, there referred to and exempt, must be made out of materials which have already paid the internal duty, or be imported, and upon which duties have been paid, or which have been imported exempt from duty. It is in respect to clothing made or manufactured out of goods of this character, and in this condition, when, if the increased value shall not exceed 5 per cent. the exemption duty is permitted. On this ground, alone, we think the plaintiffs are entitled to recover. We are also inclined to think, on the theory of the defendant, that he should have proved the cost of the material to him, and not relied on the market value at the time of

the delivery of the clothing. Judgment for plaintiffs for $406.80 with interest.

[Affirmed by the supreme court. 10 Wall. (77 U. S.) 58.]

UNITED STATES (BRACKETT v.). See Case No. 1,765.

Case No. 14,635.

UNITED STATES v. BRADBURY et al.

[2 Ware (Dav. 146), 150.] [1]

District Court, D. Maine. June Term, 1841.

PAYMENT — APPROPRIATION — BY WHOM MADE — RUNNING ACCOUNTS.

1. Where a debtor owing another several sums and on various accounts makes a payment, he may appropriate the payment to which debt he pleases. If he does not make the appropriation, the creditor may.

2. If neither party makes an appropriation at the time of payment, the law intervenes and makes the appropriation.

3. In open and running accounts, the law appropriates a partial payment to extinguish the oldest item in the account.

4. When an appropriation is made by a receipt, prima facie it is the creditor who makes it, because the language is his.

5. By the Roman law, when no appropriation of a payment is made by either party, the law applies it to the extinguishment of that debt which will be most beneficial to the debtor.

This was an action of debt on a bond given by William Bradbury, late postmaster at Levant, with sureties for the faithful performance of the duties of that office, dated Jan. 26, 1838. The bond was in the penal sum of $500, with the condition, among other things, that 'he shall pay the balance of all moneys that shall come to his hands for the postage of whatever is by law chargeable with postage, in a manner prescribed by the postmaster-general for the time being; and shall account with the United States for all moneys, bills, bonds, etc., which he shall receive for the use and benefit of the general post-office,' then to become void. It appeared in the case that Bradbury had been appointed postmaster as early as 1831. In January, 1838, in conformity with the act of congress of 1836, c. 270, § 37 [5 Stat. 88], he was required by the postmaster-general to give a new bond, which is the bond in question. At the time of its execution he was indebted, for arrearages of postage, to the amount of $465.60, and on the same day, when the bond was executed, he paid the sum of $227.91, and took a receipt therefor, in the following words: 'Mail route No. 93. Received this twenty-sixth day of January, 1838, from William Bradbury, postmaster at Levant, state of Maine, two hundred and twenty-seven dollars and ninety-one cents, being the amount due from him to the United States for the quarter ending Dec. 31, 1837, as shown by his account current, including all previous dues, back to October 1, 1836.' The receipt was printed, except the filling up with the name, date, and sum, and the last words, 'back to October 1, 1836,' which were added to the printed form with a pen. Bradbury remained postmaster until the close of the quarter, ending Sept. 30, 1838, when his account terminates. From January 1st to September 30th, he is charged with three quarters of postage, amounting to $157, and he is credited with three payments, made April 6, July 7, and October 8, meeting the three quarterly debits precisely in amount, excepting the first, when the payment is nine cents less than the debit. The balance due, on the whole account, is $237.78. The receipts taken for the last three quarters were in the same form with that above copied, with the exception of the additional words at the close, 'back to October.' The jury, under the direction of the court, returned a verdict for the penalty, and now a motion was made by the defendant's counsel to set aside the verdict and grant a new trial for misdirection of the court in matter of law.

Mr. Holmes, U. S. Dist. Atty.

C. S. Davies, for defendants.

WARE, District Judge. The instruction to the jury was, that when a debtor makes payment to a creditor, to whom he is indebted in several sums and on various accounts, as by note, bond, and book account, he has a right to direct to what account or what debt the payment shall be appropriated. This is a rule which arises out of the nature of the act. The payment is the act of the debtor, and he has a natural right to determine the quality of his own act, that is to make the appropriation of his own money. If the debtor pays generally on account, this right results to the creditor; he may then make the appropriation, and apply it to the payment of which debt he chooses. But the imputation, whether made by the debtor or creditor, must be made at the time of payment; in re presenti, hoc est statim, atque solutum est. Dig. 46, 3, 1. If not then made, it is not permitted to either party to go back afterwards and apply the payment, but the law intervenes and makes the application according to its own notions of justice, between the parties. In cases of open, running accounts, where there have been a number of successive charges and payments, from time to time, if neither of the parties has imputed these payments to extinguish any particular charges in the account, the law applies them to the payment of the debits in the order of time in which they stand in the account, each payment being appropriated to the extinguishment of the oldest charge on the debtor side of the account. Such was the direction to the jury, and, as a general rule, this is too well es-

[1] [Reported by Edward H. Davcis, Esq.]

tablished to be brought into doubt. U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720. Postmaster General v. Furber [Case No. 11,308]; U. S. Wardwell [Id. 16,640]; Clayton's Case, 1 Mer. 572.

The Roman law, from which our rules for the imputation of general and unappropriated payments are in part derived, looks, generally, to the interest of the debtor, and is governed by what may be presumed to have been the will of a prudent and discreet man, if his attention had been particularly called to the subject; "quod verisimile videretur diligentem debitorem admonitu ita suum negotium gesturum fuisse." Dig. 46, 3, 97.

When there were several debts, and the payments were general, the law imputed it to a debt which the debtor owed on his own account, rather than to one for which he was liable as surety; to one which bore interest, before one which did not; to a debt secured by mortgage or by sureties, rather than to one which was not; to one having a penalty attached to it, rather than to one which had none, and, generally, to extinguish the debt which was most onerous to the debtor. It proceeded upon this principle, that, as the right of making the appropriation belongs of right to the debtor in the first instance, when none is made by either party and it is left to be made by the law, that ought to look to the supposed will of the debtor rather than that of the creditor. But if the debts were all of the same character, this preference was abandoned; for though the debtor, on some accounts, may have an interest in extinguishing the more recent rather than the more ancient debts, the law adopted the more equitable rule between the parties, and applied the payment to the oldest. "Si nihil eorum interveniat, vetustior contractus ante solvitur." Dig. 46, 3, 97, 5; Poth. Obl. Nos. 565, 571; 7 Toullier, Droit Civil, Nos. 173, 186. In this rule, therefore, the common and civil law agree, and the rule itself has its foundation in principles of natural justice. There was, then, no error in the instruction given to the jury in laying down the principles of law applicable to the general question, independent of the specialties belonging to the particular case.

The only question which can be considered as fairly open, is whether there is in this case such an appropriation of the payments made by the debtor, as will take it out of the common rule. It is contended that there was, and that this, as a fact, may be justly inferred from the circumstances under which the payments were made, and from the receipts which were taken. The bond bears date, Jan. 26, 1838. Bradbury remained postmaster for three quarters after; and at the end of each quarter paid the amount of postage which had accrued during the quarter, and took a receipt for the sum, which described it as 'being the amount due from him to the United States for the quarter ending, etc., as shown by his account current, including all previous dues.' It is argued that this receipt makes an appropriation of the payment, first to extinguish the debt which accrued the past quarter, and that the excess only, if any there were, was to be applied toward paying the old balance; and that such was the intention of the debtor is a just inference from the fact that each payment was the precise amount of postage which had accrued during the preceding quarter. Undoubtedly it was the right of the defendant to have the money so applied, if he chose to make the application. But to carry this intention into effect it must be made known in a clear and intelligible manner, either by positive directions or by circumstances equivalent to a direct order. The fact that the payments were in each case precisely equal to the postage of the preceding quarters does undoubtedly raise a strong presumption that they were intended to be applied to the extinguishment of that part of the debt. In the case of Marryatts v. White, 2 Starkie, 101, Lord Ellenborough seemed to consider this circumstance as conclusive in a case which in its leading features resembles the present. That was an action on a promissory note, against the surety, given to secure the payment for flour to be afterwards delivered to the principal on the note. He was at the time indebted to the plaintiff for goods previously delivered. There was, therefore, an open running account. By the usage of trade a credit was allowed of three months, and if payment was sooner made, the debtor was entitled to a discount. Lord Ellenborough observed, 'that the payment of the exact amount of goods previously delivered is irrefragable evidence to show that the sum was intended in payment of those goods, and the payment of sums within the time allowed for discount, and on which discount has been allowed, affords a strong inference, in the absence of proof to the contrary, that it was made in relief of the surety.'

It will be observed that this case, in one important circumstance, differs from the case at bar. A discount was, by usage, allowed when payment was made before the expiration of the credit, and on some of the payments a discount was, in fact, allowed. This conclusively proved that the imputation was to the new, and not to the old debt; because if it had been applied to the old account no discount could have been claimed. Two circumstances here concurred to indicate the intention of the debtor, but one of which exists in the present case. That, it is true, Lord Ellenborough seems to have considered as conclusive, when standing alone and unconnected with any circumstances contributing either to confirm or weaken the presumption.

As a universal proposition, this will perhaps be found to be not wholly free from difficulty. But in the present case it does not stand alone; a receipt was taken, and an appropriation of the payment may be made by the form of the receipt. Manning v. Wes-

terne, 2 Vern. 607. Does this receipt, in its legal construction, make the appropriation which is contended for? In its terms it professes to be for the amount of the last quarter, including the previous dues. This form of expression seems to contemplate the whole debt due as one mass, and to impute the payment to the aggregate. The language of the receipt also implies that it is in satisfaction of the whole debt, the old balance, if any there was, as well as the last quarterly charge. It appears to me that the legal and proper import of the words renders it a payment on the general account; and if so, the law applies it to extinguish the oldest debits, leaving the last quarter unsatisfied.

But if the receipt admitted the construction for which the defendant's counsel contends, it would not relieve his case. When the appropriation of a payment is made by a receipt, it is by the creditor and not by the debtor that it is made. He executes the instrument, and the words are his. If the debtor objects to the appropriation, he may require a receipt in a different form, or he may by his own act impute the payment to the extinguishment of a different debt; for he is not bound, provided he objects, by the imputation of the creditor. But he must object at the time, and if he takes it without objection he will be considered as consenting to the application made by the creditor, and it will be binding upon him unless he has been overreached by fraud or surprise. Poth. Obl. No. 566, pt. 3, c. 1, art. 8. Now, if it had been the intention of the agent of the post-office to impute the payment to the last quarter, to the exclusion of the antecedent balance, and this had been done in terms ever so precise, it would not have been binding on the United States, because it would have been in direct opposition to the law. Nothing can be clearer both in principle and authority, than that a public agent, acting under the authority of law, cannot bind the government when he exceeds his powers, or when his act is repugnant to the law. Johnson v. U. S. [Case No. 7,419]. The agent who gave the receipt had no authority to impute the payment to any particular part of the debt, for this had been already done by law. By the act of July 2, 1836, c. 270, § 37, it is provided, when a new bond has been given by a postmaster, and there is an unpaid balance remaining against him, 'that payments made subsequent to the execution of the new bond by said postmaster, shall be applied first to discharge any balance which may be due on the old bond, unless he shall at the time of payment expressly direct them to be applied to the credit of his new account.' The construction of a receipt is therefore wholly immaterial, unless it be shown by other evidence that a receipt in this form was specially required by the debtor, or that the appropriation might be considered as his act. But there was no evidence of this kind in the case. In whatever point of view this case is considered, it appears to me that judgment must be for the United States.

Another question remains, and that is, for what sum the parties on this bond are liable. The whole balance due and now claimed is $227.78. If the payment made at the time when the bond was executed be imputed upon the debt which accrued back to October, 1836, then the whole of the old balance will be of more than two years standing, and by the act of congress of 1825, c. 275, § 3,—Story's Ed. [4 Stat. 103],—the sureties of a postmaster are not liable for any default which occurred more than two years before the suit was brought. This period of limitation had passed before the date of the writ. The receipt expressly imputes the payment upon that part of the debt. But, as has been already observed, when an appropriation is made by a receipt, it is, prima facie, the act of the creditor. It can only be construed to be the act of the debtor when it appears by other evidence that he required the receipt in that particular form. But if it be taken as the act of the agent of the general post-office, he had no authority to make the appropriation. It was already made by a general law. The bond, however, by its terms is made to operate only prospectively. The condition is that 'if the said Bradbury shall well and truly execute the duties of said office, etc., and shall pay the balance of all moneys that shall come into his hands, etc., and shall faithfully account with the United States for all moneys, etc., which he shall receive, etc.' The bond, therefore, can have no retroactive effect to render the parties liable for antecedent defaults. Now, the whole amount of postage which accrued, after the date of the bond, was $157, and for this amount, and this only, are the parties in this action liable.

Judgment for the penalty, and execution to be issued for $157 and interest from the date of the service of the writ, December 31, 1839.

Case No. 14,636.

UNITED STATES v. BRAMHAM.

[3 Hughes, 557.] [1]

District Court, E. D. Virginia. Jan. 11, 1878.

EMBEZZLEMENT FROM MAIL—POSTMASTERS.

Postmasters have a very limited right, if they have any at all, to act as agents of citizens to open their letters and use money inclosed.

Indictment under section 5467 for embezzling a letter having a ten-dollar note, in one count charged that the note was a United States treasury note, the other that it was a national bank note. Rose Kelly, a colored servant woman, mailed a letter addressed to Monaskan, Lancaster county, Va., having in it a ten-dollar note, to John Kelly, her father, on the 16th of November, 1876, at the Philadelphia post-office; and had the letter reg-

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

istered. From a tracer afterwards sent out, the certificate of A. C. Bramham, postmaster at Monaskan, stated that the registered letter was received there on the 21st of November, 1876. John Kelly, who was an unlettered negro, made repeated inquiry for the letter at the office with no avail. Letters, in the handwriting of Bramham, in the name of John Kelly, to Rose, were put in evidence, one of them dated on the 19th of June, 1877, stating that the money had not been received; the other dated on the 20th of June, 1877, stating that it had been received. Some time in July following Bramham took to John Kelly Rose's original letter which had contained the money, and gave it to him, but did not give him the money. On the 3d of August, 1877, Bramham paid to John Kelly two five dollar notes, and took from him his receipt signed by cross-mark in the presence of a witness for the registered letter. The witness to John Kelly's cross-mark did not observe the date of this receipt, but it bore that of the 14th of March, 1877. John Kelly said that occasionally when he had got letters at the post-office, he had asked Mr. Bramham to read them for him. On a few occasions he had got Bramham to write letters to his daughter for him. He denied that he had ever authorized Bramham to open his letters or to act as his agent, or to open this particular letter. Bramham was arrested in Baltimore, Md., on the 17th of August, 1877, and when arrested, said to the officer that this was his first offence. On the 27th of August a brother-in-law of Bramham had a conversation with John Kelly, in which, he said, that Kelly had told him that he had authorized Bramham to open his letters and to act as agent for him. There was evidence that Bramham had borne a high character.

During the argument to the jury of Bramham's counsel, in which they rested their defence on this alleged agency, counsel cited and read sundry legal authorities as to what constituted agency and some wherein courts had held that one person might authorize another to take his letters from the post-office, and open and read them, and that in such case there was no embezzlement of the letter.

THE COURT (HUGHES, District Judge), interrupted counsel when so engaged, and said that a postmaster occupied such a relation to the service and to the public as to make such a general agency incompatible with his fiduciary trust; and put in the form of an instruction what it considered to be the law on the subject, as follows: "A postmaster of the United States ought not to be the agent of any customer of his office to open his letters and take out of them, and use, their contents. Such an agency is incompatible with the duties of a postmaster; and very strict proof ought to be required by the jury of such an agency, expressly granted and conceded by the real owner of the letters."

THE COURT said there was no express law forbidding postmasters to open letters addressed to others at their offices, etc., but many of the postal laws contained clauses implying the impropriety of such a practice. For instance, section 300, p. 22, of the postal laws, compiled in 1873, and section 300, p. 90, of the same volume, were examples of such laws. They contained provisos in the words "nothing in this act contained shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself." Such is the spirit of all our postal laws; and no postmaster has a right to open any letter without express and particular authority from its owner to do so.

The following instruction was also given: "To constitute an offence under this indictment some evidence is necessary to the genuineness and value of the note charged to have been stolen out of the letter."

There was a verdict of guilty.

Case No. 14,637.

UNITED STATES v. BRANT et al.

[Pet. C. C. 14.] [1]

Circuit Court, D. New Jersey. April Term, 1806.

OFFENCE AGAINST CUSTOMS LAWS — UNLADING VESSEL BEFORE ARRIVAL AT PORT OF DISCHARGE.

An information against the defendants, for assisting to unlade rum from a vessel before her arrival at her port of discharge, stating the offence to be contrary to the 50th section of the act of congress, passed 2d March, 1799 [1 Stat. 665], dismissed, because that section does not prohibit the offence, the same being contrary to the 27th section of the act, and which was not recited in the proceedings.

[Cited in Walsh v. U. S., Case No. 17,116; U. S. v. Twenty Cases of Matches, Id. 16,559.]

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

This was an information filed in the district court, against the defendants, for assisting to unlade rum from the ship Hunter before her arrival at her port of discharge, contrary to the provisions of the 50th section of the act of congress passed 2d March, 1799 (3 Laws 183 [1 Stat. 665]). The decree of the district court was against the defendants, and an appeal was entered to this court.

BY THE COURT. The case stated in the libel and proceedings comes within the provisions of the 27th section of the act of congress, which imposes no fine on the persons who assisted in the unlawful unlading. A fine is imposed by the 50th section, but this section applies only to a vessel, after her arrival in port. The sentence of the district court reversed.

[1] [Reported by Richard Peters, Jr., Esq.].

Case No. 14,638.

UNITED STATES v. BREED et al.

[1 Sumn. 159.] [1]

Circuit Court, D. Massachusetts. May Term, 1832.

CUSTOMS DUTIES — LOAF-SUGAR — CONSTRUCTION OF REVENUE STATUTES.

1. The revenue or tariff act of 1816, c. 107 [3 Stat. 312], lays a duty on "loaf-sugar" of twelve cents per pound. *Held*, that the words "loaf-sugar" must be understood according to their general meaning in trade and commerce, and buying and selling. And if, upon the evidence, it appeared that loaf-sugar meant sugar in loaves, then crushed loaf-sugar was not "loaf-sugar" within the act.

[Cited in Sutz v. Magone, 153 U. S. 108, 14 Sup. Ct. 779.]

[Cited in brief in Nurdlinger v. Irvine (Pa. Sup.) 4 Atl. 167.]

See Bacon v. Bancroft [Case No. 714]; Lee v. Lincoln [Id. 8,195].

2. Rule as to the construction of statutes respecting revenue

[Cited in Lawrence v. Allen, 7 How. (48 U. S.) 797; U. S. v. Three Tons of Coal, Case No. 16,515; Morrison v. Arthur, Id. 9,842; Nichols v. Beard, 15 Fed. 437.]

[Cited in brief in Cutler v. Currier, 54 Me. 88.]

3. What is a fraudulent evasion of a duty.

[Cited in U. S. v. Two Hundred and Fifty Kegs of Nails, 52 Fed. 233; Id., 9 C. C. A. 558, 61 Fed. 413.]

Debt on a duty bond. [Action by the United States against Ebenezer Breed and others.] Plea, tender. Replication, that greater duties were due than the amount tendered; rejoinder and issue thereon. The cause was tried by a jury.

Mr. Dexter, for defendants.

Mr. Dunlap, Dist. Atty.

The latter cited U. S. v. Pennington [Case No. 16,026]; Webst. Dict. "Loaf-sugar"; Parker, Exch. 206; Id. 208; Hardr. 185; 3 Price, 447; Id. 189, 224, 229, 234. The former cited Two Hundred Chests of Tea, 9 Wheat. [22 U. S.] 435; 1 Pick. 368; and Grennell v. Swartwout (Sup. Ct. N. Y. 1831) [unreported].

STORY, Circuit Justice (charging jury). The whole question in this case turns upon the true construction of the tariff and revenue act of 1816, c. 107, as applicable to the facts in evidence. Revenue and duty acts are not in the sense of the law penal acts; and are not therefore to be construed strictly. Nor are they, on the other hand, acts in furtherance of private rights and liberty, or remedial; and therefore to be construed with extraordinary liberality. They are to be construed according to the true import and meaning of their terms; and when the legislative intention is ascertained, that, and that only, is to be our guide in interpreting them. We are not to strain them to reach cases not within their terms, even if we might conjecture, that public policy might have reached those cases; nor, on the other hand, are we to restrain their terms, so as to exclude cases clearly within them, simply because public policy might possibly dictate such an exclusion. The words of the act of 1816, c. 107, as to duties on the article (sugar) now in controversy, are as follows: "On brown sugar, three cents per pound; on white, clayed, or powdered sugar, four cents per pound; on lump-sugar, ten cents per pound; on loaf-sugar and sugar-candy, twelve cents per pound." Here is a description of four different varieties of the article; and if there be any other, not embraced in either of these descriptions, then it falls within the class of non-enumerated articles, and is liable to a duty of fifteen per cent. ad valorem. If it be a non-enumerated article, then the sum tendered is clearly more than the duty, which is payable; and, therefore, the issue ought to be found for the defendant. Whether it be a non-enumerated article, it is not now necessary to decide; nor has it been insisted on at the argument. If it had been necessary to decide, I should, as at present advised, incline to think, though I desire not to give any absolute opinion, that the statute meant, in the actual enumeration, to include all kinds and classes of sugars. And so it has been argued at the bar; and the controversy has been narrowed down to the inquiry, whether this is to be deemed "white, clayed, or powdered sugar," or whether it is to be deemed "loaf-sugar," within the meaning of the act. That the sugars in controversy were, at the time of their importation, in form and appearance, white, clayed, or powdered sugars; that is, that they were white, and clayed, and in powder, is disputed by no one. The whole testimony proves this; and the whole argument admits it. But on the part of the United States, it is contended, that, though this was the form of the sugar at the time of the importation, it was in fact British loaf-sugar, highly refined, and that it had been crushed from the loaves, and then imported by the defendants, not fraudulently, but bona fide, openly and without disguise, having been bought by them in its crushed state. And the argument is, that the change of form does not change the thing; it is still loaf-sugar; and the change of form is a mere evasion of the act.

The question then is, whether, in the sense of the act, the sugar is, or is not loaf-sugar. The act enumerates (as we have seen) four different classes of sugar. It does not speak of them as refined or unrefined, nor refer to any particular quality in either class. Whatever may be the quality of the sugar in either class, whether high or low, of the best or of the worst quality, all pay the same duty. Nor does the act anywhere refer to the origin or country of the sugar. It makes no difference whether it comes from Cuba or Calcutta, from England or from South

[1] [Reported by Charles Sumner, Esq.]

America. The classification is upon other principles; in two, by color and form; in two, by form, or rather by words usually descriptive of form. The first class is "brown sugar," and this duty is equally payable, whether it be raw brown, or refined brown sugar, and the testimony is, that refined sugar is brown until the bleaching process is finished. Here, then, no other designation is given, than by color. I speak now only as to the words of the act, without supposing, that the commercial sense is different from the common import of the words. The next is "white, clayed, or powdered sugar." It is stated in the evidence, that all white sugars are in fact clayed. But that is not material. The word, white, is here apparently used in contradistinction to brown, and we should probably read the clause, white clayed, or white powdered sugar. The latter has reference both to form and color, unless, which will presently be considered, the commercial sense differs from the common import of the terms. The next class is "lump-sugar," which seems to have reference to form, and is contradistinguished from the two former. The last is "loaf-sugar," which seems also to have reference to form, and is something different from brown sugar, white, clayed, or powdered sugar, and lump-sugar. What, then, is the specific difference? It is said, that loaf-sugar is, that sugar which has once been in loaves, however it may be now altered in form; and that, broken up or crushed, it is still loaf-sugar. The argument seems strong; but let us apply it to the evidence, and see how it will then meet the case. It has been stated in the evidence, and not denied, that all white, clayed, or powdered sugars are first put into the form of loaves, and that the process is indispensable to give them that character. Now, if this be true, what becomes of this whole class or sugars. According to the argument, it must pay a duty of twelve cents per pound, and not four cents per pound, because a new change of form will not change the substance of the thing. Again; lump-sugar is, according to the evidence and the specimen in court, in the same conical form as loaf-sugar; why, then, when it is broken up, does it not pay loaf-sugar duty? Why, when not broken up, does it not pay loaf-sugar duty? Plainly, in the latter case, because, though in the same form, it has acquired a commercial name and character different from that called "loaf-sugar," which is adopted by the act of congress. And in the former case, it has neither the name, nor form, nor character. And this leads me to the remark, that, after all, acts of this nature are to be interpreted, not according to the abstract propriety of language, but according to the known usage of trade and business, at home and abroad. If an article has one appellation abroad, and another at home, not with one class of citizens merely, whether merchants, or grocers, or manufacturers, but with the community at large, who are buyers and sellers; doubtless our laws are to be interpreted according to that domestic sense. But, where the foreign name is well known here, and no different appellation exists in domestic use, we must presume, that, in a commercial law, the legislature used the word in the foreign sense. I say nothing, as to what rule ought to prevail, where an article is known by one name among merchants, and by another among manufacturers, or the community at large, in interpreting the legislative meaning in a tariff act. Congress, under such circumstances may, perhaps, be fairly presumed to use it in the more general, or more usual sense, rather than in that, which belongs to a single class of citizens. But this may well be left for decision until the very question arises. I throw out these remarks only with reference to the case cited at the bar from the superior court of New York, a court certainly of great ability and learning.

What, then, is meant by "loaf-sugar," in a commercial sense, by which I mean, not merely among merchants, but among buyers and sellers generally in the domestic trade? Has it any generally received, uniform meaning? If it has, then, that must be presumed to be the meaning adopted by the legislature in the act of 1816. I agree to the law laid down in the case of Two Hundred Chests of Tea, 9 Wheat. [22 U. S.] 435. That case was as fully considered, and as deliberately weighed, as any which ever came before the court. It was there laid down, that, in construing revenue laws, we were to consider the words, not as used in their scientific or technical sense, where things were classified according to their scientific characters and properties, but as used in their known and common commercial sense, in the foreign and domestic trade. Laws of this sort taxed things by their common and usual denominations among the people, and not according to their denominations among naturalists, or botanists, or men of science.

Nor is there any thing extraordinary in congress taking articles according to their colors, or forms, or any other peculiarity. Sometimes the tax is levied upon a thing with reference to the country of its origin; sometimes according to its colors; sometimes according to its predominant component material; sometimes in its raw shape; sometimes in its manufactured shape; and sometimes, with reference merely to its form or mode of manufacture, or the vehicle in which it is. Thus, by this very act of 1816, ale, beer, and porter in bottles pay different duties from that in other vessels. Wines are taxed differently according to their origin, as Madeira, Sherry, Champagne, Burgundy; and differently, in some cases, when imported in bottles or cases, from what they are in other vessels. So raisins in jars and boxes pay a higher duty, than those in casks.

Green teas pay a higher duty than black. The form of a material is also a ground for a discriminating duty. Thus, iron or steel wire of certain descriptions pays a duty of five cents per pound, and wire of a higher number pays nine cents per pound. Iron in bars or bolts, except iron manufactured by rolling, pays forty-five cents per hundred weight; iron in sheets, or rods and hoops, $2.50 per hundred weight; and in bars or bolts, when manufactured by rolling, and in anchors, $1.50 per hundred weight. We see, that here, the form of the material constitutes the discriminating test of the duty. Doubtless in many of these cases the descriptive terms indicate the quality; not as quality, but as being usually found combined with a particular form, or a particular vehicle. It would be absurd to say, that iron did not pay a duty according to its form, as designated in the tariff; and that, if the same quality was imported in bars and bolts, and in sheets, and rods, and hoops, all must pay the same duty. So that, however true it may be, that the substance may be the same, though the form is changed, it does not follow, that the form of the substance may not be the very ground-work of the duty. Here, the duty is not laid merely on sugar, which is the generic name; but a discriminating duty is laid upon sugar of certain colors, in a certain state, or having a particular denomination, or a particular form.

It is true, that a mere change of form will not authorize a party to evade a law, or escape from its penalties. But this is a principle, that requires qualification and examination. If (as was the fact during the late war with England) an American in Canada, intending to import a piece of broadcloth into the United States from that province, should, for the purpose of disguise, put it nominally in the form of a cloak for his personal use, it would not thereby become his mere baggage, and not dutiable. The question would still be, whether the article was designed bona fide and really, or only colorably, for a cloak. If the latter, then it could not escape from duties or forfeiture. If the former, then the size might not be material. The question would be a question of intent and fact. The form would not necessarily exempt it from duties or forfeiture. But if the cloth were bona fide and in reality a cloak, and so designed for use, its size or other peculiarity would not change its character as baggage. But such cases turn upon very different considerations from cases like the present. Here, the article is in a state exactly such as may be dutiable by law, under a particular description. Its form is precisely that indicated by the law. And it is assuming the whole question to say, that the change of form is an evasion of the act, much more, that it is a fraudulent evasion. If the legislature has made the form, or descriptive appellation, the basis of the discriminating duty, then the change of form to meet the discrimination is no evasion, and no fraud. The act gives the election to the party, and he has a right to make it. He does that, which the law allows, in the very manner and with the very design it allows. Besides, there is no pretence to say, that the present defendants intended any evasion or fraud. The district attorney expressly disclaims any intention to make such a charge; and the whole facts disprove it. The honesty of the transaction is admitted to be beyond all question. To constitute an evasion of a revenue act, which shall be deemed, in point of law, a fraudulent evasion, it is not sufficient, that the party introduces another article perfectly lawful, which defeats the policy contemplated by the act, or which supersedes or diminishes the use of the article taxed by the act. There must be substantially an introduction of the very thing taxed, under a false denomination or cover, with the intent to evade or defraud the act.

I have stated these things the more at large, because the cause is of great magnitude and because it is quite possible that the decision may deprive a very meritorious class of citizens of a protection, which was supposed to be given them by the tariff act of 1816. But this furnishes no ground upon which the court can depart from the plain meaning of the law. It is a misfortune incident to all laws, that they are necessarily imperfect, and from human infirmity fall short of all the intended objects. But in all such cases it is the business of legislation, and not of courts of justice, to correct the evil. We are to administer the laws, and not to make them.

Let us, then, apply the doctrines above stated to the facts of the case. The testimony contains very few discrepancies; and few that have been deemed of much importance at the argument. Upon one point, however, the testimony, as well of the government witnesses, as of those of the defendants, entirely agrees; and that is, that "loaf-sugar" in a commercial sense in the common business of life, in buying and selling, means sugar in loaves. The name doubtless carries, in some degree, an implication of quality, arising from the fact, that quality is usually associated with form; but the designation is primarily derived from, and depends upon the form. All the witnesses, whether merchants, or refiners, or grocers, or confectioners, have spoken pointedly to this fact. All of them say, that the sugar in controversy, in the form, in which it was imported (crushed sugar), is not known as, or even called, "loaf sugar." Whatever may be its quality, it is still not "loaf-sugar," for it wants the form. A contract to buy or sell "loaf-sugar" would not be strictly complied with by a delivery of sugar in this state. It must be in loaves. Now, if this be the posture of the evidence, and it is not questioned, what is the result? The act must,

upon the principles already stated, be interpreted in a commercial sense. And if this be not "loaf-sugar" in that sense, the defence is established, and the United States have failed to sustain their suit. I do not well know, how to put the case in any other form to the jury. The question is, whether, in point of fact, the sugar in controversy is, or is not, loaf-sugar in a commercial sense; and as the jury decide this, the issue is for the defendants or for the plaintiffs.

Verdict for the defendants.

UNITED STATES v. BRENNEMAN. See Case No. 15,008.

Case No. 14,639.

UNITED STATES v. BRENT.

[1 Cranch, C. C. 525.] [1]

Circuit Court, District of Columbia. Dec. Term, 1808.

MARSHAL—ESCAPE OF DEBTOR.

The marshal is liable upon his official bond if he suffers a debtor to escape after arrest upon a capias ad satisfaciendum, although he has him in court at the return day.

Debt on the marshal's official bond.

The facts agreed were that the marshal [D. C. Brent] arrested Jane Burch on a capias ad satisfaciendum at the plaintiff's suit, and voluntarily suffered her to go out of prison for three days, after which she returned and was discharged under the insolvent act before the return day of the writ.

J. Law, for plaintiff [the United States, for the use of James & Benson McCormick]. After a voluntary escape the sheriff cannot retake the defendant; and whether in custody again or not, is of no importance, as the sheriff has made himself liable. 3 Bl. Comm. 415. It is not important whether the escape is before or after the return of the capias ad satisfaciendum. Hawkins v. Plomer, 2 W. Bl. 1049; Pitcher v. Bailey, 8 East, 171.

The law and the form of the capias ad satisfaciendum are the same in Maryland as in England. 1 Har. Ent. 642. So, also, are the forms of the pleadings. The acts of Maryland, 1768 (chapter 10), 1794 (chapter 54), and 1779 (chapter 25), do not alter the law of England.

F. S. Key, and Mr. Morsell, contra. That part of the common law of England was not adopted in Maryland, because not applicable to the circumstances of the country; there being no jails in Maryland for a long time; and even now there are some counties without public jails.

No case has been produced of such a suit in Maryland. The sheriff there is not considered liable if he has the body at the return of the capias ad satisfaciendum.

The act of assembly, 1768, c. 10, has pointed out another remedy, viz. by judgment against the sheriff on his return.

CRANCH, Chief Judge, mentioned Judge Chase's letter to Mr. Tilghman, October 20, 1798, in which he says the act 1 Rich. II. c. 12, giving the action of debt for escape of prisoners in execution, is in force in Maryland.

After consideration, THE COURT, in April, 1811 (nem. con.), rendered judgment for the plaintiff, observing that the law of England is admitted, and no practice in Maryland is sufficiently proved to the contrary.

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

Case No. 14,640.

UNITED STATES v. BRENT.

[17 Int. Rev. Rec. 54.]

District Court, D. Missouri. Jan., 1873.

EMBEZZLEMENT FROM MAIL — JOINDER OF OFFENCES—CIRCUMSTANTIAL EVIDENCE—"EMPLOYEE."

1. Where several letters were embezzled from the post-office by the same person, the several offences of stealing may be charged in the separate counts of the same indictment, and if separate indictments are found, the court may order them consolidated.

2. The court will protect the prisoner from being prejudiced in his defence, by the joinder of offences, and if satisfied that the defendant was so prejudiced, a new trial will be granted.

3. Where a definition of circumstantial evidence was given to the jury, it cannot be assumed that they disregarded this instruction simply because they came to a different conclusion from that expected, and a claim to set aside the verdict thus found, is asking the court to usurp the peculiar province of the jury.

4. Where the defendant is found not guilty on certain counts, but guilty on others, a new trial will not be granted for the purpose of allowing him to plead his innocence, established in the former trial in his own behalf.

5. The government is not bound to examine all persons through whose hands the mail passed. U. S. v. Whitaker [Case No. 16,672], explained.

6. One sworn in as a deputy postmaster and who handled the mail whenever he was about the post-office and felt inclined to do so, is an employee within the meaning of the law.

[Indictment for embezzlement of letters from the United States mail.]

KREKEL, District Judge. The first question raised, "the improper joinder of offences," is settled by the act of congress of 26th of February, 1853 [10 Stat. 162], which provides that "whenever there are or shall be several charges against any person or persons for the same act or transaction, or for two or more acts or transactions, connected together, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments shall be found in such cases, the court may order them consolidated." Brent was charged in different counts in the

same indictment with three distinct offences—the embezzling of a letter containing two hundred and forty dollars, of one containing twenty dollars, and of another containing one hundred and eighty-nine dollars, while an employee in the Quincy post-office. The offences are alleged to have been committed within a few days of each other. While it is true that these letters came to the Quincy office from various points, the offences of stealing them are "of the same class of crimes" which the act of congress aforesaid provides may be in separate counts of the same indictment, or if separate indictments shall be found, that the court may order them consolidated. U. S. v. O'Callahan [Case No. 15,910].

It is admitted that it is the duty of the court to protect the prisoner from being prejudiced in his defence by the joinder of offences, and if satisfied that the defendant was so prejudiced, a new trial would be granted. 1 Bish. Cr. Proc. § 204.

But, instead of being so prejudiced, the defendant in this case was, under the view taken by the court, rather benefited, for it enabled him, and he properly availed himself of the advantage, to show that others as well as himself had opportunities to steal from the mail, and by inquiring into the whole management of the Quincy post-office to throw doubt upon the whole case. To say that the defendant was prejudiced because his counsel had to devote their time and energy largely to defend him against alleged offences of which he was wholly innocent, as found by the verdict of the jury, is to ignore at least the experience of courts in the trial of causes, and the manner of arriving at verdicts by juries. It is enough to say, however, that the causes assigned, when considered in connection with the act of congress cited, are insufficient to grant a new trial.

The consideration of that part of the evidence which may be termed circumstantial, the court presented to the jury as follows: "By circumstantial evidence is meant the particular facts surrounding and connected with the case. The number of circumstances, and the directness with which they point to the main fact sought to be established, as well as their connection with each other, determines the weight to be given to them. If they all harmonize and tend in one direction they become relatively strong; when they tend in opposite directions, they become relatively weak, and may even destroy each other."

The objections made to this part of the charge are not directed so much to the law as given as to the assumed effect, or rather non-effect, it had on the jury as shown by the verdict. The points made by counsel are proper enough in themselves and should have been, as they were, presented to the jury in the argument. To say that they paid no heed to them, otherwise they would have come to a different conclusion, and that the court should therefore set aside the verdict, is asking the court to usurp the peculiar province of the jury.

It is insisted that the defendant is entitled to a new trial in order that he might avail himself of the advantage which the verdict of the jury, by finding him not guilty as to the stealing of the letters containing the twenty and the one hundred and eighty-nine dollars, might give him. The court has already said that so far from being prejudiced in having the several charges preferred in the same indictment, he was, if anything, benefited thereby. To ask that such benefit shall be used for the purpose of overthrowing the verdict rendered affords no basis for the granting of a new trial.

It was shown on the trial that one John Diamond, who could not be found, was a mail carrier who, as such, had the usual access to the mail, and it is contended that the government is bound to examine him and all others through whose hands the mail passed. The case of U. S. v. Whitaker [Case No. 16,672], is relied on to sustain this position. An examination of the case by no means supports the head notes, or the position taken here. The court in its instructions to the jury remarked that "before the letter reached Cincinnati it passed through the office at Mount Washington and one or two other offices, and in that office (Cincinnati) it passed though the hands of clerks, and there were others who had access to it." "Upon the whole," the court remarked, "unless you come to the conclusion that the defendant is guilty beyond reasonable doubt, you will acquit him." While this reference to the failure of the government to examine all persons who had access to the mail was entirely proper for the consideration of the jury in making up the verdict, it falls far short of showing that it was necessary for the government to so examine all such persons.

We may readily conceive a case in which a requirement to examine all persons who may have handled a particular mail would amount to a folly, for there may be an abundance of other and better evidence upon which a conviction may be had. In this case, among other testimony, there were confessions, entries upon the post-office books, possessions of money corresponding nearly in amount and size of bills with that stolen, and flight. To say that the government, after having made every effort to have John Diamond here, cannot ask a conviction on other and proper testimony is overstating the legal proposition involved.

The indictment in each count charges the defendant with being an employee in the Quincy post-office, as clerk. In reference to this question the court instructed the jury as follows: "In order to find the defendant guilty on any count of the indictment, you must find that he was a person employed in the Quincy post-office, as charged. A person employed in a post-office is one who on divers and sundry occasions more or less con-

nected in time, by and with the knowledge and consent of the postmaster or his deputy, receives and makes up mails for transmission, and who distributes and delivers mail matter; in other words, who has charge of the post-office. No special agreement regarding the employment need be shown. If you are satisfied from the evidence that the defendant on the 29th day of November, 1869, was an employee in the Quincy post-office you will consider him to have continued in such employ unless you are satisfied from the evidence that he was either discharged or became so disconnected from said post-office as to take away his authority to act as such employee. His own acts in connection with those of the postmaster or his deputy may be looked into, in order to ascertain the relation he sustained to the post-office as an employee. A person occasionally called to aid in receiving and distributing the mail, and whose authority ceases with the service for which he is specially called, is not a person employed in the post-office. The word 'clerk' used in the indictment simply means a subordinate employee." To this portion of the charge it is objected that it must appear that the defendant was under a valid and subsisting contract for regular as distinguished from casual employment.

The case of U. S. v. Nott [Case No. 15,900], is cited in support of the position taken, and as that case, in the particular under consideration, is analogous, I will proceed to examine it. The evidence in that case was that Nott, the defendant, before the commission of the offence, "had been a regular assistant postmaster at Akron, but a short time before had left the office. He still, however, at the request of the post-master, gave occasional instructions to the assistant in the office, who had little or no knowledge of the business." Under this evidence the court charged the jury that it must be shown that he the defendant was employed in the post-office before he can be found guilty. "The employee within the law," the court goes on to say in its instructions, "is not a casual assistant who may be in the post-office and assist in making up the mail. He must be a regular assistant employed by the postmaster, and whose duty it is to perform the various functions which appertain to the office. The prisoner, it appears, had been a regular assistant in the post office at Akron, but some time before this occurrence he had left the office and engaged in other business. He was under no obligation to act as assistant, nor did he receive a compensation. The extent of his engagement was, in the absence of the postmaster, to give some instructions to the boy in the office respecting his duties, of which, being inexperienced, he was ignorant. This, we think, was not an employment within the law. We do not say that a regular written contract would be necessary, but we are of opinion that the person, to come within the law, must be a regular assistant." Judge McLean is here speaking with reference to the Akron post-office, a full knowledge of which he must have derived from the evidence in the case. The term "regular assistant," when applied to the Akron post-office, may have presented no difficulty. It is otherwise when viewed with reference to such an office as that at Quincy. It is easy to determine in a case where the duties of the office require and engage the whole time of an employee, what is a "regular assistant." But it is only during a few hours of the twenty-four of each day that an assistant or employee is needed in most of the country post-offices. A "regular assistant" with reference to such an office may well be said to be a person who has taken the oath of office and who assists in receiving, opening, and distributing the mail from time to time, as Brent did. He was sworn in as a deputy postmaster of Quincy, on the 28th day of November, 1869, and handled the mail whenever he was about the post office and felt inclined to do so. Such a person the law, in the view of the court, treats as an employee. To give any other construction to the law would subject every post office in the country to the dangers of having persons take the oath as deputy postmasters and at intervals absent themselves, yet keep a sufficient run of the mails as to enable them to commit depredations, and, when caught, plead that they were not regular employees, in order to escape the severer penalties of the law. While I cheerfully recognize the high authority cited, the difference in the facts sufficiently accounts for the conclusion arrived at by this court. Having carefully considered the matter relied on in the motion for a new trial, and finding the same insufficient, the motion is overruled.

Case No. 14,641.

UNITED STATES v. BREWERY UTENSILS.

[13 Int. Rev. Rec. 95.]

District Court, W. D. Pennsylvania. 1871.

INTERNAL REVENUE — ILLEGAL MANUFACTURE OF LIQUORS—FORFEITURE.

[1. Under sections 48 and 51, Act 1864 (13 Stat. 240), as amended by Act May 13, 1866 (14 Stat. 111), a brewer is bound to enter in his books, from day to day, all the beer made by him, or at his brewery; and, if he knowingly enters a less quantity, such entry, in the absence of an explanation, subjects his brewery to forfeiture.]

[Cited in U. S. v. A Quantity of Tobacco, Case No. 16,106.]

[2. If an unstamped package of beer is found in the possession of a brewer, and it is proven that he was aware of its existence, the law presumes, in the absence of a satisfactory explanation, that he intended to defraud the revenue, and imposes a forfeiture, not only of the unstamped package, but of all the beer and materials of the brewery.]

[This was a libel for forfeiture against a brewery, the utensils, beer, and other things, claimed by Henry Herdt.]

S. A. & W. S. Purviance, for claimant.
Dist. Atty. Swoope, for the United States.

McCANDLESS, District Judge. The libel for forfeiture contained six counts. The principal charges were that the claimant had evaded and attempted to evade the payment of tax on fermented liquors, and had intentionally made false statements in his books of the amount of beer manufactured. When the officers went to the brewery to seize it, they found in a vault under the hill 354 barrels of beer, of which there was no account in the claimant's books, or in his returns made to the government. The property claimed to be forfeited is valued at $5,300. The brewery is at 135 Third street, Allegheny City.

McCANDLESS, District Judge, after explaining to the jury his opinion of the case and regulations on the subject of the manufacture of fermented liquors, said that he had reduced some of the more important instructions to writing, and he intended to file them, that he might not hereafter be misrepresented as to the construction he had given to the law, which, as it affected this case, was to be found in the 48th and 51st sections of the act of 1864 [13 Stat. 240], as amended by the act of May 13, 1866 [14 Stat. 111].

His honor's charge to the jury was as follows: Every man is presumed to know the law, and ignorance of the law is no excuse for its violation. Every man is presumed to intend the necessary consequences of his act. If the claimant knew the law and neglected or refused to obey it, it will be for the jury to say whether he did not intend to evade the provision. The law presumes the intent in the absence of any explanation of his conduct. If the jury believes that the claimant did actually evade or intend to evade the payment of the tax on fermented liquors manufactured in his brewery, then the law forfeits the property libelled, and your verdict should be for the United States. Herdt was bound to enter in his book, from day to day, all the beer made by him or at his brewery, and if he entered less than the quantity made, the entry was a false entry within the meaning of the statute; and if he knew that all the beer made was not entered, in the absence of any explanation, the false entry was intentional and your verdict should be for the United States. The claimant had the right to the vault for his beer in quantities of six barrels or upward, but before removing any part thereof for consumption and sale the same must be stamped, and a neglect or refusal to do so is an evasion of the law and would subject the same to forfeiture. In the absence of proof to the contrary the law presumes the act or omission to be intentional. You will take all the testimony together, weigh it well, and as it preponderates, so decide. The claimant's counsel have requested me to answer certain points in writing: First, that unless the jury are satisfied that defendant evaded or attempted to evade the payment of the tax on beer manufactured by him, or fraudulently neglected or refused to make true and exact entry and report of the same, or intentionally made false entry in his book or in the statement made to the assessor, or knowingly allowed or procured the same to be done, their finding must be for the defendant. Answer by the court. This point affirmed. Second. That if any unstamped barrel or cask of beer was found in possession of defendant, and you are satisfied he was not aware of the fact, the only forfeiture would be the unmarked package, and as to the rest of the goods or property seized the finding of the jury should be for the defendant. Answer. If any unstamped package of beer was found in possession of the claimant, it will be for the jury to say whether or not he was aware of the fact. If he was, in the absence of any satisfactory explanation, the law presumes an intention to defraud the revenue, and not only the unstamped package, but all the beer and materials of the brewery are subject to forfeiture. Third. That under the evidence and the law in the case the defendant had a right to store in his vault the beer referred to, as being stored by him in the vault behind the brewery, and was not bound either to notify the government of the fact that it was so stored, or to pay the taxes thereon up to the date of the seizure in the case. Answer. The claimant had a right to store his manufactured beer in the vault, but he was bound to notify the government of the fact by entering the quantity manufactured by him in his book kept for that purpose, and to pay the taxes whenever any portion of it was removed for consumption or sale.

Verdict for the United States.

Case No. 14,642.

UNITED STATES v. BRICKER.

[16 Leg. Int. 190;[1] 3 Phila. 426.]

District Court, E. D. Pennsylvania. 1859.

COUNTERFEITING COIN OF THE UNITED STATES—SIMILITUDE TO GENUINE ARTICLE.

[When the purpose and act are otherwise guilty, within the statute, the similitude suffices, if, according to the mode of use apparently designed, the piece would have a probable tendency to mislead persons whom it might be intended in this manner to defraud into a belief of its genuineness.]

This was an indictment for uttering and passing, as true, counterfeited coin in the resemblance or similitude of gold dollars.

CADWALADER, District Judge. It appeared that there had recently been manufactured gilt pieces of metal, of less weight than gold, of the size and form of gold dollars, bearing on the side called the "head"

[1] [Reprinted from 16 Leg. Int. 190, by permission.]

a somewhat rude, but otherwise complete, resemblance to the genuine gold dollar. On the reverse side, the inscription "United States of America," and words "One Dollar" were omitted; but there was a wreath resembling that upon the coins issued from the mint. In some cases, loops like eyes of shirt studs, or vest buttons, were in the centre of this reverse side. In other cases the disks were in pairs, attached in the manner of sleeve buttons, the two heads outside. The wires connecting them when thus in pairs, and the eyes of the single pieces, were very easily broken off. An imperfection at the centre of the reverse side was then apparent. When the eyes or connections were thus detached, those who dealt in them called them "pocket pieces." When connected in pairs, they were sometimes called "sleeve buttons." The single pieces, when with eyes, were sometimes called "studs," or "buttons." Two persons who dealt in them, each concerned in business in the same store, were examined as witnesses; neither could state where, how, or by whom these articles were manufactured. These dealers bought them by the dozen, at prices exceeding those of gilt buttons of the same size of other patterns. The same persons resold them, usually without eyes, by single pieces, in pairs, or in lots of half a dozen, at prices varying from two, three, or four, to ten times the price of the ordinary gilt button. The only receptacle from which they were sold in the store of these witnesses was a box labelled "Pocket Pieces." The defendant purchased some without eyes at their store on two occasions, if not oftener. These pieces, if so presented as to exhibit the head, and elude an examination of the other side, represented the genuine dollar sufficiently to mislead persons not particularly skilled in the detection of counterfeit coin into a belief that they were genuine.

It appears that the defendant on the evening of the 28th of October last, passed a piece of this description on a tavern-keeper, by laying it with its head upward on the bar, in payment for a drink, and received the change: For this he was arrested; but on the 29th of October, on a hearing before the commissioner, was discharged. About the middle of November last, he, in a similar manner, passed one, and attempted to pass another, such piece, at two taverns, in succession, on the same evening. He was arrested and searched, when two or three other such pieces, with a small amount of good money, were found upon his person.

For the defence, the principal reliance was upon the doctrine laid down in U. S. v. Morrow [Case No. 15,819], where the charge was that of "attempting to pass" a counterfeit which was a "miserable imitation of the genuine" coin, and Judge Washington said that "the jury, before they" could "convict the prisoner, ought to be satisfied that the resemblance" to the genuine was "'sufficiently strong to deceive persons exercising ordinary caution." This the counsel of the defendant contended was the statement of a rule which, when applied to the pieces in question in the present case, entitled the defendant to an acquittal.

On the part of the United States it was answered that in the case cited no general rule as to the resemblance to the genuine coin required by the act of congress was laid down. The piece in that case had not been passed upon the prosecutor. The question was whether there had been a guilty attempt to pass it. The alleged attempt had been made by the defendant, not in person, but through the alleged agency of a young child. He was not present when the child made the attempt. The guilty intention in the employment of such an agent was negatived, not in law, but in fact, if the counterfeit was not such as to deceive persons exercising ordinary caution. Judge Washington, after, in effect, saying so, and saying that the piece, as it seemed to the court, was in all respects a miserable imitation, added, "But the jury must judge for themselves." The district attorney contended that the present case was altogether different, in the specific facts proved, and depended upon an entirely different principle, as to which he cited authorities to show that no greater similitude than existed in this case was required if the guilty intent was proved, of which the facts here, as he insisted, precluded any doubt.

THE COURT (CADWALADER, District Judge), in charging the jury, said:

"The similitude or resemblance" of the alleged counterfeit coin to the genuine required by the act of congress on which the prosecution is founded, need not be defined in general terms applicable to all cases. When the allegation is that a counterfeit so resembles, in all respects, the genuine coin, as probably to have been intended for the indiscriminate deception of any person into whose hands it may find its way in the ordinary course of business, the similitude required in order to warrant an imputation of guilt ought, perhaps, to be such as might tend to deceive persons exercising ordinary caution, particularly if no artifice has been employed in order to throw a person receiving it off his guard. On this point, however, it is not necessary to express an opinion. Sometimes the allegation, as in the present case, may be that the similitude of the counterfeit coin to the genuine was purposely incomplete or imperfect, because its intended use for purposes of deception was confined to a peculiar class of transactions. Here it is alleged that the intended use of the piece was in transactions in which deception might be practiced by an artful exhibition of only the head side. A counterfeit may so resemble the genuine coin on one side as to prevent a person seeing that side from using such vigilance as he might otherwise exercise in examining both sides. He may be thus thrown off his guard, and

misled by the appearance of the side of it exhibited into a belief of its genuineness. In such a case the counterfeiter may have purposely made or left the resemblance on the side which it is intended not to exhibit, incomplete or imperfect, for the mere purpose of evading the proof of his guilty design, which would otherwise have been more manifest. For cases of this description, a specific definition of the similitude required by the statute may be given by stating, as I do, that when the purpose and act are otherwise guilty, within the statute, the similitude suffices, if, according to the mode of use apparently designed, the piece would have had a probable tendency to mislead persons whom it might be intended in this manner to defraud into a belief of its genuineness. The jury will consider this point of the similitude, first independently of the question whether the piece was actually passed or uttered with a guilty purpose. If they find that it had, according to this definition, the required similitude, they will next inquire whether it was passed or uttered with a guilty purpose. On this latter point there is no dispute as to the law. It is left, upon the testimony, to the jury, who will keep the two questions distinct, giving to the defendant the benefit of any reasonable doubt as to the facts.

The jury, after being out for some time, came into court, and asked the question: "Can a piece of metal be a counterfeit of the United States coin without the impression of the genuine coin, or the denomination?"

THE COURT answered: "If the question is as to the omission of a portion of the devices and legends required by the act of congress, such as an omission of the inscription 'United States of America,' or of the words 'One Dollar,' I answer that such omission does not prevent the jury from lawfully finding a verdict of guilty, if they believe that the piece, first, had such a tendency to deceive as has been already defined in the charge of the court; and, secondly, was passed or altered with a guilty intent, as has also been explained in the charge."

The jury retired, and soon afterwards returned with a verdict of guilty.

Case No. 14,643.

UNITED STATES v. BRICKFORD.

[See Case No. 14,591.]

Case No. 14,644.

UNITED STATES v. BRIDGES.

[10 Cent. Law J 7;[1] 27 Pittsb. Leg. J. 152.]

Circuit Court, N. D. Alabama. Oct. Term, 1879.

TRIAL—CRIMINAL PROCEDURE—SEALED VERDICT—POLLING JURY.

Where a defendant in a criminal case agrees to a sealed verdict and the jury deliver their verdict finding him guilty to the clerk of the court and then separate, the defendant has no right to have the jury polled when the verdict is read.

[Cited in Doyle .. U. S., 10 Fed. 272.]

The defendant was indicted for perjury. After the court had charged the jury, it then being night, one of the defendant's counsel said that the jury might bring in a "sealed verdict." The judge presiding said that the court would not immediately adjourn. After a short interval, the jury not having returned their verdict, the judge left the court house. That night about two o'clock, the jury delivered a sealed verdict to the clerk of the court, and separated. The court was opened the next morning at ten o'clock. The jury all being present, the verdict, signed by the foreman of the jury, was opened and read in the presence of the defendant: "We, the jury, find the defendant guilty as charged in the indictment." One of the attorneys representing the defendant immediately rose and said: "May it please the court, I move that the jury be polled." The court, Bruce, J., presiding, overruled the motion to poll the jury, for the reason that the defendant by his counsel had agreed to a sealed verdict, and that the jury had filed their sealed verdict with the clerk, and had separated. At a subsequent day of the term, the defendant moved for a new trial, alleging as one ground that he had been denied the right to poll the jury.

Walker & Shelby, for the motion, cited: 1 Bish. Cr. Proc. § 830; U. S. v. Potter [Case No. 16,078]; Fox v. Smith, 3 Cow. 23; Sargent v. State, 11 Ohio, 472; State v. Hughes, 2 Ala. 102; Brister v. State, 26 Ala. 132.

Charles E. Meyer, contra, cited: 1 Bish. Cr. Proc. § 830; Com. v. Roby, 12 Pick. 496; State v. Wise, 7 Rich. Law, 412; Cook v. State, 60 Ala. 39.

BRUCE, District Judge, in an oral opinion, commented upon the cases cited by defendant's counsel, distinguishing them from the case at bar, and overruling the motion for a new trial. He adhered to the former ruling, that where a defendant agrees to a sealed verdict, and the jury find him guilty, and deliver the verdict sealed to the clerk of the court and separate, the defendant has waived his right to have the jury polled when the verdict is read.

Case No. 14,645.

UNITED STATES v. BRIDGMAN et al.

[9 Biss. 221; 8 Am. Law Rec. 541; 12 Chi. Leg. News, 133; 9 Reporter, 74.][1]

Circuit Court, E. D. Wisconsin. Dec., 1879.

WRIT—SERVICE OF—PRIVILEGE—COMPULSORY APPEARANCE.

A citizen of Massachusetts was indicted in the federal court of Wisconsin. Under an arrange-

[1] [Reprinted by permission.]

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 9 Reporter, 74, and 8 Am. Law Rec. 541, contain only partial reports.]

ment with the United States attorney that he might within a prescribed time appear, without arrest, and plead to the indictment and give bail, he came to Wisconsin for that purpose. *Held*, that his appearance in court was compulsory, and that during the time he was necessarily within the jurisdiction of the court for such purpose, he was exempt from liability to civil process.

[Cited in Miner v. Markham, 28 Fed. 391.]

[Cited in McIntire v. McIntire, 5 Mackey, 348; Moletor v. Sinnen, 76 Wis. 311, 44 N. W. 1099.]

G. W. Hazleton, for the United States.

H. M. Finch, for defendant.

DYER, District Judge. This action was commenced by personal service of a summons upon the defendant, Joseph C. Bridgman, the other defendant not being found; and the defendant served now specially appears for the purpose of moving to set aside such service as illegal.

Bridgman was lately indicted in the United States district court for this district, and an affidavit upon which the present motion is based, states that he is a citizen of the state of Massachusetts; that he came from that state into this district for the purpose of pleading to the indictment, and giving bail, and that while he was in the office of his counsel, and before he had sufficient time to depart, he was served with the summons in this action.

It further appears that some time since, the attorney for the United States received from the attorneys for the defendant in Massachusetts, a letter in which they expressed a wish for an arrangement by which the defendant could voluntarily give bail in the criminal case, in Massachusetts, and asking if such an arrangement could be made. To this proposition the attorney for the United States replied by letter under date of November 3d, declining to make the proposed arrangement, and stating that defendant must come to Milwaukee to be arraigned before bail could be taken, and that the bail would have to be fixed by the court in the presence of the defendant.

In this letter the district attorney used this language: "I shall be glad if Mr. B. will come here of his own accord, and will wait until Tuesday, the 11th inst., for him to appear. I should not feel at liberty to consent to this, but for the fact that the commissioner of Indian affairs has already apprised you of the indictment. I therefore assume that the postponement of the arrest in order to give the defendant an opportunity to appear voluntarily and plead, while it will save expense, will do no possible harm. Mr. B. can therefore appear at any time before the 11th, or on the 11th of this month, to plead and give bail."

It should be added that in a letter of date November 3d, written by the defendant personally to the attorney for the United States, he said: "If by giving bonds to appear at court at Milwaukee will save any expense to me, and save me time, etc., I will respond upon receipt of a letter from you as soon as by the presence and order of a United States marshal."

Upon the facts thus presented, the question of the legality of the service of the process upon the defendant arises. There is clearly no ground for claiming that any fraud or deceit was practiced upon the defendant to induce him to come within this jurisdiction. As is apparent from the correspondence referred to, the defendant and his attorneys in Massachusetts, were endeavoring to make an arrangement by which he could give bail in that state to answer to the indictment pending against him here. In place of such an arrangement, the district attorney proposed to postpone his arrest until a day named, in order to give the defendant an opportunity to come without arrest, from Massachusetts, to plead to the indictment and give bail; and on the day so named, the defendant appeared, having come from the state of his residence for that purpose alone. There is perhaps an expression in the letter written by the district attorney to the defendant's attorney, which may have led him to suppose that if he would come voluntarily to the court where the indictment was pending, no harm would result to him; although, taking the whole letter together, it is quite evident that the writer did not intend that it should have that meaning.

But the real question is, was the defendant's presence within this jurisdiction in fact compulsory? I am of opinion that it should be so considered; and upon the authority of Parker v. Hotchkiss [Case No. 10,739] I must hold that the service upon the defendant of the summons in this action ought to be set aside.

In that case it was held that a suitor attending at court, but residing without the circuit, was privileged from the service of a summons; and in the statement of the case it appears that the summons was served after the cause to which the suitor was a party had been tried, and when he was at his lodgings. In the opinion delivered by Cane, J., the principle is stated that in such a case the exemption of the party from process is a privilege of the court, and that no distinction is to be taken between writs of capias and summons. In support of this distinction, authorities are cited, and Blight v. Fisher [Case No. 1,542] is overruled, Justice Grier and Chief Justice Taney concurring in the opinion.

In the case in hand, the defendant came from a foreign jurisdiction where he resided, into this district, for the sole purpose of pleading to the indictment and giving bail. His attendance was really compulsory, because he knew that if he did not come without arrest he would brought here upon a warrant. Bail could not be taken in Massachusetts, and with knowledge of this fact he was of necessity advised that he must

personally attend this court, either under or without arrest; and he chose to avail himself of the opportunity extended to him for a limited time, to come without arrest. But in fact he was here none the less under compulsion, and being here to submit himself to the court, plead to the indictment and give bail, he was, while necessarily within this jurisdiction for that purpose, exempt from liability to the service of process upon him in the present action. This conclusion is, I think, supported by the authorities which bear upon the question.

The motion to set aside the service of the summons will be granted.

Case No. 14,646.

UNITED STATES v. BRIGGS.

[2 Gall. 363.] [1]

Circuit Court, D. Massachusetts. May Term, 1815.

NONINTERCOURSE—USING BRITISH PASS.

Quære, whether a piece of cloth, or any other agreed signal, is a "pass" within the meaning of the first section of the act of August 13, 1813, c. 56 [2 Story's Laws, 1382; 3 Stat. 84, c. 57].

This was an indictment founded on the act of congress of August 13, 1813, c. 56, for using a British pass or protection. The evidence on the part of the United States went to prove, that Briggs owned and commanded a small boat, which was captured in or near the Vineyard Sound, in sight of the British ships of war, having on board vegetables and other provisions of various kinds, and also a piece of blue cloth, which was intended to be affixed to the masthead, as a signal concerted with the enemy, upon seeing which they were to suffer him to pass unmolested. Much evidence was offered on the part of the accused, to explain or contradict that of the government, but it is unnecessary to state it in this report.

STORY, Circuit Justice, after having summed up the evidence to the jury, directed them that if they believed Briggs to have used a patch for the purpose of protection, in concert with a British commander, this was, in the contemplation of the law, a "pass." It was as much so, as if a ring, or a watch-seal, or any other symbol had been given, upon the exhibition of which the defendant would be permitted to go unmolested; and it was immaterial whether the thing so used was given by the British commander, or was the property of Briggs, if it were agreed to be used for this purpose. It was the pass that was granted, and not the thing itself.

The honorable judge stated, however, that he did not feel a perfect confidence in this construction of the law, but, as the defendant would have a remedy by a motion for a new trial to correct any error in this respect, he thought it proper to give an absolute direction to the jury, and to reserve the question for a more deliberate consideration in case of a conviction.

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

Case No. 14,647.

UNITED STATES v. BRIGHT.

[Brightly, N. P. 19, note.]

Circuit Court, D. Pennsylvania. April Term, 1809.

JURISDICTION OF UNITED STATES COURTS—COURT OF APPEALS UNDER THE ARTICLES OF CONFEDERATION—DISTRICT COURTS UNDER CONSTITUTION—PRIZE CASES—SUIT IN WHICH STATE HAS AN INTEREST—STATE OFFICERS OBSTRUCTING FEDERAL PROCESS.

[1. The court of appeals established by congress under the Articles of Confederation had full power to re-examine and reverse or affirm the sentences of the courts of admiralty established by the different states, though founded upon the verdicts of juries. Penhallow v. Doane, 3 Dall. (3 U. S.) 54, followed.]

[2. Where the subject of litigation depends upon the question of prize or no prize, it is completely within the cognizance of the district courts, which, under the constitution and laws of the United States, are invested with jurisdiction of all civil causes of admiralty and maritime jurisdiction.]

[3. The mere fact that a state claims an interest in a subject in dispute in an action between private citizens, does not, by virtue of the eleventh amendment to the constitution of the United States, deprive the federal court of jurisdiction to determine the matter and enter a decree binding upon the parties before it.]

[4. The provision of the eleventh amendment that the judicial power of the United States shall not be construed to extend to any suit "in law or equity" commenced or prosecuted against a state by a citizen of another state, does not apply to suits involving questions of admiralty and maritime jurisdiction, and which are brought in the federal district courts as courts of admiralty.]

[5. A state has no constitutional power to direct its governor to employ force to resist the execution of a decree of a federal court, though such decree is deemed to have been beyond the jurisdiction of the court to make; and a militia officer, who, under the orders of the governor, employs force to resist and prevent a United States marshal from executing process issued upon such decree, is not excused or justified therein by reason of the governor's order, but is subject to punishment for violating the laws of the United States.]

WASHINGTON, Circuit Justice. Impressed with the magnitude of the questions which have been discussed, we could have wished for more time to deliberate upon them, and for an opportunity to commit to writing the opinion which we have formed, that it might have been rendered more intelligible to you, and less susceptible of being misunderstood by others. But we could not postpone the charge, without being guilty of the impropriety of suffering the jury to separate, after the arguments of counsel were closed, or of keeping them together until Monday; a hardship which we could not think of imposing upon them. I shall proceed therefore to state to you, in the best way I can, the opinion of the court upon this

novel and interesting case. It may not be improper, in the first place, to refresh your minds with a short history of the transactions which have led to the offence with which these defendants are charged, and to consequences which might have been of serious import to the nation.

Gideon Olmsted and three others, having fallen into the hands of the enemy, during the latter part of the year 1778, were put on board the sloop Active, at Jamaica, as prisoners of war, in order to be conducted to New York, whither this vessel was destined with supplies for the British troops. During the voyage, Olmsted and his companions, who had assisted in navigating the vessel, formed the bold design of taking her from the enemy, in which, with great hazard to themselves, they ultimately succeeded. Having confined in the cabin the officers, passengers, and most of the men, they steered for some port in the United States, and had got within five miles of Egg Harbour, when Captain Huston, commanding the brig Convention, belonging to the state of Pennsylvania, came up with them, and captured the Active as a prize. The sloop was conducted to Philadelphia, and libelled in the court of admiralty, established under an act of the legislature of that state. Claims were filed by Olmsted and his associates for the whole of the vessel and cargo, and by James Josiah, commander of a private armed vessel, which was in sight at the time of the capture by Huston, for a proportion of the prize. Depositions were taken in the cause. A jury was impannelled to try it. The question of fact was whether the enemy was completely subdued or not by Olmsted and his companions at the time when Capt. Huston came up with them. The jury, without stating a single fact, found a general verdict, for one-fourth to Olmsted and his associates, and the residue to Huston and Josiah, to be divided according to law, and an agreement between them. From the sentence of the court upon this verdict, Olmsted appealed to the court of appeals in prize causes, established by congress, where, after a hearing of the parties, the sentence of the admiralty court was reversed, the whole prize decreed to the appellants, and process was directed to issue from the court of admiralty, commanding the marshal to sell the vessel and cargo, and to pay over the net proceeds to those claimants. The judge of the court of admiralty refused to acknowledge the jurisdiction of the court of appeals over a verdict found in the inferior court; directed the marshal to make the sale, and to bring the proceeds into court. This was done, and the judge acknowledged the receipt of the money on the marshal's return. In May, 1779, George Ross, the judge of the court of admiralty, delivered over to David Rittenhouse, treasurer of this state, £11,469. 9s. 9d. in loan office certificates, issued in his own name, being the proportion of the prize money to which the state was entitled by the sentence of the inferior court of admiralty. Rittenhouse at the same time executed a bond to Ross, obliging himself, his heirs, executors, &c., to restore the sum so paid in case Ross should, by due course of law, be compelled to pay the same according to the decree of the court of appeals. In the condition of this bond the obligor is described as being treasurer of the state; and the money is stated as having been paid to him for the use of the state. Indents were issued to Rittenhouse on the above certificates, and these were afterwards funded in the name of Rittenhouse, for the benefit of those who might eventually appear to be entitled to them. After the death of Rittenhouse, these certificates, together with the interest thereon, which had been received, came to the hands of Mrs. Sergeant and Mrs. Waters, his representatives. The papers which covered the certificates were endorsed in the handwriting of Mr. Rittenhouse, with a memorandum declaring that they will be the property of the state of Pennsylvania when the state releases him from the bond he had given to George Ross, judge of the admiralty, for paying the fifty original certificates into the treasury as the state's share of the prize. No such release ever was given. The certificates thus remaining in the possession of the representatives of Rittenhouse, Olmsted filed his libel against them in the district court of Pennsylvania, praying execution of the decree of the court of appeals. Answers were filed by these ladies; but no claim was interposed, nor any suggestion made of interest on the part of the state, and in January, 1803, the court decreed in favour of the libellants. On the 2d of April, in the same year, the legislature of Pennsylvania passed a law, authorizing the attorney-general to require Mrs. Sergeant and Mrs. Waters to pay into the treasury the moneys acknowledged by them, in their answer in the district court, to have been received, without regard to the decree of that court; and, in case they should refuse, that a suit should be instituted against them in the name of the commonwealth for the said moneys. The governor was also required to protect the just rights of the state by any further measures he might deem necessary; and also to protect the persons and properties of those ladies from any process which might issue out of the federal court, in consequence of their obedience to this requisition, and further should give them a sufficient instrument of indemnification in case they should pay the money to the state. No further proceedings took place in the district court for some time after the passage of this law. And when, at length, an application was made for process of execution, the judge of that court, with a very commendable degree of prudence, declined ordering it, with a view to bring before the supreme court of the United States a ques-

tion so delicate in itself, and which was likely to produce the most serious consequences to the nation. Upon the application of Olmsted, the supreme court issued a mandamus to the judge of the district court, commanding him to execute the sentence pronounced by him in that case, or to show cause to the contrary. The reasons for withholding the process, assigned in answer to this writ, not being deemed sufficient by the supreme court, a peremptory mandamus was awarded.

It may not be improper here to state that no person appeared in the supreme court on the part of the state or on that of Mrs. Sergeant and Mrs. Waters, and that no arguments were offered on the part of Olmsted. The idea which I understand has gone abroad, that the mandamus was awarded upon the single opinion of the chief justice, is too absurd to deserve a serious refutation. No instance of that sort ever did or could occur; and in this particular case I do not recollect that there was one dissentient from the opinion pronounced.

Process of execution having been awarded by the judge of the district court in obedience to the mandamus, the defendant, General Michael Bright, commanding a brigade of the militia of the commonwealth of Pennsylvania, received orders from the governor of the state "immediately to have in readiness such a portion of the militia under his command, as might be necessary to execute the orders, and to employ them to protect and defend the persons and the property of the said Elizabeth Sergeant and Esther Waters from and against any process, founded on the decree of the said Richard Peters, judge of the district court of the United States, aforesaid, and in virtue of which any officer, under the direction of any court of the United States, may attempt to attach the persons or the property of the said Elizabeth Sergeant and Esther Waters." A guard was accordingly placed at the houses of Mrs. Sergeant and Mrs. Waters, and it has been fully proved, and is admitted, that the defendants, with a full knowledge of the character of the marshal of this district, of his business, and his commission, and the process which he had to execute having been read to them, opposed, with muskets and bayonets, the persevering efforts of that officer to serve the writ, and, by such resistance, prevented him from serving it. There is no dispute about the facts. The defendants have called no witnesses, and their defence is rested upon the lawfulness of the acts laid in the indictment. They justify their conduct upon two grounds—1st. That the decree of the district court, under which the process was issued, was coram non judice, and to all intents and purposes void; and 2dly. That though it were a valid and binding decree, still that they cannot be questioned criminally for acting in obedience to the orders of the governor of the state. The decree of the district court is said to be void for two reasons: First, because the court of appeals had not power to reverse the sentence of the court of admiralty, founded upon the verdict of a jury; and, secondly, because the state of Pennsylvania claims an interest in the subject which was in controversy in the district court.

The first question is, was the decree of the court of appeals void for want of jurisdiction of the case in which it was made? But first let me ask, can this be made a question at the present day, before this or any other court in the United States? We consider it to be firmly settled by the highest judicial authority in the nation that it is not now to be questioned or shaken. The power of the court of appeals to re-examine and reverse or affirm the sentence of the courts of admiralty established by the different states, though founded upon the verdicts of juries, was first considered and decided in the case of Penhallow v. Doane [3 Dall. (3 U. S.) 54], in the supreme court of the United States. The jurisdiction of that court to re-examine the whole cause, as to both law and fact, was considered as resulting from the national character of an appellate prize court, and not from any grant of power by the state from whose court the appeal had been taken. The right of the state to limit the court of appeals in the exercise of its jurisdiction was determined to be totally inadmissible. The same question was considered by the supreme court upon the motion for the mandamus, and decided to be settled and at rest. If it were necessary to give further support to the authority of these cases, the opinion of the supreme court of Pennsylvania in Ross's Executors v. Rittenhouse, and the unanimous opinion of the old congress, with the exception of the representatives of this state, and one of the representatives of New Jersey, might be mentioned. If reasons were required to strengthen the above decisions, those assigned by the committee of congress, upon the case of the Active, are believed to be conclusive.

But I think it will not be difficult to prove that the law of Pennsylvania passed on the 9th of September, 1778, establishing a court of admiralty in that state, neither by the terms of it, nor by a fair construction of its meaning, was intended to abridge the jurisdiction of the court of appeals in cases like the one under consideration. The words are: "That the jury shall be sworn or affirmed to return a true verdict upon the libel according to evidence; and the finding of the jury shall establish the facts without re-examination or appeal." The obvious meaning of this provision was that if the jury found the facts upon which the law was to arise, those facts were to be considered as conclusive by the appellate court, and not open to re-examination by the judges of that court; the legislature thinking it, no doubt, most safe to intrust the finding of facts to a jury of

twelve men. But what was to be done if the jury found no facts, as was the present case? If the appellate court were precluded from an inquiry into the facts, affirmance of the sentence appealed from would be inevitable. This absurdity then followed—in all cases it was necessary to impannel a jury to establish the facts, and in all cases, without exception, the party thinking himself aggrieved might appeal. But in every case where the jury choose to find a general verdict, the sentence appealed from must of necessity be affirmed. I cannot believe that this was the meaning of the legislature; and I do not think that the words of the law will fairly warrant such a construction. * Let me then put the question seriously to the jury: Will they have the vanity to think themselves wiser than all those who have passed opinions upon this important question of law? And will they undertake to decide that those opinions were erroneous? Miserable, indeed, must be the condition of that community where the law is unsettled, and decisions upon the very point are disregarded, when they again come, directly or incidentally, into discussion. In such a state of things good men have nothing to hope, and bad men nothing to fear. There is no standard by which the rights of property, and the most estimable privileges to which the citizens are entitled, can be regulated. All is doubt and uncertainty until the judge has pronounced the law on the particular case before him; but which carries with it no authority as to a similar case between other parties.

But suppose for a moment, against the settled law upon the point, that the court of appeals had not a power to re-examine the verdict of the jury in the case of the Active, and on that account that the decree of the district court in opposition to that of the court of admiralty was erroneous, it does not therefore follow that the district court had no jurisdiction of the case on which this process issued. If erroneous, it could only be re-examined and corrected in a superior court. But if the subject depended upon a question of prize or no prize, it was completely within the cognizance of the district court, by the constitution and laws of the United States; the former of which grants to the federal courts, and the latter to the district courts, cognizance of all civil causes of admiralty and maritime jurisdiction. This is such a cause; and we consider that circumstance to be decisive of the first point. We are happy upon this occasion, as we are upon all others, to coincide in opinion with the learned and respectable gentleman who presides in the supreme judiciary of this state.

The next ground of objection to the jurisdiction of the district court is, that the state of Pennsylvania claimed an interest in the subject of dispute between the parties in that cause. The amendment to the constitution upon which this question occurs declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state." It is certain that the suit in the district court was not commenced or prosecuted against the state of Pennsylvania. She was in no respect a party to that suit. But it is contended that under a fair construction of this amendment, if a state claims an interest in the subject in dispute, the case is not cognizable in a federal court. In most cases it will be found that the soundest and safest rule by which to arrive at the meaning and intention of a law is to abide by the words which the lawmaker has used. If he has expressed himself so ambiguously that the plain interpretation of the words would lead to absurdity, and to a contradiction of the obvious intention of the law, a more liberal course may be pursued. But if upon any occasion the strict rule should be observed, it ought to be in expounding the constitution; although I do not mean to say that even in that case this rule should be inflexible. Every reason is opposed to the construction contended for by the defendants' counsel; and to our apprehension there is not one sound reason in favour of it. If the title to the thing in dispute be in the state, and this is made to appear to the court, it is inconceivable that the plaintiff should recover so as to disturb that right. But if he should recover, the state would not be bound by the judgment, not being a party to it. This is by no means a new case. If one individual obtains a judgment or decree against another, the interest of a third person, not a party, will not be bound or prejudiced by the decision; but he may nevertheless assert his right in a court of justice against the party in possession of the property to which he claims title. The state cannot be forced into court, but she may come there, if she pleases, in pursuit of her rights, and will no doubt do so upon all proper and necessary occasions.

But if, on the other hand, the mere claim of interest by a state in the subject in dispute between two citizens can have the magic effect of suspending all the functions of a court of justice over that subject, and of annihilating its decrees when pronounced, this effective and necessary branch of our government, and of all free governments, may be rendered useless at any moment, at the pleasure of a state. If the suit be prosecuted against a state, the court perceives at once its want of jurisdiction, and can dismiss the party at the threshold. But if a latent claim in the state, not known, perhaps, by any of the litigant parties, is sufficient to oust the jurisdiction, to annul the judgment when rendered, and to affect all the parties concerned, with the consequences of carrying a void judgment into execution, the federal courts may become more than useless; they will be traps, in which unwary suitors may

be insnared to their ruin. To illustrate this position the district attorney mentioned many very strong and very supposable cases. I will add one other. A. sues B. for a debt, or for property, either real or personal, in his possession. Concious that he must pay the money or lose his possession in consequence of the unquestionable title of his adversary, B. pays over the money, or conveys the property, even pending the suit, to a third person for the use of the state, and by this operation arrests the further progress of the suit, or avoids the judgment, whenever it shall pass. A doctrine so unjust, and big with consequences so alarming, and so fatal to the general government, should have strong and unequivocal words to support it. The court would be very mischievously employed in supplying them. We should convert this amendment, this sacrifice made to state pride, into an engine to demolish altogether one of the essential branches of the general government. To this branch of the argument, therefore, the answer is short, but conclusive. The state is not a party, and she has no interest in the subject in dispute in the district court. The decree of the court of appeals extinguished the interest of Pennsylvania in any share of the Active and her cargo, and vested the full right to the whole in Olmsted and his associates, who might rightfully follow that part of the proceeds which came into the hands of the representatives of Rittenhouse, who held them as stakeholders for whoever might have title to them. Rittenhouse himself held them in his private capacity, and not as treasurer, for his individual security against the bond given to Ross, and which was still outstanding when this decree was rendered. I know not how this part of the subject can be made plainer.

There is another objection to the argument drawn from the interest of the state, which was not satisfactorily answered by Mr. Ingersoll, to whom it was stated by the court during the discussion. By the constitution of the United States the judicial power extends to all controversies between a state and citizens of another state, whatever might be the nature of the controversy, and no matter as to the court to which the cause might be assigned by the legislative distribution of the judicial powers. That amendment declares that the above provision shall not be construed to extend to any suit in law or equity commenced or prosecuted against a state by a citizen of another state or an alien. This was not a suit at law or in equity, but in a court of the law of nations, and in a case of admiralty and maritime jurisdiction. The question put to the learned counsel was, "Is such a case excluded from the cognizance of the district court by this amendment?" The answer given was that the amendment ought to be so construed, this case being equally within the mischief meant to be remedied; that is, the court is bound to supply the words, "or to cases of admiralty and maritime jurisdiction." Would we be justified by any rule of law in admitting such an interpolation, even if a reason could not be assigned for the omission of those words in the amendment itself? I think not. In our various struggles to get at the spirit and intention of the framers of the constitution, I fear that this invariable charter of our rights would, in a very little time, be entirely construed away, and become at length so disfigured that its founders would recollect very few of its original features But there appears to be a solid reason for the limitation of the amendment to cases at law and in equity. And this will throw some light upon the preceding branch of this argument. Suits at law and in equity cannot be prosecuted against a state without making her a party, and the judgment acts directly upon her. But in what manner was the execution to be made effectual? The subject was a delicate one, and it was thought best to avoid having it practically tested. But in cases of admiralty and maritime jurisdiction the property in dispute is generally in the possession of the court, or of persons bound to produce it, or its equivalent, and the proceedings are in rem. The court decides in whom the right is, and distributes the proceeds accordingly. In such a case the court need not depend upon the good will of a state claiming an interest in the thing to enable it to execute its decree. All the world are parties to such a suit, and of course are bound by the sentence. The state may interpose her claim and have it decided. But she cannot lie by, and, after the decree is passed say she was a party, and therefore not bound, for want of jurisdiction in the court. This doctrine, in relation to the proceedings of a court of the law of nations, and in which all nations are interested, might be productive of the most serious consequences to the general government, to whom are confided all our relations with foreign governments. As at present advised, then, we think that the amendment to the constitution does not extend to suits of admiralty and maritime jurisdiction.

The second ground of justification is founded upon the orders of the governor of this state, issued, as it is contended, under the sanction of a law of the state. Whether the true meaning of that law has been mistaken or not, it would perhaps ill become this court to decide; but it will not, I trust, be deemed indecorous if we express a hope that it was so. It is more agreeable to think that an individual should have been mistaken in his judgment (and in this case we are bound to think that the error, if any, was not of the heart) than that the legislature should have intended so open an attack upon the constitution and government of the United States. But if such was the design of the law, we must lament the circumstance, and must, without reserve, pronounce it to be unconstitutional and void. Upon what is the law predicated? Upon the invalidity of

the sentence of the district court. But have the people of the United States confided to the legislatures of the states, or even to that of the United States, the power to declare the judgments of the national courts null and void? Could such a power be granted to them without sapping the foundations of the government and extinguishing the last spark of American liberty? It is a truth not to be questioned that the power to declare the judgments of your courts void can never be safely lodged with a body who may enforce its decision by the physical force of the people. This power necessarily resides in the judicial tribunals, and can safely reside nowhere else. Whether a state court is competent to declare a judgment of a federal court void for want of jurisdiction need not now be considered. It may, however, be observed that, admitting the right in the first instance, the ultimate decision of the question belongs to the supreme judicial tribunal of the nation, if that decision be required; for the judicial power extends to all cases arising under the constitution and the laws of the United States made in pursuance thereof; and the twenty-fifth section of the judicial law, with a view to secure to the national judiciary this important privilege, vests in the supreme court a power to review and affirm or reverse the decision of the highest court of law or equity in a state, where a question depending upon the construction of any clause in the constitution, treaty, or statute of the United States had been decided against the title, &c., claimed under the constitution, &c. It seems, however, that this power is considered as being unsafely lodged in the national courts, because it may be abused for the purpose of drawing every case into the vortex of the federal jurisdiction. Whence can arise this jealousy? Had the judges of those courts, or of any courts, an interest in extending the sphere of their jurisdiction? Quite otherwise. As the jurisdiction of the court is abridged, the labour of the judge is diminished. Is it a privilege which is claimed for the advantage of the court or of the individuals who compose it? By no means. It is the privilege of the citizen, and as long as I have the honour of a seat on the bench I will consider myself one of the guardians of this privilege (a very feeble one, I acknowledge), and with a steady and unvarying eye, fixed upon the constitution as my guide, I shall march forward, without entertaining the guilty wish to limit this privilege where the citizen may fairly claim it, or the desire, not less criminal, to enlarge its boundaries, because it is claimed.

If, then, the validity of the decree of the district court be established upon the ground of reason, upon the basis of the constitution,—in part upon the opinion of congress and decisions of the supreme federal and state courts, more than once given,—what follows? That the governor of this state had no power to order the defendants to array themselves against the United States, acting through its judicial tribunals; and the legislature of the state was equally incompetent to clothe him with such a power, had it so intended. The defendants were bound by a paramount duty to the government of the Union, and ought not to have obeyed the mandate. There were but two modes by which the general government could assert the supremacy of its power on this occasion: by the peaceful interference of the civil authority, or by the sword. The first has been tried, and the defendants are now called to answer for their conduct before a jury of their country. Will any man be found bold enough to condemn this mode of proceeding, or complain that this alternative has been chosen? But if the accused can plead the orders of the governor as a justification of their conduct, and if the sufficiency of such a plea is established, the civil authority is done away with, its means are inadequate to its end, and force must be resorted to. Are we prepared for such a state of things? The doctrine appears to us monstrous; the consequences of it terrible. We regret that it was broached. It was contended that in a case where a state government authorizes resistance to the process of a federal court, though in a cause wherein the court had competent jurisdiction, the only remedy in such an emergency is negotiation. If there were no federal, no common, head, this position might be admitted, and on the failure of the negotiations the ultima ratio must be resorted to. But under our constitution of government, which declares the laws of the United States, made in pursuance of that instrument, the supreme law of the land, and which vests in the courts of the United States jurisdiction to try and decide particular cases, I am altogether at a loss to conceive how, in the case stated, negotiations between the general and paramount government, in relation to the powers granted to it, and a state government, can be necessary, and could ever be proper. I speak not of the power, but of the right of resistance.

But it is contended that the defendants, standing in the character of subordinate officers to the governor and commander in chief of the state, were bound implicitly to obey his orders; and that, although the orders were unlawful, still the officer and those under his command were justifiable in obeying them. The argument is imposing, but very unsound. In a state of open and public war, where military law prevails, and the peaceful voice of municipal law is drowned in the din of arms, great indulgences must necessarily be extended to the acts of subordinate officers done in obedience to the orders of their superiors. But even there the order of a superior officer to take the life of a citizen, or to invade the sanctity of his house and to deprive him of his property, would not shield the inferior against a

charge of murder or trespass, in the regular judicial tribunals of the country. In the case of Little v. Barreme [2 Cranch (6 U. S.) 170] the supreme court of the United States felt every motive which could affect them as men to excuse an unlawful act performed by a meritorious officer. He was at sea, without the possibility of consulting with counsel or others as to the legality of the act he was about to execute, and which appeared to him to be authorized by the chief executive magistrate of the nation in the instructions received from the navy department. Notwithstanding all these powerful pleas in his favour, pleas which were addressed strongly to the feelings of those who were to decide on his case, the supreme court conceived that the law of the land did not warrant the instructions given, and consequently that the officer was not justified in what he did. I am not sure, but I am induced to think that he afterwards obtained relief from congress.

This is said to be a hard case upon the defendants, because, if they had refused obedience to the order of the governor, they would have been punished by the state. I acknowledge it is a hard case; but with this you have nothing to do if the law is against the defendants. It may, however, be observed that, had the defendants refused obedience, and been prosecuted before a military or state court, they ought to have been acquitted, upon the ground that the orders themselves were unlawful and void, and we ought, of course, to suppose that they would have been acquitted.

We enter not into the political discussions which have been so ably conducted on both sides, but we admonish you to discard from your minds all political considerations, all party feelings, and all federal or state prejudices. The questions involved in this case are in the highest degree momentous, and demand a cool and dispassionate consideration. We rely upon your integrity and wisdom for a decision which you can reconcile to your consciences, and to the duties which you owe to God and to your country.

The jury found the following special verdict: "And now, to wit, on this first day of May, in the year aforesaid, the jurors, sworn and affirmed and impannelled as aforesaid, upon their oaths and affirmations aforesaid do find that on the said 25th of March, 1809, in the city of Philadelphia, aforesaid, that the defendants did knowingly and wilfully obstruct, resist, and oppose the said John Smith, then and there being an officer of the said United States, to wit, the marshal of the district of Pennsylvania, in attempting then and there to serve and execute the said judicial writ of arrest in the indictment mentioned, and that the said defendants then and there acted under the orders of the constituted authorities of the commonwealth of Pennsylvania in so obstructing, resisting, and opposing the said marshal, as aforesaid; and whether, upon the whole matter the law is in favour of the United States, or of the defendants, the jurors aforesaid refer to the consideration of the court; and if the court are of opinion that the law is for the United States, then the jurors aforesaid do find the defendants, and every of them, guilty; but if the court are of opinion that the law is for the defendants, then they find the defendants not guilty."

At a subsequent day, judgment was entered on the verdict in favour of the United States, and Gen. Bright was sentenced to be imprisoned for three months and to pay a fine of $200; and the other defendants to one month's imprisonment and a fine of $50 each; but they were immediately pardoned by the president of the United States.

Case No. 14,648.

UNITED STATES v. The BRIGHT STAR.

[See Case No. 1,880.]

Case No. 14,649.

UNITED STATES v. BRIONES.

[Hoff. Land Cas. 111.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT — VALIDITY OF GRANT.

The validity of this claim undoubted.

Claim [by Juana Briones] for one square league of land in Santa Clara county [the Rancho La Purisima Concepcion], confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

Halleck, Peachy & Billings, for appellee.

HOFFMAN, District Judge. The board of commissioners, in their opinion in this case, observe that it presents no point of doubt or difficulty. The genuineness of the original grant is fully established. The grantees are shown to have been in the possession and occupation of the land for several years prior to their grant, and continued to reside on it until 1844, when, with the permission of the governor, it was sold to the present claimant. The latter has resided on it up to the time of the filing of her petition.

In a note appended to the original grant, the boundaries are indicated with much precision; and the grant declares the quantity of land granted to be one square league. No objection was made to this claim on behalf of the United States, and we think it should be confirmed to the appellee.

A decree to that effect will therefore be entered.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

Case No. 14,649a.

UNITED STATES v. BRISTOW.

[See Case No. 3,393.]

Case No. 14,650.

UNITED STATES v. BRITTON.

[2 Mason, 464.] [1]

Circuit Court, D. Massachusetts. May Term, 1822.

FORGERY—DESTRUCTION BY DEFENDANT OF FORGED INSTRUMENT—INDICTMENT—PROOF OF—WHERE TRIED.

1. In an indictment for forgery, it is in general necessary to set forth the tenor of the instrument; and it must be proved as it is set forth.

2. It seems, that if the instrument be destroyed or suppressed by the prisoner, that fact being stated in the indictment will be a sufficient excuse for not setting forth the tenor.

[Cited in State v. Bryant, 17 N. H. 328; Moran v. Roberge, 84 Mich. 603, 48 N. W. 164.]

3. If the instrument is destroyed or suppressed by the prisoner, the tenor may be proved by parol evidence; the next best evidence is the rule; therefore if there be a copy which can be sworn to, that is the next best evidence.

[Cited in Com. v. Abbott, 130 Mass. 473; Nicholson v. Tarpey, 89 Cal. 622, 26 Pac. 1101. Cited in brief in Rhode v. McLean, 101 Ill. 469; Taylor v. McIrvin, 94 Ill. 490. Cited in note to Thompson v. Thompson, 9 Ind. 336.]

4. A check drawn in Philadelphia on Boston, in favor of the prisoner, who was then in Philadelphia, and who produces the check altered in Boston, if there be no evidence, that it was altered elsewhere, it is prima facie evidence, that it was altered in Massachusetts, that being the first state, where it is known to be altered.

[Cited in Com. v. Costley, 118 Mass. 26; State v. Yerger, 86 Mo. 39; Spencer v. Com., 2 Leigh, 757.]

5. Forgeries under the laws of the United States, must be tried in the district, where the crime is committed.

[6. Cited in State v. Houser, 26 Mo. 432, and Simmons v. State, 5 Ohio St. 352, to the point that there is no difference as to the rules of evidence between criminal and civil suits.]

Indictment for a forgery in altering a bank check. The indictment contains three counts. The substance of the first count was, that John Britton, the prisoner, having in his possession a certain order and check on the cashier of the office of discount and deposit of the Bank of the United States, at Boston, (setting forth in words and figures an order for $104, on the said cashier, signed by Thomas Wilson, the cashier of the parent bank at Philadelphia,) the said Britton, at said Boston, on the 31st of December, then last past, altered the said check, by obliterating and defacing the words, "one hundred and four," and writing the words, "nine hundred and ninety," with the intent to defraud the said bank, &c. The second count stated in substance, that the prisoner having in his possession, on the said 31st of December, a certain altered order and check, &c. (setting forth the same in words and figures,) did feloniously utter and publish the said order and check as true, he at the time of altering, &c. well knowing the same to be falsely altered, with intention to defraud the said bank, &c. The third count stated, in substance, that the prisoner feloniously altered and forged at said Boston, on the 31st of December, a certain order and check on the said bank, setting forth the same as before, in words and figures.

The material facts were, that the genuine check was drawn in Philadelphia, on the 26th of December, 1821, payable to the order of John Britton, the prisoner, for $104. The prisoner was at that time in Philadelphia, but the check was not procured by him personally, but through a broker of that city. On the 31st of December, 1821, the prisoner presented the check at the branch bank in Boston for payment, it being then altered to the sum of $9,090, and admitted his name to be John Britton, and that the bill was payable to him, and that the endorsement of his name on the back of it was his hand writing. The check was examined by the teller and cashier of the bank, and believed to be genuine; but the sum being large, and the appearance of the prisoner somewhat suspicious, payment of the check was ultimately refused, and the check at the prisoner's request was returned to him. The prisoner left the bank, but was watched, and his conduct appearing more suspicious, he was finally brought back to the bank, having been followed to Cambridge, and then the check was not to be found; but upon examination and search he declared it to be lost. The prisoner was ultimately committed to prison for trial. There was no proof in the case as to the time, manner, or circumstances, under which the prisoner became possessed of the check, nor when, nor by whom the alteration was made, nor when the prisoner left Philadelphia and arrived at Boston. But it was in evidence, that he might have arrived there in the stage within three days, and that if he left Philadelphia on the day the check was drawn, he could have arrived at Boston two days before the check was presented. The prisoner offered no explanation or evidence, to rebut any of the presumptions arising out of the facts against him. It appeared, that all the checks drawn upon the branches of the bank were of one uniform printed form and impression, in which blanks are left for the date, number, sum, person to whom payable, and the signature of the cashier, and the present check was drawn upon one of these printed forms. It also appeared in evidence, that the bank checks were bound up in a book, and when cut out, a memorandum was made in the margin of the book, of the number, date, sum, and person to whom made payable; and the book produced contained such a memorandum of the original check in this case. No copy of this check was taken and compared by any person with the original; but the cashier of

[1] [Reported by William P. Mason, Esq.]

the branch at Boston, a few days after the transaction, made from recollection, what he now swore on the trial was an exact copy.

A. Dunlap and J. T. Austin, who were counsel for the prisoner, objected to the introduction of this testimony of the cashier to the tenor of the check, and contended, that in this case, where the check, supposed to be forged, was set out in the indictment in words and figures, no parol evidence of the tenor and contents of it was admissible. And that it was necessary, in order to support the indictment, that the attorney for the government should produce either the original check itself, or an examined copy of it, but this objection was overruled by the court. The counsel for the prisoner further contended in his defence, that no evidence was produced against the prisoner to show, that the crime, if committted by him at all, was committed within the district of Massachusetts. That the onus probandi, in this particular, clearly rested on the government, and that without such evidence the court had no jurisdiction of the offence.

STORY, Circuit Justice (charging jury). This is an indictment for the forgery of a check, drawn by the cashier of the Bank of the United States at Philadelphia upon the cashier of the branch at Boston. The forgery is alleged in the indictment to consist in the alteration of a genuine check, drawn for 104 dollars, to the sum of $9,090. The indictment sets forth the tenor of the original check, and the specific alterations made; and under these circumstances the government is undoubtedly held to strict proof of the instrument as set forth; and if there be any material variance or defect in the proof, the prisoner is entitled to a verdict. It is quite another question, whether, in cases where the instrument is in the prisoner's possession, or is destroyed, or lost by him, so that it is impossible to give an exact tenor of the instrument, it is necessary to set it forth in haec verba; or whether under such circumstances a general description of the instrument with apt averments, shewing it to be within the statute, and accounting for, and excusing the omission to set forth the tenor, would not have been sufficient to satisfy the nicest principles of law, applicable to this subject. See Com. v. Houghton, 8 Mass. 107. That question does not arise in this case, because the tenor is set forth, and the government has thus precluded itself from any right to insist on any proof, short of the exact description.

(After summing up the facts in the case, the judge went on to say): It is almost unnecessary to say, that if the parol evidence of witnesses be admissible to prove the tenor, the evidence in this case is as strong for this purpose, as it is possible to require. The memorandum in the check book, the testimony of the bank officers at Philadelphia, and the pointed declaration of the teller and cashier at Boston, who saw, and deliberately examined the check, when presented for payment, afford as conclusive evidence, as it seems possible to give of the exact contents of any written instrument. But the counsel for the prisoner, deny that any parol evidence can be given, in a case of this nature, of the contents of the check; and they assert, that in point of law nothing is admissible on an indictment framed like this, but the original instrument or an examined copy. And they rely on certain dicta in some authorities cited by them in proof of their doctrine. In my judgment the authorities cited by them establish no such position, as they contend for; and so far as they go, they seem to me, to lean altogether the other way. I take the rule to be universally true, and applicable as well to criminal as civil proceedings, that the best evidence the nature of the case admits of, and that is within the reach of the party, is always to be produced; for the law will never suffer secondary evidence to be admitted, when there is better behind and within the power of the party. If therefore, an instrument is to be proved, the original, if in the possession or control of the party, is to be produced; if the original be lost or destroyed, or in the possession of the opposite party, who refuses to produce it, an examined copy, if any such exists, and can be found, is the next best evidence, and must be produced. If no such copy exists, then the contents may be proved by parol evidence, by witnesses, who have seen and read it, and can speak pointedly and clearly to its tenor and contents. Rex v. Aickles, 1 Leach, 390; s. p. Id. note a; Com. v. Snell, 3 Mass. 82. It may be difficult in many cases to find such witnesses, and especially when the instrument is long and intricate; but if the facts are made out distinctly, and the jury believe the testimony, the law gives entire credence to such proof, and deems it sufficient to justify a verdict in a civil or criminal cause. I have no difficulty therefore, in declaring, that the testimony in this case is competent proof under the circumstances to establish the tenor of the check and alterations; and if the jury believe it, they are justified in finding these facts, as the indictment has charged them. This objection was indeed taken originally to the admissibility of the testimony, and was then overruled by the court upon the fullest deliberation; and I should not now dwell on it, if it had not been dwelt upon in another view, in the close of the argument.

The next point is, whether the prisoner was guilty of the offence, that is, of altering the check; for any material alteration of it is in point of law a forgery, and clearly within the purview of the statute. Bank Act April 10, 1816, c. 44, § 18 [3 Stat. 275]. Upon this I need not say more than that the check is drawn in the prisoner's favour, and he offers no explanation of its state,

when he received it, nor of the circumstances connected with it; and as it is a mere question of fact, the jury, I am sure, will draw the proper conclusion.

The next point of the defence is, that there is no proof, that the crime was committed within this district. If this be true, this court has no jurisdiction over the offence, for the jurisdiction is limited to crimes committed within this district, that is to say, within the state of Massachusetts. I agree also, that this is a fact to be established, at least by primâ facie or presumptive proof by the prosecutor, and that the onus probandi rests on the government. But it appears to me, that such primâ facie or presumptive proof is offered by the government in this case. The check was produced at Boston in an altered state; the prisoner offers no explanation of the time or place of the alteration. It is an act, which may have been done here, or at Philadelphia, or at any of the intermediate places; but the fact is peculiarly and exclusively within the cognizance of the prisoner. Acts of this sort are not usually done in the presence of witnesses; but in places of concealment, with a view to prevent detection; and it is rare, that the government can offer any evidence of the place of the forgery, except that which arises from the fact of the utterance of the forged instrument. And I take the rule of law to be, that the place, where an instrument is found or offered in a forged state, affords prima facie evidence, or a presumption, that the instrument was forged there, unless that presumption be repelled by some other fact in the case. All the cases cited at the bar establish this distinction. In all of them there were circumstances, which were thought to repel the general presumption. In none of them was it doubted, that in general the utterance of a forged instrument in a place was presumptive proof of a forgery there; and Mr. East, in his valuable treatise on the Crown Law (page 992), manifestly so explains the doctrine; for he speaks of the difficulty of establishing the fact of forgery within the county, "where the forger is not the utterer." In Parks & Brown's Case, 2 East, P. C. pp. 963, 992, c. 19, §§ 49, 61 (Id. 2 Leach, 775), the date of the instrument was in another county, than that where the prisoner was indicted, and there was no proof that he ever had it in his possession in the latter county. In Rex v. Crocker, 2 Bos. & P. 87, the forged bill was found upon the prisoner in Wiltshire, (where he was indicted) but it bore date about two years before, at a time when he was resident in another county, and where he resided for more than a year after the date; and a majority of the judges thought, that this circumstance repelled the presumption of a forgery in Wiltshire. Rex v. Thomas, 2 Leach, 877, turned upon the fact, that the jury found, that the forgery was not committed in the county, where the party was indicted. The rule, which I have stated, is not merely correct in a legal sense, but is the dictate of common sense and reason. If a forged instrument is found or uttered in one place, and there is no evidence to show, that it was forged elsewhere, what ground is there to presume, that it was not forged, where it was found, or uttered? If its existence in a forged state is not proved in any other place, it must, from the necessity of the case, be presumed to have been forged, where its existence in such state is first made known. And there is no hardship in such a presumption, for the prisoner, if he thinks the fact in his favour, can shew, where it was forged, for he has cognizance of the time and place, or at least can shew, what was its state, when it first came into his possession. If the law were otherwise, it would be almost impossible to convict any person of a forgery, for such acts are done in retirement and concealment, far from the sight of all persons but confederates in guilt. In the present case it would be impossible to maintain an indictment in any other district, upon the evidence now before us, for the instrument was no where else seen in a forged and altered state. At Philadelphia it was in a genuine state, when last the witnesses saw it; and there is no evidence of any alteration in that state. The prisoner or his confederates with his consent, and in his presence, may have altered it in this district with as much ease and convenience as elsewhere, for no more time would be requisite, at least so far as we can judge from the evidence, to produce the effect here, (which seems to have been produced by some chemical process) than in any other place. The prisoner chooses to be silent as to the time of his arrival here, and as to the time and place, when and where he received the bill, and whether in an altered state or not. He therefore, leaves the natural presumption, whatever it is, in point of strength wholly unimpaired. If the real fact would help him, he has the means of giving us absolute certainty. The jury will therefore judge, whether his silence under these circumstances does not justify the conclusion, that the forgery was committed in this district.

Verdict, guilty, and prisoner sentenced accordingly.

Case No. 14,651.

UNITED STATES v. BROCKETT.

[2 Cranch, C. C. 441.] [1]

Circuit Court, District of Columbia. Nov. Term, 1823.

SLAVERY—INDICTMENT FOR BEATING SLAVE.

To cruelly, inhumanly, and maliciously cut, slash, beat, and ill-treat one's own slave, is an indictable offence at common law.

The indictment charged that the defendant [Robert Brockett, Sr.], "in and upon one negro slave, named Nat, the property of him,

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

the said Robert Brockett, Sen., in the peace of God and of the United States, then and there being, did make an assault, and him, the said negro Nat, did then and there cruelly, inhumanly, and maliciously, cut, slash, beat, and ill-treat, and other wrongs and injuries to the said negro Nat, then and there did, to the great damage of the said negro Nat, and against the peace and government of the United States."

Mr. Taylor, for defendant, contended that if the whipping be private, there is no limit, so that it does not extend to voluntary killing or mutilation. But in order to prevent the necessity of the court's giving any instruction on this point, he admitted that if the jury should be of opinion that the offence justified the language of the indictment, it is an indictable offence.

Mr. Swann, for United States, cited Respublica v. Teischer, 1 Dall. [1 U. S.] 335.

The jury found the following verdict: "We, of the jury, find the traverser not guilty of the counts as stated in the indictment, but recommend that the court should express their strong disapprobation of similar conduct. C. Griffith, Foreman."

Case No. 14,652.

UNITED STATES v. BROCKIUS.

[3 Wash C. C. 99.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1811.

WITNESS—COMPETENCY — CONVICTION — INFAMOUS OFFENCE.

1. A person who had been convicted in a court of this state, of an assault and battery with intent to murder, and sentenced to fine and imprisonment, is a competent witness.

[Cited in Boyd v. State (Tenn.) 29 S. W. 901; Com. v Dame, 8 Cush. 385.]

2. If incompetency, produced by the conviction of a witness, depends on the punishment, and not the nature of the offence, yet where an infamous punishment, in the discretion of the court, is not added, there is no disqualification, because it might have been inflicted. Fine and imprisonment is not an infamous punishment.

[Cited in U S v. Block, Case No. 14,609.]

[Cited in State v. Nolan (R. I.) 10 Atl. 482.]

Indictment for smuggling. One of the witnesses, in favour of the prosecution, was objected to, on the ground, that he had been convicted of an assault and battery with intent to murder, and had been sentenced to pay a fine, and to six months imprisonment, as appeared by the record produced in evidence.

Mr. Levy, for defendant, read the following cases: Co. Litt. 6, 13; Kel. 37, 38; 2 Wils. 18; 2 Bac. Abr. 583; 4 Bl. Comm. 217; 1 East, P. C. 407.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

Mr. Dallas read McNal. Ev. 206 et seq.

BY THE COURT: The punishment of this offence at common law, is fine and imprisonment, and frequently the pillory is added; but it seems to be in the discretion of the court. In lieu of the common law punishment of branding, whipping, and pillory, the Penal Code of this state, has substituted confinement and hard labour. Now, even if the incompetency produced by conviction, depended on the punishment, instead of the nature of the offence; where the infamous punishment forms no part of the sentence, there would be no disqualification, because it might have been inflicted. In this case, the punishment by fine and imprisonment, is not to be considered as an infamous punishment, so as to render the witness incompetent.

The case was left to the jury, on the evidence, who found the defendant not guilty.

Quere per WASHINGTON, whether, in any case, the statutory punishment, by confinement to hard labour, will destroy the competency of the witness, unless the crime is infamous?

Case No. 14,653.

UNITED STATES v. BROD et al.

[18 Int. Rev. Rec. 164.]

Circuit Court, N. D. New York. 1873.

PARTNERSHIP—BONDS—AUTHORITY OF ONE PARTNER TO BIND—WAREHOUSE BOND.

A partner, acting with assent of his copartners, may bind all the members of his firm by a joint and several bond, made by him in firm name, and under a single seal affixed to firm signature. This is so without reference to section 25, Act March 1, 1823 [3 Stat. 737]; and hence, although warehouse bonds may not be duty bonds, and therefore not covered by that section, yet one entered into by a member of a firm, in the name of the firm will equally bind his partner in trade.

[This was a suit by the United States against M. Brod & Co. and others.]

Case No. 14,654.

UNITED STATES v. BRODHEAD et al.

[3 Law Rep. 95.]

District Court, D Massachusetts. Dec. Term, 1839.

OFFICERS—FRAUDULENT TRANSACTIONS OF CLERKS —EXTRA COMPENSATION—BOND—SURETIES —PAST DEFALCATIONS.

1. A navy agent being a defaulter to the government, a new bond was required. *Held*, that the sureties on the new bond, in this case, were responsible for past defalcations of the principal, as well as for the future.

2. Public officers are not responsible for a fraudulent transaction of their clerks, if it is not attributable to their own negligence.

[Cited in Robertson v. Sichel, 127 U. S. 517, 8 Sup. Ct 1291.]

3. Whether public officers are entitled to extra compensation, depends on the circumstances of each particular case. There is a distinction, however, between services rendered upon a thing of permanent character, and those required upon some sudden and unforeseen emergency. In the former case they should have extra compensation, but not in the latter.

Debt on a bond signed by Daniel D. Brodhead as principal, and Stephen White, James C. Dunn, William Wyman, Charles Henshaw, Peter Harvey, F. J. Oliver, John M. Brodhead, Charles Hood, Wm. Parmenter, Charles G. Greene, Wm. Beals, David Henshaw, Isaac O. Barnes, Hall J. How, Amos Binney, George W. Lewis, Reuben A. Lamb, Samuel S. Lewis, John Henshaw, Joseph Smith, as sureties. The condition of the bond was, that Brodhead should faithfully conduct, &c. as navy agent of the port of Boston and Charlestown. The plaintiffs sought to recover the sum of seven thousand two hundred eighteen dollars and sixty-nine cents, which, it was alleged, was due from Brodhead to the United States. It appeared in evidence, that Brodhead had been navy agent for the port of Boston and Charlestown several years. He formerly had in his employ a clerk by the name of James F. Anderson, who managed to purloin, in the course of his employment, a large sum of money belonging to the United States. It was his business to fill up the checks on the bank where the money was deposited, and bring them to Brodhead to sign. After this was done, he would alter the checks, and thus draw larger sums. Thus, if a check was for $50, he could easily alter it to $500. After these fraudulent practices of Anderson were known, John A. Bates and George Bates were appointed by the government to examine Brodhead's accounts, and in their return they certified as follows: "On examining the accounts of the navy agent to ascertain the manner in which Anderson, the clerk, abstracted the sum of $7201.09, from the funds of the agent, and without his knowledge or suspicion of the fact, we have no hesitation in expressing our opinion, that such consummate art was used in altering checks and forcing balances, that the most vigilant attention on the part of Mr. Brodhead could not have prevented or sooner detected it, without additional clerical aid." After this, and before any settlement was made with the government for the amount abstracted by Anderson, a new bond was given to the government, upon which the present action was brought.

The principal grounds of defence relied on by the defendants were as follows: 1. That when this bond was given the alleged defalcation existed, and was well known to all the parties to the instrument, and the sureties were not liable for any past defalcation, but only for the future conduct of Brodhead as navy agent. 2. That the sum of $7201.09 having been fraudulently abstracted from the funds of the United States in the hands of the navy agent, by his clerk, James F. Anderson, the agent was not responsible, it not being his fault or negligence. 3. In the next place, the defendants sought to offset against the claim of the United States, the sum of two and one half per cent. commissions on the money disbursed by Mr. Brodhead for the erection of the navy hospital at Chelsea. Also, one per cent. on disbursements for other stations; and a third item of charge against the United States was for being required to endorse a large amount of treasury notes, whereby he incurred a responsibility. It was alleged by the defendants, that all these services being extraordinary, ought to be paid for as such.

Dist. Atty. Mills, for plaintiff.
Mr. Fletcher, for defendants.

DAVIS, District Judge, in his charge to the jury, said that the first position taken by the defendants could not, in his opinion, be maintained. This defalcation was known at the time the present bond was given; and the tendency of the evidence was to show, that the reason why the present bond was required, was the fact that such a defalcation existed. It could not be supposed, that the government intended to abandon this claim thus silently; and he should rule, as matter of law, that the bond did cover the defalcation existing at the time it was given.

In regard to the second ground of defence taken by the defendant, his honor instructed the jury, that if this was a mercantile case, the principal would undoubtedly be held responsible for the act of his clerk; but there was a distinction with regard to public officers. Such officers were exempted from the general rule of law, if they show that the embezzlement or misconduct was not attributable to their negligence. This was a question for the jury to settle. Did Mr. Brodhead, in this matter, conduct the business as a prudent man of business would in his own affairs? Did he exercise that degree of care and attention which the importance and responsibility of his office required? If he did, he ought not to be held responsible for the fraudulent acts of Anderson.

In regard to the third ground of defence, it was, in the first place, to be considered, whether those services were included in the ordinary duties of the navy agent. Cases might occur not within the ordinary course of the navy agent's duties, and yet requiring his services for their accomplishment, without extra compensation. If, for instance, a ship of war of the United States, should arrive in the summer season, with the crew in a sickly condition, and it should be decided to place them in tents on one of the islands in Boston harbor, it would, doubtless, be reasonably required of the navy agent to make the requisite purchases for such arrangement as within the line of his duty. But in respect to a permanent thing, as the erection

of a hospital, there would seem to be a difference; and it was proper that, as this was no part of the duty of a navy agent, he should receive extra compensation. In regard to supplies of a naval character which were to go to other stations, the agent could sustain no extra charge of commissions. It could make no difference to him whether they were to go to Charlestown or to other places. But for things of a permanent character, as the dry dock at Gosport, Mr. Brodhead might be reasonably considered as entitled to extra compensation, on the same ground as for his services in the erection of the hospital at Chelsea. As to the amount which ought to be allowed, the jury should be governed by the compensation paid the agent for his other duties. His legal allowance for his appropriate duties, was one per cent. on his disbursements, not to exceed, however, two thousand dollars per annum. It would appear, also, to be a reasonable inference from the act of March 3, 1809, § 3 [2 Stat. 536], that the compensation for such extra services, performed under what may be considered a special agency, should not exceed one per cent. on the amount disbursed, the extent of compensation to certain permanent agents in that act described. The limitation to two thousand dollars per annum, was not considered as applicable to allowances of this description. As to the charge of two and one half per cent. commissions for endorsing about $300,000 of treasury notes, the court thought it ought not to be allowed. The labor was not great, and the court did not consider that Mr. Brodhead incurred any responsibility.

The jury returned the following verdict: "The jury find that there is due to the United States from said Brodhead the sum of seven thousand two hundred and one dollars and nine cents. The jury further find that there is due to said Brodhead from the United States on his claim against them, filed in the case, the sum of seven thousand five hundred and forty-six dollars and seventy-six cents, viz.: Sixteen hundred and eighty dollars and forty-nine cents commissions at 2½ per cent. on disbursements for the navy hospital at Chelsea, and five thousand eight hundred and sixty-six dollars and twenty-seven cents for commissions, at one per cent. on disbursements for other stations. The jury therefore find, that there was not due from the said Brodhead to the plaintiffs the balance of the said sum of $7,201.09, nor any part thereof, in manner and form as the plaintiffs in their replication have alleged. But the jury find a balance due from the United States to said Brodhead of $345.67."

UNITED STATES v. BRODNAX. See Case No. 15,239.

UNITED STATES v. BROOKE. See Cases Nos. 16,615 and 16,616.

Case No. 14,655.

UNITED STATES v. BROOKS.

[4 Cranch, C. C. 427.] [1]

Circuit Court, District of Columbia. March Term, 1834.

DISTURBING PUBLIC WORSHIP—COMMON INJURY.

1. The disturbance of public worship is an act tending to destroy the public morals, and to a breach of the peace.

2. It is a common injury to an indefinite number of persons, neither of whom could sue alone; it is therefore an indictable offence at common law.

This was an indictment for disturbing the congregation of the African meeting-house while engaged in the worship of God. After conviction, the defendant [John Brooks] moved in arrest of judgment.

Mr. Dandridge, for defendant, contended, that if the disturbing of public worship in the established church was a common-law offence, yet the disturbing of a Methodist meeting was not. The holding of such a meeting was in itself a common-law offence. The precedent cited by Mr. Key, from 2 Chit. 23, 29, is only for trespass in breaking the windows of a church. All the indictments for disturbing public worship are upon statutes. Chitty per se is no authority.

Mr. Key, contra, cited 2 Chit. Cr. Law, 20, 33, etc.; Sudley's Case, 1 East, Cr. Law, 3; Com. v. Hoxey, 16 Mass. 385. See, also, 1 Nott & McC. 278; 11 Serg. & R. 394; 5 Bin. 555; 8 Johns. 290.

CRANCH, Chief Judge. The indictment charged that negro John Brooks on the 20th of December, 1823, at, &c., "with force and arms unlawfully and irreverently did disturb and hinder the congregation of the African meeting-house in Washington county aforesaid, then and there in the said house assembled for, and engaged in, the worship of God, by cursing and swearing, and loud and profane talking and noise in and near the said meeting-house, and in the hearing of, and to the disturbance of, the said people then and there assembled for the purpose aforesaid, to the disturbance of the public peace, and against the peace and government of the United States." The defendant having been convicted upon this indictment, his counsel, Mr. Dandridge, moved in arrest of judgment, on the ground that the indictment did not charge any indictable offence.

The offence charged is the unlawful disturbance and hindrance of a congregation assembled in their meeting-house, for the purpose of, and while engaged in, the public worship of Almighty God. It is an offence which tends to subvert those principles of morality which are the foundation of all good government, of all social order, and of all confidence between man and man; for the strongest

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

sanction of those principles has, in all ages and countries, and under all forms of government and of religious worship, been found in religious faith; in that relation which subsists between man and his Maker; the duties of which relation are, in a peculiar manner the subject of all religious instruction. In order to support this indictment, it is not necessary to maintain that the Christian religion is a part of the common law. Every religious sect is equally protected by our laws. Every congregation assembled for the public social worship of God is, at least, a lawful meeting, and as much under the protection of the law as a political meeting for the exercise of the right of election.

In the case of Com. v. Hoxey, 16 Mass. 385, it was decided by the supreme judicial court of that state, that an indictment lies, at common law, for disorderly behavior in town-meetings. The indictment concluded "against the form of the statute," but the case was found not to be within its provisions. The court, having decided that those words might be rejected as surplusage, said, "The remaining question is, do the facts charged amount to an offence at common law?" "On this question, we entertain no doubts. Here was a violent and rude disturbance of the citizens lawfully assembled in town-meeting, and in the actual exercise of their municipal rights and duties. The tendency of the defendant's conduct was to a breach of the peace, and to the prevention of elections necessary to the orderly government of the town and the due management of its concerns for a year. It is true, that the common law knows nothing perfectly agreeing with our municipal assemblies; but other meetings are well known and often held in England, the disturbance of which is punishable at common law as a misdemeanor. In this commonwealth, town-meetings are recognized in our constitution and laws, and the elections made, and the business transacted at those meetings, lie at the foundation of our whole civil polity. If, then, there were no statute prohibiting disorderly conduct at such meetings, an indictment for such conduct might be supported." So an indictment at common law, in England, will lie for "unjustly and irreverently disturbing and hindering the curate of a parish in the exercise of his office and the reading of divine service." 2 Chit. Cr. Law, 21; Tremaine, P. C. 239. That, it is true was for the disturbance of divine service as established by law. But in this country there is no established church, all being equally protected by law; and each sect having as perfect a right to be free from disturbance in the public worship of God according to their own forms, as the established church in England has by the common law.

The principles upon which the disturbance of public worship becomes an offence at common law are these: Every man has a perfect right to worship God in the manner most conformable to the dictates of his conscience, and to assemble and unite with others in the same act of worship, so that he does not interfere with the equal rights of others. The common law protects this right, either by giving the party his private action for damages on account of the injury he has sustained; or if the violation of the right be directly, or consequentially injurious to society, by a public prosecution. And whenever the injury is common to an indefinite number of persons, so that no one has a greater right to sue than another, the private injury is merged in the public wrong, and becomes the proper subject of public prosecution, as in the case of nuisance and of fraud. When the act is not only injurious to an indefinite number of persons, but is, in itself, morally wrong, and tends to subvert the foundations of social order, or to a breach of the peace, these principles apply with double force. The public morals are under the protection of the common law; and every open and public attempt to corrupt them is an offence against that law. It is upon this principle that the publication of obscene writings or prints, gross and public blasphemy and scoffing at religion, public lewdness, indecent exposure of the person, common houses of prostitution, and even the frequenting of such houses, have been adjudged to be offences against the common law. The disturbance of public worship is an act tending to destroy the public morals, and to excite a breach of the peace; and it is a common injury to an indefinite number of persons, neither of whom could sue alone, unless, as in the case of nuisance, he should have received some special and peculiar damage over and above the common injury sustained by the others; it is, therefore, an offence within the principles before stated, and liable to be prosecuted by indictment at the common law.

The motion in arrest of judgment is, therefore, overruled.

Case No. 14,656.

UNITED STATES v. BROWN.

Circuit Court, E. D. Pennsylvania. 1848.

SLAVE TRADE—ACT OF 1820—CITIZENSHIP OF DEFENDANT.

1. Ownership of the vessel engaged in slave trade, by a citizen, if the accused be not himself one, or citizenship of the accused, if the ownership be not in a citizen, is an essential ingredient of the offense, described by Act 1820, § 4 (3 Stat. 600). See U. S. v. Darnaud [Case No. 14,918].

2. Citizenship, within the meaning of the act of 1820, is that unequivocal relation between every American and his country which binds him to allegiance, and pledges to him protection.

3. Evidence that the funds which the accused was using belonged to one not a citizen; that he had no funds of his own; that he spoke of himself as an agent, and was recognized as such by the banker who supplied the funds, and by

the owner of those funds,—is admissible to rebut a prima facie case of ownership in a citizen.

[Decided by GRIER, Circuit Justice. Nowhere more fully reported; opinion not now accessible. Cited in 1 Brightly, Dig. 809, to the points above stated.]

Case No. 14,656a.

UNITED STATES v. BROWN.[1]

Circuit Court, S. D. New York.[2]

HOMICIDE—CORPUS DELICTI—PRESUMPTIVE EVIDENCE—HOW EVIDENCE TO BE WEIGHED.

[The law does not now require direct proof of the killing, or that the body was afterwards found. It does not prescribe any positive or exclusive mode of proof, but admits individual or presumptive evidence to prove the fact of death, with the admonitory caution, however, that it be weighed with scrupulous circumspection. See U. S. v. Mathews, Case No. 15,741a.]

Brown, otherwise called Baker, with two others of the crew, was indicted for the murder of the master of the schooner Sarah Lavinia in July, 1843, upon the high seas, by drowning. He was tried in the circuit court before Betts, District Judge, in December, 1843, and convicted and adjudged to execution. The proof was that the mate was thrown overboard by the prisoner and his associates intentionally, but there was no proof that his body was seen after his death. The defense was taken that there was no legal proof of the corpus delicti.

A fact indispensable to the maintenance of the indictment is that Walter A. Nicoll, the former mate of the schooner Sarah Lavinia, is dead. The identity of the accused, his violent struggle and conflict with —— on board the vessel, out at sea, with a murderous purpose, and even the absence of —— since that occurrence, do not necessarily import his death by violence. The substance of the crime is the killing, and that fact must be proved to the full conviction of the jury. It is a question of law what description of evidence is competent and must be given to establish the fact. The rule declared by very high authority, and in terms which it is supposed exclude all other evidence than direct proof of the killing or that the dead body was afterwards found (2 Hale, P. C. 290), is not sustained by the later authorities in England or this country.

BY THE COURT: The law does not prescribe any positive or exclusive mode of proof. It admits of individual or presumptive evidence to prove the fact of death, as it does to prove the identity of the deceased and the murderer, but with the admonitory caution that it be weighed with scrupulous circumspection. This view of the law was adopted and acted upon in this court by Judge Thompson and myself in 1838, in the case of U. S. v. Wilhelms [not reported], and two others who were indicted for murder on board the American vessel on the high seas by drowning. The prisoners were proved to have made a mutiny and revolt on board the ship, and to have attacked with great violence the officers of the vessel with deadly weapons, with intent to kill, and after having disabled the master in the conflict, and rendered him insensible, to have cast him overboard, and subsequently to have hauled the mate from his cabin in a wounded and disabled condition, and then thrown him overboard whilst begging for his life, and that those persons were never seen afterwards. The court instructed the jury that the evidence was admissible to prove the death of the master and mate by drowning. The jury found the prisoners guilty, and they were condemned to be executed. One committed suicide, one was executed, and my impression is that the other (quite a youth) was pardoned. The same doctrine had been recognized in the district court in the case of U. S. v. Gibert [Case No. 15,204].

[1] [Not previously reported.]

[2] [Date not given.]

Case No. 14,657.

UNITED STATES v. BROWN.

[1 Cranch, C. C. 210.][1]

Circuit Court, District of Columbia. Dec. Term, 1804.

WITNESS—OWNER OF STOLEN GOODS—RELEASE OF INTEREST IN FINE.

The owner of the goods stolen, having released to the United States his interest in the fine, is a competent witness for the United States, upon the prosecution under the act of congress.

[Cited in U. S. v. Tolson, Case No. 16,530.]

Indictment [against Scipio Brown] for stealing a pair of boots, the property of Benjamin Birch. Benjamin Birch executed a release to the United States of all his right to the fine, and was thereupon examined as a witness for the United States, generally, upon the authority of the case of U. S. v. McCann [Case No. 15,655], and of a former case, U. S. v. Clancey [Id. 14,800]; U. S. v. Hare [Id. 15,302]. Bill of exceptions taken.

Verdict, guilty. Sentence, twenty stripes, and one dollar fine.

Case No. 14,658.

UNITED STATES v. BROWN.

[3 Cranch, C. C. 268.][1]

Circuit Court, District of Columbia. Dec. Term, 1827.

WITNESS—FORGERY—PERSON WHOSE NAME IS FORGED—ORDER.

1. The person, whose paper is forged, is a good witness for the prosecution.

[Cited in U. S. v. Anderson, Case No. 14,452.]

2. The following is "an order for the payment of money, or delivery of goods," within the sec-

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

ond section of the Maryland act of 1799, c. 75, namely: "Mr. E. M. Linthicum will please let the bearer, John Brown, have such articles as he may choose on my account, to the value of thirty dollars; also twenty dollars in cash, and oblige his friend, Henry Tayloe. For Col. John Tayloe. Washington City, 24th December, 1827."

[Cited in Garmire v. State, 104 Ind. 445, 4 N. E. 55; Long v. Straus, 107 Ind. 103, 6 N. E. 123, and 7 N. E. 766.]

Indictment for knowingly uttering as true, and with intent to defraud E. M. Linthicum and John Tayloe, the following forged order, namely: "Mr. E. M. Linthicum will please let the bearer, John Brown, have such articles as he may choose, on my account, to the value of thirty dollars; also twenty dollars in cash, and oblige his friend, Henry Tayloe. For Col. John Tayloe. Washington City, 24th December, 1827." The said Henry Tayloe was offered as a witness, to prove that it was not his signature.

Mr. Bradley, for the prisoner, objected that the party, whose name is forged, is not a competent witness for the prosecution. Archb. Cr. Pr. 96.

THE COURT (THRUSTON, Circuit Judge, absent) overruled the objection, and suffered the witness to be sworn and examined.

CRANCH, Chief Judge, mentioned the case of U. S. v. Peacock [Case No. 16,019], in this court, at December term, 1804, in which Mr. Sloane, a member of congress, was permitted to testify that the signature James Sloane, upon the forged bill, was not written by him.

Mr. Bradley then objected that the forged paper was not such an order for the payment of money, or delivery of goods, as was intended by the second section of the Maryland act of 1799, c. 75, and cited 1 Leach, 134; Williams's Case, Id. 114; and note to Lockett's Case, Id. 95.

THE COURT (THRUSTON, Circuit Judge, absent) overruled the objection, on the authority of U. S. v. Bates [Case No. 14,542], in this court, in June, 1810; but told Mr. Bradley that he might avail himself of it, on motion in arrest of judgment, when the point might be fully considered. Cur. ad. vult.

At May term, 1828, THE COURT overruled the motion in arrest of judgment, and sentenced the prisoner to fine and imprisonment.

Case No. 14,659.

UNITED STATES v. BROWN.

[4 Cranch, C. C. 333.] [1]

Circuit Court, District of Columbia. Oct. Term, 1833.

COMMITMENT—OFFENCE—INDICTMENT FOR BREAKING JAIL.

A commitment not stating on its face any offence, is not evidence of a commitment for felony, although written on the back of a warrant of arrest charging a felony, but not referring to it.

[Cited in Erwin v. U. S., 37 Fed. 486.]

Indictment for breaking gaol, when committed for felony in stealing a saddle. The commitment did not state any offence, but was written on the back of the warrant of arrest, which charged a felony. The commitment did not refer to the warrant of arrest.

THE COURT (nem. con.) said, that it was no evidence of a commitment for felony.

Verdict, not guilty.

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

Case No. 14,660.

UNITED STATES v. BROWN.

[4 Cranch, C. C. 508.] [1]

Circuit Court, District of Columbia. March Term, 1835.

CRIMINAL LAW—EVIDENCE—ADMISSIONS—EXAMINATION BY MAGISTRATE.

What was said in the presence of the prisoner, before the examining magistrate, and to which he made no reply, cannot be given in evidence against him.

[Cited in State v. Young (Mo. Sup.) 12 S. W. 881.]

Mr. Key, Dist. Atty., offered to give in evidence against the prisoner [Nehemiah Brown], who was indicted for larceny, what had been said before the examining justice in the presence and hearing of the prisoner, to which he had made no reply.

W. L. Brent, for defendant, objected, and cited People v. Johnson, 2 Wheeler, Cr. Cas. 377.

THE COURT (THRUSTON, Circuit Judge, absent) said that the United States could not give in evidence what was said while the prisoner was under examination before the justice, if the prisoner made no reply; for he is not bound to admit or deny what is said by the witnesses.

Mr. Key said he only meant to give evidence of what was said and replied to by the prisoner; and the examination was so confined.

Case No. 14,661.

UNITED STATES v. BROWN.

[4 Cranch, C. C. 607.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

WITNESS—RESTORATION OF COMPETENCY—SERVING OUT SENTENCE.

Serving out the term of imprisonment in the penitentiary for felony, does not restore the party to his competency as a witness.

Indictment [against John Brown, a mulatto] for highway robbery of George Milburne.

The attorney for the United States offered to examine, as a witness for the United

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

States, one Sandy Spriggs, a free mulatto who had been convicted of larceny, and suffered his term of imprisonment and labor in the penitentiary of this district.

The prisoner's counsel objected that the witness was incompetent because convicted of an infamous offence.

The attorney for the United States, contended that the suffering of his punishment restored his competency; like burning in the hand, and transportation which is a substitute for the burning, and which by the statute of 19 Geo. III. and 4 Geo. I. c. 11, is to have the same effect. He also cited 4 Starkie, Ev. 717; 1 Chit. 601, 602; and 2 Russ. 594, 595.

THE COURT, however (THRUSTON, Circuit Judge, dissenting), sustained the objection and rejected the witness; being of opinion that the execution of the sentence, without any provision by statute to that effect, did not restore his competency.

The prisoner was acquitted.

The witness, Sandy Spriggs, was afterwards convicted of the same robbery, and sentenced to the penitentiary for four years only; he having probably prevented the other robbers from killing Milburne.

NOTE. See, also, the Maryland act of 1793, c. 57, § 15, by which the service and labor, imposed as a punishment under that act, have the effect of a pardon; from which special enactment it is to be inferred that without it, the punishment would not operate as a pardon.

Case No. 14,662.

UNITED STATES v. BROWN.

[Deady, 566.] [1]

District Court, D. Oregon. March 18, 1869.

STATUTES—POLICY OF—INTERNAL REVENUE—EVIDENCE—PRESUMPTIONS—WITNESS—INTEREST.

1. With the policy or impolicy of an act of congress, courts and juries have nothing to do.

2. An action for a penalty for the violation of the internal revenue act (14 Stat. 144) is a civil action, and the jury are to find according to the preponderance of the evidence.

[Cited in U. S. v. Shapleigh, 54 Fed. 133.]

3. In considering the evidence, a jury is bound to act deliberately and according to the dictates of reason and the teachings of experience.

4. The law presumes, and, until the contrary appears, juries are bound by such presumption, that a witness speaks the truth.

5. A box of sardines being sold unstamped, the presumption is that it never was stamped, but such presumption may be overcome by showing that the stamp had been lost or removed by accident, or the like.

6. A jury is not formed to reflect by its verdict the state of public opinion touching the questions involved in the case on trial.

7. Interest of a witness in the result of the action to be considered by the jury.

This was an action brought upon the information of Leander Quivey and I. G. Culpepper, against the defendant [Samuel Brown], to recover penalties to the amount of $750, for selling nine sealed boxes of sardines and six bottles of hair oil, without the same being duly stamped. On the trial, the witnesses for the government—Quivey and Culpepper—testified positively that they bought the above mentioned articles, at the store of the defendant, at Dayton, in Yamhill county, on July 2, 1868, of Columbus Brown, the son and clerk of the defendant, and that the same were not stamped when purchased. The sardines were produced on the trial, and the boxes bore the appearance of having once been stamped about the middle of the long edge, and that the stamps had afterwards come off. For the defendant, Columbus Brown testified that he sold the articles in question to Quivey and Culpepper, at the time and place they stated, but that to the best of his recollection and belief they were duly stamped at the time. He also testified that all the sardines in the store at the time of the sale were purchased of Sneath, in Portland, and that they were stamped when put upon the shelves. That bottles of hair oil were purchased of Hodge & Calef, between three and four years ago. That he believed they were stamped, because never got any goods of H. & C. that needed stamping. That he was in the habit of examining goods once a month with Assistant Assessor Porter, to see if duly stamped. That he believed articles sold to Q. and C. duly stamped, but not positive of it. T. J. Robertson, a saloon keeper, testified that he was an intimate friend of Culpepper's, and that about the first of February last, Culpepper came into his saloon on Morrison street, and plucked him one side, and told him that he had been up the country buying sardines, and when they got any with stamps on they tore them off, and that he had the dead wood on a big thing; and that Culpepper then tapped him on the side of the nose with his finger, remarking at the time to witness: "If you reveal this, or blow on me, you know your doom." Culpepper denied positively having ever told Robertson that they took the stamps from goods in any way, or that they ever did take the stamps off any articles purchased by them. There were a large number of other actions brought upon the same information and tried at the same term, in all of which the following charge was substantially delivered to the jury.

John C. Cartwright, for plaintiff.

David Logan and W. W. Page, for defendant.

DEADY, District Judge (charging jury). In this case the United States complains, for that the defendant, on or about July 2, 1868, sold nine boxes of sardines and six bottles of hair oil, without the same being duly stamped, whereby the defendant became indebted to the United States in the sum of

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

$750, or $50 for each of such boxes and bottles. The defendant answering, denies that he sold the articles mentioned without having stamps affixed to them. This action is brought upon the internal revenue act as amended July 13, 1866 (14 Stat. 144). So far as it is concerned, the act substantially provides, that if any person shall make, prepare and sell sardines in cans, or hair oil in bottles, without affixing thereto an adhesive stamp, donating the tax imposed thereon, he shall incur a penalty of fifty dollars for every omission to affix such stamp; and any person who shall offer or expose for sale any sardines in cans or hair oil in bottles, shall be deemed the manufacturer thereof, and be subject to the duties, liabilities and penalties imposed by law in regard to the sale of such article. This law has been deliberately enacted by the representatives of the American people in congress assembled, for the purpose of raising revenue to carry on the government and to enable it to meet its obligations. The penalties imposed by the law for its violation, are intended to secure obedience to it, and prevent the dishonest dealer from escaping his just share of taxation at the expense of the honest one. With the question of the policy or impolicy of this law, neither the court nor jury have anything to do. While engaged as judges and jurors we are not law makers. But you and I are called upon to administer this law fairly and fearlessly, without regard to consequences to third persons, or our personal sympathies or opinions. The law is enacted by the whole people for the whole country, and should be uniformly administered, as to all persons and in all places. As citizens, out of court, it is your privilege by all the means which the lawful freedom of speech and the press allows, to endeavor to procure the repeal of such laws as you think impolitic or unjust; but in the jury-box your only power and duty is to assist within your sphere in the enforcement of the law, as expounded to you by the court. As has been wisely said in the inaugural of the present chief magistrate, the most effectual way to procure the repeal of bad or obnoxious laws, is to rigidly enforce them. The simple inquiry for you to make then, is this: Did the defendant by himself or his clerk sell these articles described in the complaint, without the same being stamped as provided by law? This is the charge against the defendant, which by his answer he denies.

The burden of proof is upon the government to establish the fact stated in the complaint. But this is a civil action. It is therefore not necessary for the government to establish the charge beyond a reasonable doubt, as in a criminal action. You are to weigh the evidence for and against the charge and decide for or against the defendant, according to the preponderance of it. There is no presumption that the defendant violated the law, but the contrary. Therefore, if no evidence was offered in the case, one way or the other, the defendant would be entitled to a verdict. Starting with this presumption—take this evidence—weigh and consider it, and find a verdict according to what you may conclude to be the preponderance of it.

In canvassing the testimony, you are the exclusive judges of the consideration and effect to be given to it. In exercising this important power you should not act rashly or arbitrarily, but deliberately and according to the dictates of reason and the teachings of experience. Where there are apparent contradictions in the testimony it is your duty to try and reconcile them. If, after reasonable effort, you cannot conscientiously do this, then you must hold fast that which you believe to be probable and true and discard the rest. The law presumes, and you are bound to act upon that presumption, that all men, when they testify in a court of justice under the solemnity of an oath, speak the truth. That presumption of course is not conclusive, but may be overcome in many ways. As men of ordinary experience and observation, you may be satisfied from the manner of a witness—from the intrinsic improbability of his story—from the contradictions of his testimony by other witnesses whom you have reason to believe—or from the insufficient grounds which the witness gives for his belief or statement, that he is wholly or partially unworthy of belief.

The uncontradicted testimony of one credible witness is sufficient proof of any fact in this case. The technical rule requiring two witnesses to prove a fact, as in treason or perjury, has no application in this case.

A box of sardines being unstamped when sold, the legal presumption is that it never was stamped. It is also claimed by the district attorney, that if the stamp is not on the box when sold, the penalty is incurred by the seller, whether it was previously stamped or not. But I do not think the act ought to be so construed. If no stamp be on the box at the time of sale, I repeat, the presumption is, that the article never was stamped. But the party may, nevertheless, prove that it had been duly stamped, and that the stamp had come off or been removed by accident or other cause not involving any intention or design to remove it, by the person having the goods in his possession at the time. If the party makes satisfactory proof of this state of facts, then the prima facie case is overcome, and he ought not to pay the penalty imposed for selling unstamped goods. In fact the tax has been paid, but the best evidence of it, the canceled stamp on the box, has been accidentally lost or destroyed.

The state of public opinion concerning this and similar cases now pending in this court has been alluded to in your hearing. It is not necessary, I hope, for me to say, that you have not been chosen as jurors, to merely reflect by your verdict, the public opinion

upon the subject of imposing penalties upon parties for selling unstamped goods. You have taken an oath to try this case—the question of fact upon which the parties are at issue—upon the law and evidence as given you in court. With the state of public opinion you have nothing to do, nor need or should you stop to inquire upon which side is the loudest and most active clamor. Besides the so-called public opinion which sometimes seeks to intrude itself upon legal controversies, at the bidding or by the procurement of interested parties, is most often ignorant or unjust and always unreliable.

As to the witnesses Quivey and Culpepper, you should consider the money interest they have in this suit. You are not to arbitrarily assume that they are unworthy of belief on this account. But it is a circumstance to be considered by you, and on account of which you are to scrutinize their testimony with care, and act upon it with caution at least. Nor are you to presume that these witnesses are unworthy of credit, because they appear before you as persons giving information to the government against those who violate the laws, for the sake of a share of the penalty. If the defendant was openly selling sardines without being stamped, it was the legal right of any one to walk into his store and purchase them, and then inform upon him, for a share of the penalties. In all this there is no fraud or deceit except upon the part of the person selling the goods. This is what the government claims was all that was done by these witnesses, and so far, there is nothing in their conduct to impeach their characters for truth and veracity. At the same time the position or pursuit is not free from opportunity and temptation to exaggerate and even fabricate for the sake of money or success, or to gratify a grudge. On this account also, you will scan the testimony of these witnesses closely, and act upon it cautiously. As to the contradiction between Culpepper and Robertson, you must determine which of them you will believe. If Culpepper stated to Robertson what the latter says he did, it is a very strong circumstance against the credibility of the former, for two reasons: First, because Culpepper denies it on oath; and second—because if he did tear the stamps off any boxes, it may as well have been those as any others. It may occur to you, that it is not probable that any one in the position of Culpepper, if he had torn stamps off goods for the purpose of having suits brought against parties for penalties, would voluntarily seek out a third person and disclose it to him. On the other hand Robertson testifies, that he was and still is, Culpepper's "bosom friend," and therefore, it may be said he was the latter's confidant, even to that extent. As to the testimony of Brown—he has no actual pecuniary interest in the event of the action. But he is the son of the defendant, and attended to his business when it is claimed that this violation of the law took place. His father has twice the moneyed interest in the action that Q. and C. have together, and under the circumstances, this interest of his father, is as likely to influence him as a witness, as if it were legally his own. Besides as to the fact, whether the articles were stamped or not, at the time they were purchased by Q. and C., his testimony is only his opinion or belief based upon facts prior in date, of which he professes to have a general knowledge. You can judge for yourselves, from the premises, whether the opinion or belief is well or ill-founded, and reasonable or not, and act accordingly.

In conclusion, if you are satisfied from the testimony that the articles were sold in violation of the statute as already expounded to you, you ought to find for the plaintiff, but if you are not so satisfied, you ought to find a verdict for the defendant.

Verdict for the defendant.

Case No. 14,663.

UNITED STATES v. BROWN.

[Gilp. 155.] [1]

District Court, E. D. Pennsylvania. March 19, 1830.

BONDS—CONDITIONS—STATUTORY FORM—INTERNAL REVENUE COLLECTOR—RETROSPECTIVE CONDITION.

1. If a bond be taken at common law, with a condition in part good and in part bad, a recovery may be had on it, for a breach of the good part.

[Cited in Erlinger v. People, 36 Ill. 461.]

2. If a bond be taken under a statute, with a condition in part prescribed by the statute, and in part not prescribed by it, yet if it be easily divisible, a recovery may be had on it, for a breach of the part prescribed by the statute.

[Cited in brief in Shunk v. Miller, 5 Pa. St. 251.]

3. If a bond be taken under a statute, declaring that it shall be in a prescribed form and in no other, a recovery cannot be had, if it varies from the statute, or if the condition contains more than the statute requires.

[Cited in brief in Small v. Com., 8 Pa. St. 104; Sooy v. State, 38 N. J. Law, 331.]

4. A retrospective condition in a statutory bond is void.

5. The twenty-third section of the act of 9th January, 1815 [3 Stat. 172], which requires a collector of internal revenue to give bond, with condition for the true and faithful discharge of the duties of his office, does not authorise a bond, with condition that the collector has truly and faithfully discharged such duties.

[Cited in Stovall v. Com., 84 Va. 249, 4 S. E. 381.]

6. In a suit against a surety of a collector of internal revenue, upon a joint and several bond, with condition that the collector has truly and faithfully discharged his duties, and also with condition that he will truly and faithfully discharge them, a recovery may be had against the

[1] [Reported by Henry D. Gilpin, Esq.]

surety for a breach, by the collector, of the latter condition.

[Cited in brief in Musselman v. Com., 7 Pa. St. 241.]

On the 22d July, 1813 [3 Stat. 22], an act of congress was passed for the assessment and collection of direct taxes and internal duties, by which various collection districts were established in each state. The Eighth district of Pennsylvania comprised the counties of Northampton and Wayne. One collector was to be appointed by the president for each district, who was to be a respectable freeholder and reside within the same. He was required before receiving from the assessors the lists of taxes and taxables, to "give bond with one or more sufficient sureties, to be approved by the comptroller of the treasury, in at least double the amount of the taxes assessed in the collection district, for which he was appointed; which bond was to be payable to the United States, with condition for the true and faithful discharge of the duties of his office, according to law, and particularly for the due collection and payment of all moneys assessed upon such district; and the said bond was to be transmitted to and deposited in the office of the comptroller of the treasury." He was required to pay over to the treasury, quarterly, or sooner if required by the secretary, the moneys collected, and to render a final account within six months after receiving the lists from the assessor; and, in case of failure to do so, the comptroller was authorised to issue a warrant of distress against him and his sureties, their persons, chattels, and real estate. 2 Story's Laws, 1320, 1324, 1330 [3 Stat. 22, 30]. On the 2d August, 1813, an act of congress was passed, laying a direct tax, by which the sum of thirteen thousand seven hundred and eighty dollars was fixed as the quota of the counties of Northampton and Wayne, in Pennsylvania. 2 Story's Laws, 1358 [3 Stat. 53].

On the 5th January, 1814, the president of the United States, appointed Nicholas Kern of Northampton county, collector of direct taxes, for the Eighth collection district of Pennsylvania. On the 13th January, 1814, Nicholas Kern, with Jacob Weygandt and Christian Bixler as his sureties, gave bond to the United States of America, in the penal sum of twenty-seven thousand five hundred and sixty dollars, with the following condition: "Now, therefore, if the aforesaid Nicholas Kern, has truly and faithfully discharged, and shall continue truly and faithfully to discharge the duties of said office, according to law; and shall particularly, faithfully collect and pay according to law, all moneys assessed upon such district, then the above obligation shall be void, and of none effect, otherwise it shall abide and remain in full force and virtue." On the 18th May, 1814, this bond was transmitted to the comptroller of the treasury, and the sureties were approved by him. On the 9th January, 1815 [3 Stat. 164], an act of congress was passed to repeal the act of the 22d July, 1813, "except so far as the same respected the collection districts thereby established, internal duties, and the appointment and qualifications of the collectors and principal assessors, thereby authorised and required." It also provides that "each collector before receiving any list as aforesaid for collection, shall give bond with one or more sufficient sureties, to be approved by the comptroller, in the amount of the taxes assessed in the collection district, for which he has been or may be appointed, which bond shall be payable to the United States, with condition for the true and faithful discharge of the duties of his office, according to law, and particularly for the due collection and payment of all moneys assessed upon each district; and the said bond shall be transmitted to and deposited in the office of the comptroller of the treasury. Provided, nothing herein contained shall be deemed to annul, or in any wise to impair, the obligation of the bond heretofore given by any collector; but the same shall be and remain in full force and virtue, any thing in this act, to the contrary thereof, in any wise notwithstanding." It contained also similar provisions to the preceding act, for paying over moneys collected and rendering accounts, and for proceedings in case of failure. 2 Story's Laws, 1452, 1461, 1465 [3 Stat. 172, 175]. By the same act the quota of Pennsylvania was increased to double the amount fixed by the preceding one. 2 Story's Laws, 1451 [3 Stat. 164].

On the 19th April, 1816 [3 Stat. 291], an act of congress was passed for laying duties on licenses to distillers, requiring them to deliver a bond to the collector of the district, for payment of duties every twelve months; and it was made the duty of the collector to collect the duties and prosecute for their recovery. 3 Story's Laws, 1569, 1572 [3 Stat. 292, 294].

On the 17th October, 1816, Nicholas Kern, with Robert Brown and Jacob Driesbach, as his sureties, gave a second bond to the United States of America, in the penal sum of forty-five thousand dollars, with the following condition: "Now therefore, if the aforesaid Nicholas Kern has truly and faithfully discharged, and shall continue truly and faithfully to discharge, the duties of said office, according to law, and shall, particularly, faithfully collect and pay according to law, all moneys assessed upon such district, then the above obligation shall be void and of no effect, otherwise it shall remain in full force and virtue." On the 11th January, 1817, this bond was transmitted to the comptroller of the treasury, and the sureties were approved by him. Nicholas Kern continued to act as collector until the close of the year 1825. On the 14th December, in that year, a settlement of his accounts took place at the treasury, and a balance appear-

ed against him of eighteen thousand nine hundred and thirty-nine dollars and eighty-six cents. A transcript of the accounts and the two bonds were transmitted to the Eastern district of Pennsylvania, and suits were commenced against the principal and sureties in both bonds, in the year 1826.

The present defendant [William Brown] is the administrator of Robert Brown, one of the sureties in the bond of the 17th October, 1816. The declaration, which was in debt on this bond, contains two counts. The first proceeds for the penalty without setting out the condition or any breach of it. The second sets out the condition of the bond and assigns two breaches of it; the first assignment of a breach is a general one declaring, that after the execution of the bond, Nicholas Kern did not truly and faithfully discharge his official duties, nor faithfully collect and pay according to law, all moneys assessed upon his district; the second assignment of a breach is more special and comprises two allegations, the one that he did not pay fifty-one dollars and ninety-nine cents, cash received by him as collector after the execution of the bond, the other that he did not collect and pay eighteen thousand eight hundred and eighty-seven dollars and eighty-seven cents, due on uncollected bonds taken by him as collector, to wit, on the 1st January, 1817. To this declaration seven pleas and a special demurrer are filed, on six of which there is a joinder of issue as to matters of fact. The remaining plea is the fourth. The fourth is a plea in bar, containing averments of the original appointment of Nicholas Kern, and his commission, on the 5th January, 1814; that he exercised the office thenceforward till the date of this bond of the 17th October, 1816; that this bond was prescribed by the act of 9th January, 1815, and was required and taken under colour of it; that its condition varies from the one prescribed by that act in providing that Nicholas Kern, "had truly discharged the duties of his office," previously to the execution of the bond; and that therefore, the "writing brought into court," and on which the suit is brought is void. The special demurrer is to so much of the second count of the declaration as alleges a breach of condition on the part of defendant Nicholas Kern, in not collecting and paying the eighteen thousand eight hundred and eighty-seven dollars and eighty-seven cents, due on uncollected bonds taken by him, on the ground that the nature and circumstances of the uncollected bonds, and the time they were taken, or became due, are not set forth. To the fourth plea the United States demurred and the defendant joined in demurrer. The United States also joined in the special demurrer of the defendant.

The demurrers were argued on the 19th March, 1830, by—

Dallas, U. S. Dist. Atty.

Binney & Chauncey, for defendant.

Mr. Dallas, for the United States.

In order correctly to understand this case, there must be a full reference to the acts of congress, under which Nicholas Kern was appointed a collector of the direct taxes and internal duties for the Eighth district of Pennsylvania, as well as to the pleadings in this action. Upon the fourth plea the broad question comes up. It is asserted, on the part of the defendants, that the bond on which the suit is brought does not conform to the act of congress, under which it purports to have been made, but is contrary thereto; that it is therefore void in law, having a retrospective clause in the condition, not warranted by the act of congress, to wit, that the said Nicholas Kern "has" truly and faithfully discharged his duties. In answer to this objection, it is contended that the bond is good, so far as it constitutes the foundation of the demand in this suit. The declaration does not, in assigning a breach of the bond, refer to any part of the condition not prescribed by the act of congress. In setting forth the breach there is no retrospect, nor any demand made for any thing done by the collector antecedent to the bond. Utile per inutile non vitiatur. The excess in the condition is neither malum in se, nor malum prohibitum. Although the bond be taken under the statute, it is also, in its nature, a voluntary bond. It is not like a bond exacted by compulsion of law, in the course of a judicial proceeding, nor like an embargo bond, which the party gives to enjoy a particular advantage. We sue for nothing but what is contained in the act of congress, and has the assent of both parties. The law may discriminate between the good and bad parts of a bond, unless the statute is express that it shall be void. 3 Story's Laws, 1568 [3 Stat. 291]; Shep. Touch. 371; 1 Fonbl. Eq. 212; Bull. N. P. 171; Pigot's Case, 11 Coke. 27; Norton v. Simmes, Hob. 13; Butler v. Wigge, 1 Saund. 65; Lord Arlington v. Merricke, 2 Saund. 410; Shum v. Farrington, 1 Bos. & P. 640; Barton v. Webb, 8 Durn. & E. [8 Term R.] 459; Newman v. Newman, 4 Maule & S. 70; U. S. v. Smith [Case No. 16,334]; Armstrong v. U. S. [Id. 549]; U. S. v. Howell [Id. 15,405]; U. S. v. Sawyer [Id. 16,227]; Bolton v. Robinson, 13 Serg. & R. 195; Postmaster General v. Cochran, 2 Johns. 415; Vail v. Lewis, 4 Johns. 450; Hughes v. Smith, 5 Johns. 168; Morse v. Hodsdon, 5 Mass. 314; Clap v. Gould, 8 Mass. 153; Purple v. Purple, 5 Pick. 226; Washington v. Smith, 3 Call. 13; Johnstons v. Meriwether, 3 Call, 523.

Binney & Chauncey, for defendant.

Has this bond a legal validity? The first count of the declaration is general, and the plea is performance generally. The second count sets out the alleged breaches; to this there are pleas, and demurrer. This goes back to all the proceedings anterior to the

demurrer, and we are to inquire where is the first fault. If the plea be insufficient, and the matter in it not such as will warrant a judgment for the defendant, yet if the declaration be bad, setting out no good cause of action, judgment must be for the defendant. If, therefore, either the plea or the declaration is for the defendant, he will be entitled to judgment.

I. As to the plea. It is admitted that the sureties are not answerable for any thing before the bond. The declaration should inform the defendant what it is he is to answer; yet the second count in fact shows no breach at all. It contains only a general allegation, that the defendant has not performed; but does not distinctly set out a particular breach. The first part, or general averment, is but introductory to the breaches afterwards set out. The breaches, as assigned, are two; yet there is no averment that the fifty-one dollars and ninety-nine cents were collected from the district of the collector, or ought to be paid to the United States; and as to the "uncollected bonds," what bonds are referred to? All this should have been set out, to show whether or not they came under the first bond, given by Kern in 1814, pursuant to the act of 22d July, 1813,—2 Story's Laws, 1445 [3 Stat. 156],—because the bond of 1814 is to answer for such uncollected bonds. It is not averred that it was his duty, as collector, to collect these bonds; they may or may not have related to his office. The questions therefore are, is the breach set out with certainty? If certain, is the breach one within the bond? 1 Chit. Pl. 326, 328.

II. As to the validity of the bond. This is not a voluntary bond. The pleadings agree that a bond was required by the statute. The act of congress does not authorise this bond. The act is clearly prospective. This is not the case of a bond to acts which will violate some law, yet which has other conditions that are lawful; nor is it to do an act which any statute prohibits. The question is, whether, where a bond is authorised by a statute, and it is taken, not according to the statute, it is not void. The officer taking the bond has done that which is not according to his authority, but is substantially different from it. Is it good for any thing? If a statutory authority may be exceeded, and is nevertheless good for all but the excess, how can we avoid oppression? The authority must be strictly, or at least in substance pursued. Affirmative words in a statute contain or imply a negative; that it shall be done in no other manner. If the bond is void, it cannot be helped by alleging only such a violation as is within the lawful part of the condition. The question is not upon the condition, but the bond. The bond is one and indivisible; the penalty cannot be divided. Jenk. Cent. 135, pl. 76; Bull. N. P. 172; 1 Chit. Pl. 326; Dive v. Maningham, Plow. 63; Townsend's Case, Id. 113; Stradling v. Morgan, Id. 206; Lee v. Coleshill, Cro. Eliz. 529; Norton v. Syms, Moore, 856; Slade v. Drake, Hob. 298; Wethen v. Baldwin, Sid. 55; Rex v. Croke, Cowp. 29; Thatcher v. Powell, 6 Wheat. [19 U. S.] 119; U. S. v. Hipkin [Case No. 15,371]; U. S. v. Morgan [Id. 15,809]; U. S. v. One Case of Pencils [Id. 15,924]; Warner v. Racey, 20 Johns. 74.

Mr. Dallas, for the postmaster general, in reply.

The effort is not to reject that part of the contract which is admitted to be bad, but that which is admitted to be good. The act of congress requires a collector to give the bond, but does not designate the officer who is to take it. The comptroller is to approve the bond offered. Therefore the act does not give an authority to a public officer to require the bond. There are in reality but two questions. (1) Is the bond, for all the purposes of this action, valid? (2) Has it been sufficiently declared upon? A reference to the pleadings will show the last point is well established. As to the first; the good part of a condition may be permitted to stand and the bad be rejected, in the case of statute as well as common law bonds, with three exceptions: (1) where it is malum in se; (2) where it is malum prohibitum; (3) where the instrument is verbally set forth and prescribed by the statute. A voluntary bond is not a statutory bond; but Judge Story, in the case of U. S. v. Sawyer [Case No. 16,227], seems to think that an embargo bond may be called voluntary. The principle of the defendant is, that because the officer has done more than the law allowed, all is void. This is novel to the extent it is now carried. That which is out of the authority is void, but all within it is good. By the twenty-third section of the act of 9th January, 1815,—2 Story's Laws, 1461 [3 Stat. 172],—the collector is to prepare and offer his bond to the comptroller for approbation. No officer of the United States is authorised to demand the bond: if there is anything wrong in it, it is the collector's own making, no public officer had anything to do in framing it: all, therefore, beyond the law, is the voluntary act of the collector.

HOPKINSON, District Judge. In the month of January, 1814, Nicholas Kern, of Northampton county, in the state of Pennsylvania, was appointed, by the president of the United States, collector of direct taxes and internal duties for the Eighth collection district of Pennsylvania; and on the 13th of the same month he gave bond to the United States in the sum of twenty-seven thousand five hundred and sixty dollars, with the condition that "the aforesaid Nicholas Kern has truly and faithfully discharged, and shall continue truly and faithfully to discharge the duties of said office, according to law, and shall, particularly, faithfully collect and

pay, according to law, all moneys assessed upon such district." The sureties, bound with Kern in this bond, were Jacob Weygandt and Christian Bixler. This bond was taken under the act of congress of 22d July, 1813. The form of the bond to be given by a collector, is prescribed by the eighteenth section, and the condition is to be "for the true and faithful discharge of the duties of his office, according to law." The bond given, as above stated, is retrospective, and the condition is, that Kern "has discharged and shall continue to discharge" his duties. His appointment is said to have been made on the 5th January; but, as he was bound to give the security before he received any list for collection, and, of course, before he could perform any of the duties of his office, I cannot perceive for what object or reason the retrospective words were introduced; if, even by law, they could have been added to the condition prescribed by the act of congress. It may be remarked that the bond is printed with the condition I have recited, and was probably prepared in the treasury department, and distributed to all the collectors appointed under the act.

On the 17th October, 1816, Nicholas Kern gave another bond, in the same form and with the same condition as the first, but with a change of the sureties. Robert Brown and Jacob Driesbach are joined with him in the second bond. An inspection of these bonds, and comparison as to paper and type, will show that the same blank form was used for both, there being no difference between them but in the dates, the amount of the penalty, and the names of the sureties. It is on the second bond that the present suit is brought against the administrator of Robert Brown, one of the sureties. This bond was taken under the directions of an act of congress, passed on the 9th January, 1815. The second section of this act repeals the former, "except so far as the same respects the collection districts, therein and thereby established and defined, so far as the same respects internal duties, and so far as the same respects the appointment and qualifications of the collectors, and principal assessors, therein and thereby authorised and required; in all which respects, so excepted, as aforesaid, the said act shall be and continue in force, for the purposes of this act." By the twenty-third section of this act, it is provided, "that each collector, before receiving any list, as aforesaid, for collection, shall give bond, with one or more good and sufficient sureties, to be approved by the comptroller of the treasury, in the amount of the taxes assessed in the collection district for which he has been or may be appointed, which bond shall be payable to the United States, with condition for the true and faithful discharge of the duties of his office according to law, and particularly for the due collection and payment of all moneys assessed upon such district." There is, also, a provision, that nothing contained in this act "shall be deemed to annul or impair, the obligation of the bond heretofore given by any collector."

On a settlement of Nicholas Kern's accounts, a balance appears to be due from him to the United States of eighteen thousand nine hundred and thirty-nine dollars, and eighty-six cents, for the recovery of which suit is now brought. The declaration, in the first count, claims the penalty of the bond, to wit, forty-five thousand dollars, as forfeited to the United States, and sets out, that Robert Brown, on the 17th of October, in the year 1816, by his certain writing obligatory, granted himself to be held and firmly bound in the said sum "to be paid to the United States, whenever he, the said defendant, shall be thereunto afterwards required." A second count in the declaration recites the bond, and adds "which said writing obligatory was and is subject to a certain condition;" and the condition is recited; the declaration then proceeds "and the said United States in fact say, that the said Nicholas Kern, collector as aforesaid, did not, while such collector, and after the execution of the said writing obligatory, truly and faithfully discharge the duties of the said office according to law, nor particularly, faithfully collect and pay according to law, all moneys assessed upon such district, but made default therein, and neglected and refused so to do, contrary to the duties of his said office, and the acts of congress; particularly in not paying to the proper officers of the treasury of the United States, the sum of fifty-one dollars and ninety-nine cents, cash by him received as such collector, and after the execution of the said writing obligatory, and so due from him from and on the 31st December, 1821; and further, in not collecting and paying, according to law, the further sum of eighteen thousand eight hundred and eighty-seven dollars and eighty-seven cents, due by uncollected bonds taken by the said Nicholas Kern, as such collector." The death of Robert Brown, the obligor, is then averred, and the granting of letters of administration to William Brown, the present defendant. The bond is a joint and several obligation.

The defendant craves oyer of the bond, and of the condition; and they are read to him, and set out "in hæc verba." (1) In plea, to the first count in the declaration, he then says, "that the said writing obligatory is not the deed of the said Robert Brown," and of this he puts himself on the country. (2) And for further plea to the first count he says, "that he has fully administered," and prays judgment. (3) For further plea to the first count he says "that the said Nicholas Kern did continue truly and faithfully to discharge the duties of his said office;" which he is ready to verify, and therefore he prays judgment. (4) And for further plea to the first and second counts

of the declaration, he recites in his plea the appointment of Nicholas Kern, and his commission dated on the 5th January, 1814, as collector, under the act of congress passed on the 22d July, 1813; that the said Kern entered upon the exercise of his office, and continued therein "up to the day of the sealing and delivery of the said supposed writing obligatory." The plea then refers to the act of congress above mentioned, passed on the 9th January, 1815, and particularly recites the form of the bond, with the condition directed to be taken by that act. It further avers that "the said supposed writing obligatory, on the day of the date thereof, and after the said Kern had been a long time in the exercise of his said office, was required by the said United States to be sealed and delivered by the said Kern, and by the said Robert Brown, as surety of the said Kern, and was by the said United States taken from the said Kern, and from the said Robert Brown, as surety of the said Kern, on the day and at the place in the said declaration mentioned, under colour of the said act of congress of the United States, and contrary thereto." The plea then avers that the condition of the supposed writing obligatory "does not, and did not, conform to the said act of congress," and that the bond and condition were and are contrary thereto, and in violation of the same, "inasmuch as by the said condition of the said supposed writing obligatory, it is provided, that the said Nicholas Kern had, before the sealing and delivery of the said supposed writing obligatory, truly and faithfully discharged the duties of his said office, according to law, and the said supposed obligation was thereby declared to abide and remain in full force and virtue, in case the said Nicholas Kern had not, before the sealing and delivery thereof, truly and faithfully discharged the duties of his said office, according to law. And so the said defendant saith, that the said writing so brought into court is void in law." (5) As a further plea to the second count of the declaration, the defendant says, "that the writing obligatory therein mentioned, is not the deed of the said Robert Brown." (6) There is also a plea of "fully administered," to the second count. (7) As to the first breach assigned, in not paying to the treasury of the United States the sum of fifty-one dollars, and ninety-nine cents, the defendant says, that they "were not received by the said Nicholas Kern, as such collector, after the execution of the said writing obligatory." (8) As to the second breach assigned, he says, that the matters contained in it "are not sufficient in law for the United States to have or maintain their action," and that he is not bound to answer them.

The defendant then states and shows the following causes of demurrer to the said second assignment of breach. (1) That the said assignment of breach does not state and set forth the nature and circumstances of the said uncollected bonds, nor by whom, to whom, at what time, nor for what amount or consideration given, nor when or to whom payable. (2) That the said assignment of breach does not state and set forth that the said uncollected bonds were taken by the said Nicholas Kern, after the said execution and delivery of the said writing obligatory. (3) That the said assignment of breach does not state and set forth that the said sum of eighteen thousand eight hundred and eighty-seven dollars and eighty-seven cents, became and was due by the said Nicholas Kern after the execution and delivery of the said writing obligatory. (4) That the said assignment of breach does not set forth and state that the default of the said Nicholas Kern, in not collecting and paying the said sum of money, took place after the execution and delivery of the said writing obligatory, and not previously thereto.

To these pleas the United States have replied severally. As to the first, fifth and seventh, that is, those of the general issue, they also put themselves upon the country. On the second and sixth, which are pleas of "fully administered," they deny the allegation and take issue. As to the third plea they reply: (1) That after the execution of the said writing obligatory the said Nicholas Kern did not continue truly and faithfully to discharge the duties of his said office, according to law, and did not, particularly, faithfully collect and pay, according to law, all moneys assessed upon the said district, because they say that the said Nicholas Kern continued in his said office as collector from the day of the execution of the said writing obligatory until and after the first day of July, 1825; and that during the said time, that he, the said Nicholas Kern, so continued in his said office as such collector aforesaid, to wit, the said last mentioned day and year, and on divers other days and times after the day of the execution of the said writing obligatory, he, the said Nicholas Kern, in his said office and as such collector aforesaid, had and received for and on account of the said plaintiffs, divers sums of money, amounting in the whole to the sum of eighteen thousand five hundred and fifty-three dollars and thirty-three cents. (2) That after the execution of the said writing obligatory, and whilst the said Nicholas Kern continued in his said office and as collector aforesaid, he did not faithfully collect and pay, according to law, certain large sums of money assessed upon the said Eighth collection district of Pennsylvania, amounting in the whole to the sum of seventeen thousand two hundred and forty-eight dollars and fifty-six cents, but faithfully to collect and pay the same he has hitherto wholly failed and made default. As to the fourth plea they reply, that the same and the matters therein contained are not sufficient in

law to bar and preclude them from having or maintaining their aforesaid action thereof, against the said defendant. As to the second breach in the second count of the declaration assigned, they say that the matters therein contained, in manner and form, are sufficient in law for them, to have and maintain their aforesaid action against the said defendant.

On these pleadings two general questions have been raised and argued at the bar: One having relation to the declaration, or the manner and form in which the plaintiffs have set out their demand; and the other denying the whole ground of the action, and alleging that the bond or writing obligatory, on which it is founded, is wholly void in law, and that no recovery can be had upon it, in this or any other form of action.

The second question is the most important and will be first considered. It is not the first time it has come before the courts of the United States, but, so far as we may judge from the reports of the cases, it has not, until now, been examined with any considerable diligence or care. The question, briefly stated, is whether, if the condition of a statutory bond contains more than is required by the statute, the bond is wholly void. Before we enter upon the examination of this question, I will state the difference which exists in this case, between the bond actually taken and that authorised to be required by the act of congress. The condition of the bond of a collector, prescribed by the statute, is directed to be "for the true and faithful discharge of the duties of his office, according to law, and particularly, for the due collection and payment of all moneys assessed upon such district." The condition of the bond in question is, "that the said Nicholas Kern has truly discharged, and shall continue truly and faithfully to discharge the duties of his said office." The substantial difference is, that the bond taken, and on which this suit is brought, has a retrospective operation; but the bond directed by the statute has no such operation, but is altogether prospective. The question to be decided is not whether we can give to the bond this retrospective effect; that is not pretended on the part of the plaintiffs: but whether, by this departure from the statute, the obligation is entirely void and null, so that no recovery can be had upon it even for defaults or breaches of the condition, which, in truth, were made after the execution and delivery of the writing obligatory.

The argument against the legal validity of this bond is substantially this: that the officers of the United States, by whom this bond was required and taken from Nicholas Kern, and without which he could not receive his appointment as collector, or enter upon the duties of his office, were the agents of the United States, acting by and under a special authority delegated to them in precise terms by the United States: that these agents were confined strictly, or at least in matters of substance, to the terms and limits of their authority: and that if they exceeded their authority, and demanded from a collector a bond differing from that required and authorised by the law, imposing obligations upon him not imposed or warranted by the law, the whole execution of the authority was void. It is further argued, that one of the reasons of this strictness is, to preserve those who are called upon to give such bonds, from injustice and oppression by the officers who are appointed to take them: and this important object cannot be effected if the bond, having in it an illegal or unauthorised condition, shall, nevertheless, stand good for so much as is according to law: that the only remedy and protection against such oppression, under colour of office, is to declare the whole to be an illegal and void execution of the authority. The moral theory of this argument is good, but we must look further, for the policy and utility of its practical application to the business of the world and the purposes of justice. It is the duty of a court of law to pursue this inquiry into the proceedings of the courts, and to abide by their decisions upon it. It is so purely a question of law, that I shall look to the cases in which it has been agitated or decided, for my judgment upon it. The books seem to have been thoroughly examined, and we have probably all the judicial light that can be brought upon the subject. Is a statutory bond, the condition of which contains more than is required or authorised by the statute altogether void; or may it be a good and valid obligation for so much as is according to the statute, and void only as to that part which is not according to the statute? I shall take up the cases as they were read at the bar.

Much reliance has been placed on the case of Purple v. Purple, 5 Pick. 226. It was briefly this: A replevin bond was given to the officer who executed the writ; the statute required that it should be given to the defendant; the bond was adjudged to be void. It is obvious, that this case does not meet the question we are discussing. It was not the case of a bond good in part, and bad in part; of a bond with a divisible condition. No attempt indeed was or could be made, to support it on that ground. It was at once given up as a statutory bond; as such an obligation or instrument as could be supported by and under the statute in whole or in part; and the effort made was to maintain it as a good bond at common law. The court, in deciding against it, say, "the bond could, in no sense, be taken to be according to the statute." And again, they say, "it stands as a bond given to one who had no lawful authority to take it; and the purpose and effect of it were to aid and abet him in a trespass upon the attaching officer; it is therefore illegal and void."

The case of Johnstons v. Meriwether, 3 Call, 523, is also a case of a statutory bond given to a wrong person; to one not authorised by law to take it, and not divisible. It must necessarily be wholly good or wholly bad. On the service of an execution, an obligation called a "forthcoming bond," was given to the coroner instead of the plaintiff in the action. The court give no reason but it is said briefly, that if such a bond be not good as a statutory bond, it may be good at common law.

In the case of Newman v. Newman, 4 Maule & S. 70, part of the condition of the bond, was for the payment of money and part for the presentation of the obligee's son to the next avoidance of a church. It was there held that, if the latter part of the condition was simoniacal, yet the bond was good for the payment of the money. Lord Ellenborough says: "Admitting the condition of this bond to be ill as to one part of it, it seems that it may be well as to the other parts, for you may separate at the common law the bad from the good." From this case we learn, that there is no principle of the common law, which forbids us to separate the good from the bad part of the condition of a bond, where they are of a nature to be severable: and the difference between a bond at common law, and one executed under the directions of a statute, seems to be only, that in the latter case the bond is required and given under an authority derived from the statute, and it is therefore asserted that the authority must be strictly pursued; and that if it be exceeded, the whole execution is null and void. This principle will be attended to.

The case of Warner v. Racey, 20 Johns. 74, was also one of a bond given to a wrong party. It was made payable to "the people of Niagara county," instead of "to the people of the state of New York." The court very shortly say; "the bond is not according to the statute: and if it were, there is no evidence of any breach."

The case of the U. S. v. Sawyer [Case No. 16,227], decides some questions in pleading which belong to another part of our case. As to the part we are now inquiring into, there is no direct opinion given, for the learned judge thought the bond was taken substantially, according to the act of congress. The objections, however, made to that bond were essentially the same with those urged here, on the part of the defendant. That to every contract there must be two parties. That the United States can contract only according to the regulations and authorities of statutes. That the assent of the United States can be declared only through their authorised agents; and these agents cannot effectually assent, unless they are clothed with the authority by law. An assent, therefore, in a manner different from that prescribed by the law, is not valid, and consequently does not bind at all. The judge, as I have said, was of opinion, that, on a fair construction, the bond was conformable to the law. He, however, puts as a question, on which he gives no decision, whether a bond taken by a collector, under a general authority to take bonds in revenue cases, would be void on account of any irregularity or mistake in the condition? Whether such a bond, where the condition is partly conformable to, and partly variant from, the provisions of the statute, be void in whole, or good as to that part of the condition which is conformable to law? The judge significantly adds, "that the principles, on which such bonds are adjudged to be wholly void, will encounter much opposition from the authority of decided cases." This was in the year 1812.

Pigot's Case, 11 Coke, 27, was one of debt on a bond, and plea, non est factum. The bond was given originally to the plaintiff, Benedict Winchcombe, in sixty pounds. After the execution and delivery of the bond, the words "sheriff of the county of Oxford" were inserted after the name of Benedict Winchcombe, and before the words "in sixty pounds;" the obligee being, in fact, sheriff of Oxford, and the bond an official bond. The interlineation was made without the privity of the obligee. The case turns upon the effect of this interlineation in the bond. It is said, it was moved at the bar, when a deed shall be good in part and void in part; and as to this, Lord Coke says: "I conceive there is a difference when a deed is void ab initio, and when it becomes void by misfeasance, ex post facto: also, when the deed which is void ab initio, doth consist upon the entirety, and when upon divers several causes; and in these, also, there is a difference, when the several clauses are absolute and distinct, and when they are several, and yet the one has dependency upon the other." The report goes on to state, "that it was unanimously agreed in 14 Hen. VIII. 25, 26, that if some of the covenants of an indenture or of the conditions indorsed upon a bond, are against law, and some good and lawful, that in this case the covenants or conditions which are against law are void ab initio, and the others stand good." In this reference to the unanimous judgment in 14 Hen. VIII., no distinction is noted between a common law and a statutory bond; but we must observe, that the case in which it is cited by Lord Coke, was one of an official statutory bond. It is further said in this case "that if there are two absolute and distinct clauses in a deed, and the one is read to the party not lettered, and the other not, that the deed is good for the clause which was read, and, ab initio, void for the residue." Bull. N. P. 171, cites the case we have just referred to, and thus expresses himself: "If part of the condition be bad by common law and part good, the deed will be good for that part of the condition which is good: aliter, where part is made bad by statute." No

such distinction is found in Pigot's Case. Besides the words "part is made bad by statute" import something much stronger than the mere addition of a condition, not authorised by the statute, to one that is.

The case of Norton v. Simmes, Hob. 13, was a decision upon the words of the statute of 23 Hen. VI. It is said "the difference was taken between a bond made void by statute, and by common law; for if, upon the statute of 23 Hen. VI., a sheriff take a bond for a point against that law, and also for a debt due, the whole bond is void; for the letter of the statute is so." This statute prescribes the form of the bond or security which a sheriff shall take; and we thus understand what is intended in Hobart, by the expressions of a bond "made void by the statute" and "taken for a point against that law."

In the case of the U. S. v. Smith [Case No. 16,334], this statute and the decisions upon it are noticed. It was an action on a bond executed by the defendant to the United States, and delivered to the collector of the port of New York, taken under the second section of the embargo act, of 22 December, 1807,—2 Story's Laws, 1071 [2 Stat. 453]. It was contended to be a void bond, because not made in conformity with the act, which required the security "to be given to the collector of the district," and this was made payable to the United States. The condition, also, was to reland the goods at the said port of St. Mary's, or at some other port of the United States. The words of the act were that they should be relanded "in some port of the United States." Judge Talmadge said, that the law prescribed no form of bond, nor avoided any that might be adopted. He thought, "the bond, as taken, embraced the substance and was within the spirit and authority of the act, a voluntary bond and valid." He observes, that the English authorities cited were decisions upon the particular words of the statute of 23 Hen. VI., authorising and requiring bail bonds, "which statute prescribes the form of the security and declares all others to be void." The doctrines of this decision receive a strong confirmation in the case of Morse v. Hodsdon, 5 Mass. 314, where it is laid down, that if the officer to whom a writ of replevin is directed and delivered, take from the plaintiff a bond not conformed to the requisition of the statute, which is voluntarily executed by the plaintiff, he shall not avoid it on that account. How was this a voluntary bond more than that we have to deal with? The officer of the law appointed to take the bond and execute the writ required it, and the plaintiff could not get his goods without executing it. The officer, too, acted by the authority of the statute in requiring and in taking the bond. The variance was a very important one. By the condition of the bond taken, the penalty was declared to be forfeited if the plaintiff, in the replevin, did not prosecute this suit to judgment and recover; whereas it should have been to return the goods and pay damages and costs. Chief Justice Parsons says: "If a plaintiff execute an informal bond voluntarily and to obtain possession of his goods, and the officer thereupon deliver him the goods, the defendant in replevin may, if he please, accept the bond, and pursue a remedy at law upon it against the obligor, unless the bond be void by the common law or by statute." As to a bond void by statute, the chief justice says: "if it be void, it must be so in consequence of the statute directing the form of the writ of replevin. True it is that the condition, in this case, is variant from the form there directed; but that statute does not prohibit the taking a bond of any other form, or declare a bond of any other form void." The chief justice considers this bond to be a voluntary bond. He observes, "they were not obliged to give this bond; and if a formal bond had been tendered to the officer he must have executed the writ;" and concludes, "the bond must be good, unless it be declared void by the common or statute law: we know of no law by which it is made void."

The case of Clap v. Gould, 8 Mass. 153, was a replevin for goods valued at one hundred and fifty dollars. The officer was directed to execute the precept if the plaintiff first gave bond in three hundred dollars. He took a bond for eight hundred. It was objected that "the bond was not taken according to the command of the writ, nor pursuant to the directions of the statute." The objection was overruled.

In 1811, the case of Armstrong v. U. S. [Case No. 549] was decided in this circuit. It was on the equity side of the court. The material circumstances were these. In June, 1796, one Smith was appointed to collect the internal revenue of a district in New Jersey, and gave bond with one Willis as his surety: he was afterwards required to give additional security, and in January, 1799, he, with the complainants as his sureties, executed a new bond, with condition that he had faithfully executed the duties of a collector, and would thereafter faithfully execute the same. Smith, the principal, was then indebted to the United States for collections previously made, and became further indebted during the year 1799. Suit was brought by the United States on the last bond, to recover the whole. The plaintiff offered to pay the amount which became due since January, 1799. On this case Judge Washington decided, "that the substantial form of the bond required by the act of congress was prospective only; and that when a statutory bond is taken, it ought to conform, in substance at least, to the requisitions of the statute; and if it go beyond the law, it is void, at least so far as it does exceed those requisitions. That this was an official bond, which the supervisor had a right to demand, and Smith was obliged to

give, if he meant to continue in office." The result of this case was, that the whole bond was not declared to be void; nor did the complainants ask it; but an injunction was granted, except as to the sum liquidated and stated as having been due since January, 1799, with interest. We must remark here, that the judge recognises the principle that the good and the bad parts of the bond might be separated, and the condition be affirmed and executed as to the one and rejected as to the other. It is something, too, that Mr. Stockton, whose ability and attention to the rights of his clients were not surpassed, did not ask an exemption from the responsibilities of this obligation, except as to that part of it which was not authorised by the law. I should not, perhaps, omit further to remark, on this case, that Judge Washington seems to me to express himself inaccurately when he says, or is reported to say, that this was an official bond which the supervisor had a right to demand, and Smith was obliged to give. I should rather say, with Chief Justice Parsons, that Smith might have refused to execute this bond, and should have tendered one made in conformity with the act of congress, and the supervisor would have insisted on his own form at his peril. Fifteen years afterwards the same judge expressed the same opinion upon the point we are examining. In the case of the U. S. v. Howell [Case No. 15,405], he says: "It has been made a point whether a bond, not being required to be taken by any act of congress, is a valid one? My opinion on this point is, that where a statute requires an official bond, and prescribes substantially the terms of it, it must conform to the requisitions of the statute; and if it go beyond them it is void, so far at least as it exceeds those requisitions."

The case of Dive v. Maningham, Plow. 60, cited by the defendant's counsel, was a decision upon the statute of 23 Hen. VI., which, as we have already seen, expressly declares all bonds, taken under the statute, to be void which are not made in the manner prescribed by the statute: it was the case of a bail bond given to the sheriff under that statute. The judgment of Chief Justice Montague is principally given on questions of pleading, and on the construction of the statute. As to one point he says, "and it seems to me that the obligation here is void by the letter of the statute;" which avoids "obligations taken in any other manner than the statute limits;" and a reason is given for this strictness, which has a peculiar application to the bonds provided for by that statute, and the abuses intended to be prevented by it. The case referred to by the chief justice in 7 Ed. IV. was also decided on the words of the statute: "the court there, also, held that if the obligation has not the conditions expressed in the statute, it is not the deed of the party." The chief justice, still continuing his remarks upon this statute, does say: "I apprehend that if the obligation had been conditioned according to the statute, and had another thing also in the same condition, that the obligation, by reason of this condition, would be utterly void." And why? He has told us before, by the express letter of the statute. This, however, is the dictum of one of the judges, on a point not in the case decided.

There is nothing in Townsend's Case, Plow. 111, that has any judicial authority or bearing upon the question we are considering.

Lee v. Coleshill, Cro. Eliz. 529, was an action of debt on an obligation made to one Smith by the defendant, with a condition for the performance of covenants between Smith and Coleshill, whereby Coleshill, being a customer of London, made Smith his deputy, in the said office, and covenanted to surrender these letters patent before a certain day, and to procure new ones to himself and Smith; as also, that Coleshill should pay the executors of Smith three hundred pounds. The defendant showed that by the statute of 5 Ed. VI., all promises, bargains, and contracts, for the buying of divers offices, whereof this was one, were void. The plaintiff argued that he should have judgment, "for there be many covenants within the indenture, whereof some are good and lawful, and for these, doubtless, the obligation remains good." The defendant's counsel replied that "all parts here of this indenture concern the exercising of the office; and, if any of the covenants concerning other matters should be accounted good, yet the obligation is void in all, for the statute saith, the bond to that purpose shall be void, and then it is not possible it should be void to this intent and good for another." The argument of the defendant, here, was on the words of the statute expressly declaring the bond to be void; and also, on the allegation that all parts of the indenture concerned the exercising of the office. We do not know on what ground it was decided. The reporter merely says; "wherefore the court here did not deliver any great opinion; but, absente Walmsley, adjornatur." And it was afterwards adjudged, that the obligation was void in every part, being against law.

A distinction, and it is a natural one, seems to run through these cases. It is this. Where a statute authorises a bond to be taken in a prescribed manner or for certain expressed purposes, and declares, that if it be not so taken, the bond shall be void, then it may not stand good for any purpose, however lawful in itself, if it be not conformable to the statute; but where the statute only directs the condition of the bond, and does not avoid it if it should not conform to the directions, and something more than that condition is added to it, the bond may be allowed to cover the authorised part of the condition, and so much may be recovered under it, and no more.

The case of U. S. v. Morgan [Case No.

15,809], has been greatly relied upon by the defendant, and calls for a particular attention. It was an action on an embargo bond, tried in this district at April sessions, 1811. The plea, to which there was a demurrer, presented three objections to the bond. (1) That the collector, and not the United States, should have been the obligee. (2) That the condition of the bond omits to insert the words "dangers of the sea excepted." (3) That it binds the defendant to deliver to the collector at Philadelphia, where the bond was taken, the certificate of relanding in the United States, within three months from the date of the bond. None of the arguments of counsel are given, and the opinion of the court is very brief. Judge Washington says: "The bond is a statutory instrument; the officer had no authority to take it, but in virtue of a power conferred on him by the government of the United States; the power should have been at least substantially pursued. The embargo law prescribes the material parts of the bond to be taken. It is to be in a sum of double the value of the vessel and cargo, with the condition that the goods shall be relanded, dangers of the sea excepted." We see, then, that the bond in that case, stipulated for a relanding absolutely, when the law allowed an essential exception, and required the relanding accordingly. The bond was declared to be void by the judge. (1) Because the condition required the obligors to reland the cargo in the United States, although they might have been prevented by a peril of the sea. (2) Because the condition requires the obligors to return the certificate of relanding to the collector at Philadelphia, within a limited time: whereas, the law did not impose upon the obligors, the necessity of returning the certificate to that officer at all, much less to do it within a prescribed period. In comparing this case with that under our consideration, an important difference at once strikes us. The condition of that bond was not, as ours is, in its nature or terms divisible. There was not in it a part which was bad, and a part which was good, and so set forth that they might be separated from each other; that the one might be retained, and the other rejected; that the obligation might stand good for the one, and not for the other; that the United States might say, on the record, we ask for a judgment only on so much of this condition and its forfeiture, as is according to law. It is impossible to make the bond in Morgan's Case conform to the law, by taking away any part of it. You must make altogether a new and a different condition; you must add an important qualification or exception given by an act of congress, and not given by the bond; and you must essentially change, indeed expunge another part of the condition, which was not warranted by the law. In short, you must make a new contract between the parties. It was a very plain case, and this may account for the little attention that was given to the argument. Three or four cases appear to have been cited for the defendants, and not one by the United States. We may say that the ground was abandoned by the plaintiffs, and very properly.

I ought not to omit some general remarks or principles which fell from the judge. He says, that if the bond "bind the obligors to do more than the law requires, it is not the bond which the officer was authorised to take, and all is void." Now this is true as applied to such a case as he had in his view; where an absolute relanding was required, instead of a conditional one; and where a certificate was required to be delivered to a certain officer, and at a certain time, neither of which was warranted by the law. But that the judge did not mean to say that in all cases, in which the bond binds the obligor to do more than the law requires, all is void, may be inferred from his expressions in the cases already cited; one of them, that of Armstrong v. U. S., being decided six months after Morgan's Case; and the other, that of U. S. v. Howell, fifteen years later. In both of these, he qualifies the principle, by adding, "at least so far as it exceeds the requisitions of the law."

The case of U. S. v. Hipkin [Case No. 15,371], was decided in the district court at Norfolk. No opinion was given by the court, nor was any necessary. The objection to the bond was that the condition was contrary to the express provisions of the law. It was not a case of a condition with several stipulations, divisible from each other, some according to law, and others not so. The district attorney admitted that no recovery could be had for the breach of a condition that was not authorised by the law which required the bond.

The cases of Rex v. Croke, Cow. 29, and Thatcher v. Powell, 6 Wheat. [19 U. S.] 119, sustain the general principle that powers given by statutes to public officers must be strictly pursued. These cases have no particular analogy to this.

In the case of Bolton v. Robinson, 13 Serg. & R. 193, Judge Duncan gives the opinion of the court, and says: "This obligation is a statutory one, with an entire unwarranted condition; so far from conforming to the requisitions of the act it is in direct contradiction." He then quotes the opinion of Judge Washington, not for his general expressions in Morgan's Case, but with their qualifications in that of U. S. v. Armstrong, "that a statutory obligation ought to conform, at least, in substance, to the requisition of the statute. and if it go beyond the law, it is void, at least, so far as it exceeds the requisition." The judge says, "The act required bail in the nature of special bail: the bail taken was absolute for payment of the debt. The whole was excess, and the condition was therefore against law. It did not consist of several parts, some of which were

good, and some bad; and therefore the whole was void."

The case of Norton v. Syms, Moore, 856, so far as it bears upon our point, refers to Coleshill's Case, which we have already considered.

From this examination of the cases we may consider it to be settled, that if a bond be taken at the common law, with a condition, in part good and in part bad, a recovery may be had on it for a breach of the good part. This being the general common law principle, it is incumbent upon the defendant to show that a different rule is established in regard to a statutory obligation, on a bond authorised and required to be taken by a statute. An able and laborious endeavour has been made to sustain this distinction by the cases, and arguments drawn from them, to which I have referred with a careful examination. In my opinion the distinction is not supported, as applicable to a case like the present, in which there is nothing in the statute declaring that bonds, that vary from the prescribed form, shall be altogether void, and in which the good part of the condition may be easily separated from the bad. Nothing is required to be added to the contract; and nothing to be taken from it, but what is favorable to the obligor, by diminishing the extent of his responsibility.

Judgment for the United States on the demurrer.

Case No. 14,664.

UNITED STATES v. BROWN.

[Hoff. Op. 74; Hoff. Dec. 16.]

District Court, D. California. Sept. 18, 1855.

SPANISH LAND GRANT—SUFFICIENCY OF EVIDENCE—ENFORCEMENT AGAINST UNITED STATES.

[1. A claim under an alleged provisional license granted by a Spanish officer may be properly rejected in the absence of any testimony from the archives to sustain it, it being supported only by parol testimony of witnesses whose perjury has been exposed, and there being no reliable evidence that the land was ever occupied under such license.]

[2. An equity based upon a license by a Spanish officer to occupy provisionally can be enforced against the United States only by one presenting clear proofs that, on the faith of the promise, he occupied and settled the land, and a mere use of the land for pasturage, in common with others, is insufficient.]

[This was a claim by E. L. Brown to eleven leagues of land. Rejected by the board.]

HOFFMAN, District Judge. The documents originally presented by the claimant to the board, and on which he asked a confirmation of his claim, were (1) A petition of Victor Prudhon and Marcos Baca to M. G. Vallejo, director of colonization, dated December 10, 1845, in which they solicited permission to occupy a tract of land, eleven leagues in extent, "as shown by the map annexed to the petition." (2) The marginal order or decree of Vallejo, dated December 10, 1845, in which he requires the usual informe of the alcalde of the jurisdiction of Sonoma. (3) The "informe" of José de la Rosa, dated December 17, 1845. (4) A permission to occupy provisionally, signed by Vallejo and dated December 20, 1845. (5) A formal grant by Pio Pico, dated Los Angeles, December 29, 1845. (6) A certificate of confirmation by the departmental assembly, dated December 30, 1845.

All these documents were produced by the claimant and filed together in the surveyor general's office on February 9, 1852. The archives contain no trace whatever of the existence of this grant. No expediente is found, nor is the grant dated in the book of Toma de Razon for the year 1845, the latest entry in that year being dated December 23d. The records of the departmental assembly not only contain no mention of its approval, but they show that the assembly was not in session at the date when the resolution of approval was said to have been passed. The grant and papers in many particulars closely resemble those in the case of Luco v. U. S. [Case No. 8,594], which was rejected by this court as spurious, and which has since been so declared by the supreme court. [23 How. (64 U. S.) 515.] In both cases the expediente was produced by the claimant. No note appeared in the Toma de Razon. The confirmation nowhere appeared in the journal of the assembly, and was alleged to have been made at a day when that body was not in session, and the signatures of Pio Pico, in both cases, had a most suspicious appearance. Many of the principal persons connected with both claims, either as parties or as witnesses, were the same, and the lands claimed were in both cases in the immediate vicinity of Sonoma. Under these circumstances the court would have had no hesitation in affirming the decree of the board by rejecting the claim as spurious.

The case was, however, after being submitted to the court, opened for further testimony on both sides; and, it having been ascertained that Moreno, by whom the grant was attested as secretary, was not in office at the time it bears date, he was examined as a witness for the United States. He thereupon confessed that neither the signatures of himself, Pio Pico, or Covarubias were genuine, and that he was not in office at the date of the grant. Whether or not the signatures of Moreno and Covarubias are genuine, it is not easy to determine. It is clear that, at all events, they were not affixed to the documents until long after their date. The counsel for the claimant thereupon in open court renounced all claim under the fraudulent grant and certificate of approval, but they still maintain the genuineness and validity of the provisional permission to occupy signed by Vallejo.

As these documents are produced by the claimants connected with and part of an

expediente, the principal papers of which are now admitted to be forged and fraudulent, and as all the witnesses, except Vallejo, who testify to the genuineness of the provisional title, also testify to the genuineness of the forged papers, it is apparent that such testimony can afford no reliable basis for the judgment of the court in favor of the latter. That the petition to Vallejo, the informe of De la Rosa, and the license to occupy it, may have been written long subsequently to these dates, is evident. It is also evident that the witnesses who swear to the genuineness of the grant by Pio Pico, to its reception, etc., and the influences by which it was procured, would be equally ready to swear to other spurious documents. In the absence, therefore, of all testimony from the archives, with no reliable evidence that the land was ever occupied under the alleged provisional license, I should be justified in rejecting a claim supported by parol testimony of witnesses whose perjury has been exposed. But the evidence in support of the provisional grant can be shown to be unreliable, independently of the character of the witnesses or the exposure of the fraudulent character of the grant.

The petition to Vallejo refers, as we have seen, to a map or "diseño" of the land which was annexed to it. Marcos Baca, one of the pretended grantees, swears that a map of the land was made by Alcalde José de los Santos Berreyesa, before the application was made for the land, and in his third deposition the same witness states that Berreyesa was alcalde in 1845. It is evident, therefore, from the petition itself, and from the statement of Baca, that a map, made by Berreyesa, when he was alcalde, accompanied the petition. But, unfortunately, it appears, by the positive testimony of Berreyesa himself, that he was alcalde in 1846, and not in 1845; and this fact is further proved by the documents themselves, for the petition, dated December 10, 1845, is referred, not to Berreyesa as alcalde, but José de la Rosa, by whom, as alcalde, the informe is furnished. It is clear, therefore, that Berreyesa could not, as alcalde, in 1845, have prepared the map to be attached to the petition. As Berreyesa became alcalde in March, 1846, it follows that, if he did prepare the map to accompany the petition, that paper must have been made and presented subsequently to March, 1846, and that it, the informe of De la Rosa, and the license to occupy, are antedated. Berreyesa states, in addition, that he prepared, at the request of Baca, in July, 1846, a torrador or draft of a petition to be presented to himself for permission to occupy the land. If this be so, it negatives the idea that Baca could already, viz. in December, 1845, have obtained a similar permission to occupy from Vallejo.

But it is unnecessary to pursue the subject. As between Berreyesa, who is wholly unimpeached, and whose statements are clear and positive, and Marcos Baca, who, in four different depositions taken in this cause, affirms and reaffirms the genuineness of the forged titles originally relied on in this case, the court cannot for a moment hesitate which to believe. It is impossible to contemplate without disgust the series of perjuries which compose this record. Some of the witnesses who have sworn to the genuineness of the signatures have very possibly fallen into an honest mistake. But the testimony of Marcos Baca, who swears, not only to his reception of the grant shortly after its date, but also that it was obtained through the influence of Antonio Pico, the governor's brother, who wrote to him informing him of the fact; the testimony of José de la Rosa, who swears that this letter was shown him by Baca a few days "after he gave his informe"; the testimony of Cayetano, who swears, not merely to the genuineness of the signatures, but that they were affixed at the date of the grant, and that he knows this from having written the grant himself,—all this testimony, together with (undoubtedly) much of that by which the genuineness of the signatures was sought to be established, must now be admitted to be deliberate perjury. No witness swears to the time when the petition to Vallejo was presented, and his concession obtained, who does not appear, on the face of his own deposition, to have sworn falsely, with the exception of Vallejo himself, whose testimony only refers to the genuineness and date of his own signature; and on this point he is contradicted, as we have seen, by the language of the petition, which refers to a map, and the testimony of Berreyesa which shows when the map was made.

But, assuming that the genuineness of the license to occupy by Vallejo were clearly made out, such a permission could confer no rights, unless Vallejo had power to grant it, and to pledge the faith of the government to perfect the title when the conditions of occupation and cultivation had been complied with. The authority to make preliminary concessions, to which Vallejo appeals, is contained in a letter of instructions to him from Figuerroa, dated June 21, 1835. The object of these instructions is apparent from their tenor. It was, not merely to promote the general policy of Mexico with regard to colonization, but to facilitate and encourage the settlement of the northern frontier, on which the Russians had made an establishment, which already gave the government much uneasiness. It was hoped that, by founding a pueblo at Sonoma, and by encouraging the occupation of the country by Mexican citizens, a check might be put upon the encroachments and apprehended designs of the Russians, and a preponderance in numbers on the part of native citizens secured on the frontier. Whatever might have been the authority possessed by Figuerroa thus to delegate the powers he was, by the law of 1824

and the regulations of 1828, empowered to exercise, it is difficult to perceive any ground for supposing that the faculties thus attributed to Vallejo, not only continued after the death of Figuerroa, but survived the numerous revolutions and radical changes of government which subsequently took place.

In 1836 the federal constitution was overthrown by Santa Anna. California then became a department; the political chief, a governor; and the territorial deputation a departmental assembly. The next year after Figuerroa's death, his successor was expelled, and Alvarado was declared governor, and on the 7th of November, 1836, the territorial deputation passed resolutions asserting the freedom and independent sovereignty of California. The dispute with Mexico seems, however, to have been settled by a compromise. In 1838, Alvarado, who had expelled a governor sent from Mexico, was appointed governor ad interim, and in 1839, he was recognized as constitutional governor of the department. His successor was Micheltorena, who arrived from Mexico invested with extraordinary powers by Santa Anna. His rule was of short duration, and after an unsuccessful contest, he was, in February, 1845, compelled to abdicate. Pio Pico then assumed control as governor ad interim, but, like Alvarado, he was subsequently recognized as constitutional governor of the central government. Amid the confusion of so distracted and revolutionary a period, it is not easy to determine the precise authority which any officer was by law empowered to exercise. But it may well admit of doubt whether the instructions and the powers given by Figuerroa to Vallejo (a precaution against a danger long passed away, for the Russians had abandoned the country in 1842) can be considered as existing and valid down to the period of the American occupation. It must, at all events, be admitted that, even if Vallejo had authority to confer an inchoate title to lands on the frontier, and to bind the government to make a formal title, such an equity could be enforced against the United States only by one who presented clear and satisfactory proofs that, on the faith of the promise, he had occupied and settled the land, and thus rendered a full consideration to the former government.

On this point the testimony is not only unreliable but insufficient. It is found chiefly in the depositions of Baca and his brothers, and its effect is thus stated by Mr. Commissioner Thompson, who delivered the opinion of the board: "The occupancy proved in this case was nothing more than the exercise of the common right of pasturage, which was enjoyed by all the inhabitants of the country on the public lands; and there is nothing in it going to show any exclusive possession or claim of ownership on which an equity could be founded." In this view of the testimony I entirely concur. The claim must, therefore, be rejected.

Case No. 14,665.

UNITED STATES v. BROWN.

[2 Lowell, 267.] [1]

District Court, D. Massachusetts. July, 1873.

LIMITATION OF ACTIONS—CRIMINAL PROSECUTIONS—ABSENCE OF DEFENDANT—PLEA NOT GUILTY.

1. A mate of a whaling-ship was indicted for beating and wounding one of the crew, more than two years before the date of the indictment. *Held*, the prosecution was barred by the statute of limitations of 30th April, 1790 (1 Stat. 119), notwithstanding the defendant had been absent from the United States during the whole of the two years after the offence was committed.

2. The statute of 28th February, 1839, § 4 (5 Stat. 322), extending the time for suits and prosecutions for penalties to five years, does not apply to indictments for crimes which may be punished by imprisonment.

3. Whether it applies to any criminal prosecutions, quære?

4. In a trial upon an indictment, the defendant may take advantage of the bar of the statute of limitations, under the plea of not guilty.

The defendant [J. H. Brown] was indicted at the June term, 1873, for beating and wounding, on the high seas, one of the crew of an American vessel, the defendant being the first officer of the vessel. The offence was laid as having been committed in August, 1871; but the evidence was, that the real date was in August or September, 1870. At the trial, the point was reserved, whether the statute of limitations was a bar. The jury found the defendant guilty. The ship was engaged in a whaling voyage when the assault was made, and did not return to the United States until more than two years afterwards.

T. M. Stetson, for defendant. The bar of the statute of 1790 is absolute. There is no exception of absence from the jurisdiction, unless for the purpose of avoiding arrest or prosecution. The statute of 1839 does not apply to a crime of this sort.

E. P. Nettleton, Asst. Dist. Atty., for the United States, suggested that the statute of 1839 extended the time for prosecutions to five years.

LOWELL, District Judge. The thirty-second section of the crimes act of 30th April, 1790 (1 Stat. 119), enacts that no one shall be prosecuted, tried, or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence or incurring the fine or forfeiture; but this is not to extend to any person fleeing from justice. The statute is a general one, which applies to penal laws enacted since 1790; and a prosecution for a fine or forfeiture includes an action of debt for a pecuniary penalty. Adams v. Woods, 2 Cranch [6 U. S.] 336.

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

It reaches this case, then, and the inquiries are (1) whether the bar has been properly taken advantage of; (2) whether there is any exception in the statute which saves this prosecution; and (3) whether any later statute has modified or repealed that of 1790.

1. I have seen dicta that the statute of limitations must be pleaded. Johnson v. U. S. [Case No. 7,418]; State v. Hussey, 7 Iowa, 409. One of these cases came up on habeas corpus after sentence, and the other on demurrer; and all that was decided in either case, was, that the statute could not be availed of in the mode adopted in that instance. In civil cases, the rule is, that the statute must be pleaded. But to this there is a well-established exception of penal actions. In those, the plaintiff must show that his action accrued within the time, because his only title arises from the prosecution of the action itself. An informer, for example, has no vested right in the penalties, but only a right to bring an action within a certain time. This is the origin of the distinction, and it has been applied to all penal actions. Parsons v. Hunter [Case No. 10,778]; Hodsden v. Harridge, 2 Saund. 63, notes 6 and i; Hawk. P. C. bk. 2, c. 26, § 45. If, therefore, we adopt the analogy of civil pleading, we should not require a special plea in a case involving penalties.

But I do not care to rest the decision on a distinction which appears more nice than logical. I prefer to say that, in criminal cases, the plea of not guilty puts in issue the whole case on both sides. 1 Starkie, Cr. Pl. 340; Archb. Cr. Pl. (17th Ed.) 139; 1 Bish. Cr. Proc. § 799. It is usual to plead matters of record, such as a former conviction or acquittal; but I doubt if even that is necessary. At all events, the statute of limitations need not be specially pleaded. See Bish. St. Cr. § 264, and cases. Acc. U. S. v. Cook, 17 Wall. [84 U. S.] 179, per Clifford, J. I suppose that the dicta referred to merely mean that the bar of the statute is a substantive matter of defence, which must be set up at the trial, or it will be presumed to be waived, or to have been found against the defendant.

2. The defendant was absent from the country during the whole of the two years, and it is said that this statute ought not to begin to run until his return. The only exception in the statute itself is of criminals fleeing from justice; and the mate of a whale-ship, who has merely continued his cruise, does not come within that description. It may have been an oversight in congress not to provide specially for offences on the high seas, where the jurisdiction of the courts and the power to arrest are not practically coextensive; but as they have omitted to enact that the statute should begin to run only when the defendant came within the limits of the country, the courts cannot supply the omission. In the first statute of limitations of civil actions there was no exception of defendants beyond seas, though there was such an exception when plaintiffs were abroad; and the courts have uniformly held, in construing that and other similar statutes, that they could not ingraft exceptions upon the act.

It was suggested in some of the cases that the plaintiff was not without remedy, because he might proceed against an absent defendant by way of outlawry; but the decisions are not really bottomed on that foundation. Swayn v. Stephens, Cro. Car. 333; Hall v. Wybourn, 2 Salk. 420; Beckford v. Wade, 17 Ves. 92. See McIver v. Ragan, 2 Wheat. [15 U. S.] 25. I am informed by a gentleman who represented the government in a similar case before Judge Sprague, that he decided it in accordance with this view.

3. The fourth section of the act of 28th February, 1839 (5 Stat. 322), has been held to extend the time for suing penalties to five years. Stimpson v. Pond [Case No. 13,455]. But it has always been understood that the section applies only to civil actions. The language is not entirely clear. It is, that no suit or prosecution shall be maintained for any penalty or forfeiture, pecuniary or otherwise, unless begun within five years, provided the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States, so that the proper process may be served against such person or property therefor. The words, "penalty," "offender," and "prosecution," have some savor of criminality about them: but, construing this section in connection with the third section, as Mr. Justice Curtis did in the case last above cited (that section being in terms confined to civil actions); and considering that the prosecution of a fine or forfeiture had been held in the case in Cranch to be apt words to include a civil action for a penalty, and the great difficulty there would be in bringing all criminal actions, such as piracies, &c., to be embraced within penalties, pecuniary or otherwise; I think the true construction is plain, and that a prosecution for a crime for which the defendant may be hung or imprisoned is not the prosecution for a penalty, pecuniary or otherwise. The latter are intended to refer to specific property, such as ships and goods, which are presently after mentioned as being liable, and the proviso means, that in suits for pecuniary penalties there must have been, within the five years, an opportunity for personal service on the defendant, and in suits for specific forfeitures there must have been a possibility of seizing the property, within the same period. New trial ordered.

Case No. 14,666.

UNITED STATES v. BROWN.

[3 McLean, 233.] [1]

Circuit Court, D. Ohio. July Term, 1843.

INDICTMENT—RULES OF PLEADING—PROOF—SURPLUSAGE—LARCENY FROM MAILS.

1. The rules of pleading are the same in civil and criminal cases.

2. Where the prosecutor states the offence with greater particularity than he is bound to do, the proof must correspond with the averments.

[Cited in U. S. v. Thomas, Case No. 16,473; U. S. v. Goodwin, 20 Fed. 240.]

[Cited in brief in Com. v. Dale, 144 Mass. 363, 11 N. E. 536. Cited in Schayer v. People (Colo. App.) 37 Pac. 44; U. S. v. Fuller (N. M.) 20 Pac. 179.]

3. That cannot be regarded as surplusage, which is connected with the offence.

[Cited in brief in Commonwealth v. Perry (Mass.) 11 N. E. 538; Com. v. Tolliver, 8 Gray, 386.]

The District Attorney, for plaintiff.

Mr. Stanton and Mr. Collier, for defendant.

OPINION OF THE COURT. The defendant, being a post-master, was indicted for stealing a letter from the mail directed to Daniel Kilgore, Cadiz, Ohio, which contained certain bank notes, the property of a person named, of the value of, &c. which letter came into the possession of the defendant as post-master, &c. On the part of the prosecution witnesses were examined to prove the mailing of the letter, at Columbus, in this state, directed to Cadiz, containing various bank notes, which letter was forwarded in the mail, but was never received. That the defendant was post-master on the route the letter was sent, and within a few miles of Cadiz. Also to prove, that a part of the notes lost were found in possession of the defendant. The defendant failed to show how he came into the possession of the money, although an attempt was made to do so. He proved a good character, &c. Certain points being made, the court instructed the jury that the embezzlement of the letter was the gist of the offence, and that the money it contained, which was taken, was an aggravation of the act. That it was not necessary to describe the notes particularly, or to state whose property they were. But where such description is given, and the property is averred to be in a particular individual, both must be proved as laid. The rules of pleading are the same in civil as in criminal actions. In Jerome v. Whitney, 7 Johns. 321, the court held that if the plaintiff in his declaration on a note for value received, instead of stating generally that it was given for value received, sets forth specially in what the value received consisted, he is bound to prove the particular value according to the averment, and the general acknowledgment of value in the note is not sufficient to support the declaration. So in 3 Day, 283, it was held, that where in an indictment for stopping the mail, the contract of the carrier of the mail with the post office department, was set out, it must be proved. And where an indictment for burglary in the house of J. D. with intent to steal the goods of J. W. it appearing that J. W. had no property there, it was held material to state truly in whom the property of the goods was. In 1 Chit. Pl. 263, it is said, if however the matter unnecessarily stated be wholly foreign and irrelevant to the cause, so that no allegation whatever on the subject was necessary, it will be rejected as surplusage. If the prosecutor choose to state the offence with greater particularity than is required by the statute, he will be bound by the statement, and must prove it as laid. Rex v. Dawlin, 5 Term R. 311. If the averments be mere facts disconnected with the offence, they need not be proved.

Jury found a verdict of not guilty.

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

Case No. 14,667.

UNITED STATES v. BROWN.

[4 McLean, 142.] [1]

Circuit Court, D. Ohio. July Term, 1846.

COUNTERFEITING — COIN — JURY — EVIDENCE—WEIGHT OF—REASONABLE DOUBT.

1. The act of congress punishes counterfeiting the gold and silver coin of the United States.

2. And also foreign gold and silver coin made current by the laws of the United States.

3. The jury are the exclusive judges of the credibility of the witnesses.

4. To authorize a verdict of guilty, the evidence must be satisfactory.

5. Not that the evidence must show the guilt of the accused beyond all doubt, but it must produce a reasonable conviction of the guilt of the accused in the minds of the jury.

[This was an indictment against James Brown for a violation of the act of congress of March, 1825, which provides the punishment for counterfeiting gold and silver coin.]

Mr. Bartley, U. S. Dist. Atty.

Swayne & Spaulding, for defendant.

McLEAN, Circuit Justice (charging jury). The great importance of this case, and the deep interest felt by the public in the trial, will induce me to state the case more in detail than has been my usual practice. The first count in the indictment charges the defendant with having counterfeited fifty pieces of coin, each piece thereof in the resemblance and similitude of the gold coin, which has been coined at the mint of the United States, called a quarter eagle, unlawfully, feloniously did falsely make, forge and counterfeit. In the second count, it is charged that he did cause and procure to be

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

falsely made, forged and counterfeited, the said coin. Third count, that he did willingly aid and assist in falsely making, forging and counterfeiting said coins, etc. The last count charges the defendant with falsely making thirty pieces of half dollars, of the similitude of half dollars coined at the mint.

By act of congress, the following silver coins are made current in the United States. "The Spanish pillar dollars, and the dollars of Mexico, Peru and Bolivia, of certain weight, etc. And gold coins are made current, to wit: the gold coins of Great Britain, Portugal and Brazil; the gold coins of France, of Spain, Mexico and Columbia," etc.

The act of congress of March 3, 1825, § 18 [4 Stat. 120], provides that "if any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting any, in the resemblance or similitude of the gold or silver coin which has been, or hereafter may be coined at the mint of the United States; or in the resemblance or similitude of any foreign gold or silver coin which by law is or hereafter may be made current in the United States; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States, from any foreign place, with intent to pass, utter, publish or sell as true, any such false, forged or counterfeited coin, knowing the same to be false, forged or counterfeited, with intent to defraud," etc., shall be punished, etc.

Mr. Jane, a witness, states—After Brown's arrest, searched his house, and found in the garret, in a barrel, a number of cups made of copper and zinc. And also, between the garret floor and the lathing, the iron tools presented. Found in a lower room a trunk, having within it bank note paper, containing articles of jewelry, scissors and cords, etc.

William Savage—Is a jeweler acquainted with gilding. Cups used for galvanic gilding, connected by wires; quarter eagles shown, given the appearance of gold by galvanizing. This art, for gilding, etc., was sold through many parts of the country some years ago. The two quarter eagles presented, galvanized—the others, fire gilded. All counterfeited.

Mr. Wheeler—Is an engraver and copperplate maker. The iron instruments are part of the press of a copperplate printer, and might be used for a bank note press. Part of the paper found in the trunk, bank note paper. Specimens of notes, not on bank paper, at least some of them.

John H. Bellows—Has been acquainted with defendant ten or twelve years, by sight. Lives from ten to twelve miles from him. In May, 1845, witness had a conversation with defendant, at his own house. A short time before this, witness had returned from Indiana. Defendant asked witness if he had seen Hoskison, and inquired what business he followed—said that he had been engaged in counterfeiting. Defendant inquired what kind of money they had there, and if he had seen any of their counterfeit gold? Witness answered in the negative—did not know there was any. Defendant replied that a good article of that kind could be got up. Also, that good articles of paper and silver could be got up, but specified no particular bank. Before witness left defendant's house, a day was appointed at which they should meet at Akron, to exhibit counterfeit money—understood hard money. But no opportunity being afforded to examine the money when they met at Akron, defendant requested witness to call at his house. Witness called 5th July, but did not see defendant, he being not well or fit for business. On 7th July, witness called again. Defendant showed him some of his money—$20 on Yates County Bank, New York—which was counterfeit. Received five $20 bills on this bank. Defendant said that himself and others would be at work soon, and would get it up; and he requested witness to call again about the money, as soon as he could. Witness called again 23d July, when defendant informed him that he would have gold in about four weeks. That a man who could make it, they had sent for to Detroit, but he had not come. That they would send for him again—the man's family had been sick, which prevented his coming. Defendant at this time showed witness notes on Yates County Bank. Witness got from him sixty dollars in $20 bills. Before this, received from defendant five bills on some bank, each $20; for all of which, he paid twenty cents on the dollar. Defendant requested witness to come down in four weeks, and he would have the gold ready. Witness called at the time requested, but the man from Detroit had not yet come, his family still being sick, but defendant assured witness that he would be there in a few days. Defendant complained that it was a hard country to get up a thing of the kind in, and did not know but that he should have to go to Pittsburgh for materials. He supposed they were watched—that there were many persons there who interfered with other people's business. And defendant proposed that witness should come in the night. The next visit was made in the night, and the witness was accompanied by Jacob Smith. On this visit, defendant talked with the witness about the gold, but it was not yet ready; in a short time it would be. Defendant showed witness counterfeit dollars and fifty cent pieces. Received fifty dollars from defendant; fifteen dollars in Mexican dollars, the balance in fifty cent pieces—not a very good article, but defendant said it would do him good. This was in August. Defendant said the man to make the gold was there; said if witness would come down such an evening, would have some gold; that they were at work night and day, and also

defendant; that the place where the gold was made was at a blacksmith's, a friend of the defendant's, who lived in a private place. Witness remained three-fourths of an hour. After he left with Smith, he showed him one of the pieces of coin. Next visit by witness, had with the defendant similar conversation with the above, but was disappointed in obtaining gold. He received from the defendant, at Hardy's grocery, as he now explains, some $3 bills, four of them on Louisville. Defendant promised to send the gold to him on the next Saturday. On 1st November, defendant sent by Wheeler two hundred and twenty-five dollars in gold, one hundred and twenty-five of which were in quarter eagles, or 20 shilling pieces, the balance in sovereigns. Sold to defendant a horse for seventy or seventy-five dollars, and a yoke of cattle at sixty or sixty-five dollars. Wheeler took away the horse the same evening he handed to witness the gold. For the paper he was to pay twenty cents on the dollar, and for the gold thirty-three and one-third per cent. in the horse and oxen and in good money. Afterward, witness saw Brown, who informed him that he liked the horse well, and he asked witness how he liked the gold. Witness replied that it was rather light. Defendant said it was the kind they had made and were making. November 13th, witness received fifty dollars in quarter eagles, in the night, in part payment for the horse and cattle. At different times witness had loaned defendant from one to five dollars, which were never returned. This was the last time witness got money from defendant. Witness saw a man called Stranahan at the grocery. Defendant said to him, "that is the man who made the money." Witness says he let Martin have about one hundred dollars in gold. Booth got some twenty or thirty dollars of the silver. Witness returned some of the silver to Brown, and told him he had better work it over. When witness was arrested, had gold pieces hid in the corn house at his father's—directed Martin to get it. Witness does not remember the exact sum, but it amounted to perhaps thirty dollars. Martin accompanied witness sometimes when he visited Brown. In fore part of July witness saw Holt at Tiffin, and also in April before. He was the same Holt to whom he gave counterfeit money. August 19th, witness received fifty dollars in silver from defendant.

Jacob Smith—Went to Brown's in company with Bellows, at his request. This was after dark. Witness did not go into the house, but remained in the road from a half to three-quarters of an hour. He saw Bellows and Brown out of the house, talking together. After they left Brown's, Bellows showed him, and perhaps handed him, a roll of coins, and took out one or two half dollars.

John W. Rickets—Saw Brown in 1840, when he observed to witness, "You ought to become better acquainted with me." And asked witness "if he understood him?" Some time last fall defendant handed witness a genuine half eagle, and requested witness to get two quarter eagles for it, which he did. Afterward defendant wrote a note to Hiram Brown, requesting him and witness to send to him five dollars in gold. On Monday evening witness sent to him a quarter eagle, and Brown sent a sovereign. Witness was arrested at the time the defendant was arrested. Defendant charged witness that he must never say anything about the two quarter eagles sent to the defendant. He told witness that they were making quarter eagles down there, near his house; and he said these were a good article. About 1st December, 1845, Brown requested witness to inquire what kind of a scrape Bellows had got into, in Stark county. Witness made the inquiry of Bellows, and stated to Brown that he had got into no scrape which he could not easily get out of. Brown said he was glad to hear it, as Bellows was a clever fellow, and that he was right.

Matthias Martin—Became acquainted with Brown in 1845, in the fall. Went after night, with Bellows, to defendant's house, two or three times in all. Witness remained out of doors to watch the horses, supposing defendant and Bellows did not wish his presence. The first visit, witness thinks they remained at Brown's about an hour. As Bellows was about leaving, saw Brown at the door of his house. The second visit, Bellows remained longer than the first one. Saw Brown, when Bellows came out, at the door, as before. The night was not dark, and witness was in the door yard. Whether there were three visits or not, in which he accompanied Bellows to Brown's, witness can not be certain. But the last visit, heard Brown say, "Jack, you shall have that money on Saturday morning next, and I will either bring or send it to you." This was Wednesday. Something about danger was said, when Bellows observed, "There is no danger." The next Saturday after, saw a man riding one horse away from old Mr. Bellows's, and leading another. Same evening, Bellows opened and showed witness a roll of money—quarter eagles and some other gold pieces. This was done in five minutes after the horse was led off. Went the same evening, with Bellows, to Brimfield. Saw Booth at that place, to whom Bellows gave $50. Returned home the same night. Witness got from Bellows $50, in quarter eagles; and Booth showed witness the same sum which he received.

Thomas McKinstry—Some time before Brown was arrested, witness received a counterfeit quarter eagle from defendant. Witness had applied to defendant to discover where a bogus machine had been conveyed, and he promised to make the discovery, if aid could be given to his son Daniel in Michigan, who had been indicted for counterfeiting coin; and, also, that certain influences should be used with the marshal and dis-

trict attorney of this state, to pardon the defendant.

Defendant's evidence:

Cook—Claims the trunk as his property, and its contents, including the iron instruments exhibited—that he is a "steel and copper plate printer," and a printer of bank notes. Is associated at St. Louis with Witchell, under the firm of Witchell and Cook—that his partner is an engraver. That in 1845, witness arrived at Cleveland from Buffalo, on his way to Pittsburgh. Took passage on the canal boat commanded by Captain Baxter. Being short of money, he made an arrangement with Daniel Brown, who came on board the boat, that the latter should advance to the witness $25, for which witness should pay $30, and would pledge the trunk now in court, with its contents, for the payment of the money. The trunk to be forwarded to the address of witness so soon as the money was paid. The 24th September, 1845, the trunk was carried from the canal boat to Brown's, by the witness and Daniel Brown, witness leaving immediately, and overtaking the boat. Witness went to Pittsburgh, hired an office, remained there a few days, left, and has not since returned. Paid six months rent. Witness lived at Cincinnati—worked at his trade with a certain firm—printed notes for the trust company and other banks. Came through Akron—received there a letter from Daniel Brown. Remained but a short time—came on—remained at Amity six days. Passed through this city—went on to Jeffersonville, twelve or fourteen miles south of this place, where he saw Daniel Brown, with whom he remained only a short time, and then returned to this city.

M. C. Richardson—Keeps a public house at Cleveland—Cook stopped with him, took the canal boat, etc.

Hiram Adams—Saw Cook at Cleveland—recommended him to Capt. Baxter's boat.

R. D. Baxter—Commanded the canal boat Hibernia in the fall of 1845. Took Cook on board at Cleveland, and also Daniel Brown, near that place. Was called to witness a loan of money by Brown to Cook, $25, for which the latter was to pay $30, and pledged his trunk and its contents, which were seen by witness, for the payment of the loan—the trunk, etc., to be sent to Cook on the payment of the money. When opposite Brown's house, Cook and Daniel Brown took the trunk out of the boat, and carried it toward Brown's house. In some three or four miles, Cook overtook the boat.

Alex. Patton—Worked as a house carpenter two months last summer, beginning the fore part of July, for Daniel Brown, who lived in the same house with his father. Had free access to every part of the house. Laid a part of the garret floor. Saw in an old barrel, which he used for scaffolding, the materials presented, and which composed a part of a galvanic battery. Witness saw John H. Bellows at Brown's one evening. He was in company with some other person, who remained on his horse in the road. Bellows got down, went into the house. Witness knows Daniel Brown was at home, but is not certain whether the defendant was at home or not. Bellows returned to the road, after having remained some time in the house, and he and his companion rode off.

Benjamin Tewell—Some three years ago, a man came to Akron to sell receipts for constructing galvanizing batteries, named Ady. Witness, in conjunction with Daniel Brown, bought one. Had the machine constructed, and left it at Brown's. Had another one built, which he sold for a horse which was kept by Daniel Brown, who agreed to pay witness $25.

L. G. Steinhour—In the fall of 1845, witness being on his way to Brown's, to collect from him a note, about a quarter of a mile before he reached Brown's, he saw two persons, one was sitting in the shade, the other was riding his horse up and down the road, apparently to show his paces or gait. Bellows was on horseback, who asked the witness where he was going. Witness answered, to Brown's, to see if he could get payment on a note in dimes, etc. Bellows told witness Brown was not at home, on which witness returned. Wheeler was the person sitting in the shade. Bellows asked witness to get up behind him, to ride over the river; but witness declined, saying he had borrowed a canoe to cross, and must cross the river in it. After crossing, he fell in with Bellows on the tow path. Came to a waste weir, and witness rode over it, behind Bellows. Witness observed to Bellows that he had a good horse. Yes, B. replied, but he is not mine; I have sold him to Wheeler for $70 or $75; and that he had also sold to Wheeler a yoke of oxen; that Wheeler lived with old Jim. Witness heard Bellows swear against Brown before the commissioner, and afterward witness asked him what induced him to swear as he had done, in relation to the horse. Bellows replied that every one had his own notions in regard to swearing. Afterward Bellows saw witness, and requested him to say nothing about what he had said to him. Thinks he saw Bellows at Brown's, the latter part of October, 1845.

C. B. M'Donald—Has known John H. Bellows five years. Said that he supposed the people might think him a scoundrel, for coming out and disclosing, as he had done to Mr. Otis, against Brown. That he was under the necessity of doing so for his own safety. That he would never be a witness against James Brown. Saw the yoke of cattle in Wheeler's possession, who offered to sell them. This might have been in August last.

John Boosinger—Told his son and John Bellows, who were in jail, that Mills wanted them to turn state's evidence against Brown;

both said they knew nothing against Brown. Mills said they wanted to get hold of the leaders of the gang.

J. D. Wild—Lives at lock, one and a half miles below Brown's, since the 22d July, 1845. Saw John H. Bellows at the lock on January 7th, the Wednesday before the defendant was arrested—inquired for Wheeler—went toward Akron. James Brown was at the lock on the 4th of July, 1845; remained all night, and also on the 5th, until one or two o'clock. Next Monday, 7th of July, defendant came to the grocery at the lock—was on horseback—rode toward Cleveland. On the 4th or 5th, Brown was drinking, but can not say that he was drunk.

Moses O'Brien—After Brown had his trial, talking in the street with some persons, Bellows came up to them, touched him on the shoulder, and stepping aside, observed to witness that he had got into a scrape. Bellows said it was proposed that he should go clear, if he would come out and prosecute Brown. Bellows wanted witness to take money, and say that Brown had given it to him. Witness replied that he would have nothing to do with it. Witness only knew Bellows from sight. Witness got a letter out of a certain post office for Wheeler, and received from him one dollar.

B. C. Mosher—Lives in Providence, Lucas county. In the latter part of July, or forepart of August, saw Bellows at Tiffin. Was about buying a horse of witness; agreed to give $75. Went into a room, and Bellows offered him gold, quarter eagles, which witness refused to take, supposing it not good. Bellows had, in appearance, one hundred quarter eagles. Witness described Bellows as wearing a cap, and a coat of certain cut and material.

John Hobbie—Was at Brown's on the 7th July, 1845—made inquiry, and was informed that Brown was not at home. Wheeler has lived at Brown's since March, 1845. Yoke of cattle taken to defendant's in August last. Thinks the horse was taken to Brown's the forepart of October.

Alexander Burton—Heard the greater part of the evidence of Bellows before the commissioner, against Brown. Understood from Bellows, that he called on Brown to know if he had counterfeit money; Brown said an article of the kind could be got up. Stated that he got money the 5th of July. Said nothing as to his meeting Brown in Akron, as now stated by him, to talk with him about counterfeit money. Can not say when Bellows stated before the commissioner at what time his first interview took place with Brown.

Gen. Burse—Acted as counsel for Brown before the commissioner. Took minutes of Bellows's evidence. Bellows said that he went to Brown's to get counterfeit money. This was the first time he conversed with Brown. Brown said such an article could be got up, and Bellows then asked him to get it up. This was the latter part of May. Said he called on the 5th of July; saw Brown and his wife, and got $100. This was between 12 and 2 o'clock on the 5th; said nothing of being at Brown's on the 7th of July. He said he got the gold the latter part of October—contract for oxen was made in July; called latter part of July or 1st of August. Next visit latter part of August or 1st of September; next, latter part of September, or beginning of October. Bellows stated that he received on the 4th, three dollar bills, at Hardy's grocery, from Brown; several persons were present. Brown asked him to step aside, and presented to him these bills—said they were something new, and might do him some good. The cattle, he said, were sold for $60; the horse for $75. Stated that the gold was sent to him by Wheeler, the latter part of October. That about the 1st of September got the half dollars. Said nothing about Martin. Did not state that any one was with him at Brown's, except Smith. About six weeks before examination before commissioner, got in gold from Brown $45. After Bellows was confined, witness called on him as counsel—stated his case. Afterward Bellows was asked what he knew about Brown, when he replied that he never saw Brown have any counterfeit money, that he had talked with him about it. Bellows said, several were drinking at a grocery, when some one threw down a half dollar; it was remarked that was bogus money. Brown said, if that is bogus money, I have plenty more just like it. That is all, Bellows said, that I have ever heard Brown say about counterfeit money. Rickets was sworn on Hiram Brown's trial, but he said nothing about Brown's having counterfeit silver. He said that he knew nothing against Brown.

Zebulon Jones—Heard Bellows swear before the commissioner; said he was positive he received money the 5th July; said nothing about Brown's being intoxicated the 4th July—did not name the 7th. Bellows said that Brown said such an article could be got up, and witness advised him to get it up. Nothing said of getting New York bills 23rd July—omitted other things.

Rebutting evidence, United States:

Horace Kay—Has been acquainted with Steinhour eight years. His character for truth is not good. Witness would believe him under oath as he believes other witnesses.

Hiram Fuller—Some say Steinhour's character is not good; can not say how the majority speak on that subject.

Major Cole—Keeps Union hall in this city—Cook, the witness, stopped with him. Brought to his house the trunk exhibited in court—took it away some days since.

In support of United States' witnesses:

Warren H. Smith—Has known Rickets eight or nine years. His general character is good for truth. Witness would believe him

under oath. Knows Bellows; his character for truth is good. Witness would believe him under oath, where there were corroborating circumstances.

Mr. Spicer—Has been acquainted with Bellows since he was a boy—his character for truth is good, and witness would believe him under oath.

Israel Allen—Has known Bellows twelve or fifteen years. Knows no reason why witness should not believe him under oath. Nothing known against Bellows except his connection with the defendant. Witness thinks he varied some in his statement here, from his evidence before the commissioner.

Alexander Brewster—Has known Bellows since a child—his character for truth is good. Nothing against him except his connection with the defendant. Before this occurrence, would have believed him—and now, can not say that he could disbelieve him under oath. Some variance, owing, as witness supposes, to different questions.

Mr. Jane, Sheff.—Bellows stated before the commissioner, that Brown, in their first interview, asked him if he had seen any coins—thinks he referred to witness' trip to Indiana. Brown said an article could be got up—that the conversation commenced about farming. Bellows said, repeatedly, he could not recollect all his visits to Brown, or the dates. There was a variation from the 5th to the 7th July, between his statement on this trial, and before the commissioner. McDaniel's general character for truth is bad. Witness would not believe him under oath. Bellows said before the commissioner, that he received the Louisville notes at Hardy's grocery.

John H. Bellows—After 7th July went to Tiffin—wore a grey striped frock coat and hat. Was there only once in July. Had with him no counterfeit gold coin. He kept an account on a board of the moneys received from Brown. By a reference to those dates he is able to speak more specifically now than before the commissioner. His statements before him were made when he could not refer to his account. Does not recollect of having stated in his examination here that the Louisville notes were received at Brown's; if he did say so he was mistaken, as they were received at the grocery.

Ithamer Bellows—His son was absent four or five days in July—forepart of the month. Wore a striped frock coat and hat, when he went away and when he returned. Was absent only this time in the month of July.

Joseph C. Jones—About five years ago became acquainted with Cook. His general character for truth not good. He never printed any notes for the trust company.

Rebutting by defendant:

Samuel Edgerly—Does not know any thing in the neighborhood prejudicial to the truth of Steinhour. O'Brien's character is good.

General Burse—Would believe O'Brien under oath.

Zebulon Jones—Knows nothing against Steinhour.

A. Miller—Steinhour, where morals are concerned, is a small pattern. McDaniel's character the same.

Mr. Lee—Would believe Steinhour under oath.

Patrick Christy—Steinhour does not always adhere to the truth.

The circumstances of this case are somewhat peculiar. The jury can not but perceive that the defendant, from the qualities of his mind, and the energy of his character, as disclosed in the evidence, exercises an uncommon influence over those with whom he associates. Indeed, he is not undistinguished in the county of his residence. He at this time holds the commission of justice of the peace, elected by his fellow citizens, and it appears he has much influence in the neighborhood.

The strongest witness against the defendant is Bellows. This witness is impeached by his own admissions, that, for some time, he was an accomplice with the defendant. The counsel in the defense have assailed this witness on four grounds. 1. That he is an accomplice. 2. That a motive of revenge, or a corrupt influence, induced him to give evidence in behalf of the prosecution. 3. That there are contradictions in his statements. 4. That he is contradicted by other witnesses. The contradictions consist mainly in declaring, as you have observed in the testimony, that he sold the oxen and horse to Wheeler, and that he knew nothing against Brown. Steinhour swears that such was Bellows' declaration the day he met him near Brown's. The character of Steinhour is assailed by proof that his reputation for truth among his neighbors, is not good, while other witnesses think him worthy of credit. In judging of the credibility of a witness, the jury will always consider the circumstances under which he testifies, and under which his statements at different times were made. This remark will apply to the witness Bellows. Some of the contradictions charged against him are explained, and others are accounted for by the peculiar circumstances under which he was placed. It appears from the testimony of Mr. Otis, a highly respectable member of the bar, at Akron, and Mr. Mills, a deputy marshal, that Bellows was much influenced by their advice in disclosing the facts. Accomplices are often used for this purpose, and not unfrequently, great good is done to the public through the evidence of accomplices.

As a general rule, it is said that a jury will not convict on the testimony of an accomplice, uncorroborated by other evidence. In this case, it is contended that much of the evidence of Bellows is corroborated. As for instance, the sale of the oxen. It was proved by E. R. Bellows, and others, that he was seen on Brown's farm several times. The sale of the horse, which he swears to,

is also proved by others; and that he was seen in possession of the gold. Hiram Ayres, Jacob Smith and Matthias Martin, establish many of the facts stated by Bellows, which go to the most important statements made by him. Several of the witnesses, who have long known Bellows, notwithstanding his connection with the defendant, would believe him under oath, and say his character for truth is good. You, gentlemen, are exclusively to judge of the credit due to the witnesses. You are to weigh the evidence, and in the exercise of your own judgment, will come to the decision as to the guilt or innocence of the defendant. Your minds must be clear as to his guilt, before you convict him. Not that clearness which excludes all doubt, but a rational conviction of guilt, which is satisfactory to your consciences.

The jury found the defendant guilty, and he was sentenced to hard labor in the penitentiary for ——— years.

Case No. 14,668.

UNITED STATES v. BROWN.

[4 McLean, 378.] [1]

Circuit Court, D. Michigan. June Term, 1848.

TRESPASS—CUTTING TIMBER—JUSTIFICATION—PRE-EMPTION RIGHT.

At law.

Mr. Norvell, U. S. Dist. Atty.
Mr. Seaman, for defendant.

OPINION OF THE COURT. This was an action of trespass, for cutting timber upon the public lands. On the part of the defendant, it was proved that he claimed the land, under the act of congress of the 4th of September, 1841 [5 Stat. 453]. It was objected, by the district attorney, that a pre-emption right under that act can not be shown by parol. Last May, it was proved that defendant admitted that he had not paid for the land. THE COURT instructed the jury that the defense of the defendant could only be sustained by his showing that he had taken some steps to secure his pre-emptive right set up. That short of this, he could plead no justification or excuse for the trespass charged.

Verdict for plaintiff. Judgment.

Case No. 14,669.

UNITED STATES v. BROWN.

[1 Mason, 151.] [2]

Circuit Court, D Massachusetts. Oct. Term, 1816.

PURCHASING ARMS FROM SOLDIER—STOLEN ARMS.

On an indictment under the act of March 16, 1802, c. 9, § 19 [2 Stat. 136], for purchasing of a soldier "his arms," it must be proved, that the soldier was in the lawful possession of the arms, or had a special bailment of them, otherwise the indictment cannot be sustained. If the arms were stolen, the case is not within the act.

Indictment against the defendant [George Brown] for purchasing a soldier's arms, against the act of March 16, 1802, c. 9, § 19. Upon the trial, the evidence was that the defendant purchased a musket from a soldier, knowing him to be such, and that the soldier claimed the arms as his own. But it also appeared, that the musket was not lawfully in the possession of the soldier, but had been stolen by him from the arsenal of the United States, at Charlestown.

G. Blake, for the United States.
Wm. Austin, for defendant.

STORY, Circuit Justice. The act of congress declares, that every person, who shall purchase from a soldier his arms, uniform, clothing, or any part thereof, shall, on conviction, be liable to a limited fine or imprisonment, at the discretion of the court having cognizance of the offence. To bring the case within the statute, it is not necessary, that the arms should be strictly the absolute property of the soldier; for then the act would have no effect, as the arms used by the soldiers in the public service belong to the United States. It is sufficient, if the soldier have a special property therein by a bailment in the course of the service; or have a lawful possession, using them as his own in the duties of the service. But if his possession be unlawful, or obtained by larceny, the arms are not in the sense of the act, "his arms." It may be a blot in the act (and unfortunately there are many blots in our Criminal Code) but it is competent only for the legislature to cure the defect.

Verdict for plaintiff.

Case No. 14,670.

UNITED STATES v. BROWN.

[1 Paine, 422.] [1]

Circuit Court, D. New York. April Term, 1825.

COVENANT—PENAL BOND—BREACH—NON-PERFORMANCE OF CONDITION—NON-PAYMENT OF PENALTY.

1. Covenant will not lie upon words in an instrument inserted by way of condition or defeasance by the performance of some collateral act.

[Cited in Douglas v. Hennessy, 15 R. I. 279, 3 Atl. 213, 7 Atl. 3, 10 Atl. 584.]

2. So upon a penal bond conditioned that one should account for public monies, property, &c.: *held*, that covenant would not lie upon the condition.

3. But covenant will lie upon the bond itself; but the breach assigned must be the non-payment of the penalty.

[Cited in brief in Farrar v. Christy, 24 Mo. 465.]

[Cited in Jackson Co. v. Leonard, 16 W. Va. 486, 492.]

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

[2] [Reported by William P. Mason, Esq.]

[1] [Reported by Elijah Paine, Jr., Esq.]

4. Where covenant was brought upon the bond itself, and the breach assigned was the non-performance of the condition, it was *held* bad on demurrer.

[Certified from the district court of the United States for the Northern district of New York.]

R. Tillotson, U. S. Dist. Atty.

W. Slosson and Mr. Griffen, for defendant.

THOMPSON, Circuit Justice. This case has been certified into this court, from the Northern district of this state, under the provisions of the judiciary act (2 Laws U. S. 203 [1 Stat. 73]), the judge of that court having been the district attorney by whom the suit was commenced. The question arises upon demurrer to the declaration. The action is covenant on a bond, in the penalty of five thousand dollars, by which the defendant and Jacob Brown, acknowledge themselves to be held and firmly bound to the United States in that sum; and for the payment of which they bind themselves jointly and severally, with a condition, that if the said Samuel Brown, Junr. "shall well and faithfully account for all public monies that may come into his hands, as deputy quartermaster general, and faithfully account for, and distribute all public property that he may receive into his charge, then the obligation to be void, else to remain in full force and virtue."

The general question that arises in this case, is, whether debt or covenant is the proper action to be brought upon a bond like the one in question. On an examination both of the elementary writers and adjudged cases on this question, there seems to be considerable uncertainty and contrariety of opinion. The general rule however is, that the action of covenant is not confined to any particular words, but may be maintained upon any sealed instrument, where the words import an agreement. But where the words do not amount to an agreement, covenant will not lie. In the present case, covenant might probably be maintained, upon the penalty of the bond, if the breach was properly assigned. It contains an acknowledgment of an indebtedness to the United States of five thousand dollars, and a promise to pay. But the breach of the covenant would be the non-payment of the five thousand dollars, in part or in whole. The first count in the declaration sets out that the defendant did covenant to pay to the United States the sum of five thousand dollars, and had the breach assigned been the non-payment of the money, it might have been unexceptionable. But the breach assigned is, that the defendant refused and neglected to pay out and distribute, or account for the money and public property which he had received, as deputy quartermaster general. The breach assigned does not therefore come within the covenant, as set out. It is not alleged in the first count, that the defendant covenanted, or agreed to covenant for such money and public property, or to pay out and distribute the same. The breach assigned must always be clearly within the covenant. The first count in the declaration is therefore bad on this ground.

The other counts in the declaration are founded entirely upon the condition of the bond, without noticing any covenant or agreement contained in the penal part, and allege that the defendant did thereby covenant with the United States, that he would well and faithfully account for all public monies, and distribute all public property that should come into his hands as deputy quarter-master, and assigning various breaches of such covenants.

The question that arises on these counts, is, whether an action of covenant will lie upon a mere condition or defeasance in a penal bond, relating to some collateral matter, and not for the payment of money. If covenant can be maintained upon the condition of the bond, it must be because it contains per se an agreement to do some act. But there are no words in the condition, importing an agreement. It merely sets out what shall avoid the covenant or obligation contained in the penal part of the bond, and is for the benefit of the obligor, and showing the terms and conditions upon which he can exonerate and discharge himself from the debt he has acknowledged he owed the obligees. The condition when taken by itself, is senseless and imperfect as a contract. Although there is some uncertainty as to what words shall be deemed to amount to a covenant, I think it may be laid down as a safe conclusion, that covenant will not lie upon words in an instrument inserted by way of condition or defeasance, by the performance of some collateral act. It may be pretty safely affirmed, that covenant upon this condition cannot be sustained against Jacob Brown, the surety. He is not even named in the condition, and there are no words which in any shape or manner import an agreement on his part, either himself to account for the faithful expenditure of public money, and the distribution of public property, or that the defendant shall do it. If covenant will therefore lie against the defendant, it presents the singular case, that upon the same instrument one kind of action will lie against one of the obligors, which will not lie against the other.

It is unnecessary to decide, whether in all cases where covenants are secured by a penalty, the extent of damages is limited to such penalty, as against the principal. It certainly is, so far as relates to the surety. And if, as against the principal, damages may be recovered beyond the penalty, we have a case where, upon the same instrument, there is one rule of damages for one obligor, and a different rule for the other. Such incongruities I apprehend are not sanctioned by the

law. I am accordingly of opinion that the defendant is entitled to judgment upon demurrer.

Case No. 14,671.

UNITED STATES v. BROWN et al.

[1 Sawy. 531;[1] 13 Int. Rev. Rec. 126.]

District Court, D. Oregon. March 27, 1871.

INDICTMENT — MOTION TO QUASH — AFFIDAVIT — "DEFENDANTS"—WITNESS—INCRIMINATING TESTIMONY—STATE LAWS.

1. A motion to set aside or quash an indictment will not lie unless the objection appear upon the face of the indictment.

[Cited in U. S. v Terry, 39 Fed. 357.]

2. An affidavit of a defendant that he believed the grand jury acted upon incompetent or insufficient evidence in finding an indictment against him, not allowed on a motion to quash.

[Cited in People v. Lauder, 82 Mich. 121, 46 N. W. 956.]

3. There are no defendants or co-defendants to an inquiry before the grand jury, until the indictment is found and filed in court.

4. Under the act of February 25, 1868 (15 Stat. 37), a person may be compelled in a judicial proceeding to testify to matters tending to criminate himself, but no use can be made of such testimony against the witness in a criminal proceeding.

[Criticised in U. S. v. Farrington, 5 Fed. 346. Cited in U. S. v. McCarthy, 18 Fed. 89; U. S. v. Smith, 47 Fed. 504.]

[Cited in People v. Lauder, 82 Mich. 150, 46 N. W. 956.]

5. The act of July 6, 1862 (12 Stat. 588), only extends the thirty-fourth section of the judiciary act to cases in equity and admiralty, and does not include criminal actions or proceedings.

[Cited in Logan v. U. S., 12 Sup. Ct. 629.]

[This was an indictment against John Brown, Paul Oberhiem, John Gassen, Thomas B. Scott, Samuel Adolph, Henry Heyman, Daniel Wagnon, and Wesley Brown. Heard on motions to quash the indictment.]

John C. Cartwright, for the United States.

Walter W. Thayer and W. Lair Hill, for defendants.

DEADY, District Judge. On March 17, 1871, the grand jury of this court found an indictment against John Brown and seven others for corruptly impeding the due administration of justice, in this court by advising, causing and procuring one Morris Graves, a material witness in a criminal charge against said Brown, pending before said grand jury, to secrete and absent himself, so as to avoid being served with a subpœna, then issued out of this court to require and command the attendance of said witness before said jury. The indictment is found under section 2 of the act of March 2, 1831 (4 Stat. 488). At the foot of the indictment the names of persons are inserted or endorsed as the witnesses examined before the grand jury in accordance with the practice prescribed by the Criminal Code of the state, six of whom appear to be the same persons as six of the defendants in the indictment.

One of the defendants, upon being arraigned, pleaded guilty to the indictment, one of them has not been arrested, and the other six have filed two motions, one by Brown and the other by the other five, to set aside and quash the indictment, which have been argued and submitted together. The motions are substantially the same, and are made upon the following grounds: (1) That the grand jury compelled six of the persons named in the indictment to appear before them and testify against their will, and acted upon the evidence so obtained in finding said indictment. (2) That for the purpose of finding said indictment the grand jury received incompetent testimony, to wit: that of the defendants aforesaid. (3, 4, 5, and 6) That the indictment is not direct and certain as to the crime charged, or as to the necessary circumstances thereof, and that the indictment does not charge a crime nor do the facts stated constitute one.

In support of these motions, counsel for defendants have read the separate affidavits of four of the defendants, Paul Oberheim, John Gassen, Thomas B. Scott, and Samuel Adolph, each of which is substantially to the effect, that affiant appeared before the grand jury which found this indictment in obedience to a subpœna served upon him, and there gave evidence "regarding the charges for the purpose of said indictment," and as affiant believes, said evidence was used by said grand jury upon which to find this indictment against affiant and the other defendants therein.

Under the Code an indictment cannot be attacked by motion except as provided in section 115, which enacts, that it must be set aside on motion of the defendant when it appears that "the same has not been found, endorsed and presented as prescribed in chapter 7," or when the names of the witnesses before the grand jury are not placed upon the indictment. Code Or. 460.

It must be admitted that these motions, styled both motions to set aside and to quash, do not come within the scope of this provision. For aught that appears and indeed from what appears, the indictment was found by the concurrence of the requisite number of grand jurors. The names of the witnesses are endorsed upon it, and it is properly endorsed "A true bill," and signed by the foreman, and was by such foreman, in the presence of the grand jury, duly presented in open court and filed with the clerk as a public record.

As I understand it, the Code does not allow any inquiry by the court as to the sufficiency or competency of the testimony upon which a grand jury has acted in finding an indictment, for the purpose of setting it aside. So at common law, a motion to quash an indictment was only allowed for such insufficiency

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

in the body or caption of it, as would make a judgment upon it against the defendant erroneous; and even then it was in the discretion of the court either to allow the motion or oblige the defendant to plead or demur. 4 Bac. Abr. 342.

Neither the motion to set aside nor the motion to quash will lie where the objection does not appear or arise upon the face of the indictment, or perhaps the records of the court. This being so, the affidavits of the defendants impugning the conduct and judgment of the grand jury, cannot be considered upon the hearing of this motion. If the contrary practice were established, there would be no need of grand juries, and the court would necessarily assume both the function of indicting and trying criminals; for it is safe to presume that in most cases the defendant would object to being tried upon the indictment, and support such objection by his affidavit that he believed the grand jury acted upon incompetent or insufficient evidence. The wit of man could not devise a mode of indicting which would not be liable to this objection from the defendant. In the administration of criminal justice, confidence must be reposed somewhere; and it must be admitted that there are few bodies concerned in it, that may be more safely trusted than the grand juries of this district. The material allegation of each of these affidavits, that the affiant believes the grand jury acted upon his evidence in finding the indictment against himself and co-defendant, is quite as likely to be false as true, because the affiant has no means of knowing the fact. Nor does it appear that the affiants gave any material testimony in the matter. They do not say that they confessed their guilt, or that of their fellows, before the grand jury. Upon this point I cite and rely upon the opinion of Mr. Justice Nelson in U. S. v. Reed [Case No. 16,134], and the authorities there cited, in which case a motion to quash upon a similar affidavit of the defendant was denied.

Laying aside, then, the affidavits of the defendants, what objection appears to the manner of finding this indictment upon the face of it? It is answered that, it appears that each of the six defendants whose names appear as witnesses upon the indictment, was a witness against himself and against his co-defendants, and that, therefore, the indictment was found upon incompetent testimony. Is this conclusion from the premises a certain or even a probable one? In the investigation of this matter ten persons appear to have been before the grand jury and examined as witnesses. Upon the testimony of which one of them this indictment was found, as to any or all of the defendants, this court cannot know or presume. There is no presumption that all of them or any particular one of them gave material or any testimony before the grand jury. There had been no preliminary examination before a commissioner concerning the commission of this alleged crime. The investigation originated with the grand jury, as was lawful and proper. In endeavoring to find out who, if any, were probably guilty of impeding the administration of justice by running off and secreting the witness who had failed to appear before them, they might call before them and examine many persons who were ignorant, or affected to be, about the matter, and the testimony of others might establish the fact that some of these same persons were the very ones who should be indicted. For instance, this indictment, for aught that appears, may have been found upon the testimony of the three witnesses not named as defendants therein. But for the sake of the argument let it be assumed that each of these six defendants who were before the grand jury gave material testimony against the other five, would the indictment against these six, or either of them, have been found upon incompetent testimony? I think not. Each of these parties might have been compelled to testify before the grand jury concerning the part, if any, which each of the others took in this alleged criminal transaction.

The argument to the contrary by the counsel for defendant is based upon section 211 of the Code, which enacts that "a defendant in a criminal action or proceeding cannot be a witness for or against himself, nor for or against his co-defendant." Code Or. 477. And also section 48, which declares that, "in the investigation of a charge for the purpose of indictment, the grand jury shall receive no other evidence than such as might be given on the trial of the person charged with the crime in question." Id. 449. And the assumption that these parties were defendants and co-defendants in a criminal action or proceeding before the finding of the indictment, and during the investigation of the matter before the grand jury; and that the inquiry before that body was the investigation of a criminal charge made against each of these particular six defendants.

I cannot conceive of any one being a defendant until some distinct action or proceeding known to the law has been commenced against him, to which he then becomes a party, and in which he is entitled to be heard as soon as he is brought into court or chooses to appear. Section 11 of the Criminal Code provides substantially that a criminal action is commenced when the indictment is found and filed with the clerk. So in U. S. v. Reed, cited above, it was held that while an investigation was going on before the grand jury touching a particular charge, there was no cause pending in court or before that body in the legal sense of the term. There are, in fact or law, no defendants or co-defendants to an investigation before a grand jury touching an alleged or supposed commission of crime.

Neither was the grand jury investigating a criminal charge made against these partic-

ular six defendants within the meaning of section 48 of the Code. Neither of these defendants was charged with the commission of a crime until after this investigation had ceased, and the indictment was filed in court. Then for the first time in a legal sense they were accused of the commission of a crime. Section 48 only applies to cases when a party has been duly charged with the commission of crime before a committing magistrate and held to answer. In such a case the grand jury are called upon to inquire whether the defendant in this criminal proceeding before the magistrate is prima facie guilty, as charged, and indorse the indictment accordingly. But in a general inquiry instituted by a grand jury for the purpose of ascertaining who committed a particular crime, or whether a crime was committed at all, it would be impossible to apply section 48, without stopping the inquiry at the threshold. The grand jury cannot know at once who will be the person put on trial for the crime, and who will be his co-defendants if any, and therefore cannot know if the testimony of either would be incompetent on the trial on that account, and for that reason not to be received by them on the investigation.

By the act of February 25, 1868 (15 Stat. 37), it is provided that no evidence of a party obtained in a judicial proceeding shall be used against such party in any court in the United States, in any criminal proceeding or proceeding to enforce a forfeiture or penalty. As the law stood before the passage of this act, a witness could decline to answer a question when the answer would tend to criminate himself. But now he may be compelled to answer, when inquiry is pertinent to any judicial proceeding, because it may be necessary to the ends of justice as to others, and cannot be used against himself. If this is not the object and effect of the act, I confess I do not know what is.

This being so, the grand jury might have interrogated each of these defendants concerning the part he took in this transaction, if any, but they were not authorized to find an indictment against either of them upon his own testimony. But either might be indicted upon the testimony of the other, and if any of them saw proper to volunteer a statement or confession of his own guilt to the grand jury, he might be indicted upon that. I see no reason why a party may not as well confess his crime before a grand jury, as before a court, as one of the defendants in this indictment has already done. But when a person is called before a grand jury as a witness, and it is subsequently sought to prove a confession, alleged to have been made by him whilst before such body, to sustain an indictment found against such person, I think it ought to be received with great caution, and rejected unless it satisfactorily appeared that it was deliberately and voluntarily made, and not inadvertently or from the supposed constraint of his position or the obligation of his oath. The national constitution (amendment 5), has wisely and humanely established beyond legislative control and popular caprice or necessity, the common law rule, that "no person shall be compelled, in any criminal case, to be a witness against himself."

Much was said upon the argument of this branch of the motion as to whether the sections of the Code above cited, touching the competency of witnesses in criminal actions are applicable to and govern in such actions in this court. The defense maintained the affirmative of the question and relied upon the act of July 6, 1862 (12 Stat. 588), which enacts that: "The laws of the state in which the court shall be held, shall be the rules of decision as to the competency of witnesses, in the courts of the United States in trials at common law, in equity and admiralty."

Prior to the passage of this act, the state law as to the competency of witnesses in the United States courts was the rule in "trials at common law" by virtue of section 34 of the judiciary act of 1798 (1 Stat. 92), but not in equity or admiralty. So far as I can perceive, this act is prospective, and was passed to produce uniformity in this respect in trials at common law, equity and admiralty. Practically it extends the judiciary act to cases in equity and admiralty. At first blush, it would seem that the phrase trials at common law was comprehensive enough, and intended to include the trial of criminal actions. But in U. S. v. Ried, 12 How. [53 U. S.] 362, Chief Justice Taney held that this phrase in the section of the judiciary act above cited, did not include criminal actions, but only "civil cases at common law as contradistinguished from suits in equity." While admitting the propriety and necessity of the rule of following the state law as to the competency of witnesses in civil actions, because it is in effect a rule of property, the chief justice said: "But it could not be supposed, without very plain words to show it, that congress intended to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another."

Upon authority, I think the case conclusive that the act of July 6, 1862, does not apply to criminal actions. However, in my judgment, that consideration does not affect the question arising upon this motion, for I regard the Code in this respect as nothing more than an affirmance of the common law, and therefore the rule of this court. The motion to quash upon the first and second grounds, must be denied.

As to the other grounds of the motion, the objection should regularly have been taken by demurrer, but by consent the defendants have been permitted to make and argue

them in this way. On the argument, I was not much impressed with the force of the objections, but am not prepared now to say they are not well taken. Being pressed for time, I have not been able to give them the consideration I would like, I shall, therefore, deny the motion altogether, and if it becomes necessary, these objections to the sufficiency of the indictment, may be made in arrest of judgment.

Case No. 14,672.

UNITED STATES v. BROWN et al.

[3 Sawy. 602; [1] 8 Chi. Leg. News, 291.]

District Court, D. Oregon. April 12, 1876.

SEAMEN—OFFENSES—ENTRY IN LOG-BOOK.

A prosecution cannot be maintained against a seaman for any of the offenses defined in section 4596 of the Revised Statutes, unless an entry of the circumstances is made by the master in the official log-book of the vessel as soon as possible after the occurrence, and read over to the seaman, or a copy furnished him, and his reply thereto entered in the same manner.

Separate informations were filed against the defendants [Charles Brown and others] in the above-entitled cases, charging each of them with willful disobedience to the lawful commands of the master of the ship, William H. Thorndyke, upon which they were lawfully engaged as seamen on a voyage from Philadelphia to Sitka, at Sitka, on February 14, 1876, by refusing to discharge cargo. The defendants pleaded not guilty, and were tried together by the court. The prosecution called the master of the ship, and offered to prove the commission of the offense by him. The defense objected, and demanded the production of proof of the entry in the official log-book, concerning the same, as required by section 4597 of the Revised Statutes. The log-book was produced, but contained no entry on the subject.

Rufus Mallory, for the United States.

David Goodsell and Joseph Simon, for defendants.

DEADY, District Judge. The crimes defined by section 4596 of the Revised Statutes, which includes the charge against the defendants, relate to the discipline and conduct of the ship rather than the general public. If the master intended to prosecute a seaman for the commission of any of them, it is made his duty by sections 4290 and 4291 of the Revised Statutes, to make an entry concerning the same in the official log-book as soon as possible after the occurrence, and to read the same to the offender, or furnish him with a copy of the same, and enter his reply thereto. Section 4597 of the Revised Statutes provides that "in any subsequent legal proceedings" said entries "shall, if practicable, be produced or proved, and in default of such production or proof, the court hearing the case may, at its discretion, refuse to receive evidence of the offense."

It is maintained on the part of the prosecution that when an entry was made, it must be produced or proved, or the court in its discretion may refuse to hear the evidence in support of the charge, but when it appears that no entry was made, then the statute does not apply. But this construction of the statute would make it almost devoid of meaning and useless. The evident purpose of the statute is to prevent prosecutions for breaches of discipline on shipboard, except in those cases where the master shall deem the matter of sufficient importance, while the circumstances are all fresh in his memory, and before there is any temptation to make use of it as a means to some other end, to enter a charge against the offender, together with his reply, in the official log-book. If any difficulty arises between the crew and the master, a previous offense or dereliction, of which no entry was made, cannot be invoked or trumped up, as a make-weight in this subsequent controversy.

In this case, it appears by the affidavit of the master, made before the deputy collector and ex officio shipping master at Sitka, that the defendants, in company with one Antonio Page, attempted to desert the ship in a small boat at Sitka, but being capsized, were discovered and rescued by the officers of the ship, except Page, who was drowned. The defendants then refused to work, and the master, by the advice of the collector, put them in irons until they consented to work, and made this affidavit of the transaction, instead of making an entry in the log-book. The confinement of the defendants was proper enough, if they refused to work, but if it was intended to prosecute them also for the offense of disobeying orders, it was incumbent on the master to have made the proper entries in his log-book. This not having been done, the law presumes that it was not deemed of sufficient importance at the time, but is now sought to be done as an afterthought, or with some ulterior purpose. The defendants are found not guilty, and discharged.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

UNITED STATES (BROWN v.). See Case No. 2,032.

UNITED STATES (BROWNE v.). See Case No. 2,036.

Case No. 14,673.

UNITED STATES v. BROWNING.

[1 Cranch, C. C. 330.] [1]

Circuit Court, District of Columbia. July Term, 1806.

JURY—PEREMPTORY CHALLENGES—FELONY.

In all cases of felony, by the laws of Virginia, the prisoner is entitled to a peremptory challenge of twenty jurors.

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

Indictment for larceny.

The counsel for the prisoner, namely, C. Simms, C. Lee, E. J. Lee, and Mr. Hiort, contended, that as this theft was charged in the indictment to have been done feloniously, the prisoner had a right to a peremptory challenge of twenty jurors, under the act of assembly (Old Rev. Code, 109). See U. S. v. Carrigo [Case No. 14,735].

CRANCH, Chief Judge. This is an indictment under the act of congress of 1790 (1 Stat. 112), for stealing a tub of butter. The indictment states that the prisoner feloniously took, and carried away, &c., contrary to the form of the statute in the case made, &c. The question for the consideration of the court is, whether the prisoner is entitled to a peremptory challenge.

By the act of congress of March 3, 1801 (2 Stat. 115), it is enacted, "that all felonies, committed within the county of Alexandria, shall be punished in the same manner as such crimes were punishable by the laws of Virginia, as they existed prior to the year 1796." The indictment charges a felony, and by the laws of Virginia, as they existed prior to 1796, its punishment was death, with the benefit of clergy.

The act of assembly of Virginia of November 13, 1792 (page 103, Old Rev. Code, 110, § 8) says: "No person, arraigned for treason, shall be admitted to a peremptory challenge above the number of twenty-four, nor shall any person, arraigned for murder or felony, be admitted to a peremptory challenge above the number of twenty." And the 18th section declares, that if the prisoner persists in challenging more than the law allows, he shall be considered as convicted, and judgment shall be passed accordingly. The act of December 26, 1792 (page 206, § 3), declares, that if any principal offender shall be convicted of any felony, or shall challenge peremptorily more than twenty of the jurors, it shall be lawful to proceed against the accessory in the same manner as if such principal felon had been attained thereof, "notwithstanding such principal felon shall be admitted to the benefit of his clergy." This shows clearly the understanding of the legislature, that in clergyable offences the prisoner had a right of peremptory challenge. Indeed, it is a common law privilege, in all cases of felony, which has not been taken away by an act of assembly. By the act of 15th December, 1796, § 13 (page 357), the penitentiary act of Virginia, the claim of benefit of clergy is abolished. But by the 26th section (page 359), the privilege of peremptory challenge is retained in all cases where it was enjoyed before that act. By the act of 27th November, 1789 (pages 45, 46), the benefit of clergy is to be allowed in all cases where it is not expressly taken away by act of assembly.

The indictment describes the common law offence of grand larceny, and by striking out the words, "contrary to the form of the statute, &c.," it will be a good indictment at common law. As to the punishment of felonies, the act of congress of 3d March, 1801 (2 Stat. 115), is positive, and so far repeals the act of 1790. But if the indictment had not charged the taking to be felonious, it may be doubted whether it would not have been a good indictment under the act of 1790, and whether the court might not have imposed the statutory punishment, and denied the claim of peremptory challenge. However, inasmuch as it is charged as a felony, and the laws of Virginia give a right of peremptory challenge in all cases of felony, there can be no question that the prisoner is entitled to it.

Case No. 14,674.

UNITED STATES v. BROWNING.

[1 Cranch, C. C. 500.] [1]

Circuit Court, District of Columbia. July Term, 1808.

CERTIORARI—FORCIBLE ENTRY AND DETAINER—PLEAS—RESTITUTION.

1. In Alexandria county, a certiorari, in a case of forcible entry and detainer, may be issued by one judge in vacation.

2. The inquisition may be traversed. No pleas will be allowed but a traverse of the force, or a possession for three years.

3. Restitution will not be awarded unless some person be held out of possession who has a right to possession. The act of Virginia does not punish the force; it only provides for restitution.

This was a certiorari to bring up the proceedings had before a justice of the peace in a case of forcible entry and detainer, upon a warrant issued under the act of Virginia of the 3d of December, 1792, p. 151, which reduces into one the several acts concerning forcible entries and detainers. The certiorari was granted by the chief judge of this court, upon the petition and affidavit of the defendant, in vacation. The petition was addressed to the chief judge, and his order was in these words: "Let the certiorari issue as prayed, upon bond being given according to law, in the penalty of two hundred dollars." See the act of Virginia of 12th of December, 1792, reducing into one the several acts concerning the establishment, jurisdiction, and powers of the district courts (sections 45, 49, p. 81); and the act of congress of 3d March, 1801, § 3 (2 Stat. 115), which gives this court, sitting in Alexandria, the same powers and jurisdiction, civil and criminal, as were then possessed and exercised by the district courts of Virginia. Upon the return of the certiorari, it appeared that the jury had found an inquisition of forcible entry and detainer, to which the defendant, by Mr. Youngs, his attorney, had offered two pleas in writing: 1st. That restitution ought not to be made to Stephen Cooke, at whose instance the warrant had been issued, because

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

on the 6th of January, 1807, he had in writing demised the premises for a term of seven years to Hammond, who took possession and assigned his term to Morris who took possession; and that afterwards Browning, by permission of Morris, took possession, which he now holds, and this he is ready to verify, and prays judgment whether the said Cooke has right of entry or possession, in manner and form as he claims the same. 2d. That restitution ought not to be made, because the said Cooke, on the —— day of May, 1808, distrained and took away the goods, &c., to be dealt with according to law, to satisfy the rent-arrear, and prays judgment whether the said Cooke has right to his warrant of forcible entry and detainer, &c. These pleas were objected to by Mr. C. Simms, in behalf of Cooke, and the justice refused to receive them. They were again offered to this court.

Mr. Taylor, for the prosecution, objected, and contended that the defendant could not, after inquisition found, traverse the force. 1 Hawk. P. C. c. 64, §§ 17, 25–27; Id. § 8. Nor can the title be put in issue. It is a question of possession only. Id. § 38. But if the defendant can now traverse the force, he can plead nothing else, unless it be a possession for the space of three years, according to the 7th section of the act of Virginia.

Mr. Youngs, contrà, contended that as Cooke had demised the premises for a term which was unexpired, he had no right of entry, there being no clause of re-entry for nonpayment of rent. Gordon v. Harper, 7 Term R. 9. That if he had no right of entry, he could not claim restitution against one holding by permission of the lessee; and that by the statute of Virginia of the 12th of December, 1792, § 40, p. 80, the defendant had a right to plead as many several matters as he should think necessary for his defence.

THE COURT, however, rejected the pleas, and confined the defendant to the general plea, "Not guilty in manner and form, as stated in the inquisition."

Youngs & Swann, for defendant.
Taylor & Simms, for the United States.

THE COURT (nem. con.) on the prayer of the defendant's counsel, instructed the jury that, if they should be satisfied by the evidence, that the traverser was, at the time of the said force, in possession of the said land, under the said Morris, and by virtue of the lease aforesaid, and did not hold the said possession adversely to the said Morris nor to the said Hammond, the jury ought to find the issue for the defendant. The grounds of the opinion were that the holding must be a holding of some person out of a possession. Some person must be put out of possession; but according to the supposed case, Cooke had no right to possession. Browning's possession was Hammond's possession, and Hammond's possession was Cooke's possession, during the term. The act of assembly does not punish the force; it only provides for the restitution; but restitution cannot be made to a man not put out of possession, and not entitled to possession. If the court would not award restitution, the jury ought not to find the defendant guilty; that is, under the construction of the act of assembly, the defendant cannot be guilty of unlawful force, unless in a case where restitution ought to be made.

The jury, not being able to agree, were discharged by consent. But at November term, 1809, the jury found the defendant guilty of the force as charged in the inquisition.

Case No. 14,675.

UNITED STATES v. BRUAN.

[7 Betts, D C. MS. 25.]

District Court, S. D. New York, Feb. 17, 1846.

ACTION ON JUDGMENT—DEFENSES.

[In an action on a judgment assigned to plaintiff, a plea merely alleging that plaintiff received the assignment of the judgment for the benefit of the firm of which defendant is the surviving partner, without disclosing from whom the consideration for the assignment proceeded, or stating the nature of the trust, and a verdict in accordance with such plea, do not justify a judgment for defendant, such plea and finding not being inconsistent with plaintiff's possession of rights in the subject-matter which equity would uphold.]

[This was an action at law by the United States against George W. Bruan, executor.]

BETTS, District Judge. This is an action of debt to recover $351,216.72, the amount of several judgments rendered in this court, in favor of the plaintiff against the defendant. The defendant pleaded specially in bar of the action, that by act of congress of June 15, 1832 [4 Stat. 530], the secretary of the treasury was authorized to compromise and finally settle with the trustee of the late firm of Thomas H. Smith & Son all the claims of the United States upon the said firm and their securities upon such terms as he may deem most conducive to the interests of the United States, and avers that the judgments in the declaration mentioned composed a part of those claims, and that the defendant was, at the passage of the act, sole surviving partner and trustee of Thomas H. Smith & Son. It further avers that the judgments, etc., were compromised and finally settled with the late firm of Thos. H. Smith & Son, and the same and all the right, etc., of the United States therein were assigned to Matthias Bruan, by and with consent of the secretary of the treasury; and that said M. B. now holds each and every of said judgments for the benefit of said firm or the surviving partner thereof; and that Thomas H. Smith was one of the partners of said firm; and that the bonds on which the judgments were rendered were executed by him as such partner. The plaintiffs replied, that the defendant was not the sole trustee nor any trustee of the firm;

that the said judgments were not compromised and finally settled with the trustee of the said firm; that Matthias Bruan does not hold the judgments nor any of them for the benefit of the firm or the surviving partner thereof.

On the trial of these issues, the deed of settlement made by the secretary of the treasury, and by which he also assigned the judgments to Matthias Bruan, were given in evidence. It was contended by the defendant upon the proof, that Matthias Bruan took the assignments and held the judgments for the benefit of the late firm of Thos. Smith & Co., and as trustee of the defendant, the representative of the firm. On the other side, the argument was that the United States had transferred the judgments to Matthias Bruan as purchaser in his own right, and that he holds them as absolute owner. The jury, under the charge of the court, found specially: First, that the defendant was sole surviving partner of Thomas H. Smith & Son, and was not sole surviving trustee of that firm; second, that the aforesaid judgments were compromised and finally settled by the United States with Matthias Bruan, as trustee of the firm, and not with the defendant; third, that Matthias Bruan holds the judgments so assigned him as trustee of said firm. A motion is now made that judgment be entered for the plaintiffs veredicto non obstante.

It is most manifest that the plea sets up no bar in law to the recovery of the plaintiffs. It does not, by implication, import that the judgments have been paid and satisfied by the defendant. So far as it asserts the compromise and settlement with the United States to have been made by the defendant, it is negatived by the verdict. The only particulars involved in the averments, which would seem to have relation to the vitality of the judgments is that they are in prosecution for the benefit of the assignee, Matthias Bruan, who holds them for the benefit of the firm. This fact, as found by the jury, is not an explicit answer to the issue, but may perhaps properly be taken as tantamount to it. I do not say that the defendant, if he had pleaded and proved the consideration on the settlement to have been paid by the firm, might not even, at law, defeat this action, brought with a view to revive the judgments. The nominal assignee would then be a mere conduit for conveying to the party interested the right passed from the judgment creditors, and a court of law might, perhaps, fitly exercise its equitable control over judgments and parties to the extent of preventing such formal assignee enforcing the judgments against the party actually entitled to hold them. The plea interposed does not present that case. It does not disclose the consideration upon which the assignment was obtained, at all events; it does not aver such consideration proceeded from the defendant or the firm.

The issue and the finding of the jury thereupon is, that Matthias Bruan holds the assignment as trustee of the firm of Thomas H. Smith & Son. Such holding would be in no way inconsistent with the existence of collateral interests or privileges of his own to be protected by the judgments before they became the full property of the firm, and thus legally extinguished. No facts characterizing the trust exercised by Matthias Bruan are given by the plea, nor can its nature be implied from the verdict; and the court cannot accordingly pronounce even that these judgments were trust deposits in his hands. He might be trustee of the firm in the most ample sense, and yet hold liabilities against them, absolutely in his own right. Nevertheless, accepting it as declared by the verdict that the assignee took the assignment of the judgments, and holds them for the benefit of the firm, I do not think that constitutes a legal defence to the revival of the judgment. It is not inconsistent with his possessing rights in the subject-matter which a court of equity would uphold, or this court, if the application had been made by motion on the part of the defendant, to have satisfaction of the judgments entered, or to have them transferred by Mr. Bruan to the defendant. The defence not being a legal one in substance, the plaintiffs are entitled to judgment notwithstanding the verdict affirmed it. 2 Cow. 626; 2 Archb. Civil Pl. p. 229. I think the plea would have been pronounced bad on general demurrer. This is not the case, then in which there is reason to believe from the statement of the plea that it is founded on matter which would be a bar if well pleaded, and where the court would accordingly endeavor to protect the verdict by permitting the defendant to amend. 5 Wend. 112. Judgment for plaintiff on the verdict.

Case No. 14,676.

UNITED STATES v. BRUCE.

[2 Cranch, C. C. 95.] [1]

Circuit Court, District of Columbia. Dec. Term, 1813.

SLAVERY—MANUMISSION.

An informal instrument of manumission, accompanied by an actual manumission of the defendant before the commission of the offence charged, followed by a formal deed of manumission after the commission of the offence, is sufficient evidence that the defendant was not a slave at the time of committing the offence.

[Cited in U. S. v. Charles, Case No. 14,786; U. S. v. Gray, Id. 15,252.]

Indictment under the statute of Maryland, 1751, c. 14, for conspiring with Negro Charles to burn Mrs. Love's house, Charles having been convicted and pardoned. United States v. Charles [Case No. 14,786]. The indictment charged the defendant [Jacob Bruce] as a slave. The statute makes it a capital offence.

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

Mr. Jones, for the United States, offered Charles, a slave, as a witness.

John Lee, D. Forest, and Mr. Law, for defendant, objected that by the Maryland law of 1717, c. 13, § 3, no slave can be a witness even against a slave, in a capital case.

Mr. Jones. The statute of 1751, c. 14, upon which this prosecution is founded, admits slaves to be witnesses.

The counsel for the defendant, contended that he was not a slave at the time of committing the offence; and as evidence of his freedom, offered an informal paper, purporting to be an instrument of manumission, and evidence that he was actually set free before the commission of the offence by Mr. John M. Goldsborough, his master, for his faithful services; and a formal deed of manumission, executed after the commission of the offence, agreeably to the provisions of the Maryland law, 1796, c. 67.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion, that as between the master and slave, the informal paper, with actual manumission, was valid, and that the defendant could not be convicted as a slave under the act of assembly.

Case No. 14,677.

UNITED STATES v. BRUNE.

[2 Wall. Jr. 264.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1852.

CRIMINAL LAW—EVIDENCE—OWNERSHIP OF VESSELS—SHIP'S REGISTRY.

On an indictment under a law which makes criminal certain acts done on board a vessel owned in whole or in part by a citizen of the United States, an American registry is not even primâ facie evidence of such ownership; though such registry is made by the government only on the pre-supposition of such ownership, and after oath by one or more persons of such ownership by them. Nor is general reputation of such ownership any evidence of it. Ownership in such a case is a fact to be proved as other facts.

[Cited in U. S. v. The F. W. Johnson, Case No. 15,179; Scudder v. Calais Steamboat Co., Id. 12,565; same case on appeal, 2 Black (67 U. S.) 388.]

A law of congress for the suppression of the slave trade (Act May 15, 1820, c. 113, § 5 [3 Stat. 601]) enacts that, if any person being of a ship's company of any vessel owned wholly or in part by any citizen of the United States, shall aid and abet in confining any negro, &c., with intent to make such negro a slave, he shall be adjudged a pirate. And an indictment in this case charged that Brune, being second mate of the brig Fame, owned by a citizen and citizens of the United states, did forcibly, feloniously and piratically receive, aid and abet in confining and detaining on board such vessel 400 negroes with intent to make them slaves, contrary to the form of the act of congress, &c. The fact that the defendant had been engaged in a slaving voyage, was perfectly proved: and to prove that the vessel was owned by a citizen and citizens of the United States, the prosecution, without offering to follow it up by other evidence, offered the ship's registry, and evidence of general reputation of ownership, that is to say, "that she was said to belong to citizens of the United States by all persons who talked of her." This registry, as is generally known, is made under an act of congress (Act December 31, 1792 [1 Stat. 287]) declaring what vessels shall be "denominated and deemed vessels of the United States entitled to the benefits and privileges appertaining to such vessels." It prescribes that before the registry can be made, the owner or one of the owners shall swear (among other facts) "that she is owned wholly or in part by a citizen of the United States," after which the registry is made.

J. C. Vandyke. We object to this evidence: (1) The registry offered is not the best evidence; and can only be offered where there is an intention of following it with other and more positive proof of ownership. It is necessary as part of the proof of ownership; but it is not in itself proof of ownership. It is the act of a third party done from motives of pecuniary interest, and is inadmissible to affect the rights of one upon trial for life or death. (2) It is a document, having its origin in statutory provisions. It was unknown to the common or civil law, and was created in England by statute of 12 Car. II. in 1660, for certain purposes; and was afterwards introduced into the French Code, and subsequently in 1792, became by special enactment part of the marine regulation of the federal government. The original English act did not require the owners to be citizens. There is no act upon the subject, either in England or America, making the registry proof of ownership. The registry is required to give the ship a national character, and to entitle the owners to certain privileges, and can only be used for the purposes specified in the acts creating it; and then only in the manner authorized by the act. Ownership is the essence of the case. It is a fact, which must be proved, however difficult, before the defendant can be adjudged a pirate. Common reputation will not do; for common reputation is often a common liar.

Mr. Pettit and P. N. Dallas, in reply, insisted, that the registry was evidence of the national character of the ship, which, by the terms of the registry act, is based upon ownership by citizens of the United States; that independently of this, the general reputation of ownership was the only evidence possible to be produced in establishing that fact. If more was required, it would be impossible to convict any man where the question of ownership arose. The practice, in this court and in the admiralty, has been in cases generally where national character and American ownership is to be proved, to admit the

[1] [Reported by John William Wallace, Esq.]

registry as prima facie proof; and there is no reason why this case should come under a different rule than that which has been generally adopted. We offer it only as prima facie evidence. The other side may show the truth if it does not.

GRIER, Circuit Justice. The very gist of this indictment is the ownership by a citizen or citizens of the United States. The act of congress makes it so. The indictment properly alleges it, and it must of course be proved. The registry, though it may perhaps be evidence of ownership for some purposes, is not even prima facie evidence of it in a criminal prosecution like this; nor would common reputation be. You must show the fact of ownership, as you generally show other facts; proving it by witnesses whom the defendant may cross-examine. The man, who swears that he owns the vessel, may have sworn to an untruth, and she may not be owned, either "wholly or in part, by any citizen of the United States" at all. And even if the persons set forth in the registry as owners, were owners at the date of it, their ownership may in point of fact have ceased before the alleged piracy, though the proper entry or no entry may have been made at the custom-house.

If the act had ordained that the detention, &c., on any vessel "denominated and deemed a vessel of the United States," should be piracy, the case might be different. The registry, whether granted on a true or a false oath, settles that. But the act requires that the vessel be owned by a citizen or citizens of the United States: a different thing and a fact; of which the oath before the collector of customs is no more evidence in a case like this, than an oath before any other person would be. It was extrajudicial, not in this case, ex parte, and without a single requisite to make it evidence.

The prosecution not being prepared with other evidence, the court charged in favour of the prisoner. The jury found a verdict of "Not guilty under the charge of the court: but guilty in point of fact": a verdict, of course, which the court obliged them to alter to one of not guilty.

[NOTE. The following letter from the reporter of 2 Wall. Jr., was found among the papers in this case in the clerk's office:

["To the Hon Messrs. Justices Grier & Kane—Gentlemen: As there is a case now pending before you in which the case of United States v. Brune, reported in 2 Wall. Jr. 264, may possibly be cited, I deem it well to say that that report is the only case in that volume of reports of which I have not a personal knowledge. It was reported from rough notes given to me, and I have reason to think that it was a certified copy of the registry which was offered in evidence, and not the registry itself. The case may or may not be good law; out, as a matter of fact, I believe that the words 'copy or certified copy' should appear in the statement and syllabus. I have mentioned this both to the United States attorney, Mr. Vandyke, and to Mr. Guillon, of the defendant's counsel, and will be obliged, if your honors see fit, that they, along with Mr. Kane, have the perusal of this note. I have the honor to be, with the greatest respect, your obed't serv't, John Wm. Wallace. Walnut and 6th, May 3, 1855."]

Case No. 14,677a.

UNITED STATES v. BRUSH.

The GENERAL RONDEAU.

[10 Niles Reg. 251.]

Circuit Court, E. D. South Carolina. Nov. 28, 1820.

PIRACY—MUTINY ON FOREIGN PRIVATEER—JURISDICTION OF COURTS.

[The crew of a privateer commissioned by a foreign government mutinied, secured control of the vessel, sent away their officers, divided among themselves certain specie on board, and brought the vessel into the United States without committing any further depredations. Part of the crew were American seamen. *Held* that, if the case were one of general piracy, the United States courts had jurisdiction to try the American members of the crew, and that it was a question for the jury whether the motives of the crew in seizing the vessel and dismissing her officers were not to plunder her, and not merely to throw off the authority of the officers.]

The crew of the Gen. Rondeau were tried on a charge of piracy. It appears from the evidence of some of the crew, who were witnesses for the United States, that the Gen. Rondeau was a privateer commissioned by the republic of Buenos Ayres about the commencement of 1820, and, after a successful cruize, was lying off the island of Grenada, some time in May, on her way to Margaritta, to which port her prizes had been sent for condemnation, where a boat with the third officer, Lieut. McSweeney, was sent ashore; that, the boat having returned without one of the crew, they expressed their resentment, and refused to proceed to their port of destination. In the attempt of the officers to restore obedience, Lieut. McSweeney was killed. The crew then took possession of the brig and confined the officers. After a short interval the officers were sent away in a boat, the command of the brig assumed by the crew, and her course changed for the United States. Two days after, all the specie on board was divided among the crew. Several vessels were spoken by the brig on her way to the United States, and some of the men were put on board of them, but no violence was offered. When the brig arrived near Georgetown, the prisoners abandoned her, bringing their money and clothes on shore. Some were arrested in Georgetown, and some in Charlestown. The Americans were first put on their trial.

On the part of the prisoners it was contended: First, that this was not a case of general piracy, but of mutiny, and therefore the republic of Buenos Ayres alone had jurisdiction of it. Second, that the offence, even if piracy, having occurred on board of a foreign privateer, which is a part of the fleet of a nation, the republic of Buenos Ayres had an exclusive jurisdiction of it.

On the part of the United States it was

contended, that piracy was robbery on the high seas; that in this case there was a robbery as well as a mutiny; that the United States had jurisdiction over its own citizens whenever they may commit piracy, and the jurisdiction of a nation over its own fleet, being personal, and not territorial, does not exclude the personal jurisdiction which all nations have of piracy.

Before JOHNSON, Circuit Justice, and DRAYTON, District Judge.

JOHNSON, Circuit Justice, charged in favor of the jurisdiction of the court over its own citizens in cases of general piracy, though committed on board of a foreign vessel, and he left it for the jury to say whether there was not evidence in this case, not only of a mutiny, but of a piracy, and whether the motives of the crew in seizing the brig and dismissing the officers were not to plunder the vessel and not merely to throw off the authority of their officers.

The jury, after deliberating for a short time, returned with a verdict of acquittal. The case of the foreigners composing this crew, was then submitted to the same jury, who also acquitted them.

Case No. 14 678.

UNITED STATES v. BUCHANAN.

[Crabbe, 563.] [1]

District Court, E. D. Pennsylvania. June 4, 1845.

NAVY—DUTIES AND EMOLUMENTS OF PURSERS—USAGE—SET-OFF.

1. In 1839–40 there was no act of congress expressly defining the duties or emoluments of pursers in the navy, or the quantity and kind of stores to be provided by them; those points were regulated by the rules of the navy, by orders from the navy department, and by usage and custom.

2. The commander of a vessel of war has a right to issue and enforce orders as to the discipline of his ship, and on this principle, may control the issue of stores by the purser, but not vary their price.

3. The "red book" of 1832 did not restrain pursers to ten per cent. advance on their private stores, but suspended the "blue book" rule to that effect.

4. An usage, to be binding in the navy, must be uniform, and applicable to all officers of the same grade under similar circumstances.

5. No change of usage, even by authority, can have a retrospective effect, but must be limited to the future.

6. Acts of a government agent, not previously authorized, but subsequently ratified by government, render the latter responsible for any loss occasioned thereby.

7. Unliquidated damages arising from torts may be set off against a government claim; but such damages can only include actual loss, not anticipated profits

This was an action of debt, on an official bond, to recover the sum of $11,535 50, alleged to be due from [M'Kean Buchanan] the defendant to the plaintiffs. It appeared that the defendant was a purser in the navy of the United States. In 1839, he was ordered to the frigate Constitution, then about to sail for the Pacific under command of Captain Turner, and being the flag-ship of Commodore Claxton. The usual stores, including private stores of fine clothing, &c., were laid in by the defendant, and served out to the crew at various rates of advance; that on government stores, or "slops," being ten per cent., and on the private stores, which the purser was then allowed, and indeed expected to take on board, twenty-five or fifty per cent., according to the description of the article. A purser's absolute pay at that time was forty dollars per month, but he was allowed these percentages in addition. In 1840, Commodore Claxton issued a general order to the squadron under his command, that, until the decision of the navy department was known, all private stores of clothing, when issued, should be charged as slops, that is, at an advance of ten per cent., and stated in this order that it was founded on the directions of the "blue book," or book of regulations for the navy, published in 1818, the following being the parts thereof referred to: Page 102, § 13: "The purser shall be authorized to dispose of the slops to the crew at a profit of ten per cent." Page 103, § 14: "All articles of wearing apparel, or materials of which wearing apparel is made, to be charged as slops."

The defendant protested against this order, but was obliged to submit to it, and it was confirmed by the secretary of the navy. In order to test the defendant's right to be credited with his loss arising from the order in question, and also to other credits which he claimed, this suit was brought; the amount sued for by the plaintiffs being, as before stated, $11,535.50, and interest; and the credits claimed by the defendant in his affidavit of defence being as follows:

Commission for drawing bills of exchange	$ 1,601 86
Commission on payments at Navy Yard, Pensacola	1,955 61
Loss of commissions and depreciation of property	9,360 31
Loss of commissions on sale of slops	385 52
	$13,303 30

On the trial these credits were varied by the evidence, and went to the jury in the following form:

Commission on bills of exchange	$ 1,626 85
Commission on payments at Pensacola	2,275 38
Loss of commissions and depreciation of property	9,360 31
	$13,262 55

—Or $1,727.05 more than the amount of the plaintiffs' demand. The defendant made no claim for interest.

The case came on for trial, before Judge RANDALL and a special jury, on the 4th June, 1845, and was argued by Watts, Dist.

[1] [Reported by William H. Crabbe.]

Atty., for the United States, and by G. M. Wharton and Mr. Dallas, for defendant.

G. M. Wharton, for defendant.

A party having claims against government, has but one of two courses to adopt: either to apply to congress for relief, which is attended with trouble, expense, and inconvenience; or, if he is fortunate enough to hold government funds, to force them to sue him, and then give his claims as a set-off to their demand. This latter course has been adopted by the defendant, and has produced the present suit. The defendant was under a contract with the plaintiffs. In return for his services he was to receive his pay and rations, and also the special emoluments of his office. This contract has been broken, and the principal item of the defendant's claim is a remuneration for the damage he has incurred thereby. The act which caused this damage was that of an authorized agent of the plaintiffs, and was subsequently sanctioned by them; we therefore claim to hold the United States responsible for the consequences. The compensation of a purser, in 1839 and 1840, was composed of several items. He received a fixed pay of $40 per month and his rations, and he also received a percentage on the first cost of the stores served out by him, and on some few other matters. This percentage varied with the article on which it was charged. On coarse government clothing, or slops, and the material thereof, it was fixed, by the "blue book," at ten per cent.; but by the usage of the navy, sanctioned by the "red book" of regulations of 1832, pursers were permitted—indeed, by the evidence, it was their duty—to take to sea, on their private account, other and finer articles of clothing, and the comforts and luxuries of life, for which they were authorized to charge an advance of twenty-five or fifty per cent. on the respective costs. These charges, of ten, twenty-five, and fifty per cent. advance, were part of the compensation of a purser, and the act of 26th August, 1842 (5 Stat. 535), under which those officers are now paid a fixed salary, without percentages, is an express recognition that those charges formed one of the items of a purser's pay before that date, and government went so far to sanction this practice, that they advanced the money to enable pursers to lay in these private stores. Congress alone could alter that pay, and no authority to do so rested either in the secretary of the navy, or the commissioners. The red book settles this matter beyond question, and the authority of that book cannot be impugned. It was communicated to the officers of the navy, officially, by the secretary, and they were ordered by him to "take it as their guide, * * * after its receipt;" and, at p. 18, it directs that twenty-five per cent. may be charged on "articles of secondary necessity," and fifty per cent. on "luxuries." The meaning of the words "secondary necessity" is to be explained by the usage of the service, and the evidence shows that by the usage it covers the fine clothing included by Commodore Claxton's order; but as that clothing had been laid in under the sanction of the secretary's order, and under the guarantee of the red book, no commodore, and no secretary assuming a commodore's order as his own, could rescind that order so as to affect or prohibit the sale of goods purchased under it. We therefore think that our main item of $9,360.31 is a valid claim against government.

We claim also for extra services and risk in drawing bills of exchange between 1827 and 1830. It was not part of a purser's regular duty to draw these bills, and, till the act of 3d March, 1835,—4 Story's Laws, 2411 [4 Stat. 755],—commanders received this same allowance of two and a half per cent. therefor. The evidence also shows that such allowances have been made to some other pursers. The claim for a percentage on payments made to mechanics and laborers at the Pensacola navy yard, rests on similar grounds. The same allowance has been shown by the evidence to have been made to other pursers; and it is no part of a purser's regular duties to pay those who are not enlisted in the naval service.

Mr. Watts, U. S. Dist. Atty.

The starting-point of this case is the claim of $11,535.50, with interest from 1st March, 1844, by the plaintiffs. In answer to this, the defendant alleges certain credits which he thinks himself entitled to, amounting, in all, to $1,727.05 more than the plaintiffs' demand. Though the defendant claims these credits against the United States as a set-off, his claim is really in the nature of a cross action for $13,262.55, and he must be held to strict and clear proof of that sum. The main item of the defendant's claim arises from the order of Commodore Claxton, directing him to charge his private stores of clothing as slops; and the line of argument taken to justify this item, makes it necessary to have a thorough understanding as to what the position of a purser in the navy really is.

By the act of 18th April, 1814,—2 Story's Laws, 1427 [3 Stat. 136],—providing for the pay and subsistence of officers, a purser is put on an equality with chaplains and sailing-masters, and nearly so with lieutenants. It became necessary to lay in government stores, and in the course of time it grew to be the custom for pursers to purchase private stores with money advanced by government. By the act of 7th February, 1815,—2 Story's Laws, 1496, 1497 [3 Stat. 202],—the president was authorized to appoint three officers of the navy, a board of commissioners, who should have power, with the consent of the secretary of the navy, to adopt rules and regulations for the service, which

were to be enforced and obeyed till altered by the same authority. These rules were adopted, and published in the blue book, in 1818; they have all the force of law, and cannot be altered or repealed but by similar law. Under those rules (pages 102, 103), all articles of wearing apparel, and the materials to make the same, are to be served out at an advance of ten per cent. on their cost. Under this state of affairs the defendant sets up his claim for cross credits, to reduce the government demand and to make it his debtor, and for a foundation to his claim he relies on a contract insisted to exist between himself and the government, and regulated by usage and the red book. On this contract the defendant's whole case depends, for if there is no contract, there can be no breach, no damages, no set-off. But there can be no contract, for if there is it must be binding on both parties, while here each may rescind it at will and in a moment. If the defendant's office created a contract with the United States, so must all offices under government: a doctrine contrary to the whole spirit of our institutions, and not for a moment tenable. If there is a contract, the officers of government are a privileged order, perfectly supreme, not under the control of their superiors, and endowed with certain vested rights not to be impaired even by congress. Every approach to such results has been carefully barred by the decisions of our courts. Ex parte Hennen, 13 Pet. [38 U. S.] 258, 259; Com. v. Sutherland, 3 Serg. & R. 145; Marbury v. Madison, 1 Cranch [5 U. S.] 137; Bowerbank v. Morris [Case No. 1,726].

Even if a contract existed, there can be no set-off on the facts of this case, for, according to the defendant's own argument, the damage arose from the wrongful acts of officers or agents of government, for which the latter can on no principle be held liable. Work v. Hoofnagle, 1 Yeates, 506; Burke v. Trevitt [Case No. 2,163]; Johnson v. U. S. [Cases Nos. 7,419 and 7,420]; U. S. v. Lyman [Case No. 15,647]; Mallery v. Shattuck, 3 Cranch [7 U. S.] 483. Beside, there are unliquidated damages arising from torts, which are not a legitimate ground of set-off. Gogel v. Jacoby, 5 Serg. & R. 122; Cornell v. Green, 10 Serg. & R. 14; Heck v. Shener, 4 Serg. & R. 249; U. S. v. Robeson, 9 Pet. [34 U. S.] 323; Meredith v. U. S., 13 Pet. [38 U. S.] 492, 493; Winchester v. Hackley, 2 Cranch [6 U. S.] 342; Com. v. Matlack, 4 Dall. [4 U. S.] 303; U. S. v. Wells [Case No. 16,663]. Neither can prospective profits, or depreciation of property, be charged against the government. Monongahela Nav. Co. v. Fenlon, 4 Watts & S. 205, 214. This alleged contract is endeavored to be supported by usage, and by the red book. We have seen that under the acts of 1814 and 1815, and the blue book, the law is not in accordance with the defendant's views, and when the law upon a particular subject is positive no evidence of contrary usage can be received. Brown v. Jackson [Case No. 2,016]; Collings v. Hope [Id. 3,003]; U. S. v. Duval [Id. 15,015]; Stoever v. Whitman, 6 Bin. 417. While the red book itself (page 49, and note) proves that the blue book was not rendered obsolete by the publication of the former.

This claim for depreciation and loss of commissions, is not an equitable one, and therefore not within the law allowing equitable set-offs. Act March 3, 1797,—1 Story's Laws, 465 [1 Stat. 512]. It is inequitable, because it assumes that government, after having advanced to the defendant, without interest, the money to purchase his private stores, guaranteed that they should all be sold at an advance of twenty-five or fifty per cent.; because it charges loss on goods voluntarily sold by the defendant, or used by him; because it charges loss on all the articles of defendant's stores, while Commodore Claxton's order only covered wearing apparel and its materials; and because it charges depreciation of value on account of the goods remaining unsold, when the only possible effect of the order reducing their price would have been to increase the sale. It is therefore submitted that the claim to set off $9,360.31, is not admissible on any ground.

The defendant claims to set off $1,626.85, being his commissions at two and a half per cent., for drawing bills of exchange while abroad, from 1827 to 1830. There is no law to authorize this charge. Drawing such bills was part of his duty as purser (red book, p. 51), and all such allowances ceased after the 9th November, 1826, according to the instructions of the secretary of the navy of that date. Usage is again invoked to support this claim, but even if it could be admitted that usage should vary positive law, which we have already seen is not admissible, the evidence should show that usage to be uniform and undeviating, which is not the case here.

The claim for the remaining set-off of $2,275.38, for commissions on payments at Pensacola, from 1835 to 1837, is, at least, equally untenable. Those payments were part of the defendant's regular duty (blue book, p. 8), and extra allowances therefore are prohibited by the pay-bill of 3d March, 1835,—4 Story's Laws, 2413 [4 Stat. 755].

Mr. Dallas, for defendant, in reply:

The jury is substituted for the accounting officers of government; its province is to decide simply on the conflicting claims of the parties before the court, and it is not to be led off to any collateral issues. The plaintiffs have claimed $11,535.50, while the defendant demands $1,727.05; these two sums, and the items which make them up, are the limits of the question which this jury is to decide. The question then arises as to what principles, laws, usages, or practices, must regulate the decision. By what

is the naval service governed? Not by the will of the executive; not by any single written code; not by the whims or caprices of the several officers; but by the constitution of the United States, and the acts of congress; by the regulations, orders, and decisions emanating from the commander in chief, or the navy department, and by the customs or usages of the service. These, taken together, form the body of law, written and unwritten. Codification, in the shape of orders and regulations, has been effected, to a certain extent by the act of 23d April, 1800,—1 Story's Laws, 761 [2 Stat. 45],—the blue book, and the red book, but after all this, a vast portion of naval law is still, necessarily, to be found only under the broad head of custom. The act of 1800, recognises custom generally, and so does the universal practice of courts martial; the blue and red books contain but a skeleton of the general regulations of the service, although the latter of these contains many things not in the former. As to the authority of the red book, we conceive it to be at least equal to that of the blue book. Its nature, contents, source, title, the order which prefaces it, its being distributed throughout the service, and its full recognition by the evidence before this court, entitle it to be considered as of full authority for the settlement of the question here involved.

The first of the defendant's credits is for commissions on bills of exchange, drawn by him during the years 1827, 1828, and 1829. They were drawn when abroad, by authority of his commander, at the personal risk of the defendant in case of their protest; they realised a premium of six per cent., their proceeds were all applied to government service, and they were all honored by government. On principle, the defendant was clearly entitled to an extra allowance on this account, as he had performed an extra service and incurred an extra risk; and in practice, as appears by the evidence, such allowances have been made both to commanders and to pursers. The fact of there being but few cases of this allowance to pursers only shows the rarity and unusual character of the service, and were this the first and only case of such a claim by a purser, which it is not, the same principle which justified the allowance to commanders should give it to pursers. It is said that these allowances ceased after the 9th November, 1826; but at that date the defendant was on a foreign station, too remote from navy agents to obtain the necessary funds in any other way, and could not be aware of a change of system contained in a letter from the secretary of the navy to the fourth auditor of the treasury.

The next credit claimed, is for commissions on payments to mechanics and laborers at the navy yard, Pensacola. The evidence shows many cases of such allowances to pursers, and the principle of them is very evident; such payments are not within the legitimate line of a purser's duty; the persons paid do not belong to the navy, and the purser is obliged to assume extra risk and responsibility, by keeping on hand a larger sum of money than he otherwise would.

The third and chief item of our claim, is for the profits, &c., of which the defendant was deprived by the unjust and illegal interference of the plaintiffs with his rights. In regard to this claim, the evidence shows that, by long-established and uniform custom, the purser was bound to lay in his private stores, purchased with money advanced by government, which stores have always been known as "articles of secondary necessity," or as "luxuries," and have never been confounded with public supplies, either in the commission on their sale, or the responsibility on their loss or damage; that the defendant pursued, in all respects, the customary course as to his stores; that Commodore Claxton seized, or prevented the sale of these stores, defeated the established custom, debarred the defendant of his rights, and induced the plaintiffs to assume these illegal acts.

We therefore claim to set off a total sum of $13,262.55, or $1,727.05 more than the plaintiffs' demand.

RANDALL, District Judge (charging jury). Although, in form, this is an action brought by the United States to recover from the defendant an alleged balance, under his official bond as a purser in the navy, in reality, the only inquiry is the validity of a claim by the defendant against the government, consisting of three items, for which he claims credit, and which have been rejected by the proper accounting officers. As no action can be maintained by an individual against the United States, the only remedy for a claimant whose accounts have been rejected, is either to apply to congress, or, by retaining money of the government in his hands to compel the United States to commence a suit against him, and then his whole demand may be examined by way of a set-off, or equitable defence, provided it has been previously presented to the treasury department, and has there been disallowed. These preliminary proceedings having been had, let us examine the items of the claim, and the evidence adduced in their support.

The principal item is a claim for a loss of commission, or depreciation in the value of property purchased by the defendant as part of the stores for the U. S. ship "Constitution," to which he was ordered as purser. In March, 1839, the defendant joined that vessel at Norfolk, she being then commanded by Captain Turner, and the flag ship of Commodore Claxton, the commander of the squadron intended for the Pacific. At Norfolk, and at New York, he purchased a supply of such stores, and other articles, as were usually purchased by pursers for the

officers and crew; the government furnishing such articles as were of primary necessity, and the remainder being purchased by the defendant with moneys provided by the government, the articles remaining at his risk. There is no act of congress expressly defining the duties or emoluments of the purser, or the quantity or kind of stores necessary to be provided by him; these are settled by the rules and regulations of the navy, by orders from the navy department, and by usage or custom.

It does not appear that any complaint was made, either by Captain Turner or Commodore Claxton, at the time of laying in the stores, of their quantity or price; and some of the officers prove that, considering the intended cruise, the supply was a reasonable one. A list of articles belonging to the purser, and their prices, was exhibited to the captain, approved by him, and placed in a public part of the ship soon after she proceeded to sea, by which it appeared that an advance of twenty-five per cent. was charged on articles termed of secondary necessity, and fifty per cent. on those termed luxuries. No complaint was made of these charges until the commencement of the year 1840, when, in consequence of information having been communicated to the commodore that a quantity of silk handkerchiefs had been sold by the steward of the purser (without the knowledge and in the absence of the latter) to the crew, and by them attempted to be smuggled on shore, he sent for a schedule of the ship's stores, and issued an order, dated 23d of February, 1840, by which he directed that, "until the decision of the department in the premises be known, the issue of articles of private clothing is prohibited as far as it conflicts with that of the public slops in store, and when served out, must be charged at a profit of ten per cent."

The defendant immediately remonstrated against the propriety of this order, as being contrary to usage, but, on the commodore insisting on its enforcement, he was obliged to submit. It is admitted that by "private clothing" the clothing purchased by the purser, and remaining at his risk, is intended; and that it has been customary and usual, and by some of the witnesses considered the absolute duty of the purser, to provide such articles for the use of the men. That the commander of a vessel of war has a right to issue orders in relation to the discipline of his ship and the conduct of his officers on board, and to enforce those orders, there can be no doubt. It is a necessary part of discipline that such power should be vested in him, he being responsible for any abuse of it. It is also his right to control the issue of stores by the purser, and, if he thought the interests of the government or of the crew required it, to restrict the issue of such stores to a proper quantity; but he has no right to reduce or control the prices at which such stores are to be issued, that being fixed by the rules and regulations, and the usage and customs of the navy. Was there a fixed price or rate of advance which the purser had a right to charge on these articles? If so, what was it? And was it changed by the order of Commodore Claxton? On behalf of the United States it is contended that the rules and regulations prepared by the board of navy commissioners, and published in 1818, were in full force, and that by these "all articles of wearing apparel, and materials of which wearing apparel is made," were "to be charged as slops," and an advance of ten per cent. only allowed. It is admitted that so far as these rules and regulations are not opposed to the acts of congress, or to subsequent rules and regulations, they are in force; it is contended, however, that these do not extend to the private stores of the purser, but only to those purchased by government, or, if they do so extend, that the rule is superseded by the regulations issued in 1832, which were in full force in 1839–'40.

I deem it unnecessary to detain the jury by an examination of the first view, as I think the last is correct. Although the rule or section referred to in the red book, on the face of it, purports to bear date on the 27th July, 1809, and may have been suspended by the rules of 1818 (as to which, however, it is unnecessary to decide), I consider the incorporation of it in the rules of 1832 as a new issue of that date, and binding from the time of its promulgation, although it may conflict with the rules of 1818. Each successive secretary, or head of a department, has the same right as his predecessor to give a construction to the laws, regulations, or usages, of the business of his department, and the construction given to the last will be binding until changed or altered by a successor. U. S. v. McDaniel, 7 Pet. [32 U. S.] 14. This construction of the rules of 1832 has been adopted not only by the accounting officers of the government, but by congress. Act for the relief of E. B. Babbit, 2d March, 1833 [6 Stat. 548]. The rules of 1832 provide (page 18) that twenty-five per cent. should be allowed on articles of secondary necessity; are these articles of private clothing, and materials of which such clothing is made, within that term? This is a question for the jury. From the evidence it appears that the articles furnished by the purser are of a finer material than those provided by the government, and have generally been considered in the service as a holiday or shore dress for the seamen; they are not required to purchase these private stores, but do so at their own will or desire. A number of witnesses have been examined who prove it to have been the custom and usage to charge upon these articles an advance of twenty-five per cent., and that they were considered of a secondary necessity. It is true there can be no usage recognised by the court which is contrary to law; but it is

evidence of the construction given to the law, and when the usage is established it regulates the rights and duties of those who act within its limits. U. S. v. McDaniel, 7 Pet. [32 U. S.] 14, 15.

But it is said that a different construction was given to these regulations by Mr. Secretary Paulding, and that he confirmed the views of Commodore Claxton. If the order of Commodore Claxton had been confined to supplies purchased subsequently to the receipt by him of this general order, there might have been force in this argument; but no change of usage, even by authority, can have a retrospective effect, and must be limited to the future. This construction appears to have been given to the order in relation to all the other pursers on the station, who were allowed to dispose of their stores on hand at the former prices. It is said, however, that, supposing all these doings of Commodore Claxton to have been wrong, still the government is not liable for his acts, and therefore the defendant is not entitled to this set-off, although he has sustained damage thereby. For the purposes of this case, and with a view of obtaining a verdict on the merits of this claim, I state the law to be that Commodore Claxton was the agent of the government in all this transaction, and that, although his acts may not have been previously authorized by the government, as they were afterwards ratified by the secretary of the navy, with a full knowledge of the facts, the government is responsible for any loss occasioned by his orders so ratified and confirmed.

Again, it is contended that, supposing all the allegations of the defendant to have been fully made out by the evidence, yet this is not such a claim as can be set off against the demand of the government in this action. However this might be in suits between individuals, the government of the United States does not resort to technicalities to screen it from a just claim by any of its citizens. The act of 3d of March, 1797, directs not only that legal but that equitable credits should be allowed to the debtors of the United States by the proper officers of the treasury department, and, if there disallowed, they may be given in evidence at the trial; and this whether the credits arise out of the particular transaction for which suit was brought, or any distinct or independent transaction which would constitute a legal or equitable set-off or defence, in whole or in part, to the debt sued for by the United States. U. S. v. Wilkins, 6 Wheat. [19 U. S.] 135. It is incumbent on the defendant to satisfy you what is the amount of credit to which he is entitled under this head. In estimating it you are to allow only the actual loss sustained by him, and not any prospective or anticipated profits which might have been made by the defendant, supposing his whole stock to have been sold at the prices claimed by him. If, in consequence of Commodore Claxton's order, the goods remaining on hand were injured or damaged, he is entitled to recover the amount of such damage; but the jury will determine whether such damage was caused by the order, and whether the sales were lessened in quantity in consequence of the reduction in price. The sales made on shore, and those to other pursers, are not such as would entitle him to charge the government with the advance of twenty-five per cent. on cost, but if made bona fide, with a view to reduce an anticipated loss, he will be entitled to be made good his actual loss on such sales.

The second and third items of claim are for commissions on moneys paid by the defendant to mechanics and laborers, when stationed at the Navy Yard in Pensacola, from October, 1835, to December, 1837; and for commissions on the amount of bills of exchange drawn by him on the government from May, 1827, to February, 1830. These are alleged to be extra services for which, by the custom of the department, the defendant is entitled to extra compensation. From the rules and regulations of 1818 and 1832, as given in evidence, it appears that both the drawing of the bills of exchange by pursers, when abroad, and the payment of mechanics and laborers by them when stationed at the navy yards, were duties devolved on, and usually performed by, pursers. But if, from the evidence, the jury believe that these duties were required of, and were performed by the defendant, over and above the regular duties of his appointment, and that it has been the practice of the government, or of the navy department, to allow to pursers compensation or commission over and above their regular pay, and that the defendant took upon himself the labor and responsibility of such payments, and drawing of bills, with an understanding on both sides that he should be compensated for the same as extra services, then, it is competent for the jury to allow such sum as they may find to be reasonable, and conformable to the general usage of the government in like cases.

But custom and usage, which have been invoked by the defendant in his favor, must also operate when established against him. The usage, to be binding, must be uniform; and applicable to all officers of the same grade, under similar circumstances. It is not sufficient that one, or two, or half a dozen officers have been allowed an extra compensation for such services, unless the rule was a general one, so that each officer performing the service might be supposed to rely on the known practice of the government to allow extra compensation when the service is performed. The jury will say whether the few cases in which extra compensation is proved to have been allowed are not rather exceptions to the general rule of refusing such compensation, than proof

of the rule itself. My opinion is that the weight of the evidence is against the claim of the defendant for either of these items. I have deemed it unnecessary to enter into any examination of the amount of these claims. There is no dispute about the amount of bills drawn, or the sums paid to mechanics and laborers; the only question is as to the right to any payment or compensation for either.

NOTE. On the 25th June, 1845, the jury rendered a verdict for defendant, and granted him a certificate for $508.72; the defendant being thereby allowed the following credits:

Commissions on payments at Pensacola	$ 2,275 38
Interest thereon	1,024 00
Commissions on bills of exchange	1,626 83
Interest thereon	1,455 00
Loss on sales	385 52
Loss of commissions	5,277 46
	$12,044 22
Deduct government claim	11,535 50
Due defendant	$ 508 72

On the 5th September, 1845, the defendant released the two items of interest allowed by the jury, and agreed that judgment should be entered for the plaintiffs for $1,970.28, with interest from 1st March, 1844, in all $2,479, and costs; and thereupon the court overruled a motion for a new trial, which had been made by the plaintiffs. On the 15th September, 1845, the plaintiffs took a writ of error to the circuit court of the United States for the Eastern district of Pennsylvania, wherein, on the 9th November, 1846, the judgment of the district court was affirmed; and thereupon the plaintiffs, on the 14th November, 1846, took a writ of error to the supreme court of the United States, wherein, at January term, 1850, the judgments below were reversed, and a venire de novo ordered. See 8 How. [49 U. S.] 83. The case was subsequently discontinued.

Case No. 14,679.

UNITED STATES ex rel. HUIDEKOPER v. BUCHANAN COUNTY.

[5 Dill. 285.] [1]

Circuit Court W. D. Missouri. 1878.

MUNICIPAL BONDS—ENFORCEMENT OF JUDGMENT—MANDAMUS—TAXES—WARRANT TO PAY JUDGMENT ON BONDS.

1. A judgment of the court upon the bonds of the county issued in aid of a railroad company may be enforced by a mandamus to compel the levy and collection of taxes; or, if the amount is already in the county treasury, applicable to such debts, to compel the county court to draw a warrant to pay the judgment. See, also, U. S. v. Greene Co. Ct. [Case No. 15,259], and U. S. v. Lafayette Co. Ct. [Id. 15,549].

2. Such a duty is not judicial. State v. Macon Co. Ct. [68 Mo. 29], commented on.

3. Where two out of three judges of the county court refused to obey a peremptory writ of mandamus, they were ordered to return the writ into court, with a sworn return thereon, and also to show cause why they should not be attached for contempt.

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

The relator, Huidekoper, a judgment creditor of the county of Buchanan, a majority of whose county justices had refused to obey a writ of mandamus from this court, or to make any return thereof, moved for an order that the respondents, the county judges, be peremptorily commanded to return the writ, with a return thereon, and to show cause why they should not be attached for contempt. At the November term, 1878, counsel appeared for the respondents, and in argument denied the power of this court to issue, in such cases, a writ of mandamus to the judges of the county court, relying upon the recent decision of the supreme court of Missouri in State v. Macon Co. Ct. [68 Mo. 29].

Mr. Shippen, for relator.

Mr. Chandler, for respondents.

Before DILLON, Circuit Judge, and KREKEL, District Judge.

DILLON, Circuit Judge (orally). The relator, a holder of bonds of Buchanan county, brought suit some years ago, in this court, upon coupons. The defendant resisted, but the plaintiff recovered judgment. The county never sought to have the judgment reviewed by the United States supreme court, but acquiesced therein. The case is reported [Case No. 6,847]. Subsequently it levied taxes to pay interest, and did pay some interest on the same issue of bonds. It levied a special tax for the purpose, and it is alleged without denial that there is about $45,000, the produce of this special tax, now in the county treasury, applicable to these debts. There it lies, liable to be lost, and doing no good. The debt, however, stands here uncontested, accumulating with interest and costs. The relator, having recovered another judgment, filed an information for a mandamus last July, stating these facts, and asked that the judges of the county court be required forthwith to pay or cause to be paid out of this fund the amount of this judgment. The peremptory writ was granted upon due notice, and made returnable on the first Monday of September last. The writ was duly served in July on each of the three judges of the county court. One judge returns that at a meeting of the county court he was ready and willing to obey, but the other two judges refused. The other judges make no return, but come at this time by counsel and move to arrest these proceedings, on the ground of there being no authority in this court to maintain them. This is based in argument on a recent decision of the supreme court of Missouri in the case of State v. Macon Co. Ct. [68 Mo. 29], wherein it is said that it is not competent for a court to issue its command to a county court to issue a warrant to pay a judgment. Clearly that part of the decision was not essential to the case before that court. Anterior to judgment, a county court cannot be compelled by mandamus

from this court to approve a claim. Passing thereon is a judicial act. But the law authorizes a county court to be sued; and when it comes and is heard by a court of competent jurisdiction, and a judgment is rendered against it, a solemn conclusion is reached. The claim is then judicially audited, and it is the duty of the county court to take the proper steps for its payment. Such is the duty of the county court, no less than of an individual against whom a judgment is rendered. But if a county court fails to do its duty, is that the end of the creditor's rights? Must he go to the county court and say, "Here is a United States circuit court judgment; please audit it?" And if it will not, must he appeal to the circuit court of that county, and thence, if the decision be against him, to the state supreme court? Thus, litigation begun in the federal court would end in the supreme court of the state, instead of the United States supreme court. Such is the inevitable result of the views the respondents have so zealously pressed upon us. The non-resident creditor has a right, under the constitution and laws of the United States, to bring his action in the federal courts. Nothing can be imputed to him if he avails himself of such a right, nor is any reflection whatever cast thereby on the state courts. Such is not the basis of our judgment on this application. We hold that this court has jurisdiction of these proceedings, and that it cannot be impeded in its action by the legislature or the courts of this state. Upon the motion herein by the relator we will grant an order for the respondents peremptorily to return the writ, with a sworn return thereto, and that cause be shown by the refusing judges why they should not be attached for contempt in not returning the writ; such return and showing to be made within ten days. Ordered accordingly.

[The cases of U. S. v. Greene Co. Ct., Case No. 15,259, and U. S. v. Lafayette Co. Ct., Id. 15,549, were published as a note to this case in original report.]

Case No. 14,680.

UNITED STATES v. BUCK.

[17 Leg Int. 181.[1] 4 Phila. 161; 8 Am. Law Reg 540.]

District Court, E. D. Pennsylvania. 1860.

RESISTING OFFICER—ATTEMPT TO RESCUE SLAVE—FUGITIVE SLAVE LAW—INDICTMENT—TRIAL.

1. A fugitive slave having been brought by the marshal, under a warrant of arrest, before the circuit court, the case was heard, and a certificate, whose contents were conformable to the requirements of the act of September 18, 1850 [9 Stat. 462], authorizing his removal to the state from which he had escaped, was delivered to the claimant. The claimant having afterwards made an affidavit that he apprehended a rescue, the marshal retained the fugitive in custody, placing him in charge of certain deputies or assistants, who, when engaged in removing him, were obstructed by the defendant. The acts of obstruction constituted or included an attempt to rescue the fugitive from custody. When this occurred, neither the claimant, nor any private person as his agent, was present. *Held*, that for the purpose of the removal of the fugitive, and for incidental purposes, the certificate had established conclusively the relation of the claimant to the fugitive to be that of a proprietary master to his servant; that the subsequent custody of the marshal was lawful only in consequence of the master's affidavit, and might have been terminated by him at any time; that if it had been thus terminated, or had been interrupted, or had never taken effect, the right of custody would have been in the master alone; that the marshal's custody, while it continued, was not incompatible with any reasonable intervention, control, direction, or participation of the master in which the marshal might acquiesce, but that the custody, unless actually assumed by the master, was, through his affidavit, continued in the marshal, in the same official character in which he had held the fugitive under the warrant of arrest; that the defendant might therefore have been indicted under the 22d section of the act of April 30, 1790 [1 Stat. 112], for obstructing the marshal as an officer, but that he was liable also to indictment under the 7th section of the act of September 18, 1850, for the attempt to rescue from the custody of the marshal and his assistants.

2. Under an indictment for such an attempt, the prosecution may be maintained without the adduction of any independent evidence that the fugitive owed service or labor, and had escaped from the state in which it was due.

3. Such an indictment contained averments of the issuing of the warrant of arrest, and of the subsequent proceedings, including the certificate and affidavit. These averments were preceded by allegations that the fugitive had escaped, and that he owed, in the state from which he had escaped, service or labor to the claimant. *Held*, that the enactments of the law of September 18, 1850, as to the conclusiveness of the certificate, rendered these preceding allegations matters of mere inducement, and that, the certificate having been produced in evidence, no independent proof of them was required in order to sustain the prosecution.

4. Such a prosecution is not maintainable unless the defendant acted "knowingly and willingly." But his only ignorance that can excuse him is ignorance of the existence of the custody, or of its lawfulness. Where he might, upon inquiry, have readily known the truth, his omission to inquire is evidence from which his actual knowledge of the truth may be inferred. This is particularly the case where the custody is official.

5. A court of the United States ought never to sit with its doors of entrance closed, so as to prevent publicity in its proceedings. But its police must be maintained. Where the court has not prescribed any general rule, or made any special or particular order, on the subject, the specific duty of the marshal to maintain and regulate its police according to law is an incident of his general duty to attend the court. When, during the pendency of a particular proceeding, there is reason to believe that an unrestricted admission of persons of a known class or association would endanger the security of the administration of justice, or in any manner prevent the police of the court from being properly maintained, the marshal, without excluding absolutely such persons, as a class, may adopt prudential measures to prevent their indiscriminate admission, regulating the exercise of his discretion so that their exclusion is not carried beyond the exigency of the particular occasion.

[This was an indictment against Jeremiah Buck for an attempt to rescue from the custody of the marshal a fugitive slave.]

[1][Reprinted from 17 Leg. Int. 181, by permission.]

CADWALADER, District Judge. The government of the United States exists through a delegation of specifically defined powers, which the several states have yielded upon certain conditions. The rightful continuance of the government is dependent upon the faithful performance of these conditions. One of them is that fugitives from justice, found in a state into which they have fled, shall be delivered up for removal to the state having jurisdiction of their alleged crimes. Another condition is that slaves escaping from one state into another shall be surrendered. In the case of a fugitive from justice, the surrender is to be made on the demand of the executive authority of the state from which he fled. In the case of slaves, it is to be made upon a claim by the party to whom their service or labor is due. In legislating for the fulfilment of these two constitutional conditions, congress has never assumed the power of disposing at pleasure of the custody of a fugitive of either kind. The constitution would not have sanctioned any such arbitrary legislation. The fugitive from justice has been surrendered into the custody, not of an officer of the United States, but of an agent or duly accredited representative of the state, by whose executive authority the demand has been made. The fugitive slave cannot, unless at the desire of the claimant whose right has been established, be delivered into any other custody than that of such claimant. When, at his desire, the fugitive is delivered into the custody of an officer of the United States, this officer's custody is temporary and its purpose limited. It exists only for the protection or security of the right which has been established, and cannot be exclusive of the control of the possessor of such right. This right is that of a proprietary master of the fugitive. The legal importance of keeping this distinctive character of it in view will be seen hereafter.

In the first legislation of congress, under these two clauses of the constitution, the subjects of both were provided for in a single statute. This act, which was passed on 12th February, 1793 [1 Stat. 302], has not been followed by any further legislation, so far as the surrender of fugitives from justice is concerned. The jurisdiction under this head is not exercisable under the act by the judges or officers of the United States, but by the governments of the several states. The jurisdiction and powers for the surrender and return of fugitives from service or labor were vested by the act in judicial officers of the United States, and concurrently, in certain local magistrates of the several states. This legislation on the subject of fugitive slaves was extended by the act of September 18, 1850. So far as this act has modified or superseded the previous law, no jurisdiction or authority is vested in any state officer or magistrate. The owner of a fugitive slave is not bound to proceed under either of these laws. He may follow the slave into the state into which he has escaped, and may, without any legal process, arrest him there; and may, without any judicial certificate, or other legal attestation of the right of removal, carry him back to the state from which he escaped. All this may be done lawfully. But, if the owner does not, under one act, or the other, obtain a certificate of his right of removal, he becomes liable as a trespasser, for the arrest, detention and removal, unless he can prove the escape, and that the fugitive owed him service or labor in the state from which he fled.

In a proceeding under the act of February 12, 1793, the arrest of a fugitive slave was made without any warrant or other process. He was taken by the claimant, or his agent, before a judge of one of the courts of the United States, or a local magistrate, who, upon the adduction of the requisite proof, gave a certificate which served as a warrant for the removal of the fugitive to the state or territory from which he had escaped. This act contained no express provision that the certificate should have any conclusive effect as proof of the right of removal. The act of September 18, 1850, provides that the alleged fugitive may be arrested by the claimant, either without process, or under a warrant issued by a court or judge of the United States, or by one of the commissioners of a certain description, appointed by designated courts of the United States. It vested in any one of these commissioners a jurisdiction concurrent and co-extensive with that exercisable by a court of the United States, or one of the judges of such a court. This act required the marshals of the United States and their deputies to obey and execute all warrants and precepts issued under its provisions when to them directed. It imposed a pecuniary penalty for any refusal or neglect to receive or execute such process, and made the marshal, in case of an escape, with, or without, his assent, after arrest, liable on his official bond for the value of the fugitive, according to a prescribed standard. The commissioners were authorized, within their respective counties, to depute, by writing, one or more suitable persons, from time to time, to execute such warrants and other process as might be issued by them in the lawful performance of their respective duties. The commissioners, or the persons thus deputed by them to execute process, were authorized to summon, and call to their aid, the by-standers, or posse commitatus, when necessary. Their warrants were to run and be executed any where in the state within which they were issued. In a proceeding conducted according to the provisions of this act, the alleged fugitive, whether arrested under a warrant, or without process, is brought before a court or judge of the United States, or a commissioner whose duty it is to hear the case of the

claimant in a summary manner. If the claim is established, the court, or judge, or commissioner, delivers to the claimant or his agent, a certificate setting forth substantially the facts established, and authorizing him to use the reasonable force and restraint necessary, under the circumstances of the case, for the return of the fugitive to the state whence he escaped. This law makes the certificate thus delivered conclusive of the right to remove the fugitive to such state, and enacts that it shall prevent all molestation of the claimant by any process issued by any court, judge, magistrate or other person whomsoever. The certificate as described succinctly in the 4th, and more fully in the 6th section, answers a two-fold legal purpose. It ascertains the claimant's right to remove the fugitive, and constitutes, or includes, a warrant for his removal.

In a prior stage of the cause, I had occasion to express an opinion, which I now repeat, that, under an indictment for an offence against this law committed after such a certificate has been delivered to the claimant, its production in evidence renders independent proof that the fugitive owed service or labor to the claimant, and that he escaped from the state in which it was due, unnecessary on the part of the prosecution. I also expressed an opinion that though such an indictment contained allegations that he had escaped, and owed the service or labor, followed by an averment that the certificate had been awarded, the enactments of the law of 1850, as to the conclusiveness of the certificate, rendered these preceding allegations matters of mere inducement, of which no independent proof was required, in order to sustain the prosecution. I still am of this opinion. The question, whether the alleged fugitive was a slave or not cannot be tried under such an indictment. Where the claimant, after the certificate of his right has been issued, makes affidavit that he has reason to apprehend a forcible rescue of the fugitive before he can be taken beyond the limits of the state in which the arrest was made, the act requires the officer who made it to retain the custody of the fugitive, and remove him to the state whence he fled, and there deliver him to the claimant. The act also authorizes and requires the officer to employ and retain for this purpose, at the expense of the United States, as many persons as he may deem necessary to overcome such force. In a clause which defines the rate of compensation for such service, and of the allowance for expenses, the persons thus employed by the officer are designated as his assistants. The standard here prescribed is that of the compensation and allowance in cases of transportation by the marshal of persons charged as criminals.

In the present case, the testimony shows that, under a warrant of arrest, a fugitive slave had, under this act, been brought in the lawful custody of the marshal before a judge of the circuit court; that the right of the claimant had been established, and the certificate prescribed by the act of 1850 had been issued, when the claimant's affidavit that he had reason to apprehend a forcible rescue was regularly made; that a copy of this affidavit was in the hands of the marshal, or his principal deputy; that the marshal, therefore, conformably to the provisions of the law, retained the fugitive in custody, and was in the act of removing him from the court house, when the occurrences on which the prosecution is founded took place. These occurrences were very remarkable. They took place in the public street, in the face of day, in open defiance of the law. The doorway leading from this court into Fifth street is distant not more than about sixty yards from the point on the north side of Chestnut street, a little westward of Seventh street, where the defendant was arrested. The intervening space is occupied, on the same side of Fifth street, by offices of the police of the city. There was in the street a crowd chiefly composed of colored persons. More than fifty officers of the city police were stationed there to keep the passage clear. These officers wore their badges. This was the state of things when the fugitive was brought by the marshal, or his principal deputy, through the Fifth street doorway, and placed in a carriage. Three deputies or assistants of the marshal, including his principal deputy, took seats inside of the carriage and another assistant or deputy took a seat by the driver. The carriage then got under way towards Chestnut street. An immediate movement from the eastern footway towards the street pavement appears to have been made by colored persons who crowded forward in such a manner as to impede the progress of the carriage. An attempt to stop it was made when it had advanced only a few paces. Before it reached Chestnut street, this attempt had been repeated once or twice, if not three times. The speed of the horses was increased as they approached Chestnut street, and was becoming rapid as their heads were turned westward in order to pass up that street. At this point, the portion of the crowd which had been in the carriage way of the street, appears to have been left behind, but to have been following closely in the rear. The carriage would probably have soon left the great body of them far behind, if its progress had not been again stopped in a more violent manner than on the previous occasions. Here some colored persons who rushed from both footways into the carriage way, seized the heads of the horses on both sides, and forced them on the side walk against an iron awning post, when several arrests, including that of the defendant, were made by officers of the city police. The period from the time at which the carriage left the door of the court house to the time of their arrest, was probably not more than one or two minutes. There had been confusion and noise during

the whole of this period, the colored persons crowding towards the carriage and exhibiting great excitement. Several witnesses heard the word "rescue" shouted. Robert Williamson says that he heard it shouted loud by more than one voice before the carriage reached the corner of Chestnut street. Edward G. Wood and Robert Wilson state that White, one of the men arrested, called "rescue." Wilson says that White called rescue before Buck the defendant came up. Seven witnesses, namely, Trefts, Robinson, Brodie, Wood, Barry, Axe, and Williamson, positively identify the defendant as one of the three principal actors in the scene which occurred when the horses were forced upon the pavement. Mr. Wood, Robert Williamson, Axe and Barry describe this occurrence particularly. The clearest account seems to have been that of Mr. Wood. According to their testimony White seized the horses on one side and the defendant on the other, while Green took hold of the traces and with an uplifted cane was striking at the driver. Barry describes the defendant as the person most active in hauling the horses on the footway. Mr. Axe, the policeman who arrested him, describes him as violently excited and exerting great strength in keeping his hold on their heads. White and Green were arrested at about the same time. What occurred afterwards is not important except that their arrest seems not to have prevented a fresh outbreak of similar violence. The crowd moved up Chestnut street and the disturbance continued. If you believe the witnesses for the prosecution, and give due effect to their testimony, you will probably have no doubt that the defendant, at the time of his arrest was engaged with others, both in obstructing the execution of process by the marshal, and in attempting to rescue from custody the fugitive whom the marshal's deputies had in charge. The latter, as I will state hereafter, is the only offence for which the defendant is on trial.

The defendant is not thus guilty unless he thus acted knowingly and wilfully. He however cannot allege ignorance of law as an excuse. No man can ever allege this excuse. Every person is bound, and is presumed, to know the law. Otherwise the pretence or excuse of ignorance of it would be urged in every case. The only ignorance that can be alleged in excuse is ignorance of the fact which renders an act unlawful. In this case, the only excuse which could be admitted under this head is that of ignorance that the fugitive was in lawful custody. The question of such ignorance in cases under the fugitive slave laws has usually arisen where an alleged fugitive was in the hands of the claimant, or his agent; that is to say, in the hands of private persons not officers of the law. The circuit court of the United States for the Ohio district have decided many such cases, particularly under the act of 1793. In two cases that court used words which I will quote: "To bring an individual within the statute, he must have knowledge that the colored persons are fugitives from labor, or, he must act under such circumstances as show that he might have had such knowledge by exercising ordinary prudence." Giltner v. Gorham [Case No. 5,453]; Weimer v. Sloane [Id. 17,363]. Without stating any rule in this precise form of words, I instruct you that if the defendant, from circumstances within his observation or means of immediate inquiry, might readily have known the truth, a belief of his actual knowledge of it may be reasonably deduced. In cases of mere private custody of an alleged fugitive, the application of such a rule may, according to varying circumstances, be difficult or easy. But there seldom can be difficulty where the custody is that of an official person. The true character of such a custody if not apparent or known, may usually be ascertained without any difficulty by a person desirous of knowing the truth. In this case, the place, the persons and the circumstances, indicated that the custody was both lawful and official. Could there have otherwise been any doubt it would have been removed by the fact that the city police, with their badges exhibited, were on the spot. They would, if there had been any thing unlawful, have been the persons to redress the wrong. If you believe the testimony, they must have been seen to be protecting, or endeavoring to protect, the carriage and those in it from such violence as that in which the defendant was immediately afterwards engaged. You probably, therefore, would have no difficulty in finding that he acted knowingly and wilfully, if the case rested upon the testimony for the prosecution alone. But the defendant has examined a number of witnesses, as persons in the same situation as himself in respect of the occurrences in controversy, every one of whom, so far as I remember—certainly almost every one—knew the general character and particular description of the case that was pending; knew that the person put into the carriage was the fugitive or alleged fugitive; knew that he was in custody of the marshal; knew the person of either the marshal himself, or of one of the deputies who accompanied the prisoner; and knew the court room and the marshal's office, and, of course, knew the doorway leading from it into the street. (Some parts of the testimony under this head were here particularly quoted by the court in the words of the respective witnesses.) The defendant's testimony on other points is of no materiality that I can perceive. (Here the court reviewed this testimony in detail, comparing it with the counter evidence.) If the jury take a different view of the evidence, the decision upon the facts is for them, and not for the court. This remark applies to all the facts in the cause. If there is any reasonable doubt concerning them, the defendant is entitled to the benefit of it.

The testimony as to his general good character should avail him so far as it may serve to create any reasonable doubt of his guilt, or to increase any doubt of it that might otherwise have existed.

A suggestion on behalf of the defendant is made in the form of a complaint urged against the marshal, or some of his deputies, for keeping colored persons out of the court room during the hearing of the case of the fugitive slave, though white persons were admitted without objection. I do not understand the bearing of the testimony under this head as matter of defence. If the complaints were well founded, it would not justify, or excuse, an assault upon the officers, much less an obstruction of the execution of legal process, or an attempted rescue from official custody. Independently of any question in this cause, the subject is, however, of great importance; and, as it has been publicly discussed, should not be passed without notice. If colored persons, as a class, were excluded from the court room for any reason which would not, under like circumstances, apply to white persons, a mistake was committed. The marshal had no right or power to exclude them for any such reason. I cannot believe that he or his deputies were so ignorant of their duty that such a mistake was committed. But if a class of persons, white or colored, are, for any reason, dangerous attendants upon a court, so dangerous as to interfere with its police and security, some discrimination as to their unlimited admission may, from necessity, be exercisable while the danger continues. Courts of justice must be open; but their police must also be maintained. If a subject of judicial investigation is one as to which any known class of persons are too much excited in feeling to be able patiently to attend upon its discussion, an indiscriminate admission of all persons of the class would sometimes be very dangerous. (Here the court exemplified this proposition in its possible application to cases other than that in question.) In the case of a fugitive slave, the danger of admitting indiscriminately persons whose feelings might have prompted them to act like those who made the attack upon the carriage on the occasion in question, might endanger the police of a court. This danger, where it exists, the marshal, who maintains its police, cannot properly disregard. A discrimination of some kind appears to have been exercised by him on the occasion in question. Colored persons, including those who afterwards committed acts of illegal force, appear to have attended in great numbers, and to have endeavored to obtain admission into the court room an hour before the time at which the court was to be opened. Had they been indiscriminately admitted at that time, the court room and its avenues would probably have been occupied by them to the exclusion of all other persons. What may have been observable during that hour of the temper and feeling of these colored persons, what may have been known of the character or former conduct of any of them, we could not here inquire. But, the events of the afternoon prove that there may have been sufficient reason for the marshal's refusal to admit them indiscriminately in the morning. We have no means of inquiring into the reasons by which his discrimination was particularly regulated. The testimony shows that colored persons of good character, whose usual deportment was quiet and orderly, were not able to command their feelings on the day in question so as to abstain from acts of lawless violence. This proves that any exercise of discrimination on his part must have been attended with embarrassing difficulties and possibly dangers. That colored persons generally were excluded from the court room seems to be true. That they were not excluded indiscriminately is, however, not less true. In the course of the testimony, it came out casually that the marshal himself directed the admission of one to whom entrance had been refused by the deputy; and that the deputy, without the marshal's order, admitted another. There is no reason to believe that others may not also have been admitted. One witness, the colored clergyman, who was refused admittance, says that he had "quite a squabble" with one of the marshal's deputies. This witness admits that his feelings were deeply interested. How far he may have been excited, whether he may have used language of a tendency to excite the feelings of others, are inquiries which would have been out of place here. But such considerations may not have been improperly entertained by the marshal on that occasion. Besides his duty to maintain the police of the court, he had the custody of the fugitive, and was liable for an escape though he had been forcibly rescued. We therefore cannot, in a collateral proceeding like the present, ascertain whether his conduct was, or was not, wisely regulated in the precautions which he used in order to prevent an indiscriminate admission of all persons into the court room. Had a rescue been the result of his omission to adopt adequate precautions, the case might have undergone an investigation in which his neglect would not have been thought excusable. It is fortunate for the jury, and for the country, that we are not now engaged in such an investigation.

The duty of stating and explaining the law of the case remains to be performed. This duty devolves upon the court. In a criminal case, the jury can judge of the law as well as of the facts. But where the jury cannot know the law otherwise than as it may be stated by the court, their duty is to believe that the court states it correctly. If there existed no law for the punishment of an act like that of which the evidence tends to prove this defendant guilty, the United States would cease to have a government. No gov-

ernment can be administered unless its laws can be enforced, and resistance of their execution punished. Under the government of the United States, large standing military garrisons posted throughout the land in strong fortresses have not been thought necessary for the enforcement of the laws. No such military organization will become necessary, so long as the government's judicial organs, which designation includes juries as well as courts, fulfil their duties to the constitution and the laws.

The only question of law which has not already been sufficiently considered is, whether the present prosecution can be sustained under the indictment? The act of 1793 imposed penalties for obstructing an arrest by the claimant, and rescuing, harboring, or concealing the fugitive. But these were only pecuniary amounts, recoverable in a civil action by the claimant for his own benefit. Under this act, there was no official custody of an alleged fugitive slave except constructively during the hearing before the judge or magistrate. But, under the act of 1850, the proceedings may, at every stage of them, be conducted under legal sanction, and the alleged fugitive may, not only during the hearing, but before and after it, be in custody under legal process. This, however, as we have already seen, is an optional method of proceeding. The claimant in person, or by an unofficial agent, may still make the arrest without process, and bring the fugitive before the court, or judge, or commissioner; and, after the receipt of a certificate under the act, may take the fugitive into his private custody, without asking official protection of any kind. The 7th section of the act, in view of these alternative and optional modes of proceeding, made it a criminal offence knowingly and willingly to obstruct, hinder, or prevent the claimant, his agent, or assistants from arresting the fugitive with or without process, or to rescue or attempt to rescue him from the custody of the claimant, his agent, or assistants, when arrested, or to aid, abet, or assist the escape of the fugitive from the claimant, his agent, "or other person or persons legally authorized as aforesaid," or to harbor or conceal the fugitive so as to prevent his discovery and arrest after notice or knowledge that he was a fugitive from service or labor. The indictment is founded upon this enactment. It charges an attempted rescue of the fugitive. The first count, after stating the warrant of arrest, and subsequent proceedings to the granting of the certificate, avers that the affidavit of apprehension of a rescue was afterwards made by the claimant, and lays the offence as an attempt to rescue from the custody of the marshal, and the persons employed by him according to the provisions of the act. The second count, not mentioning the affidavit, lays the offence as an attempt to rescue from the custody of the claimant, and certain persons described as his assistants, who, in fact, were the marshal, and persons mentioned in the first count. These two counts are properly joined in the same indictment. But it does not follow that a verdict of guilty upon both can be properly found. If the claimant, after the receipt by him of the certificate, had not taken the affidavit, your verdict, if rendered against the defendant, would have been properly found upon the second count. But, as the affidavit was taken, and neither the claimant, nor any unofficial agent on his part, was actually present when the offence was committed, the verdict, if against the defendant, should, I think, be a verdict of guilty upon the first count only.

The remaining inquiry, therefore, is, whether the prosecution can be supported upon the first count. On this point I had some doubt in an early stage of the trial. But this doubt has been removed; and I am now of opinion that the prosecution, so far as the case depends upon matter of law, can be maintained upon this count. The objections to this view of the question will be stated and answered. They depend upon an assumption of three propositions. The first is that an obstruction of an officer of the United States in the execution of legal process of any kind is indictable under the 22d section of the act of congress for the punishment of crimes, passed on April 30, 1790, before any legislation of the United States, as to the reception of fugitive slaves, and that the defendant, if guilty of any offence, was indictable under that act. The second proposition is, that when the claimant, after the receipt of the certificate, made the affidavit, the custody of the fugitive was in the marshal alone, and was, in law, an exclusively official custody. The third, stated partly as an independent proposition, and partly as connected with, or dependent upon the first and second, is, that the 7th section of the act of 1850 does not apply to any interference with or obstruction or prevention of an officer of the United States in the execution of process, but was intended only for cases of interference with or obstruction of private persons having a fugitive slave in lawful custody.

The first proposition, that this defendant might have been convicted under the act of 1790, of an obstruction of the marshal in the execution of process, is, I think, true. I do not think that this exempts the defendant from being liable also under the present indictment founded upon the act of 1850. The first proposition will, however, be considered, in order that its connection, or want of connection, with the two others, may afterwards be discussed. The 22d section of the act of 1790 made it a criminal offence, knowingly and wilfully to obstruct, resist, or oppose any officer of the United States in serving, or attempting to serve or execute any mesne process, or warrant, or any rule or order of any of the courts of the United States, or any other legal or judicial writ or process what-

ever, or to assault, beat, or wound any officer or others person duly authorized in serving or executing any writ, rule, order, process, or warrant, aforesaid. This section, and some others of the same act, are prospective in their operation. The section applies, therefore, to obstructions of the execution of process by officers of the United States, acting under jurisdictions established by subsequent acts of congress. In the language of Judge Washington, it includes all legal process in the hands of an officer of the United States. U. S. v. Lukins [Case No. 15,639]. His language, which I have only partially quoted, justifies the remark of Judge Curtis, in the year 1851, repeated in 1854, that "it embraces every legal process whatever, whether issued by a court in session, or by a judge, or magistrate, or commissioner, acting in the due administration of any law of the United States." 2 Curt. 639, Append. This remark, it is true, was made only in a charge to a grand jury; and therefore has not the authority of an expression of an opinion in the course of a legal adjudication. But the subject came soon after before the same judge in a judicial proceeding in which it was assumed, though not decided, that an attack upon the marshal while in custody of an alleged fugitive from service, could, if the indictment was properly framed, be made the subject of criminal prosecution under this section of the act of 1790. It also appears that the subject had been for three years under the consideration of Judge Curtis, without any change in this opinion expressed by him originally in the year 1851. Independently of this authority, I should, upon the words of the act, and the authority of Judge Washington's opinion, have arrived at the same conclusion. I have, therefore, no difficulty in stating my opinion that any wilful obstruction of a marshal, deputy marshal, commissioner, or other officer of the United States, while executing a warrant of arrest under the fugitive slave law of 1850, or while in custody of a fugitive, in consequence of a claimant's affidavit, made after the certificate has been delivered to him, is indictable under the act of 1790. But, I am of opinion, as will appear more fully in considering the second proposition, that it is thus indictable only where the marshal is in the actual custody of a fugitive.

The second proposition as to the alleged exclusiveness of the marshal's custody has been in part anticipated at the commencement of this charge. The constitution requires the delivery of the fugitive to the claimant, whose relation to him is that of a master to a servant. As a husband may retake his wife, a parent his child, or a guardian his ward, so a master may retake his servant wherever he may find him; and, in the case of a servant of this description, may retain him in custody and under control. In defining the power and rights of the person to whom the service or labor is due, elementary rules of jurisprudence as to these domestic relations, contained in 3 Bl. Comm. 4, have therefore been adopted by the supreme court as applicable to the interpretation of acts of congress passed under this clause of the constitution, and even to the interpretation of the constitutional provision itself. [Prigg v. Pennsylvania] 16 Pet. [41 U. S.] 613; [Jones v. Van Zandt] 5 How. [46 U. S.] 229. A parent's or guardian's custody of his child, or a master's proprietary custody of his slave may be assisted, promoted, enforced, or maintained by the custody of an official functionary. But, in an ordinary case, the assistance of such a functionary to the lawful custody of the master, does not supersede or annul it, and, under the constitution and laws of the United States, could not lawfully annul it. Consequently, though the marshal's custody of the fugitive in this case was official, so far as it extended, yet, it was not through any legal necessity, exclusive. It may have been exclusive in fact, but it was not, even then, independent of possible intervention by the master.

The act of 1850, makes it the duty of the officer, after the certificate issued, upon the affidavit of apprehension of rescue, to retain the fugitive in custody for the purpose of removal. The counsel on both sides agree that this word "retain" defines the character of the official custody, which must, for general purposes, be the same before and after the certificate. There is, however, a certain specific distinction which may, for particular purposes, be attended with important differences. Until the certificate is issued, the right of the claimant is undetermined. The period of the hearing of the case may be excluded for the present from consideration. In this period there can be no control or direction on the part of the claimant, and the custody of an officer must be subordinate to that of the court, or judge or commissioner. The distinction to which I advert is between the custody which before the hearing may exist under the warrant of arrest, and the custody which may, after the certificate, be retained by the officer in consequence of the affidavit of apprehension of rescue. The warrant of arrest is legal process directed to the officer, which he is bound to return to the court or judge or commissioner. Whether the proceeding under this writ, until it is executed by an arrest, is under the exclusive control of the claimant is a question which it is not necessary to decide. When it has been primarily executed by an arrest, the claimant before it is returned to the court, or judge, or commissioner, may possibly have the right of abandoning the proceeding, and ordering the alleged fugitive to be set at liberty. Whether the alleged fugitive may not insist on being brought before the court, or judge or commissioner is a point upon which it is not necessary to express an opinion. The claimant certainly cannot, for any other purpose than that of the absolute liberation of the alleged fugitive, interfere with the official custody of

him between the time of arrest, and the time at which the process is returned to the court, or judge or commissioner. Unless there is an absolute discharge, the officer must return it and bring in the alleged fugitive. To this extent the claimant, by taking out the process, has, until its return, surrendered or qualified the personal exercise of his alleged right as master. But, in this interval between the arrest and the return, the custody of the officer is, even to this extent, exclusive in those cases only where it is an actual custody. When he does not find the alleged fugitive, the claimant, if able to find him, can lawfully take him. If, after arrest, the officer dies, or becomes incapable of acting, or if he wrongfully refuses to retain the fugitive in order to return the writ, and improperly liberates him, the claimant may take or keep him as if there had not been any process. In these, and in other cases which might be specified, the claimant, at the peril of afterwards proving his ownership of the fugitive, may take him or may temporarily control and regulate the custody. This could not be done under process in an ordinary legal proceeding. Under the warrant of arrest, there may possibly be difficulties inherent in some of these questions. But, there can be no such complication after the certificate has conclusively settled the question of the right of removal. The marshal, or other official custodian,—when the affidavit of apprehension of resuce has been taken after certificate issued—retains his former custody against all the world except the claimant; but he retains it for the exclusive protection and security of the claimant, whose concurrent, or substituted control or custody of the fugitive cannot then be wrongful. The certificate is conclusive of the right of removal to the state from which the fugitive had escaped, and no tribunal can question its effect for the purposes of the removal; but, it is not like the warrant of arrest, returnable to the court, or judge, or commissioner by whom it was issued. It is not, like the warrant of arrest, process directed to the officer. It is a certificate in favor of the claimant himself. So far as it constitutes a warrant for the removal of the fugitive, it is exercisable by the claimant whose right has been established. The custody of the marshal is, therefore, as between him and the claimant, auxiliary only. He is an official assistant of the claimant. In order to give the full protective benefit of his official character to the claimant, the act of congress prescribes that the custody shall be not less official than under the former warrant of arrest. Nevertheless, the claimant in whose favor the certificate has been awarded, may at any time, discharge the officer, may act as the custodian of the fugitive while the officer is present. Questions may indeed arise whether this can be reasonably done by a claimant who requires the continuance of the marshal's custody. But such questions can occur only between the officer and the claimant, and must be settled between themselves. Third persons cannot be concerned in any such question. The custody of the marshal, therefore, though it may be exclusive in fact, is not necessarily from its character, exclusive in law. Consequently, as I have already instructed you, an indictment which alleges an attempt to rescue from the custody of the officer and his assistants would not be supported by the mere production of the certificate of removal and affidavit of apprehension of rescue, and proof of a subsequent attempt to rescue, without the further proof, which has been adduced here, that the officer had, in fact, the custody when the attempt was made.

If the foregoing views are correct, a principal difficulty which might otherwise have been encountered in considering the third proposition, has been removed. This proposition is, that the 7th section was not intended to apply to an attempt to rescue from the custody of an officer of the United States, but was applicable exclusively to such unlawful interferences with unofficial custody, as would not have been indictable under the act of 1790. When the words of the 7th section are carefully considered, their applicability to lawless interferences with such official custody as the other enactments of the statute authorize becomes unquestionable. The question specifically presented might be discussed on somewhat narrow, or on more extended views. The result of each mode of reasoning would, perhaps, be the same. Under the narrower view, it is obvious that there might be cases of such attempts to rescue from official custody as would fail or be frustrated before they amounted to obstructions of the official execution of process. Such attempts would not be indictable under the act of 1790. According to the argument in this case for the defence, an attempt of this kind to rescue from private custody would be indictable, but the more aggravated offence of such an attempt to rescue from official custody would not be punishable. There is no probability that this can have been intended by congress. But the question may, I think, be determined on the broader ground, that there is no distinction between an official and an unofficial custody under the 7th section of the act of 1850 except so far as the phraseology of indictments may require variation in order to adapt them to the specific distinctions of different cases under the act. That this was the opinion of Judge Nelson appears from his charge to the grand jury, delivered at the October sessions of 1851, in the circuit court for the Northern district of New York. 2 Blatchf. Append. 560. I do not refer to what he said in such a charge as having the full force of judicial authority. But this charge serves to explain the form of the indictment afterwards found in the case of U. S. v. Reed [Case No. 16,134]. This indictment had been removed by certificate from the district into the circuit court. In another case, U.

S. v. Cobb [Id. 14,820], in which the opinion of Judge Conkling on a preliminary hearing is reported, a bill had also been found in the district court, and, as I infer from a subsequent account of it, had also been certified into the circuit court. In each case, as we may infer from the reports which we have, the indictment was founded upon the 7th section of the act of 1850. Both cases arose from the rescue of an alleged fugitive slave on 1st October, 1851, at Syracuse. The rescue was from a deputy marshal who had him in custody under a warrant of arrest issued by a commissioner. This rescue had prevented any hearing from taking place. The case was, therefore, that of a rescue from a custody of a character as official as any of which the existence under the act of 1850 can be recognized as possible. A motion was made afterwards to quash the indictment. This was about a year after the charge of Judge Nelson to the grand jury. The point now in question does not appear to have been made in the argument of the motion. It may perhaps have been reserved by counsel to be taken on the trial, or upon a motion in arrest of judgment. But attention must have been directed to it from the remarks upon it in the previous charge to the grand jury; and the reasoning and remarks in the court's opinion [U. S. v. Reed, supra] seem to cover the question and to affirm the validity of an indictment under the act of 1850, for a rescue from official custody. The same view seems to have been tacitly assumed to be correct in U. S. v. Williams [Case No. 16,705], in the circuit court for this district, under an indictment for obstruction of process, tried before Judge Kane after the decision of a well-known case arising from the same transaction, in which there had been a prosecution for treason.

Independently of any reported case, I would have arrived at this conclusion upon the words of the act of 1850. It certainly makes the offence of preventing an arrest indictable, whether the claimant, or those assisting him, were endeavoring to make it "with or without process;" and the context shows a connection of these words with the subsequent specification of the other offences, including that of a rescue or attempt to rescue. Therefore, if the acts which are in question in this case had occurred before the hearing, the offence would have been indictable, though the alleged fugitive had been in the custody of the marshal. Consequently, the official character of the custody was, in the primary stage of the proceeding, immaterial. We have seen that, if there was any distinction after the certificate and affidavit, the official character of the custody was then, in law, less material. But the act seems, in this respect, to place them on the same footing, by enacting, in effect, that the officer shall, in this latter stage of the proceeding, retain his former custody. The rule must therefore be the same in both stages, and the reason for its application in the latter stage is more forcible. I am consequently of opinion that, if you take the view of the facts which the testimony appears to warrant, your verdict, so far as the law of the case is concerned, should be that the defendant is guilty on the first count, and not guilty upon the second count, of the indictment.

Verdict accordingly.

Case No. 14,680a.

UNITED STATES v. BUETE.

[2 Hayw. & H. 49.] [1]

Circuit Court, District of Columbia. May 31, 1851.

PERJURY—AFFIDAVIT—EVIDENCE.

1. In a trial for perjury, it is proper to admit the affidavit of another party to be read to the jury, for the purpose of showing what the prisoner swore to; the evidence showing that it was on the same sheet of paper, and the prisoner's affidavit referred to the former affidavit in these words: "Well acquainted with the within Brown, who signed and swore to the within declaration."

2. The testimony of the marshal, that a party named Brown evaded criminal process, without showing its connection with the prisoner's case, ought not to have been admitted, as it was not relevant to the issue, and may have injuriously prejudiced the case of the prisoner in the view of the jury

Error to the Criminal Court of the District of Columbia.

On the following indictment: "District of Columbia, County of Washington, to wit: The jurors of the U. S., for the county aforesaid, on their oaths present that Henry Buete, late of the county aforesaid, laborer, falsely intended to defraud the U. S., and wickedly and maliciously contriving and intending to aggrieve and injure the heirs and legal representatives of one William Brown, deceased, on the 5th day of February, 1849, at the county aforesaid, came in his proper person before one, Samuel Grubb, the said Samuel Grubb being a justice of the peace, and for the county aforesaid, duly qualified and commissioned, and then and there in due form of law was sworn and took his corporal oath on the Holy Evangely of Almighty God, and then and there falsely swore on the Holy Evangely of Almighty God, (the said Samuel Grubb then and there having a lawful and competent power and authority to administer such oath,) that one George F. Brown was the brother of William Brown, who was a first sergeant in Co. G, 3rd regiment of artillery, in the army of the United States, and that the said William Brown was never married, and left no father or mother, brother or sister other than the said George F. Brown, whereas in truth and in fact the said George F. Brown was

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

not the brother of the said Wm. Brown. And the jurors aforesaid, on their oaths aforesaid, further present that the oath so taken falsely as aforesaid by the said Henry Buete was material, in order to enable the said George F. Brown to obtain from the government of the U. S. certain county land, to which the said Wm. Brown, the deceased, was entitled, and that the said oath so taken falsely as aforesaid was taken in support of a claim against the U. S. And the jurors aforesaid, on their oaths aforesaid, further present that at the time of his taking the oath aforesaid, the said Henry Buete well knew that the said George F. Brown was not the brother of the said Wm. Brown. And so the jurors aforesaid, on their oaths aforesaid, do say that the said Henry Buete, on the 5th of Feb., 1849, at the county aforesaid, before the said Samuel Grubb, justice of the peace as aforesaid, (he, the said Samuel Grubb, then and there having such powers and authority as aforesaid,) by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, feloniously, falsely, wickedly, willfully and corruptly, did commit willful and corrupt perjury, and feloniously, wickedly, willfully and corruptly did swear falsely in support of a claim against the U. S., to the great displeasure of Almighty God, in contempt of the United States and their laws, to the evil and pernicious example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace and government of the U. S."

The exceptions to the rulings of the judge of the criminal court are given in the opinion. The jury brought in a verdict of guilty, and the defendant was sentenced to imprisonment, at labor in the penitentiary of the District of Columbia, for the period of four years.

P. R. Findall, U. S. Atty.

DUNLOP, Circuit Judge. The first bill of exceptions in this record presents solely for review in this court the correctness of the ruling of the judge of the criminal court, in admitting on the trial before the jury the affidavits of George F. Brown, and of the prisoner Henry Buete and Albert Hoffer, of the 5th of February, 1849, as set forth in the record. The indictment against Buete was for perjury, and averred the falsehood to be that George F. Brown was the brother of William Brown, an oath made to enable George F. Brown to obtain from the United States certain bounty land due to the representatives of the deceased William Brown, a soldier killed in battle, in the service of the United States, in the war with Mexico, on or about the 20th of August, 1847. The indictment further averred that George F. Brown was not the brother of William Brown, and that Buete well knew it when he took the false oath. Buete's affidavit, in which Hoffer joined, was clearly admissible evidence to the jury—it was the basis of the prosecution—the United States could not prove the affidavit to be false, without first showing to the jury what the oath was, and what Buete had sworn to. George F. Brown's affidavit and Buete's affidavit, the evidence in the bill of exceptions shows were on the same sheet of paper, and Buete's affidavit refers to Brown's in these words, "well acquainted with the within named George F. Brown, who signed and swore to the within declaration, claiming bounty land, &c." Brown's affidavit therefore was admissible, if for no other purpose to explain and make certain to the jury what Buete had himself sworn to. To this extent, and for this object, it cannot be said to be res inter alios acta. We see no error in the opinion of the judge of the criminal court, as presented on the first bill of exception.

The second bill of exceptions, among other things, contains the following statement: "And the said United States, in order further to support the issue on their part, joined offered evidence tending to prove that at the last term of the criminal court of the District of Columbia, the grand jury for Washington county, in said district, found an indictment against the said George F. Brown, otherwise called George Brown, for false swearing in said affidavit, so made by him before Justice Grubb as aforesaid; and that said affiant fled from justice and has not appeared to answer to said indictment, which evidence the court refused to allow to go to the jury, but ruled that the marshal of the United States, for the district aforesaid, a witness in the cause on behalf of the United States, might be examined, and asked whether he had in his hands criminal process against the said George F. Brown, otherwise called George Brown, returnable to the present term of the said criminal court, and whether he had been able to find said defendant and serve said process on him, and thereupon the court propounded said questions to Richard Wallack, marshal and witness as aforesaid; and said witness answered that he had in his hands criminal process against one George F. Brown, otherwise called George Brown, returnable to the present term of the said criminal court, that he had endeavored, but had not been able after the most diligent enquiry to find said Brown and serve said process on him, and that said Brown had not appeared to said process and to the evidence of said Richard Wallack; the counsel for the prisoner objected, but the court overruled said objection and allowed the said evidence to go to the jury, whereupon the prisoner, by his counsel, excepts, &c."

The evidence thus admitted by the judge, we think, was not relevant to the issue, and may have injuriously prejudiced the case of the prisoner in the view of the jury. It

was more objectionable, vague and uncertain, than that offered by the United States, which the judge had before properly rejected. In a separate indictment against Buete for perjury, as this was no act of Brown, could rightly prejudice the accused, unless he was connected with them by evidence. Even a conviction of George Brown for perjury, in the matter of his affidavit, would not, we suppose, be admissible evidence in a trial on this indictment against Buete, to establish the facts that George Brown was not the brother of William Brown, and that Buete knew the fact to be so when he took the alleged false oath. But however this may be, which we need not now decide, it seems very clear that George F. Brown's evasion of criminal process in the hands of the marshal, without showing what that process was, and its connection with Buete's case, and said Brown's neglecting to appear to it ought not to have been admitted on this trial against Buete for perjury.

The judgment of the criminal court must therefore be reversed, and the cause remanded, with directions to the criminal court to award a venire facias de novo.

Case No. 14,681.

UNITED STATES v. BUFFALO PARK.

[16 Blatchf. 189; 25 Int. Rev. Rec. 359; 8 Reporter, 582.] [1]

Circuit Court, N. D. New York. April 16, 1879.

INTERNAL REVENUE—TAX ON GROSS RECEIPTS—PUBLIC EXHIBITION—RACE TRACK.

A corporation which maintains a driving track, with stands and other conveniences for horse-racing, and annually, for several days in succession, devotes such track to horse-racing, and keeps its grounds open, for pay, to the public, and realizes money therefrom, is not liable to a tax on its gross receipts, under section 108 of the act of June 30, 1864 (13 Stat. 276), as conducting a public exhibition of feats of horsemanship, or a show which is opened to the public for pay.

[Cited in The Viola, 59 Fed. 635; The Ceres, 61 Fed. 702.]

At law.

Richard Crowley, U. S. Dist. Atty.

Bass, Cleveland & Bissell, for defendant.

WALLACE, District Judge. This is an action to recover the amount of a tax claimed to be due under section 108 of the act of June 30, 1864 (13 Stat. 276), which provides, that "any person, firm or corporation, * * * conducting or having the management of any theatre, opera, circus, museum, or other public exhibition of dramatic or operatic representations, plays, performances, musical entertainments, feats of horsemanship, acrobatic sports or other shows which are opened to the public for pay, but not including occasional concerts, school exhibitions, lectures or exhibitions of works of art, shall be subject to and pay a duty of two per centum on the gross amount of all receipts derived by such person, firm, company or corporation from such representations, plays, performances, exhibitions, shows or musical entertainments."

The defendant is a corporation existing under a special act of the legislature of the state of New York, which permits it to acquire land for a public park, and to construct riding and driving tracks and fair or show grounds; and it is authorized to give premiums to encourage competition and improvement in the mechanical arts, in the breed, usefulness, pace and value of horses, cattle and other domestic animals, and in agriculture and horticulture. It is authorized to charge for admission to its grounds. Pursuant to the object of its incorporation the defendant did construct a driving track, with stands and other conveniences for horse-racing, and annually, during the period for which the tax is claimed, for several days in succession, devoted its driving track to horse-racing, and kept its grounds open, for pay, to the public, realizing therefrom the sum of $58,284. The question in the case, and the only question, is, whether such an exhibition is within the statute which imposes the tax. It is an exhibition of feats of horses and not of their riders, and, therefore, not within the statute, as an exhibition of "feats of horsemanship." If such an exhibition is included, it is because it is one of the "other shows which are opened to the public for pay," within the meaning of the statute. If it had been intended to tax the receipts of all public exhibitions, that purpose could have been tersely and completely expressed, without enumerating specifically various kinds of public exhibitions. The enumeration of the specified exhibitions indicates that these were the special subjects of legislative consideration. Some effect, however, must be given to the general descriptive term, "other shows;" otherwise, it would not have been employed. This is done by construing the general term to cover all other exhibitions of a similar kind to those which were present to the legislative contemplation, but not to include such as are not reasonably suggested by those specifically described. In the construction of statutes and of contracts, where general words of description follow particular ones, the general words are controlled and limited by the particular ones, so as to apply to subjects ejusdem generis. Thus, in the case of Sandiman v. Breach, 7 Barn. & C. 96, the statute enacted, that no "tradesman, artificer, workman, laborer, or other person," should do or exercise any worldly business or work of their ordinary callings upon the Lord's day, and it was held that stage drivers were not included in the terms "other persons."

The statute in question forms part of a comprehensive scheme of taxation, one fea-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 8 Reporter, 582, contains only a partial report.]

ture of which is the taxation of the profits or income of business avocations. Among well recognized business avocations is the management of many kinds of public exhibitions. Other public exhibitions, although conducted for profit in exceptional instances, are not primarily conducted for this end. It is evident that this distinction was present in the minds of the legislature. Operas, museums, circuses and theatres are particularly mentioned in the statute, and they are all of the class of exhibitions ordinarily presented for profit and managed as business ventures. Closely approximating to theatres and operas are "exhibitions of dramatic or operatic representations, plays, performances, musical entertainments," and to circuses are "feats of horsemanship or acrobatic sports," but with differences which suggest the necessity of a particular enumeration. Then, for greater precision, the statute excepts certain entertainments or exhibitions which might otherwise be deemed included in the class described, but which are usually presented not primarily for profit, but for the education and improvement of the public. Thus it seems that the line is quite clearly defined, between exhibitions which are intended by their projectors for profit, and usually managed as business enterprises, and those which are not followed as business avocations. Fairs, industrial exhibitions and entertainments for charitable purposes, are all of them "shows which are opened to the public for pay," but they are not named and are not within the description of the exhibitions taxed. They are as much so, however, as are horse-races, base-ball matches, regattas, or various other "shows," which might have been subjected to tax. The defendant is not liable to a tax.

Judgment is ordered for the defendant.

UNITED STATES (BULLITT v.). See Case No. 2,128.

Case No. 14,682.

UNITED STATES v. BURCH.

[1 Cranch, C. C. 36.] [1]

Circuit Court, District of Columbia. July Term, 1801.

INTERNAL REVENUE — SELLING LIQUOR WITHOUT LICENSE—INDICTMENT—SALE BY WIFE.

The day laid in an indictment for selling whiskey is not material. Selling by the wife, with the knowledge and assent of the husband, is the selling of the husband.

Indictment for retailing whiskey without license.

THE COURT was of opinion that the day is not material if the fact be proved to be committed before the indictment found. That the selling by the wife, with the knowledge and assent of the husband, is the selling of the husband.

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

Case No. 14,683.

UNITED STATES v. BURCH.

[1 Cranch, C. C. 36.] [1]

Circuit Court, District of Columbia. July Term, 1801.

DISORDERLY HOUSE—INDICTMENT—TIME LAID—FORMER CONVICTION.

1. The time laid in the indictment for keeping a disorderly house is not material.

2. A conviction is a bar to prosecution for all the time previous to the conviction.

Indictment for keeping a disorderly house.

THE COURT was of opinion that the time is not material if before the indictment found. The keeping of a disorderly house is a single offence, and one conviction is a bar to a prosecution for keeping a disorderly house at any time prior to the finding of the indictment.

Case No. 14,684.

UNITED STATES v. BURDETT et al.

[2 Sumn. 336.] [2]

Circuit Court, D. Massachusetts. May Term, 1836.

CUSTOMS DUTIES—PRODUCT OF FOREIGN FISHING.

Where whales are caught, and oil is manufactured, by the crew of an American vessel, the oil is not the product of "foreign fishing," within the purview of the revenue laws of the United States, though it has since been owned, and brought into port, by persons in a foreign service.

Writ of error from the district court of the United States for the district of Massachusetts.

The original suit was debt on a duty bond. At the trial a bill of exceptions was offered, and signed, in substance as follows: The defendants proved, that the ship Helvetius, a ship of the United States, and owned by certain citizens of the United States, sailed from New London on a whaling voyage, on the 4th of July, 1832. That she went into the Pacific Ocean, and on her voyage took 1,500 barrels of spermaceti oil. The Helvetius, with all this oil on board, was stranded on the coast of Oahee, one of the Sandwich Islands, on the 9th of November, 1834. About one third of the oil was lost when the vessel was wrecked, and the voyage was broken up. Of the oil that was saved, one third went to the salvors. The king of the island, John C. Jones (the consul of the United States), and French & Co. were the salvors. The said Jones, and French & Co. were citizens of the United States, then residing on the said island, and transacting business there. The share of the oil belonging to the king, in manner aforesaid, was sold to William S. Hinckley, who is a native citizen of the United States. The crew of the Helvetius were paid off in oil, and their share, being about

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

[2] [Reported by Charles Sumner, Esq.]

4,000 gallons, was bought by said Hinckley. All the oil thus purchased by Hinckley, was shipped by him on board the barque Don Quixotte, a vessel of the United States, and consigned to Henry Burdett, one of the defendants, who is a citizen of the United States. The bond in suit was given for the duties claimed to be due on the oil consigned to said Burdett as aforesaid.

On this evidence, the attorney for the United States requested the honorable judge to instruct the jury, that the oil aforesaid, within the meaning of the statute of the United States, was oil of foreign fishing, and subject to duty, and that the plaintiffs were entitled to a verdict to the amount then due on the bond aforesaid. But the judge refused so to instruct the jury. On the contrary thereof, the jury were instructed, that the oil in question, being the production of United States fishery, could not be considered, under the circumstances proved, to be of foreign fishery, within the intent and meaning of the laws of revenue, or as such liable to the duties for which that said bond was taken.

Judgment was rendered in favor of the defendants, upon the verdict; and the present writ of error was brought to revise that judgment.

Mr. Mills, U. S. Dist. Atty.

C. P. Curtis and E. G. Loring, for defendants.

STORY, Circuit Justice. My judgment is, that the opinion of the district judge was perfectly correct, as it was laid down to the jury at the trial. The question is, whether this oil was the product of "foreign fishing," within the true intent and meaning of the revenue laws of the United States. Whether foreign or not, depends upon the character of the vessel, and the voyage at the time when the whales were caught, and the oil manufactured; and not upon any subsequent events. Now, it is not disputed, that the Helvetius was an American vessel, duly licensed and employed in the whale fisheries under the authority of our laws; and that the oil was manufactured from whales caught by her crew during her whaling voyage. If so, it was clearly in the sense of our laws, not the product of "foreign fishing," for that means fishing in or by foreign vessels under foreign flags; but strictly domestic fishing, or American fishing. If this oil had been brought into our ports by the Helvetius, there could be no doubt, that it would not be liable to duties, as the product of "foreign fishing." It can make no difference in its original character, that it has come into port in another vessel. The question is not, by whom it is owned, or by whom imported; but whether manufactured by persons in a foreign service, or by persons in the American service. It takes its character from its origin. "Noscitur ab origine." The judgment must, therefore, be affirmed.

Case No. 14,685.

UNITED STATES v. BURFORD.

[2 Cranch, C. C. 102.] [1]

Circuit Court, District of Columbia. June Term, 1814.

WITNESS—PROSECUTION FOR PERJURY—INTEREST.

A defendant in equity is a competent witness upon an indictment against the plaintiff in equity, for perjury in his affidavit made to procure an injunction.

Indictment for perjury, in [John A. Burford's] the defendant's affidavit to a bill in equity for an injunction against Peter Miller. The attorney for the United States, offered to examine the defendant in equity, Peter Miller, as a witness, to prove the perjury.

Mr. Law and F. S. Key, for defendant, objected that, the question of injunction being still pending, the defendant in equity was not a competent witness to prove the perjury, and cited Rex v. Dalby, Peake, 12; and Rex v. Menetone, 4 East, 576, note.

But THE COURT (nem. con.) overruled the objection, because the conviction of Burford could not affect the cause in chancery; the oath of the complainant not being in evidence, either on a motion to dissolve the injunction after answer, or on the final hearing, but is only required to satisfy the chancellor that there is prima facie ground to order the injunction.

Case No. 14,686.

UNITED STATES v. BURLEY.

[14 Blatchf. 91.] [2]

Circuit Court, S. D. New York. Jan. 12, 1877.

VIOLATION OF ELECTION LAWS—NATURALIZATION CERTIFICATE—UNLAWFUL ISSUE.

B. registered as a voter, on the production of a certificate of his naturalization, which had been issued by a state court without his presence in court, and without any oath having been taken by him. The certificate was regular on its face. On an indictment against B., under section 5426 of the Revised Statutes, for using, for the purpose of registering as a voter, a naturalization certificate, knowing the same to have been unlawfully issued, *held*, that the mere fact that B. knew that the certificate had been issued without his presence in court, and without any oath being taken by him, was not sufficient to warrant a conviction.

This was an indictment, under section 5426 of the Revised Statutes, for using, for the purpose of registering as a voter, a naturalization certificate, knowing the same to have been unlawfully issued. The evidence showed that the defendant [William Burley] had registered as a voter, upon the production of a certificate of his naturalization, which certificate had been issued by a state court without the presence of the applicant in court, and without any oath hav-

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

[2] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

ing been taken by him. The certificate was, in all respects, regular upon its face.

Benjamin B. Foster, Asst. U. S. Dist. Atty.
John L. Hill, for defendant.

THE COURT held, that the mere fact that the defendant knew that the certificate had been issued without his presence in court, and without any oath being taken by him, was not sufficient to warrant a conviction.

Case No. 14,687.

UNITED STATES ex rel. LEARNED v. BURLINGTON.

[2 Am. Law Reg. (N. S.) 394.]

Circuit Court, D. Iowa. Jan. Term, 1863.[1]

MANDAMUS—MUNICIPAL CORPORATION—TAX LIMIT—JUDGMENT CREDITOR.

1. The federal courts have jurisdiction and power to issue the writ of mandamus to a municipal corporation to compel it to perform its duty, although such duty is created and enjoined by state law alone.

2. An agreement to levy a special tax cannot be implied from an ordinance making it the duty of the city council "to provide means to meet the payment" of a designated debt when the same may become due.

3. A city council has no power to levy taxes not expressly authorized by its charter or the law. Hence, where by the charter of a city it is provided that no greater tax than one per centum shall be levied for any one year, and this maximum rate is actually levied, a mandamus will be refused even to a judgment-creditor to compel the city to levy a greater tax, or even to levy a specific tax to pay his judgment.

[Cited in Britton v. Platte City, Case No. 1,907.]

At law.

MILLER, Circuit Justice. The plaintiff, having recovered against the city of Burlington a judgment in the district court of the United States for the state of Iowa, and having issued execution which was returned nulla bona, applied to that court for a writ of mandamus, requiring the mayor and aldermen of said city to levy a special tax for the payment of said judgment. The cause being of that class which, by the act creating this court, is transferred into it, the application is now made here for the peremptory writ.

The defendants, who have been served with notice, make answer under oath, to the information, and set up, substantially, the following reasons why the writ should not be granted: 1st. That the courts of the federal government have no jurisdiction to issue a writ of mandamus to persons whose functions are created by state law, such officers being responsible alone to state authority, so far as this writ is concerned. 2d. That there is nothing in the ordinance or contract, by which the debt was created, which requires that any specific tax shall be levied for the payment of this debt. 3d. That by the charter of the city of Burlington, no greater tax than one per cent. per annum can be levied on the taxable property of the city, and that the authorities have levied a tax of that amount for the present year.

The plaintiff objects, by way of demurrer, to the sufficiency of the matters thus set up in the answer, which may be treated as standing in the place of a return to an alternative writ.

1. If there were any doubt as to the power of the federal courts to use the writ of mandamus in cases of this character, the question is settled in favor of the existence of that power by the case of Commissioners of Knox Co. v. Aspinwall, 24 How. [65 U. S.] 376. The first objection is therefore untenable.

2. In reply to the second objection it is claimed by plaintiff that in the ordinance for borrowing the money, under which the debt was contracted, on which the judgment was rendered, there is a provision for levying a specific tax for the payment of the debt and interest. The language of the ordinance on this subject is as follows: "Be is further enacted, that it shall be the duty of the city council of said city to provide means to meet the payment of said bonds and coupons, when the same may become due, according to the contract entered into for said loan and to pay the same." Does this language imply an agreement to levy a special tax separate from other taxes or other resources of the city, for the payment of this debt? Or does it imply that out of the various resources of the city, its general annual tax, its wharfage, its licenses, or its power to borrow money, some means will be provided by the city authorities for that purpose? The latter seems to be the more reasonable construction of the ordinance. The plaintiff, however, urges that by sections 1895–1897, Code (Revision 1860, § 3274 et seq.), it is made the duty of the mayor and aldermen of the city to levy a tax for the special purpose of paying this debt, and to see that it is collected and appropriated to that purpose, and that this duty should be enforced by mandamus. These sections do provide that in cases where judgment has been recovered against a city or any other civil corporation, and no property is found on which to levy execution, that "a tax must be levied as early as practicable, sufficient to pay off the judgment with interest and costs."[1] The case of State v. Judge of

[1] [Reversed in 154 U. S. 568, 14 Sup. Ct. 1212.]

[1] These sections of the statute law are as follows: Section 3274 (1895): "Public buildings owned by the state, or any county, city, school district, or other civil corporation, or any other public property necessary and proper for carrying out the general purpose of the corporation, are exempt from execution. The property of a private citizen can in no case be levied upon to pay the debt of a civil corporation." Section 3275 (1896): "In case no property is found on which to levy, which is not exempted by the last section, or if the judgment-creditor elect not to issue execu-

Floyd Co., 5 Iowa, 380, seems to intimate pretty strongly that in such a case if the tax was not levied, a sufficient remedy is provided by section 1897 in the personal responsibility of the officers who should refuse to make the levy. From the view taken of the present case by the court, it is not necessary to decide this point.

3. If it is true, as claimed by defendant, that the mayor and aldermen of Burlington have no legal authority to levy any tax on property liable to taxation, exceeding one per cent. per annum, and that they have levied a tax of that amount for the present year, it is clear that this court cannot compel them to levy any additional tax. The only statutory provisions on that point, brought to the attention of the court, or which it has been able to find, are the 1st section of the act of February 22d, 1847, [Laws 1846–47, p. 91], to amend the charter of the city of Burlington, and the 1st section of the act of January 22d, 1853, to amend said charter. By the act first mentioned, it is declared "that the amount of tax to be levied upon real and personal estate by the mayor and aldermen of the city of Burlington, after the taking effect of this act, shall not exceed 12½ cents on every one hundred dollars' worth of property to be assessed." This is one-eighth of one per cent. The act of 1853 says, "That to defray the current expenses of said city, the city council shall have power to levy and collect taxes on all the real and personal property in said city, not exempted by general law from taxation: provided, that the amount of taxes levied for said purpose shall not in any one year exceed one dollar on each one hundred dollars' worth of property taxed."

The result of these two sections considered alone would seem to be that except for the purpose of defraying the current expenses of the city, the tax cannot exceed one-eighth of one per cent., and cannot, for any or all purposes, exceed one per cent. Do the provisions of sections 1895, 1896, and 1897 of the Code repeal the above sections of the city charter, or do they override them when brought into question together, or is there any necessary conflict between them? There is certainly no express repeal, and the Code could not be intended by implication to repeal the section last quoted, for it was passed since the Code became the law of the land. The rule also is well understood, that a repeal by implication can only arise when that is the necessary inference from the impossibility that both the acts, supposed to be in conflict, can stand. If either act is to override the other, or repeal the other, certainly the later expression of the legislative will must stand in preference to the former. But in the present case, there is no such necessary conflict. The provision of the Code can have its effect by compelling the city council to levy the tax so far as it has power to levy it. The provisions of the charter can stand as they were intended, as a useful and just limitation of that power. The previous year to this the city council of Burlington, as appears by the answer in this case, only levied a tax of one-half per cent. Undoubtedly if this was found to be inadequate to meet the current expenses, and to provide a fund to meet the judgment, it was the duty of the council under section 1897 of the Code, to so increase the tax, inside of one per cent., as to raise that fund if it could be so done. This they aver they have now done to the full extent of their authority, and this court will not order them to exceed it. That this is a sound view of the intention of the framers of the Code is strongly to be inferred, from some of its provisions on the subject of town and city corporations. Chapter 42 is devoted to providing the manner in which the citizens of a village or town may organize themselves into a corporation, and may either assume the privileges and responsibilities of towns or cities according to the number of the population. In speaking of a town charter thus adopted, it says, section 665, that it may give powers to establish by-laws, ordinances, &c., and "to levy and collect taxes on all property within the limits of such corporation which by the laws of the state is not for all purposes exempt from taxation, which tax must not exceed one per cent. per annum on the assessed value thereof," and section 669 says that "the preceding provisions are applicable to a town desiring to become organized as a city." Now these are the very corporations mentioned in sections 1895 to 1897, inclusive, of which it is said that a tax must be levied to pay a judgment recovered against them. Was it meant that they should absolutely, at once, levy a tax sufficient to pay the debt without regard to the one per cent. limitation in the previous sections? Or was it meant that they should use such taxing power as they had for that purpose, and no more? If the former is the sound construction, then the limit upon the taxing power is nugatory, and it makes no difference how strongly the legislature, or the charter adopted by the people, may forbid excessive taxation, the authorities of the city may, by resorting to the power to make contracts, impose upon the property-holders a tax unlimited in amount or duration. The wisdom of that provision in the Code, and in the charter of the city of Burlington, has been amply vindicated by events occurring since their enactment, and they should not be lightly set aside.

As it appears then to the court that the

tion against such corporation, he is entitled to the amount of his judgment and costs in the ordinary evidences of indebtedness issued by that corporation. And if the debtor corporation issues no scrip or evidence of debt, a tax must be levied as early as possible." Section 3276 (1897): "A failure on the part of officers of the corporation to comply with the requirement of the last section, renders them personally liable for the debt."

city authorities have already levied for the present year, a tax as large as the law permits, no writ of mandamus can rightfully issue to compel them to levy more. The demurrer of plaintiff being to the whole answer, is overruled, and the application for a writ of mandamus is refused.

[Reversed by the supreme court. 154 U. S. 568, 14 Sup. Ct. 1212.]

NOTE. The importance of the questions discussed and decided by Mr. Justice Miller in the foregoing opinion, will more fully appear when it is considered that the charters of most of the Western, if not Eastern cities, contain limitations on the power of taxation similar to those contained in the charter of the city of Burlington, and when it is further considered that many of these cities, in the flush and prosperous times preceding 1857, contracted heavy debts by way of subscriptions to the stock of railway companies, for internal improvements, and for other purposes. Its practical importance, therefore, as well as the high position and ability of the judge who delivered the opinion, well justifies its publication.

The case is suggestive of a few thoughts which we will briefly present. We have given in a note the sections of the Code to which the opinion refers, in order that the reader might have a clear view of all the statute law bearing on the subject.

I. The first remark we make is, that there is nothing in the opinion which favors the idea that cities will be allowed to evade the performance of their legal obligations to their creditors. If the organic law of a municipal corporation contains no limitation on the rate of taxation, there is nothing in the judgment under consideration which denies the right of a judgment-creditor to a specific or other sufficient tax immediately to pay his debt. In the absence of such limitation on the taxing power, then, if the creditor has been prudent enough to stipulate for the levy of a specific tax, it cannot be doubted that his rights would, if necessary, be enforced against the delinquent tribunal or debtor by mandamus. And where, as in the principal case, there is a limitation, it is very plainly intimated, and doubtless would have been so decided if the case had called for it, that the debtor corporation would, if necessary to pay the judgment, be compelled to levy the maximum rate authorized by its charter. These observations may be extended to and applied, mutatis mutandis, to counties and other civil corporations.

II. In regard to the decision of the main point involved, no reason is seen to question its correctness. The creditor had not stipulated for the levy of a special tax to pay his debt. The charter of the city contained, at the time the debt was created, an express provision, "the wisdom of which," according to Mr. Justice Miller, "has been amply vindicated" by experience, limiting the taxing power. The object of this provision is obvious—to secure the citizen and property-owner against onerous and excessive taxation. The sections of the Code of Iowa relied on by the relator were held by the court, and we think correctly, not to confer the right upon the city to levy taxes to an amount greater than the charter-rate. These sections occur in the general statutes of the state in the chapter on "Executions." They do not confer upon the city a distinct, substantive, grant of the power of taxation; but can have effect by compelling the city to levy, in accordance with its charter and as far as it has the power to do so, a tax to pay the debt. The case before the court, then, was one where the charter of the city prohibited a rate of taxation for any one year to "exceed one dollar on each one hundred dollars' worth of property taxed." That amount the city had actually levied. The court held that more could not be legally required of it. The legal principles upon which this portion of the decision rests seem to the writer to be plain. No lawyer will question the correctness of the proposition that neither a city nor any other civil body can exercise the right or power of taxation unless such power or right be expressly conferred by the legislature. Recognising this well-known principle, it is said in a very recent case (12 Iowa, 545), "that no property can lawfully be taxed until the legislature authorizes it to be done, and when the act requires it to be done in a particular way, that way alone can be pursued." It follows that if the legislature has conferred no power of this kind, the city or other political body can exercise none. If such power is delegated to a limited extent, it can be exercised to that extent, but no further. It seems, also, necessarily to follow, that the power to create a liability does not per se imply or carry with it the power to levy and collect a tax to discharge such liability. The grant of power to levy and collect taxes must be clear, distinct, and express. In the charter of the city of Burlington the same grant which gave the power contained also the limitations upon the extent to which it might be exercised.

The precise question decided in the foregoing case has not, to the writer's knowledge, at least as respects cities, been elsewhere adjudicated. It was raised in the case of Com. v. Council of City of Pittsburgh, 34 Pa. St. 496. By the act of 1804, incorporating the town of Pittsburgh, the levy of a tax in any one year exceeding half a cent on the dollar was prohibited except upon certain conditions, which had not been complied with. But the court held that as the special act of 1853, which authorized the city to subscribe the stock, also authorized it to borrow money and to provide funds for its payment by the levy and collection of such taxes as might be necessary, that this amounted to a repeal pro tanto of any prior statutory restrictions (if any there were) upon the exercise of the right of taxation. But the principle involved in the leading case is everywhere admitted. Thus, in the elementary treatise on the subject the law is thus stated and the authorities cited: "The power to levy the tax is a limited one, and if the limits prescribed by the law are transcended, the levy is void." Blackw. Tax. Titles, 190. "The power of taxation is the highest attribute of sovereignty. It cannot be enforced against the citizen unless it is clearly and distinctly authorized by law." Id. 194. "A municipal corporation or other inferior organization possesses no power to levy taxes not expressly authorized by its act of incorporation. Where they are thus authorized they must, in the exercise of the power, conform to the principles and requirements of the constitution." Id. 196, 197. "The exercise of the power to levy taxes by the fiscal agents or officers of a county, city, town, &c., is not a judicial, but a ministerial act, and is discretionary within the limits prescribed by law." Id. 196. In the case of Kemper v. McClelland's Lessee, 19 Ohio, 308,—a case in many respects strikingly like the one under review,—these general principles were applied. A law of Ohio provided that taxes to be levied for county purposes should not "exceed three mills on the dollar." The commissioners, notwithstanding, imposed a tax of four and a half mills, and the court held that the levy and all tax sales made to pay the same were unauthorized and void.

III. Other questions might be suggested, but cannot be discussed at this time. Can the legislature, for example, as against an existing creditor, by an amendment to the law, reduce the limit or abridge the power of taxation? Again: On the answer of the city, in the principal case, that it had levied a general tax as large as the law permitted, the court denied a mandamus to compel the levy of a special tax. On the general tax the judgment-creditor would have no lien. And as officers of municipal corporations are generally held not subject to garnishment, the creditor could acquire no lien on the proceeds of

such general tax. Suppose the city, when the tax was collected, should refuse to pay the judgment-creditor, could not the courts compel it to do so by mandamus or other appropriate remedy? Suppose the city should act in bad faith and misappropriate the tax, could not the courts, by injunction or otherwise, protect the creditor and compel the city to do right? But suppose the city, without acting in positive bad faith, should need or appropriate all the general tax in carrying on the legitimate functions of the corporation, such as paying officers, repairing streets, &c., &c., can it be restrained from so doing by a judgment-creditor? Has a judgment-creditor, under such circumstances, the right to be paid and to insist, if necessary, that the officers of a city, or at least that those who extend credit to it afterwards, shall take the scrip or credit of the city, and in their turn obtain judgment and payment? Has a judgment-creditor any greater rights than a non-judgment creditor? If so, are judgments to be paid in the order of their date? These and similar queries of a like practical character may be started, to many of which it would be difficult to find answers in cases already adjudged. They open to an inviting field, on the confines of which, even, we cannot enter at this time. We propose to give the results of our explorations of it on a future occasion, if not anticipated by others.

Case No. 14,688.

UNITED STATES v. BURLINGTON & M. R. R. CO.

[4 Dill. 297;[1] 3 Cent. Law J. 336.]

Circuit Court, D. Nebraska. Jan., 1876.[2]

PUBLIC LANDS—GRANT TO RAILROADS—CONFLICT—LIMITS AND EXTENT OF GRANT—ANNULLING PATENT BY JUDICIAL DECREE.

1. There are no lateral limits to the grant of lands made by congress (13 Stat. 356, § 19) to the defendant company; in this respect differing from other grants mentioned.

[Cited in Missouri, K. & T. Ry. Co. v. Kansas Pac. Ry. Co., 97 U. S. 497.]

2. What lands are embraced in the description of the grant as being "on the line" of the said road defined, and the language held to mean that the lands shall be taken along a line parallel to the general direction of the road, on each side of it, and within lines perpendicular to its terminus at each end.

3. By the grant the company was entitled to patents for the lands earned "on the completion of any consecutive twenty miles" of its road: *Held*, that the company was not bound to apply for, or receive, its patents by sections of twenty miles as soon as completed, but might await the final completion of the road, and get all its lands at the same time. *Held*, also, patents will not be set aside where they represent only what the company was entitled to, even if they were issued too soon—the road being completed, and no injury having resulted to the government.

4. Construing the alleged conflicting grants to the defendant company, and the Union Pacific Railroad Company: *Held*, that the land department correctly decided that the title of the Union Pacific Railroad Company to lands within twenty miles of its road was paramount to the title of the defendant company.

5. There was no authority in the grant to issue patents for land on the north side of the defendant's road, in lieu of lands deficient on the south side of its road, and such patents are void. But, in a bill to have such patents declared null, the lands must be described or identified.

Demurrer to a bill in equity, filed on behalf of the United States by the district attorney. The object of the bill is to have a declaration of the nullity, in whole or in part, of several patents of lands, issued to the defendant under section 19 of the act of July 2d, 1864, which was an act to amend the act "to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same, for postal, military, and other purposes," approved July 1, 1862. 13 Stat. 356 [12 Stat. 489]. The questions made, and the facts on which they arose, appear in the opinion.

Mr. Neville, U. S. Dist. Atty.

Mr. Woolworth, for defendant.

MILLER, Circuit Justice. This case comes before me on a demurrer to a bill in equity, filed on behalf of the United States by the district attorney. The object of the bill is to have a declaration of the nullity, in whole or in part, of several patents for lands, issued to the defendant under section 19 of the act of July 2d, 1864, which was an act to amend the act "to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same, for postal, military, and other purposes," approved July 1st, 1862. 13 Stat. 356.

The 18th section of this amendatory act of 1864 grants to the Burlington and Missouri River Railroad Company, an existing corporation under the laws of Iowa, the right of way, and the use of adjacent lands for earth, stone, timber, etc., through the territory of Nebraska, from the point on the Missouri river, south of the mouth of the Platte river, where it may choose to cross, to an intersection with the main track of the Union Pacific Railroad, not further west than the one-hundredth meridian of longitude.

Section 19, out of the construction of which the suit mainly arises, is here given verbatim: "Be it further enacted, that, for the purpose of aiding in the construction of said road, there be, and hereby is, granted to said Burlington and Missouri River Railroad Company every alternate section of public lands (excepting mineral land, as reserved by this act), designated by odd numbers, to the amount of ten sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed: provided, that said company shall accept this grant within one year from the passage of this act, by filing said acceptance with the secretary of the interior, and shall

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

[2] [Affirmed in 98 U. S. 334.]

also establish the line of said road, and file a map thereof with the secretary of the interior, within one year from the date of said acceptance, when said secretary shall withdraw the lands mentioned in this grant from market."

1. The first question arising in the case comes out of the construction of this section asserted in the bill, that no lands are granted by this act outside of the lateral limit of twenty miles on each side of the road.

It is very difficult to perceive on what principles this construction can be maintained; no lateral limit is mentioned, nor any twenty miles. The grant is one of amount or quantity, and that quantity is to be had, subject alone to these restrictions: 1. The sections can only be of odd numbers. 2. They must be limited to ten per mile on each side of the road. 3. They must be on the line of the road. 4. They must be of lands not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or a homestead claim had not attached at the time the road was definitely located. There is no limitation by any lateral line. As it was very well known that the road must run through the most settled part of Nebraska, and that much of the land along its line was already disposed of, and that, within the two years allowed for the definite location of the road, much more of it would be claimed under homestead and pre-emption laws, it was clear to the framers of the act that the company could not get the amount of ten alternate sections on each side of the road, within a limit of twenty miles.

If it be said that all other grants, and especially the other grants of lands to the Pacific railroads, in the original and amended acts, have their lateral limits, we answer that the difference in the phraseology of the grant, and other circumstances, shows an intention not to limit it in this case.

There is, probably, no railroad grant to be found within those lateral limits, when the grant is of any "amount" or "number of odd sections." The phrase is always every alternate odd, or even, section within certain limits, and congress generally gives an indemnity on such of these sections as have been reserved or disposed of, by express language authorizing them to be selected elsewhere outside the limit. What is still more significant, is, that in this very act of 1864, the original grant of 1862 to the Union Pacific Company is increased from five sections on each side of the road to ten, and the existence of lateral limits of the original act is mentioned, but enlarged to twenty miles only on each side, to meet the increased number of sections granted. The 17th section of this act also grants to a corporation, thereafter to be organized, to build a road from Sioux City, in Iowa, to a junction with the Union Pacific, the same number of alternate sections of land for ten miles in width, on each side of the road. We are forced to the conclusion that when, after enlarging the limit of the original grant to the main road by section 4 of this act, and on granting to a new company lands to build the Sioux City branch by section 17, in both of which the lands were to be found within a certain limit, congress made this grant of a certain amount of such lands without such limit, it was intentional and of a purpose. 13 Stat. 356. The reason for this difference is also clear. For all the branches of the road mentioned in the act of 1862, of which the Sioux City branch was one, and the Burlington and Missouri River was not, there was a large subsidy of bonds of the United States, per mile, in addition to the lands granted by congress. But when, two years afterwards, that body authorized the Burlington and Missouri River Railroad Company to extend its road to a junction with the main road through Nebraska, and parallel, or nearly so, to this main road, it did not choose to give that company any bonds or money. And for this reason, as well as because such a large part of land had already been disposed of within a limit of twenty miles, it was deemed a reasonable measure of equalizing the donations to permit the whole amount of ten sections on each side of the road to be taken, if they could be found, without any lateral restriction.

2. The next allegation of the bill demanding attention, is, that a large number of the sections, or parts of sections, of land included in these patents, lie some fifty or a hundred miles distant from the road, and do not come within the description of the grant, as being "on the line thereof."

It is extremely difficult to fix any very precise meaning to this phrase. It is used in reference to the grant to the Union Pacific Company, in connection with the twenty-mile limit. It cannot, therefore, mean contiguous to the road-bed, or to the land taken for the road-bed, as a section of land twenty miles distant from the road-bed is clearly within the grant. If twenty miles distant is on the line, what limit in a lateral direction can you say is not? The equivalent phrase in the grant to the Sioux City branch is, "on each side of the same, along the whole length of said road." The line of the road seems here to be used for the course or direction of the road, and along its whole length means probably parallel with its course, and between its termini. And this is what I suppose is really meant: that the land shall be taken along, or parallel to, the general direction of the road, on each side of it, and within lines perpendicular to its terminus at each end.

3. The next section of this act, to-wit, section 20, provides, that when any consecutive twenty miles of the road has been completed, and this shall be made to appear to the president, "patents shall issue, conveying the right and title to said lands to said company, on each side of said road, as far as the same

is completed, to the amount aforesaid." And the bill insists that, when a patent issues for any section of twenty miles, no land could lawfully be included which did not lie parallel to that twenty miles, and within lines drawn perpendicular to each end of that twenty miles. It then alleges that this rule was disregarded, and large numbers of sections were included in the patents issued on the completion of every section of twenty miles, which lay east or west of the terminus of those sections, the road running nearly east and west.

It may be conceded that when the company presented their claim for the lands they were entitled to by reason of the completion of any specified section of twenty miles, they were only entitled to lands parallel to that section, and not either east or west of its respective termini, but they were neither bound to apply for, nor receive, their patents by sections of twenty miles. It was optional with the company to await the final completion of the road, and get all the lands to which they would have been entitled at the same time. What would they have been? Obviously, ten sections on each side of the whole length of the road, without regard to the section of twenty miles. Or, if the full quantity was not found on each twenty-mile section, when applied for in sections, within the limits of that sub-division, a patent might have been taken for what could be so found, and the remainder would be due to the company when the road was finished. If, then, the patents, as they now stand, only represent what the company was entitled to on the completion of the road, I think the error, if there was one, in issuing them too soon, does not require that they should be set aside, since the road has now been completed for two or three years, and no possible injury can result to the United States.

If my construction of the 19th section, and of the amendatory act, is sound, the defendant has received no more lands than it was entitled to by the mistake of the commissioners, or any other lands than what it would have had if it had received its patent for the whole after the road was finished. If these patents were set aside, the company could now ask that the same lands be repatented to it.

4. The road of the defendant and the road of the Union Pacific Company run for many miles parallel to each other, and so near as to be within twenty miles of each other, on the south side of the road of the latter company.

In the selection of lands for the defendant company, the department of the interior refused to permit it to take any lands within the twenty miles on each side of the Union Pacific road, on the ground that the right of that company to the alternate odd sections, within that limit, was paramount to that of the Burlington and Missouri River Railroad Company. Thus, a strip of forty miles in width, on the north of the road of the defendant, was excluded from its selection. The bill before me now alleges that this was all wrong. That, first, the track of the Union Pacific had no grant at all of lands; and, secondly, if it had, it was only by the act of 1864, made at the same time with the grant to defendant, and, therefore, their rights were equal when the roads brought them in conflict.

The act of 1862 created a corporation called the Union Pacific Railroad Company, and authorized this company, and others named in the act, to construct a single line of road from the one-hundredth meridian of west longitude toward the Pacific Ocean, with three branches from this meridian eastward. One of these branches was to commence on the western boundary of Iowa, at such a point as the president should select, and thence to join the main road at the one-hundredth meridian. Specific grants of so much in bonds for each mile, and for so much land for each mile, were made to all these roads by the same act. Section 3 of the act, speaking of the Union Pacific, declares that there is hereby granted to said company, for the purpose of assisting in the construction of said railroad and telegraph line, every alternate section of public lands, to the amount of five sections per mile, on each side of said railroad, on the line thereof, and within ten miles on each side of the road. It is argued that, because the Iowa branch is separately described as such, and the road from the one-hundredth meridian of longitude to the western boundary of Nebraska is spoken of by the law as the line of the Union Pacific, no grant is given for the Iowa branch.

But the caption of the act speaks of a road from the Missouri river to the Pacific Ocean. The grants are made to build this road, and the branches as parts of it. There is nothing in the act to indicate, and no reason can be given why the lands on each side of the branch should not be given, as well as on the main road and the other branches. If the lands are not given for this branch, neither are the bonds. Yet the president, the secretary of the treasury, and of the interior, and subsequent acts of congress, have all recognized the grant, both of bonds and lands, as extending as well to this branch as to the other parts of the road. I do not doubt that there was such a grant intended, and that intent must control.

The original act, however (12 Stat. 492, § 3), only gave five alternate sections per mile on each side, within a limit of ten miles on each side of the road. By section 4 of the amendatory act of 1864, it is enacted that section 3 of the original act be hereby amended, by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and inserting in lieu thereof the word "twenty." It will be

seen, on a comparison of the sections, that, as amended, it is a grant of ten sections on each side of the road, within twenty miles thereof. It is argued by counsel for plaintiff, that, as to the enlarged grant outside of the ten-mile limit, it is made by the same act, and takes effect as of the same date, as the grant to the Burlington and Missouri River Railroad Company, found in the subsequent section 19, and that where the lines of the road made a lap in which the right of selection conflicts, the alternate odd sections should have been equally divided between the two companies, and that the lands patented to the defendant, in lieu of those to which it was entitled within the limits of this conflict, were so done in violation of the law, and the patents are void. But I am of opinion that the land department correctly decided that the title of the Union Pacific Company, within twenty miles on each side of its road, was paramount and exclusive. Looking to the certainty that in some portions of their lines these roads must, before their connection, run parallel with each other within the twenty-mile limit of the Union Pacific, it seems reasonable that congress, instead of enlarging the grant to this road in general terms, used words which made the amendment a part of the original grant, for the purpose of having it take effect as of the date of that grant. In other words, it incorporates nunc pro tunc words which make that grant one for twenty miles on each side of its road. Whether this retrospective character would be given to the amendment, in a case where intervening rights had attached, we need not now decide. Probably it would not, but the Burlington and Missouri River Railroad Company takes its right by the same statute which says that the former act shall read so as to give the Union Pacific the lands now the subject of controversy. This view would commend itself to congress by its intrinsic equity, for by it each road gets the largest quantity of land which the statute permits, while the other construction allows the Burlington and Missouri Company to get all it could under any circumstances, the other road losing what the latter took within the lap. This comes out of the fact that the Burlington and Missouri Company was not confined within any lateral limits, while the Union Pacific could not go without its twenty-mile limit to make up deficiencies.

Besides, both of these roads have acquiesced in the construction given and acted on by the United States, the officers of the government having prescribed it as the one which should govern all their rights, the patents have been issued under it for the full amount of all the land which could be so claimed under both grants, and innocent purchasers have no doubt become owners of much of the land patented to the Union Pacific Company; and it is certainly all mortgaged, so that an incalculable amount of injustice would be done by holding all this void and setting aside the patents. If the patents are not absolutely void, and only voidable, then every principle of equity in the settlement of conflicting and doubtful rights acquiesced in by the parties, is opposed to setting aside these patents at the instance of the United States.

5. There remains one more ground for equitable relief relied on by the bill.

It is alleged that one hundred and fifty thousand acres of land lying on the north side of defendant's road, have been patented in lieu of lands found deficient on the south side of the road, and that the patents so issued are void.

I am of opinion that the act of congress did not intend to grant twenty sections per mile for the road, but ten sections per mile on each side of the road—that no right to take more on either side of the road than what amounted to ten sections per mile on that side was conferred. If, for any reason, the required number of sections could not be found on one side, it was as in the case of a similar deficiency in the twenty-mile limit of the other road, a loss which congress had made no provision to supply. There existed, therefore, no power in the office of the land department to issue patents for lands on the north side for those not found on the south side. If the lands so patented can be identified, I think that the government is entitled to have a declaration that as to these the patent conveys no title.

But the bill before me does not so identify them. I find no description of them by congressional sub-division, nor by reference to any patent containing them exclusively, nor by reference to any schedule of them. The court cannot declare all the patents issued void because there are some lands included in some of the patents which there was no right to convey.

As the bill stands, the demurrer must be sustained. If, however, the attorney for the United States thinks he can amend so as to identify these lands by specific description, he has leave to do so. If he does this, defendant can either renew his demurrer or answer to that part of the bill. If he renews his demurrer, it may be considered as overruled. If he chooses to abide the demurrer, a decree can go for the plaintiff for the lands so described. If plaintiff abides by his bill as it now stands, it must be dismissed on the demurrer.

Subsequently the district attorney amended the prayer of his bill (being unable to describe the lands specifically) and asked that the company be decreed to re-convey to the United States an equal amount of lands or pay the value of the excess, and to the bill as amended the circuit justice sustained a demurrer, being of opinion that the United States is not entitled to such relief, as neither the specific lands nor their value can be ascertained as a foundation for relief, nor the

value of the lands to be re-conveyed. Bill dismissed.

[Upon an appeal to the supreme court, the above decree was affirmed. 98 U. S. 334.]

Construction of land grant to Union Pacific Railroad Company and to the Sioux City branch (12 Stat. 489; 13 Stat. 356), see Sioux City & P. R. Co. v. Union Pac. R. Co. [Case No. 12,909].

Case No. 14,689.

UNITED STATES v. BURNETT.

[Cited in U. S. v. Noelke, 1 Fed. 429, 433. See Case No. 14,571.]

Case No. 14,690.

UNITED STATES v. BURNHAM.

[1 Mason, 57.] [1]

Circuit Court, D. Massachusetts. May Term, 1816.

WRIT OF ERROR—REPLEADER—VIDELICET—OPINION ON MATTERS OF FACT—FORFEITURE.

1. Upon a writ of error, if the verdict below was given upon an immaterial issue, a repleader cannot be awarded; but judgment must be rendered against the party who committed the first fault if there be sufficient matter on which to found such judgment.

2. In an information on the fiftieth section of the collection act of 1799, c. 128 [1 Story's Laws, 617; 1 Stat. 665, c. 22], it is necessary to allege that the goods were unladen in some port or place within a collection district, without a permit from the collector of that port or district. But it will be sufficient if the fact be so, to allege the port or district to be to the attorney unknown. Material matter, although alleged under a videlicet, is traversable, and must be proved as laid. Of the nature and office of a videlicet. Where immaterial matter may be rejected as surplusage or not.

[Cited in Garland v. Davis, 4 How. (45 U. S.) 143.]

3. It is no ground for a bill of exceptions that a court refused to instruct the jury on a point of law, which was so stated that it involved an opinion on matters of fact, as where an opinion was prayed "under the circumstances of the case," which were not found as facts.

[4. Cited in Wicker v. Hoppock, 6 Wall. (73 U. S.) 99, Warren v. Stoddart, 105 U. S. 230, Lawrence v. Porter, 11 C. C. A. 27, 63 Fed. 67, and Judice v. Southern Pac. Co. (La.) 16 South. 817, to the point that, where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it, at a trifling expense, or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent.]

This was a writ of error from a judgment of the district court of Massachusetts, rendered upon an information in rem, against certain goods and merchandise seized on land, by the collector of the district of Boston and Charlestown, at Boston, in said district, for an alleged breach of law. The information charged in substance, that the goods and merchandise being of foreign growth, produce, and manufacture, and liable to the payment of duties on importation, were imported and brought into the United States, in some ship or vessel unknown, from some foreign port or place unknown, and "were afterwards, to wit, on the 15th of January, 1816, unladen and delivered from said vessel within the United States, to wit, at Boston, in said district, without a special license or permit from the collector, naval officer, or any other competent officer of said port, for such unlading and delivery, contrary to the statute in such case made and provided." And it is farther charged, that the duties on the same goods had not been paid, or secured to be paid, according to law; by reason of all which they became forfeited.

The claimant [Samuel Burnham] in his plea alleged, that the duties to which the goods, &c., were liable, had been paid or secured to be paid, according to law; and that "they were not unladen, or delivered within the United States, without a special license or permit from the collector of the customs of the United States, at the port or district where said goods were first entered, viz. the district of Memphremagog," and that the goods, &c. have not become forfeited as alleged in the information. The replication on behalf of the United States alleged, that the duties on the goods had not been paid, or secured to be paid, according to law; and "that the same were unladen, and delivered, within the United States, without a special license or permit from the collector of the customs of the United States, at the port where the said goods were entered," and that the same have become forfeited, as in the information alleged, and prayed this to be inquired of by the country; and the issue was accordingly joined by the claimant. At the trial in the district court, a bill of exceptions was filed to the opinion of the court. The bill of exceptions recited the testimony, depositions, and evidence given in the cause, at large, by which, among other things, it appeared, that the goods were brought from Canada into the district of Memphremagog, of which Derby constituted the sole port of entry, and is the place where the office for the collection of duties is established; that the collector of the district resided at Irasburg, about fourteen miles from Derby, and within the district aforesaid, where the goods were entered, and bonds taken for the security of the regular duties, and a permit for unlading granted by the collector upon the application of the claimant, without the goods ever having been seen by the collector, or any other officer of the customs, and without the collector knowing whether the goods were at the time of such entry at Irasburg, or whether they had ever been brought to the port of Derby aforesaid. And thereupon the attorney for the United States moved the court to instruct the jury "that inasmuch as the entry, if any such existed, was made at Irasburg, which was not then, nor ever, a legal port of entry, the supposed entry, as also the

[1] [Reported by William P. Mason, Esq.]

permit supposed to be founded thereon, must be considered as a nullity, and void, and that the forfeiture of the merchandise must, therefore, under all the circumstances of the case, be considered as resulting of course." But the said judge did then and there refuse so to direct the jury; and did then and there, in summing up the cause to the jury, declare, "that although the said town of Irasburg, where the said entry of the goods was effected, was not at the time a port of entry, still he was not prepared to express an opinion, if the jury should find that the goods were entered at Irasburg, that such an entry was merely a nullity, so as to expose the goods to forfeiture merely on that ground," and the jury then and there rendered their verdict on the issue aforesaid in favor of the claimants, upon which judgment was rendered against the United States.

The cause was now argued on the assignment of errors by—

G. Blake, U. S. Dist. Atty.

A. Townsend, for defendant in error.

Mr. Blake. The question which is presented by this case, is, whether a collector of the customs can enter goods at a port which is not a port of entry. If he cannot, the instrument granted in this case was not such a permit as the law contemplates. The collection act of March 2, 1799, from the first to the eighteenth section both inclusive, designates certain ports within specified districts as ports of entry and delivery. The eighteenth section of the same act, makes it unlawful to make entry of vessels from foreign ports, at any other than the said ports of entry. The fiftieth section provides that no vessels from any foreign ports shall be unladen, without a permit from the collector, &c. of the port at which they are so unladen. The twentieth section provides for the personal attendance of the collectors, naval officers, and surveyors, at the ports to which they are respectively assigned. Now it appears in this case, that the goods were not entered at a port of entry nor during the attendance of the collector, or any of his officers; under which circumstances we contend the court ought to have instructed the jury, that the permit given was illegal and void, and, therefore, that no entry was in fact made.

Mr. Townsend. The question presented by the district attorney is no longer open to him. The forfeiture in this case is highly penal, and he ought so to have formed his information, as to give notice to the other party what was the ground relied upon; we should then have come into court prepared to show that the entry was a legal one. The gist of the information is, that the goods were entered without a permit, and without the payment of duties, but the jury have found that they were entered by permit, and the bond taken by the government is perfect evidence of the security of the duties. The entry at Irasburg, which is an essential fact, has not been relied on, and the gentleman has precluded us from a trial as to that point, by not offering us an issue upon it. The appraised value of the goods, is their value deducting the duties; now, shall it be in the power of the United States to seize these goods for nonpayment of duties, when at the same time there is a paper in the case acknowledging the receipt of them? As to the construction which ought to be put on the collection act, it is contended that the United States have put their own construction upon it, through their agent in this case, the collector of Derby. The defendant, entering his goods according to the directions of the officer of the government, who must be supposed acquainted with his duty, and rightly informed of the construction given to the laws relative to his particular department, surely acted under sufficient authority, and it is to be presumed with perfect innocence. And if in consequence of such an entry, the goods should be forfeited, the government become gainers by the ignorance or fraud of their own officers.

Mr. Blake in reply. Notwithstanding the objections offered to the form of the information, I apprehend that the ground taken by it is the true ground. If it shall be thought by the court that the entry of goods at a port which is not a port of entry, is an illegal and void entry, then the allegation of the information that there was no permit, is correct. Every part of the collection act indicates the intention of its framers, that the goods to be entered should be inspected by the officers appointed for that purpose. The sickness or absence of the collector is provided for by the appointment of other officers to act in his place under such circumstances, and it is evident to every one, that if this were not the case, the frauds committed upon the revenue would be innumerable. The law has gone so far as to leave it to the discretion of the secretary of the treasury to increase the number of ports of entry, when he shall think it advisable so to do, the better to provide against the want of proper attention; but if it is in the power of the collectors to dispense with this attention when their convenience may urge it, the law would be completely frustrated, and the favors of the collectors be distributed far and wide.

THE COURT here making some remarks upon the pleadings, observed to Mr. Townsend that such were their defects, that even should the point of law raised in the bill of exceptions, be decided in favor of the defendant, still the court would be obliged to give judgment against the party who committed the first fault, and in that case it would be in favor of the United States; for notwithstanding the faults of the information, it certainly contained sufficient matter to warrant a judgment, and that the plea of the defendant was insufficient, the issues immaterial, and the verdict of the jury did not reach the real point in controversy.

In answer to this, the counsel for the defendant argued to the court, that the videlicet in the information, and the words introduced under it, alleging that the goods were unladen at Boston, might be rejected as surplusage, by which means the faults in the pleadings would be remedied.

But THE COURT decided, that as the immaterial matter made a part of a material averment, it could not be rejected.

The following opinion was afterwards delivered at an adjourned meeting of the court:

STORY, Circuit Justice. Rarely has any record come before the court, attended with more embarrassing circumstances, where the merits of the cause lay in so narrow a compass. The information in substance charges, that the goods and merchandise being of foreign growth and manufacture, and liable to the payment of duties, were imported and brought into the United States from some foreign port or place unknown, and being so imported, were afterwards unladen, and delivered from the said vessel, within the United States, to wit, at the port of Boston, in the district of Boston and Charlestown, without a special permit or license from the collector, naval officer, or other competent officer of the said port, for such unlading and delivery, contrary to the statute in such case made and provided; and it further avers, that the duties to which said goods and merchandise were liable, have not been paid, or secured to be paid, according to law; by reason of all which, and by force of the said statute, they have become forfeited. It is obvious from this summary statement, that the information rests on the fiftieth section of the collection act of March 2, 1799, c. 128; and to bring the case within that section, it was neither material, nor proper to allege, that the goods were of foreign growth or manufacture, or liable to the payment of duties, or that the duties due thereon had not been paid, or secured to be paid according to law; for no such qualifications are incorporated into the language of the section, or are implied by intendment of law. It was the policy of the legislature in order to suppress smuggling, to prohibit any goods, brought in any vessel, from any foreign port, whether of foreign or domestic growth, or manufacture, or whether liable to duties or free, from being unladen without a permit from the proper officer at the port of unlivery. It is generally unnecessary, and often perilous in informations upon revenue laws to make the allegations more broad, or more narrow, than the terms, in which the prohibition is expressed in the statutes themselves. And the present case is an example of the inconvenience of any deviation from the strictness of pleading.

The plea of the claimant alleges, that the duties, to which the goods and merchandise were liable, have been paid or secured to be paid according to law; and that they were not unladen or delivered within the United States, without a special license or permit from the collector of the United States, at the port or district where said goods and merchandise were first entered, viz. the district of Memphremagog; and that the goods have not become forfeited as alleged in the information. The replication alleges, that the duties, to which the goods were liable, had not been paid or secured to be paid according to law, and that the same were unladen and delivered within the United States, without a special license or permit from the collector of the customs at the port where the goods were entered; and that the same have become forfeited, as in the information is alleged; and it concludes with an issue to the country, which is joined by the claimant.

Independent of the objections to these pleadings on account of their inartificial structure and duplicity, the fact put in issue, as to the payment or security of the duties, is upon this information wholly immaterial. If the goods were unladen without a permit, they would be clearly forfeited under the statute, although the duties had been paid or secured; and on the other hand, although the duties may not have been paid or secured to be paid, yet if there has not been an unlading without a permit, the goods would be safe from the penalty of the statute. A verdict, therefore, finding the payment or non-payment of the duties, would be in every view of the information without any legal efficacy.

The other allegation of fact in the plea, upon which issue is taken in the replication, was doubtless intended as a traverse of that averment in the information, which constituted the very gist of the action; but in the terms in which it is expressed, it does not meet the point. The information charges, "that the said goods and merchandise being imported and brought as aforesaid, were afterwards, to wit, on the same day of January, unladen and delivered from the said vessel within the United States, to wit, at the port of Boston, in the district aforesaid, without a special license or permit from the collector, naval officer, or any other competent officer of the said port, for such unlading and delivery;" the traverse on the plea is, "that they were not unladen or delivered within the United States, without a special license or permit from the collector of the customs of the United States, at the port or district where said goods were first entered, viz. the district of Memphremagog." The substance of the charge in the information is, that the goods were unladen at Boston, without a permit from the collector, &c., of that port; the substance of the plea is, that the goods were not unladen without a permit from the collector of the port or district where they were first entered, to wit, the district of Memphremagog. The plea, therefore, contains neither a denial, nor a confession and avoidance of the matter in the information; but alleges matter totally dis-

tinct, (and even that by way of negative allegation) which, whether true or false, has nothing to do with the controversy between the parties; and the plea might be strictly true in point of fact, and yet the forfeiture charged in the information might have been incurred; for the goods might have been unladen from a vessel at Boston, without a permit from the collector of that port, notwithstanding they might have been first entered and the duties secured, and a permit granted in the district of Memphremagog. The issue joined on this allegation in the plea is, therefore, immaterial; and it has this additional vice, that as it neither traverses nor denies the material averments of the information, it must be deemed in law to admit them. Nicholson v. Simpson, 1 Strange, 297; Blake v. West, 1 Ld. Raym. 504. It follows that, as the plea and replication are in this view bad, the verdict founded on them cannot avail the defendant, even supposing, that the point of law raised in the bill of exceptions should be decided in his favor; for the court must pronounce upon the whole record; and if the plea and replication are bad and immaterial, and the information contains sufficient matter to warrant a judgment, (as this certainly does,) there must be a final judgment for the United States. If this had been a case originally depending in this court, a repleader might perhaps have been proper to be awarded; for although in general, a repleader is not grantable in favor of the person, who made the first fault in pleading, nor where the court can give judgment upon the whole record; yet if it appear, that substantial justice will not otherwise be done, the court might award it. But this court sits in this cause as a court of error, and although the practice was anciently otherwise, a repleader is now never awarded by a court of error. Holbage v. Bennet, 2 Keb. 769, 789, 825; Bennet v. Holbech, 2 Saund. 317; Crosse v. Bilson, 6 Mod. 102.

To avoid the effect of these principles, and to save the defendant from the perils of mispleading, it is argued, that in the allegation of the information, that the goods "were unladen and delivered from the said vessel within the United States, to wit, at the port of Boston, in said district aforesaid," the words under the videlicet may be rejected as surplusage, so as not to tie up the proof to an unlading at Boston; and in like manner the words under the videlicet in the plea, ("viz. the district of Memphremagog,") may be rejected as surplusage, so as not to tie up the proof to the district of Memphremagog; and then the issue, though informal, will yet meet the point of the information. This argument proceeds upon the supposition, that the matters stated under the videlicet are immaterial; and that whatever is immaterial may be rejected as surplusage. But it is by no means generally true, that whatever is immaterial may be rejected as surplusage. If the immaterial matter constitute a part of a material averment, so that the whole cannot be struck out without destroying the right of action, or defence of the party, there the immaterial matter cannot be rejected as surplusage; but may be traversed in pleading, and must be proved as laid, though the averment be more particular than it need have been. 2 Saund. 206, note 27; Williamson v. Allison, 2 East, 446; Bristow v. Wright, Doug. 665; Savage v. Smith, 2 W. Bl. 1101. The doctrine has in some cases been pressed somewhat farther; and a distinction taken between immaterial and impertinent averments, that the latter need not be proved, though the former must, because relative to the point in question. Doug. 665; 2 W. Bl. 1101; 2 East, 446. The true rule seems to be, that whenever the whole allegation may be struck out without affecting the legal right set up by the party, it is impertinent, and may be rejected as surplusage. But if the immaterial matter be sensible in the place, where it occurs, and constitute a part of a material allegation, then it cannot be rejected; but it may be traversed, and must be proved, if put in issue. Nor is it true, as urged in the argument, that matter stated under a videlicet is mere surplusage. It is sometimes used to explain, what goes before it; and if the explanation be consistent with the preceding matter, it is traversable. So it is sometimes used to restrain the generality of the former words, where they are not express, and special, and then it is traversable. And whenever a videlicet contains matter, which is material, and necessary to be alleged, it is considered as a direct and positive averment, and as such traversable, in the same manner, as if no videlicet had been inserted. Skinner v. Andrews, 1 Saund. 170; Stukeley v. Butler, Hob. 175; Hayman v. Rogers, 1 Strange, 232; Bissex v. Bissex, 3 Burrows, 1729; Knight v. Preston, 2 Wils. 332; Grimwood v. Barrit, 6 Term R. 460; Dakin's Case, 2 Saund. 291, note 1; Rex v. Stevens, 5 East, 254. If the matter alleged under the videlicet in the information or plea be tried by these rules, it will not be easy to reject it as surplusage. It is evidently explanatory of the generality of the preceding words, and consistent and sensible in the place, where it occurs, and therefore just as much a part of the preceding allegation, as if it had been stated without a videlicet. The matter, also, under the videlicet in the information, was material, and pertinent to be alleged. The fiftieth section of the collection act, on which this information is founded, manifestly contemplates, that the goods are unladen within some port, or place, of a district of the United States, without a permit from the collector of the particular port or district, where they are unladen. If the unlading be within the maritime limits of the United States, before an arrival at any port, the case seems properly to fall within the twenty-seventh section, and not within the fiftieth section of the act. The Industry [Case No. 7,028]. To bring a case within the

purview of the fiftieth section, it is, therefore, necessary to allege in the information, that the goods were unladen within some port, or other place within a collection district, without a permit from the collector of such district. I do not say, that it is necessary to specify the particular port, or district by its legal name; for it would be sufficient to state it to be unknown to the attorney of the United States. But it must judicially appear in the information, to be an unlading within some port, or district; and if the United States should choose to specify the particular port, or district, they are bound by the specification. In the present information, the matter under the videlicet would, independent of this ground, have been material; because it is referred to in the subsequent part of the allegation. The unlading is alleged to be without a permit from the collector of the same port, and if the words under the videlicet were struck out, there would be a material defect in the information. For even supposing that the words, "the said port," could then be referred to the introductory part, so as to mean the port of Boston, still, as a collector has no authority to grant a permit, nor is there any necessity of obtaining one from him, except for an unlading within his district, there would be nothing remaining in the information to show, that the unlading was within the district of Boston and Charlestown, so as to render a permit from him necessary, or to make its non-existence a cause of forfeiture. The matter also alleged under the videlicet in the plea, (even supposing that the plea, as containing a negative allegation of new matter, could be sustained) is open to many of the observations, which have been already made; and upon other distinct grounds, must be held material. It is, however, unnecessary to review these grounds, because, for the reasons already stated, the plea has a fatal defect.

The insufficiencies of the pleadings, render it unnecessary to consider the point of law intended to be raised by the bill of exceptions. I say, intended to be raised; for the bill of exceptions is so inartificially drawn, that it is very doubtful, if it presents any distinct question of law. The bill contains a very unnecessary and prolix recital of all the evidence given on the trial, in the very language of the depositions and witnesses; the greater part of which evidence is totally impertinent to the point of law. And the district attorney then prays the court to instruct the jury, among other things, that a forfeiture of the merchandise must, therefore, "under all the circumstances of the case," be considered as resulting of course. What those circumstances were was matter of fact for the consideration of the jury, and did not properly fall within the province of the court to ascertain, or decide. It is very clear, therefore, that the court was not bound to give the instruction in the manner, in which it was asked. Smith v. Carrington, 4 Cranch [8 U. S.] 62. The proper course would have been, if the facts, on which the point of law arose, were not in dispute, to have stated them shortly and succinctly, as facts in proof, and prayed the court to instruct the jury on the law arising out of them; and if the facts were in dispute, to have prayed the court to instruct the jury as to the law, if they should find the facts as the party alleged them. I regret extremely, that I have been compelled, by a sense of duty, to take notice of the irregularities in the pleadings and exceptions in this case, which, I am quite sure, were simply owing to the unavoidable haste, in which they were prepared by the learned counsel. Nothing could have been a more unwelcome and irksome task to me. Irregularity in pleading tends greatly to increase the embarrassments, as well as the labors, of the court. It also very frequently commits the substantial interests of the parties, and defeats the purposes of justice. It is a melancholy reflection, that much of the time of courts of justice is employed in ingenious devices, and laborious technical study, to disentangle the merits of causes from the difficulties, in which they are involved by the parties.

I recommend to the counsel, in this case, to enter into an agreement to set aside the judgment and all the pleadings, and to plead anew, so that the real merits of the cause may be tried at the bar of this court. If such an agreement be not entered into, for the reasons which have already been mentioned, I shall feel myself compelled to pronounce a reversal of the judgment of the district court, and to award a final judgment in favor of the United States.

Upon this intimation, the counsel agreed to set aside the pleadings and judgment, and to plead anew.

Case No. 14,691.

UNITED STATES v. BURNS.

[5 McLean, 23.] [1]

Circuit Court, D. Ohio. Oct. Term, 1849.

COUNTERFEITING—ARTICLES FOUND IN POSSESSION—SPURIOUS COIN—LIABILITY TO DECEIVE—JUDICIAL NOTICE—INDICTMENT—JOINDER.

1. On an indictment for counterfeiting coin, the guilty participation of the defendant in the act may be inferred from proof that a quantity of spurious coin, and instruments and appliances for making it, were found in his possession. Such proof, unexplained by evidence rebutting the presumption of guilt, will be sufficient to justify a verdict of guilty.

[Cited in U. S. v. Otey, 31 Fed. 70.]

2. On the trial of such an indictment, there must be proof sustaining the averments, that the coins alleged to have been made were in the likeness and similitude of genuine coins.

3. If the spurious coin, from its incompleteness, or the defectiveness of its manufacture, is not fitted to deceive persons of the most ordinary caution and intelligence, the inference of a criminal intention in making it does not arise.

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

4. It is not necessary to prove, in support of a charge for making American coins, or coins made current by act of congress, that there are genuine coins, of which, those alleged to have been made, were counterfeits. The court and jury, will take notice without proof, of the legal coins made at the mint of the United States pursuant to law, and of foreign coins made current by law.

5. The designation in the indictment of the coins, alleged to have been made, as coins called fifty cent pieces and twenty-five cent pieces, instead of the half dollar and the quarter dollar, by which names they are called in the act of congress regulating the coinage of the country, is not a material variance, and will not support a motion in arrest of judgment.

6. One or more good counts in an indictment, though there may be some that are bad, will sustain a general verdict of guilty.

7. In an indictment framed on the 20th section of the crimes act of the 3d of March, 1825 [4 Stat. 121], it is not a misjoinder to add to the counts charging the making of false coin, a count for aiding and assisting in making such coins, and one for procuring them to be made.

[Cited in U. S. v. Lancaster, 44 Fed. 894.]

[This was an indictment against James Burns for counterfeiting coin.]

Mr. Mason, U. S. Dist. Atty.

Mr. Perry and Mr. Cushing, for defendant.

LEAVITT, District Judge. The indictment in this case is framed under the 20th section of the act of congress of the 3rd of March, 1825, "more effectually to provide for the punishment of certain crimes against the United States, and for other purposes." 4 Stat. 121. It is provided in this section, that "if any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting any coin, in the resemblance or similitude of the gold or silver coin, which has been or may hereafter be coined at the mint of the United States; or, in the resemblance or similitude of any foreign gold or silver coin, which by law now is, or may hereafter be made current in the United States, &c., he shall be deemed guilty," &c. There are six counts in the indictment: 1. Making a counterfeit silver coin of the United States, called twenty-five cents; one called fifty cents; and a foreign coin, made current by law, called five francs. 2. Making an American coin called fifty cents. 3. Making a large quantity—viz: twenty pieces of American coin called fifty cent pieces; twenty-five pieces called twenty-five cent pieces; twenty pieces foreign coin called twenty-five cent pieces; and twenty pieces of foreign coin called five francs 4. Making ten pieces of American coin called fifty cent pieces, or half dollars. 5. Aiding and assisting some person, to the jurors unknown, in making and counterfeiting sundry coins. 6. Causing and procuring the making of false coins.

Without attempting a minute recapitulation of the evidence of all the witnesses for the prosecution, it will be sufficient to call the attention of the jury to the prominent and material facts proved. These facts are: that the defendant, some time previous to his arrest, rented a tenement on Baum street, in the city of Cincinnati, the basement of which, was occupied by himself, and one Rogers, and the other parts were rented by the defendant to other persons. In September, 1848, the witnesses Legge, Davidson, and Blackburn, having a warrant for the arrest of the defendant and the said Rogers, entered the basement room of the house referred to. They found Rogers and arrested him; the defendant was not there. The witnesses state, that in this room they found on a table, a considerable quantity of counterfeit coin, some of which was in an unfinished state. In a trunk they found a leathern bag filled with counterfeit half dollars and five franc pieces, which were finished. There were also in the room, several bars of metal, and a box containing moulds for making five franc pieces, half and quarter dollars, and half eagles. It is also proved, that on several occasions previously to the arrest of Rogers, the defendant had purchased plaster of Paris, alleging at one time, that he wanted it for dental purposes, and at another for making busts. On one occasion he purchased a box full of plaster which was put up by the witness, and the box marked by him, and which, being shown to him in court, he identified as being the same box which contained the plaster, and which was found by the officers in the room referred to, occupied by the defendant and Rogers. The defendant was subsequently arrested on the Kentucky side of the Ohio river, a short distance below the mouth of Big Sandy. When arrested he was trying to make his escape. On his person were found some counterfeit five franc, half dollar, and quarter dollar pieces. He denied that he had passed any counterfeit coin, but on being reminded of his connection with Rogers, said he had kept more of that kind of company than was good for him, and inquired if he could not be relieved from his difficulty by enlisting as a soldier in the service of the United States.

It is insisted by the counsel for the defense, that this evidence does not establish the guilty agency of the defendant, in making, or aiding to make, any of the false coin, described in the indictment. On this point, it will be sufficient to remark, that the law raises a presumption of guilt from the circumstances proved. The defendant was the lessee, and had been the actual occupant, in connection with Rogers, of the room in which a large quantity of spurious coin, and various instruments and appliances for coining were found. It is also proved that a box containing plaster of Paris, purchased by the defendant, was found in the room, and when arrested, several pieces of counterfeit coin were found upon his person. These are circumstances from which, unexplained by testimony on the part of the defendant, relieving him from the suspicions and inferences other-

wise arising, the jury may rightfully presume his criminal participation in making the spurious coin found in his possession.

It is also insisted in argument, that there is no proof that the coins found in the defendant's possession are in the likeness and similitude of the genuine coins, of which they are alleged to be counterfeit imitations. This is undoubtedly one of the material allegations in the indictment, which must be sustained by the evidence, to the satisfaction of the jury. It is of the essence of the crime imputed to the defendant, that he made, or assisted in making the spurious coin, with the fraudulent intent of passing it as genuine. And it is certain that no such intent can be fairly presumed, unless the coin was of a character, and in a condition to be used for purposes of fraud and imposition. It would seem from the evidence that a portion of the coin found in the defendant's room, was in an unfinished state, and therefore not prepared for use. The statute provides no punishment for the manufacture of unfinished coin; nor is that the charge exhibited against the defendant in the indictment. There was a part of the coin found by the witnesses, which was in a finished state. The precise character and appearance of the coin are not stated by the witnesses. It will be for the jury to say, whether they were so far artistically complete as to be used successfully for the purposes of deception and fraud. If, from incompleteness, or the clumsiness of the manufacture, men of very ordinary circumspection and intelligence could not be imposed on by them, there is no ground for the inference that they were designed for fraudulent use. The jury however will bear in mind that it is the object and the policy of the law, to protect all classes of community from frauds and impositions, connected with attempts to pass spurious coins. There are many whose experience and intelligence do not qualify them for a very accurate judgment of the character of coin, and such may be defrauded by it, while others of greater experience and skill in these matters would reject it without hesitation. It will be for the jury to say, whether the evidence in this case sustains the averment, that the coin made by the defendant was "in the likeness and similitude of genuine coin."

It has been also suggested by counsel, that the jury cannot convict in this case, for the reason that no proof has been offered on the part of the prosecution, of the fact that there are genuine coins, of which those mentioned in the indictment are counterfeits. It was not necessary that such proof should be offered. There are some facts, of which a court and jury will take notice, without formal proof. That the coins named in the indictment as fifty cent pieces or half dollars, or as twenty-five cent pieces, are legal subdivisions of the dollar, authorized to be coined by the mint of the United States, is a fact within the judicial cognizance of this court, upon which the jury may act without evidence.

The jury returned a general verdict of guilty.

On a subsequent day of the term, the counsel for the defense filed a motion in arrest of judgment. Judge McLEAN was not present at the argument of this motion. It was overruled by Judge LEAVITT for reasons substantially as follows:

The first five of the numerous grounds stated in the motion in arrest of judgment, filed in this case, are based on technical exceptions to the caption of the indictment. These may be summarily stated as follows: That the caption does not state when or where the indictment was found; or, the names of the jurors by whom it was found, nor the place from whence they came; or, that they were good and lawful men; or, that the venire was duly served and returned. These exceptions do not call for special consideration, and may be disposed of by the remark, that the form of the caption of the indictment is in strict accordance with the forms used in this court, from its organization. There seems to be no ground for a doubt as to its sufficiency.

The court will, therefore, proceed to notice the other reasons urged in support of this motion. The first and most prominent of these is, that the indictment charges no crime under the statute. It is urged in support of this ground, that the first three counts of the indictment, charging the act of making counterfeit coins, described the coins made as "fifty cent," and "twenty-five cent" pieces, and are fatally defective in not designating these coins by the names used in the statute authorizing their coinage by the mint of the United States. It is true, the names used in those counts of the indictment, descriptive of the coins, are not verbally identical with those used in the statute. The 9th section of the act of congress of April 2, 1792, for "establishing a mint, and regulating the coins of the United States" (1 Stat. 248), authorizes, among other coins, the coinage of dollars, to be of the value of the Spanish milled dollar; "half dollars," to be half the value of the dollar, and "quarter dollars," to be one-fourth the value of the dollar. Is it essential that these terms should be used in the indictment, as designating the coin alleged to have been counterfeited? In the view of the court, this discrepancy is not a material variance.

If the section of the statute, under which this indictment is framed, specifically designates by name the various coins, for the fraudulent making of which it provides a penalty, there would be a strong show of reason for insisting on the use of the precise terms of the statute. But the section referred to, provides in general terms for the crime of counterfeiting the gold and silver coins of the country, and foreign coins made

current by law, without naming them. The fact, that in the act regulating the coinage of the country, the pieces of coin charged in the indictment to have been forged, are designated by names different from those used in the indictment, if those names are pertinent, and of equivalent meaning, affords no sufficient ground for arresting the judgment. The gist of the crime consists in the fraudulent making of false coin. In charging the crime in the indictment, it is necessary to describe specifically, by name and denomination, the coin alleged to have been made. But there is no principle requiring that the precise terms used in the statute, should be used in the indictment. If equivalent terms are used—terms popularly and universally known and understood as identical with those in the indictment—it will be sufficient. Now these parts of a dollar, described in the indictment as pieces called "fifty cents," and "twenty-five cents," are as accurately designated, and as well understood by those terms, as if they had been called the "half dollar," and the "quarter dollar." And the court and jury will take notice, without proof, that a fifty cent piece, or a twenty-five cent piece, is identical in its meaning and import with the half dollar, and the quarter dollar, respectively. Any other view of this question, would involve a strictness and rigidity of construction, not required by any established principle of criminal law, and violative of the plain teachings of common sense. It is true, that great certainty and precision are required in setting out a criminal charge in an indictment. But, in stating this as an admitted rule in the administration of criminal law, the reason on which it is based should be kept in view. That reason obviously is, that the accused may know with certainty the specific crime for which he is arraigned, and enjoy the most ample privilege of meeting and repelling the charge. It is not perceived that the conclusion here announced, can, by possibility, restrict or infringe upon this right. True, the precise words used in the statute, are not used in the indictment; but those used in the latter, are of equivalent and identical import with those in the statute. It is impossible that the defendant could be misled by the use of these terms, or that they could offer any hindrance in the preparation of his defense.

But if the court entertained an opinion different from that here announced, on the point under consideration, it would afford no ground for arresting the judgment in this case. The exception referred to applies only to the first three counts. In the fourth count, the charge set out, is, the making sundry pieces of American coin, called "fifty cent pieces," or "half dollars." Here the term used in the statute before referred to, regulating the coinage, is used in the indictment. That in the designation of the coin, the alternative form of expression is adopted, constitutes no objection to the count. If this count is good, though the others should be adjudged bad, the verdict of guilty is sustained. This is now understood to be the doctrine sanctioned in the American courts, if not elsewhere. It has heretofore received the approval of this court. In the case of U. S. v Burroughs [Case No. 14,695]. Judge McLean, in giving his opinion on a motion in arrest of judgment says: "If the first count be bad, there being other counts in the indictment which are good, on a general verdict of guilty, the judgment can not be arrested. In this, an indictment differs from a declaration. For one defective count in the latter, the judgment must be arrested; while in the former, one good count sustains the verdict."

This view disposes of the motion in arrest. There is, however, another point insisted on in support of the motion, which it may be well to notice. This point is, that there is a misjoinder of offences in the indictment, that calls for the arrest of the judgment. The alleged misjoinder consists in uniting with the counts charging the defendant with making false coins, the distinct offences of aiding and assisting some other person in such making, and causing and procuring some other person to make such coins. These are set forth respectively, in the 5th and 6th counts. The rule in relation to the joinder of distinct offences in different counts of the same indictment, is well settled. The test is, that the judgment be the same for each offence. Rosc. Cr. Ev. 216. Now the crimes charged in all the counts of this indictment, are embraced in the same section of the statute, and the same judgment follows each. There is, therefore, clearly, no misjoinder.

The motion in arrest being overruled, judgment was entered on the verdict, that the defendant be confined in the penitentiary, at hard labor, for five years.

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